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# **THE ROLE OF JUSTICES OF THE PEACE IN QUEENSLAND**

Issues Paper

WP No 51

Queensland Law Reform Commission  
February 1998

## HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary proposals in this Paper.

Written comments and submissions should be sent to:

The Secretary  
Queensland Law Reform Commission  
PO Box 312  
ROMA STREET QLD 4003

or by facsimile on: (07) 3247 9045

or be e-mail to: [law\\_reform\\_commission@jag.qld.gov.au](mailto:law_reform_commission@jag.qld.gov.au)

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Closing date: 22 May 1998

It would be helpful if comments and submissions addressed specific issues in the Paper.

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**Ms A C Thompson**

The Commission's premises are located on the 7th Floor, 50 Ann Street, Brisbane. The postal address is PO Box 312, Roma Street, 4003. Telephone (07) 3247 4544. Facsimile (07) 3247 9045.

E-mail: [law\\_reform\\_commission@jag.qld.gov.au](mailto:law_reform_commission@jag.qld.gov.au)

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# CHAPTER 1

## INTRODUCTION

### 1. TERMS OF REFERENCE

The Attorney-General has requested the Commission, as part of its Fifth Program, to review the role of justices of the peace in Queensland, in particular, the desirability of maintaining this office in the light of a changing society.

### 2. BACKGROUND

The office of the justice of the peace has its origins in England in the fourteenth century.<sup>1</sup> Over time, there have been many changes in the nature of the role undertaken by justices of the peace. Even within Australia, there are marked differences between the roles of justices of the peace in different jurisdictions.<sup>2</sup>

In Queensland, justices of the peace are appointed under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).<sup>3</sup> That Act establishes:

- the various categories of justices of the peace and the office of commissioner for declarations;<sup>4</sup>
- the qualifications for, and disqualifications from, office as either a justice of the peace or commissioner for declarations;<sup>5</sup> and
- the limitations on the powers that may be exercised by a justice of the peace or by a commissioner for declarations.<sup>6</sup>

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<sup>1</sup> See pages 3-5 of this Issues Paper for a more detailed discussion of the origins of the role.

<sup>2</sup> See Chapters 5 and 7.

<sup>3</sup> The background to the enactment of this Act is set out at pages 5-8 of this Issues Paper.

<sup>4</sup> See pages 12-16 of this Issues Paper.

<sup>5</sup> See pages 22-26 of this Issues Paper.

<sup>6</sup> See pages 11-16 of this Issues Paper.



### 3. THE PURPOSE OF THIS ISSUES PAPER

This Issues Paper has been produced to provide information to interested people on the issues that the Commission envisages will need to be addressed during the course of this reference, and to assist people in making submissions.

In particular, the paper:

- gives a brief summary of the development of the role of the justice of the peace;<sup>7</sup>
- examines the existing categories of justices of the peace and the office of commissioner for declarations;<sup>8</sup> and
- examines the main powers that may be exercised by justices of the peace and commissioners for declarations.<sup>9</sup>

In Chapter 8, the Commission raises a number of specific issues about the roles of justices of the peace and commissioners for declarations on which it seeks submissions.

At the conclusion of this reference, the Commission will report to the Attorney-General on what it considers to be the most appropriate reforms, if any, to the existing law.

### 4. CALL FOR SUBMISSIONS

In order to assist it in making its recommendations, the Commission seeks input from members of the public, from relevant professions and from organisations and individuals with an interest or expertise in the area.

Details about how to make a submission are set out at the beginning of this paper.

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<sup>7</sup> See Chapter 2.

<sup>8</sup> See Chapter 3.

<sup>9</sup> See Chapter 5.

## CHAPTER 2

### THE DEVELOPMENT OF THE ROLE OF JUSTICE OF THE PEACE

#### 1. THE HISTORICAL ORIGINS OF THE ROLE OF JUSTICE OF THE PEACE

The office of justice of the peace was first established in England by the enactment of a series of statutes in the fourteenth century.<sup>10</sup> In 1327, “conservators of the peace” were appointed in each county.<sup>11</sup> In the following year, these conservators of the peace were given the power to punish offenders.<sup>12</sup> In 1344, they were empowered to hear and determine felonies and trespasses (now known as misdemeanours).<sup>13</sup>

In 1361, four or five persons (including one lord) were appointed in every county to “keep the peace, to arrest and imprison offenders, to imprison or take surety of suspected persons, and to hear and determine felonies and trespasses done in the county”.<sup>14</sup> In 1363, these persons were directed to hold court hearings (with a jury) four times a year.<sup>15</sup> It was around this time that the title “justice of the peace” began to be used.<sup>16</sup>

The four court hearings became known as the courts of quarter sessions. The types of cases heard by courts of quarter sessions were very wide and included almost all criminal cases (apart from treason and difficult cases).<sup>17</sup> It was not until the eighteenth century that courts of quarter sessions stopped hearing cases that might be capitally

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<sup>10</sup> Note that some commentators believe that its origins date back to at least the last years of the twelfth century when “keepers” and “conservators” of the peace were appointed to aid in the preservation of peace and to hand over arrested prisoners to the sheriff: see, for example, Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 286-287 and Nichols P, *Western Australia Handbook for Justices* (2nd ed 1991) at 1.1.

<sup>11</sup> 1 Edward III St 2 c 16 (1327), cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 287.

<sup>12</sup> 2 Edward III c 6 (1328), cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 287.

<sup>13</sup> 18 Edward III St 2 c 2 (1344), cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 287.

<sup>14</sup> 34 Edward III c 1 (1361), cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 288.

<sup>15</sup> 36 Edward III St 1 c 12 (1363), cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 288 and at 292-293.

<sup>16</sup> Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 288.

<sup>17</sup> *Id* at 293.

punished.<sup>18</sup>

Various statutes were enacted that empowered justices of the peace to determine less serious matters outside courts of quarter sessions. These court hearings - which were held without a jury - became known in the nineteenth century as the courts of petty sessions.<sup>19</sup>

By the sixteenth century, justices of the peace were also responsible for a great deal of administrative work. They had the power to issue warrants for the arrest of suspected criminals,<sup>20</sup> and they carried out functions which now would be regulated by local government or other government agencies.<sup>21</sup>

Traditionally, justices of the peace were men of position. In 1389, it was enacted that they should be "the most sufficient knights, esquires and gentlemen of the land".<sup>22</sup> In 1439, a property qualification was added.<sup>23</sup>

## 2. THE ROLE OF JUSTICE OF THE PEACE IN AUSTRALIA

The office of justice of the peace was inherited from England when Australia (or, more accurately, the colony of New South Wales) was first settled in 1788. The office was subsequently inherited in Queensland, when Queensland separated from New South Wales in 1859.

Initially, Australian justices of the peace exercised very similar powers to their English counterparts. In fact, in some cases they had even greater powers, especially over

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<sup>18</sup> Ibid.

<sup>19</sup> Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 293 and Kiralfy AKR, *Potter's Historical Introduction to English Law and Its Institutions* (4th ed 1958) at 229.

<sup>20</sup> Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 294-295.

<sup>21</sup> Castles AC, *An Australian Legal History* (1982) at 68. One commentator has said: "they regulated wages, prices, profits, employment, marriages, wearing apparel, apprenticeship and housebuilding ... they were put in charge of the regulations dealing with weights and measures, the maintenance of bridges, the upkeep of roads, the administration of the Poor Law, the building and control of local prisons" (see Babington, *A House in Bow Street* (1969) at 28, cited in Castles AC, *An Australian Legal History* (1982) at 68).

<sup>22</sup> 13 Richard II St 1 c 7, cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 289.

<sup>23</sup> 18 Henry VI c 11, cited in Holdsworth WS, *A History of English Law* (7th ed 1956), vol 1 at 289.

convicts.<sup>24</sup> However, the role of Australian justices of the peace changed significantly once the use of paid magistrates became more extensive.<sup>25</sup>

Today, Australian justices of the peace have very little in common with their English counterparts. Although an English justice of the peace (aided by a legally qualified clerk) typically sits as a magistrate in court for a full day once a fortnight,<sup>26</sup> most Australian justices of the peace only ever undertake administrative duties.

In Australia, the office of justice of the peace is a state institution: there are no national justices of the peace. Each State and Territory government has enacted its own legislation regulating the appointment and powers of justices of the peace. The functions and powers of a justice of the peace differ from State to State.<sup>27</sup> For example, in Queensland, it is still possible for a justice of the peace to exercise certain judicial functions, whereas, since 1989, Victorian justices of the peace have been able to carry out only administrative tasks.<sup>28</sup>

### 3. THE SITUATION IN QUEENSLAND PRIOR TO 1991

#### (a) Introduction

In Queensland, justices of the peace have been regulated by statute since the *Justices Act 1886* (Qld) was first enacted. That Act initially dealt with the appointment, functions and powers of both lay and paid justices. Since 1886, justices of the peace have acquired - pursuant to various Acts - a multitude of additional powers.

#### (b) The *Justices of the Peace Act 1975* (Qld)

In 1975, the provisions in the *Justices Act 1886* (Qld) dealing with the appointment and

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<sup>24</sup> Crawford J, *Australian Courts of Law* (3rd ed 1993) at 91.

<sup>25</sup> Note that the use of paid magistrates was a well-entrenched feature of the New South Wales legal system by about 1850: see Castles AC, *An Australian Legal History* (1982) at 212.

<sup>26</sup> Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (May 1990) at 5. See also Liverani MR, "No Salaries, No Morning Teas or Early Closing Hours", *Law Society Journal* 32(3) (April 1994) 36 at 38.

<sup>27</sup> See Chapters 5 and 7.

<sup>28</sup> Victorian justices of the peace have not been eligible to constitute a Magistrates Court since 1984. However, it was not until the *Magistrates' Court Act 1989* (Vic) was passed that Victorian justices of the peace lost their power to hear bail applications and to issue summonses and warrants. See pages 61-62 of this Issues Paper.

removal of justices of the peace were repealed and replaced by the *Justices of the Peace Act 1975* (Qld). The 1975 Act contained a number of new provisions, including qualifications for appointment as a justice of the peace, provisions regarding the establishment of a register of justices of the peace, and provisions for the removal of a justice of the peace on grounds such as a criminal conviction, bankruptcy and mental illness.

Under the *Justices of the Peace Act 1975* (Qld), there was only one class of justice of the peace. This meant that all persons appointed to the office of justice of the peace were automatically eligible to exercise the full range of powers given to justices of the peace under the *Justices Act 1886* (Qld) and various other Acts.<sup>29</sup> These powers included the power to hear and determine certain judicial proceedings; the power to issue summonses and warrants; and the power to witness affidavits and statutory declarations.

Under the 1975 Act (and the regulations made under it), there was no requirement for a justice of the peace to undergo any training, whether before, or subsequent to, his or her appointment as a justice of the peace. In fact, until the early 1980s, there were no training courses available.<sup>30</sup>

### **(c) The 1990 Green Paper**

#### **(i) Problems identified by the Green Paper**

In May 1990, the office of the Attorney-General (Queensland) released a discussion paper on the role of justices of the peace in Queensland.<sup>31</sup> According to the discussion paper, the 1990 review of the role of justices of the peace was instigated because of “widespread concern about the lack of compulsory training of justices of the peace and other problems”.<sup>32</sup> Some of the “other problems” included:

- (1) The fact that, although all justices of the peace are eligible to exercise the full range of powers given to justices of the peace under the *Justices Act 1886* (Qld) and various other Acts, the vast majority of justices of the

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<sup>29</sup> *Justices of the Peace Act 1975* (Qld) s 19.

<sup>30</sup> Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (May 1990) at 8.

<sup>31</sup> Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (May 1990).

<sup>32</sup> *Id* at 1.

peace only ever witness signatures.<sup>33</sup>

- (2) Complaints received from members of the police force and the general public that it is difficult to obtain the services of an available, willing and competent justice of the peace.<sup>34</sup>
- (3) The fact that justices of the peace are not required to be appointed on a “needs basis” and that the numbers of justices of the peace “have consequently proliferated”.<sup>35</sup>
- (4) Allegations that some justices of the peace are prepared to “rubber stamp” police requests for warrants with no exercise of judicial discretion whatsoever.<sup>36</sup>
- (5) Evidence of serious mistakes in the issue of summonses and warrants by some justices of the peace.<sup>37</sup>
- (6) The potential for justices of the peace from small rural communities to be placed in situations where they are asked to exercise judicial powers against persons whom they know on a personal basis.<sup>38</sup>

## **(ii) Options canvassed by the Green Paper**

The discussion paper canvassed numerous different options for the future role of justices of the peace in Queensland. The most significant options for reform included:

- (1) The existing “one class” appointment provisions should be repealed and replaced with provisions that:
  - (a) require all appointees to perform administrative duties; and
  - (b) allow only specially selected and trained appointees to perform non-bench judicial duties (such as issuing summonses and

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<sup>33</sup> Id at 1, 5-7, 13.

<sup>34</sup> Id at 1, 5, 17-18.

<sup>35</sup> Id at 1.

<sup>36</sup> Id at 17-18.

<sup>37</sup> Id at 1, 17-18.

<sup>38</sup> Id at 11.

warrants).<sup>39</sup>

- (2) All existing and prospective justices of the peace (including those whose appointments are limited to administrative duties) should be required to undertake an approved training course.<sup>40</sup>
- (3) Justices of the peace should be required to renew their registration every five years. Re-registration should be conditional upon proof that an approved refresher course has been successfully completed.<sup>41</sup>
- (4) Applicants who wish to perform non-bench judicial duties (as well as administrative duties) should be scrutinised far more carefully than applicants who wish to carry out only administrative duties. Applicants who wish to perform non-bench judicial duties should be required to undergo a personal interview conducted by a person authorised to do so by the Director-General of the Department of the Attorney-General.<sup>42</sup>
- (5) The title “justice of the peace” should be used only by those specially selected and trained persons who perform non-bench judicial duties (as well as administrative duties). All existing and prospective justices of the peace who are trained to carry out only administrative duties should be called “Commissioners of Affidavits”.<sup>43</sup>
- (6) Any changes to the existing legislation should be effective immediately. There should not be any “sunset clause”.<sup>44</sup>

#### **4. THE JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS ACT 1991 (QLD): A TIERED APPROACH**

##### **(a) Introduction**

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<sup>39</sup> Id at 33. The question whether there was an interim need for an even smaller select group to perform bench duties (for example, sentencing and conducting committal hearings) was left open.

<sup>40</sup> Id at 39.

<sup>41</sup> Id at 44.

<sup>42</sup> Id at 45.

<sup>43</sup> Id at 37.

<sup>44</sup> Id at 35.

In 1991, the *Justices of the Peace Act 1975* (Qld) was repealed and replaced with the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). The 1991 Act adopted some, but not all, of the options discussed above. For example, although the 1991 Act abolished the “one class” appointment system, it does not require justices of the peace to renew their registration on a regular basis; it does not require justices of the peace to undergo regular refresher courses; and it contains quite significant transitional provisions.

**(b) The creation of categories of justices of the peace and of the office of commissioner for declarations**

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) introduced two categories of justice of the peace: a justice of the peace (qualified) and a justice of the peace (magistrates court), as well as creating the office of commissioner for declarations.<sup>45</sup> The Act also imposed various restrictions on the powers that could be exercised by persons appointed to these offices.

**(c) Transitional provisions**

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) originally provided for a five year transitional period, which would have expired on 1 November 1996.<sup>46</sup> In 1996, the transitional period was extended until 30 June 2000.<sup>47</sup>

Significantly, section 41(a) provides that, subject to section 42, a justice of the peace who immediately before the commencement of the 1991 Act held office as a justice of the peace under the *Justices of the Peace Act 1975* (Qld) “continues to hold office as a justice of the peace under this Act”.<sup>48</sup>

Section 42 provides that, if at 30 June 2000 a person remains in office as a justice of the peace under section 41(a), the person ceases to hold that office and instead holds office as a justice of the peace (commissioner for declarations).

Until 30 June 2000, however, almost nine years after the commencement of the

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<sup>45</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(2), (3). See Chapter 3 for a discussion of these offices.

<sup>46</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 41 and 42.

<sup>47</sup> S 9 of the *Justices of the Peace and Commissioners for Declarations Legislations Amendment Act 1996* (Qld) amended s 42 of the Act.

<sup>48</sup> This category of justice of the peace is referred to throughout this Issues Paper as an “old system justice of the peace”.



*Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), a justice of the peace who held office immediately before the commencement of that Act and who has not been appointed as either a justice of the peace (qualified) or a justice of the peace (magistrates court) will be able to exercise all the powers that are “conferred on the justice of the peace or on a commissioner for declarations by the *Justices Act 1886* or any other Act”.<sup>49</sup> Such a justice of the peace will not be subject to the restrictions that apply to the powers that may be exercised by a person appointed under the 1991 Act<sup>50</sup> as either a justice of the peace (qualified) or a justice of the peace (magistrates court), or as a commissioner for declarations.<sup>51</sup>

For example, an “unqualified” old system justice of the peace is authorised, and will continue to be authorised until 30 June 2000, to conduct a committal hearing under section 104 of the *Justices Act 1886* (Qld), whereas a person who has been appointed as a justice of the peace (qualified) is not able to exercise that power.<sup>52</sup>

The main reason expressed for extending the deadline for the automatic conversion of old system justices of the peace to the office of justice of the peace (commissioner for declarations) was the low rate at which old system justices of the peace were becoming qualified as justices of the peace of one of the new categories. In the second reading speech for the *Justices of the Peace and Commissioners for Declarations Legislation Amendment Bill 1996* (Qld), the Attorney-General and Minister for Justice, the Honourable D E Beanland MLA, stated:<sup>53</sup>

The JP Act provided for a five-year transitional period that was to terminate on 1 November 1996. However, since 1991, of the 63,000 registered JPs, less than 50 percent have participated in the reform program. If the transition period was allowed to terminate on 1 November 1996, it could place the administration of justice in jeopardy, particularly in regional, rural and remote localities. This is because on 1 November 1996 approximately 38,000 JPs who were appointed prior to 1 November 1991 and did not upgrade to either a JP (Qualified) or JP (Magistrates Court) will lose all their old JP powers, except those of a commissioner for declarations.

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<sup>49</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(a).

<sup>50</sup> These restrictions are found in s 29(3) to (5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). See the discussion of these provisions in Chapter 3.

<sup>51</sup> S 29(6) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) confirms that s 29(3) to (5) do not restrict the powers conferred by s 29(1)(a) on a justice of the peace who held office as a justice of the peace immediately before the commencement of that Act and who has not converted to one of the new offices created by the 1991 Act.

<sup>52</sup> S 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that a justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding, “is limited to taking or making a procedural action or order”. See Chapter 3 for a discussion of the powers of the different categories of justices of the peace.

<sup>53</sup> *Hansard*, Legislative Assembly (Qld) (4 September 1996) at 2423.

A further reason expressed by the Attorney-General and Minister for Justice for extending the deadline was that concerns had been expressed by a significant number of justices of the peace about the current system.<sup>54</sup> The extension of the transitional period maintains the *status quo* until the Commission presents its final report on this reference.<sup>55</sup>

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54      *Ibid.*

55      *Ibid.*

## CHAPTER 3

### CATEGORIES OF JUSTICE OF THE PEACE

#### 1. INTRODUCTION

Prior to the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) there was only one class of justice of the peace who would attend to all the duties of that office, such as taking affidavits and statutory declarations, issuing summonses and warrants, as well as the bench duties of a justice of the peace.<sup>56</sup> As mentioned in Chapter 2,<sup>57</sup> the 1991 Act established two categories of justice of the peace, a justice of the peace (qualified) and a justice of the peace (magistrates court),<sup>58</sup> as well as establishing the office of a commissioner for declarations.

However, because most of the Acts that confer powers on a justice of the peace pre-date the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), they are often expressed simply to confer powers on “a justice of the peace” or on “a justice”<sup>59</sup> (which is commonly defined to include a justice of the peace<sup>60</sup>), without any reference to the present distinction between a justice of the peace (magistrates court) and a justice of the peace (qualified).

#### 2. LIMITATIONS ON THE POWERS OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS

Section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) imposes important limitations on the powers that may be exercised by “a justice of the peace” by restricting the exercise of certain powers to a particular category of justice of the peace or to a commissioner for declarations.

Subsection 29(1) provides:

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<sup>56</sup> *Justices of the Peace Act 1975* (Qld) s 19.

<sup>57</sup> At page 9 of this Issues Paper.

<sup>58</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15 (2).

<sup>59</sup> “Justice” is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to mean a justice of the peace.

<sup>60</sup> See, for example, the definition of “justice” in s 4 of the *Justices Act 1886* (Qld):  
“**justices**” or “**justice**” means justices of the peace or a justice of the peace having jurisdiction where the act in question is, or is to be, performed, and includes a stipendiary magistrate and, where necessary, a Magistrates Court.

A justice of the peace -

- (a) **subject to subsections (3) to (5)**, has and may exercise all the powers conferred on the justice of the peace or on a commissioner for declarations by the *Justices Act 1886* or any other Act; and
- (b) may take any affidavit or attest any instrument or document that may be taken or attested under any Act or law. [emphasis added]

Subsections 29(3) to (5) limit the powers that may be exercised by a justice of the peace (qualified), a justice of the peace (magistrates court) and a justice of the peace (commissioner for declarations) respectively.<sup>61</sup> Section 29(7) further provides:

A limitation imposed by subsection (3), (4), or (5) on the powers exercisable by a justice of the peace of a specified category applies despite the provisions of any Act conferring powers on a justice of the peace unless the Act expressly excludes the operation of the subsection.<sup>62</sup>

In other words, the 1991 Act imposes limitations on the powers of each category of justice of the peace except justices of the peace appointed prior to the 1991 Act, who continue to hold office by virtue of the transitional provisions of that Act.

### 3. CURRENT CATEGORIES OF OFFICE

#### (a) Justice of the peace (magistrates court)

The *Justices Act 1886* (Qld) is one of many Acts that confer powers on a justice of the peace. It provides for a number of circumstances in which a justice of the peace either alone or, depending on the circumstances, with at least one other justice of the peace, may exercise “bench” duties. For example, section 27(1) of that Act provides that, subject to the provisions of any other Act, every complaint shall be heard and determined by a Magistrates Court constituted by two or more justices. “Justice” is defined in the Act to include a justice of the peace.<sup>63</sup>

However, section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) imposes a significant limitation on the exercise of that power and on powers conferred by other Acts. Section 29(4) provides:

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<sup>61</sup> Those subsections are discussed below in relation to each category of justice of the peace and in relation to a commissioner for declarations.

<sup>62</sup> See s 42(5) of the *Community Services (Aborigines) Act 1984* (Qld) and s 40(5) of the *Community Services (Torres Strait) Act 1984* (Qld) as examples of provisions that specifically exclude the effect of s 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

<sup>63</sup> See note 60 of this Issues Paper.

A justice of the peace (magistrates court), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to -

- (a) the hearing and determination of a charge of a simple offence or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* in a case where the defendant pleads guilty; and
- (b) conducting an examination of witnesses in relation to an indictable offence under the *Justices Act 1886*; and
- (c) taking or making a procedural action or order.<sup>64</sup>

The types of matters that may be heard by a justice of the peace (magistrates court) are discussed in more detail in Chapter 5 of this paper. However, section 29(4) broadly restricts a justice of the peace (magistrates court), in the exercise of “bench” duties, to:

- hearing a limited range of criminal matters in which the defendant pleads guilty;
- conducting committal hearings; and
- taking or making procedural actions or orders, for example, charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding.

Section 29(4) does not, however, provide the authority, for example, to issue a warrant. That power is derived from other legislation. This section simply authorises a justice of the peace (magistrates court) to exercise that power, in circumstances where an Act confers the power generally on a “justice of the peace”.

### **(b) Justice of the peace (qualified)**

Just as the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) restricts the circumstances in which a justice of the peace (magistrates court) may exercise bench duties, the Act imposes even greater restrictions on the power of a justice of the peace (qualified) to do so. Section 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides:

A justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to taking or making a procedural action or order.

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<sup>64</sup> Note that “procedural action or order” is defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) to mean:  
 an action taken or order made for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate, for example the charging of a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings.

This limits the powers that may be exercised by a justice of the peace (qualified) to those powers mentioned in the third limb above in relation to the powers of a justice of the peace (magistrates court), such as charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding.<sup>65</sup> Section 29(3) does not confer those powers on a justice of the peace (qualified). It merely authorises a justice of the peace (qualified) to exercise those powers in circumstances where other Acts confer those powers generally on a “justice of the peace”.

### (c) Commissioner for declarations

A commissioner for declarations has and may exercise any power conferred on a commissioner for declarations by any Act or law, and may take any affidavit or attest any instrument or document that may be taken or attested under any Act or law.<sup>66</sup>

### (d) Justice of the peace

Until the expiry of the transitional provisions of the 1991 Act on 30 June 2000,<sup>67</sup> there will be a category of persons referred to simply as “justices of the peace”. This category consists of justices of the peace who held office as a justice of the peace immediately before the commencement of the 1991 Act<sup>68</sup> and who have not since been appointed as a commissioner for declarations, justice of the peace (qualified), or justice of the peace (magistrates court).

Such a justice of the peace continues to hold office under the 1991 Act<sup>69</sup> and may exercise “all the powers conferred on the justice of the peace or commissioner for declarations by the *Justices Act 1886* or any other Act”.<sup>70</sup>

If the justice of the peace is subsequently appointed as a justice of the peace (qualified)

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<sup>65</sup> See the definition of “procedural action or order” in note 64 of this Issues Paper.

<sup>66</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

<sup>67</sup> See the discussion of the transitional provisions at pages 9-10 of this Issues Paper. At the end of the transitional period, this category of justice of the peace will, by virtue of the operation of s 42 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), automatically become a justice of the peace (commissioner for declarations), an office with a largely witnessing function.

<sup>68</sup> That is, they held office under the *Justices of the Peace Act 1975* (Qld), which was repealed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

<sup>69</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 41(a).

<sup>70</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

or justice of the peace (magistrates court), his or her powers will then be restricted by the limitations imposed by subsections 29(3) and (4) of the 1991 Act, to which section 29(1) is subject.<sup>71</sup>

Accordingly, a person who was a justice of the peace under the 1975 Act and who has not been appointed as a justice of the peace (qualified) or a justice of the peace (magistrates court) or transferred to the office of commissioner for declarations may, until 30 June 2000, exercise all the powers that are generally conferred on a justice of the peace. He or she will not be subject to the limitations imposed by the Act with respect to the powers that are exercisable by a justice of the peace (qualified), a justice of the peace (magistrates court), or a justice of the peace (commissioner for declarations).

However, unless such a justice of the peace is appointed as a justice of the peace (qualified) or as a justice of the peace (magistrates court) before the expiration of the transitional period, he or she will automatically become a justice of the peace (commissioner for declarations) at that time.

#### **4. A FUTURE CATEGORY: JUSTICE OF THE PEACE (COMMISSIONER FOR DECLARATIONS)**

This is not a category to which a person can apply to be appointed under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Rather, it is an office that will come into existence at the end of the transitional period for the 1991 Act on 30 June 2000.<sup>72</sup>

At that time, all old system justices of the peace (that is, those justices of the peace who held office immediately before the commencement of the 1991 Act) who have not been appointed as a justice of the peace (qualified) or a justice of the peace (magistrates court), or who have not applied in the meantime under section 44 of the Act to be registered as a commissioner for declarations and been so registered, will cease to hold office as a justice of the peace and will instead hold office as a justice of the peace (commissioner for declarations).<sup>73</sup>

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<sup>71</sup> Those restrictions do not apply to an old system justice of the peace who has not been appointed to either of those offices: see s 29(6)(b) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

<sup>72</sup> As mentioned in Chapter 2, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) originally provided for a five year transitional period. The transitional period was extended to 30 June 2000 by s 9 of the *Justices of the Peace and Commissioners for Declarations Legislation Amendment Act 1996* (Qld), which amended s 42(1) of the 1991 Act.

<sup>73</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(1).

The powers of a justice of the peace (commissioner for declarations) are identical to those that may be exercised by a commissioner for declarations.<sup>74</sup> Accordingly, a justice of the peace (commissioner for declarations):<sup>75</sup>

- will have and be able to exercise all the powers conferred on a commissioner for declarations by any Act or law; and
- will be able to take any affidavit or attest any instrument or document that may be taken or attested under any Act or law.

The reason for having two categories with identical powers appears to have been a desire not to take the title “justice of the peace” away from old system justices of the peace, even at the end of the transitional period. In the Second Reading Speech for the *Justices of the Peace and Commissioners for Declarations Bill 1991* (Qld) the then Attorney-General, the Honourable Dean Wells MLA, stated:<sup>76</sup>

But what of somebody who does not want to undertake any of the courses and does not want to become a commissioner for declarations? Such a person is now a justice of the peace, and has served the community in that capacity. The Government, therefore, does not propose to take the honour or the title away from them. Such people will continue to be able to write “JP” after their name. After five years, the powers of a JP (qualified) and of a JP (Magistrates Court) will only be capable of being exercised by a person who has received formal training. A person choosing not to undertake the further training and choosing not to become a commissioner for declarations will not be entitled to a seal, but will be entitled to continue his witnessing functions, and to write “JP (commissioner for declarations)” after his name.

It is possible that the title “justice of the peace (commissioner for declarations)” may cause some confusion as to the powers that may be exercised by the person, suggesting that the person still retains some powers of a judicial nature, or may exercise a greater range of powers than may be exercised by a commissioner for declarations. The Commission notes that the preferred option in the 1990 Green Paper<sup>77</sup> was that people previously appointed as justices of the peace should lose the use of the title of “Justice of the Peace” and instead be called “Commissioners of Affidavits” if they performed administrative duties only.<sup>78</sup>

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<sup>74</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5).

<sup>75</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

<sup>76</sup> *Hansard*, Legislative Assembly (Qld) (31 May 1991) at 8325.

<sup>77</sup> Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (May 1990) at 37.

<sup>78</sup> *Ibid.*



## 5. JUSTICES OF THE PEACE IN ABORIGINAL, TORRES STRAIT ISLANDER AND REMOTE COMMUNITIES

### (a) Introduction

Although the categories of justices of the peace are established by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), and the limitations imposed on the exercise of powers by specific categories of justice of the peace are found in section 29 of that Act,<sup>79</sup> other Queensland legislation makes provision for special categories of justices of the peace (or at least justices of the peace with special powers in designated parts of the State). These are:

- Aboriginal justices of the peace who may constitute an “Aboriginal Court” under the provisions of the *Community Services (Aborigines) Act 1984* (Qld);
- Torres Strait Islander justices of the peace who may constitute an “Island Court” under the provisions of the *Community Services (Torres Strait) Act 1984* (Qld); and
- justices of the peace in specified Aboriginal, Torres Strait Islander, and remote communities who have powers under recently amended provisions of the *Criminal Code* (Qld) that exceed those of an ordinary justice of the peace (magistrates court).

These are discussed below.

### (b) Aboriginal and Torres Strait Islander Courts

The *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) provide respectively for the establishment of Aboriginal Councils and Island Councils.<sup>80</sup> The Acts further provide that the Governor in Council may approve an Aboriginal Council and an Island Council to govern trust areas<sup>81</sup> under each Act.<sup>82</sup>

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<sup>79</sup> See pages 11-16 of this Issues Paper.

<sup>80</sup> *Community Services (Aborigines) Act 1984* (Qld) s 15; *Community Services (Torres Strait) Act 1984* (Qld) s 15.

<sup>81</sup> “Trust area” is defined in s 6 of the *Community Services (Aborigines) Act 1984* (Qld) and s 6 of the *Community Services (Torres Strait) Act 1984* (Qld).

<sup>82</sup> *Community Services (Aborigines) Act 1984* (Qld) s 14(1); *Community Services (Torres Strait) Act 1984* (Qld) s 14(1). The community of Islanders at Bamaga is also required to be governed by an Island Council: *Community Services (Torres Strait) Act 1984* (Qld) s 14(1).

Aboriginal and Island Councils have and may discharge the functions of local government of the trust areas for which they are established and are, under both Acts, expressly charged with the good rule and government of those areas.<sup>83</sup> For that purpose, Councils may make by-laws<sup>84</sup> and enforce the observance of those by-laws. Included in the matters for which a Council may make by-laws are the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of the area.<sup>85</sup> A by-law of a Council may impose a penalty in respect of any breach of a by-law of up to \$500 or not more than \$50 per day.<sup>86</sup>

The *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) provide respectively for two justices of the peace who are Aboriginal residents of an area to constitute an Aboriginal Court, and for two justices of the peace who are Islander residents of an area to constitute an Island Court.<sup>87</sup> For this purpose, a “justice of the peace” is defined to mean:<sup>88</sup>

- a justice of the peace whose office is preserved by the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld); or
- a justice of the peace (magistrates court) holding office under that Act.

However, where the person is a justice of the peace (magistrates court) under the 1991 Act, the limitations imposed by section 29(4) of that Act on the powers that may be exercised by a justice of the peace (magistrates court) do not apply.<sup>89</sup>

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<sup>83</sup> *Community Services (Aborigines) Act 1984* (Qld) s 25(1); *Community Services (Torres Strait) Act 1984* (Qld) s 23(1).

<sup>84</sup> A by-law is made by resolution of a Council, but does not take effect until it has been approved by the Governor in Council: *Community Services (Aborigines) Act 1984* (Qld) s 26(2); *Community Services (Torres Strait) Act 1984* (Qld) s 24(2).

<sup>85</sup> *Community Services (Aborigines) Act 1984* (Qld) s 25(2)(a); *Community Services (Torres Strait) Act 1984* (Qld) s 23(2)(a).

<sup>86</sup> *Community Services (Aborigines) Act 1984* (Qld) s 25(6); *Community Services (Torres Strait) Act 1984* (Qld) s 23(6).

<sup>87</sup> *Community Services (Aborigines) Act 1984* (Qld) s 42(2)(a); *Community Services (Torres Strait) Act 1984* (Qld) s 40(2)(a). Where this requirement cannot be readily complied with, the Court may be constituted by members of the Council established for the area: *Community Services (Aborigines) Act 1984* (Qld) s 42(2)(b); *Community Services (Torres Strait) Act 1984* (Qld) s 40(2)(b).

<sup>88</sup> *Community Services (Aborigines) Act 1984* (Qld) s 42(4); *Community Services (Torres Strait) Act 1984* (Qld) s 40(4).

<sup>89</sup> *Community Services (Aborigines) Act 1984* (Qld) s 42(5); *Community Services (Torres Strait) Act 1984* (Qld) s 40(5).

This means, for example, that two justices of the peace (magistrates court) who are constituting an Aboriginal Court or an Island Court are not limited to hearing a charge in a case in which the defendant pleads guilty.<sup>90</sup> Rather, Aboriginal Courts and Island Courts, and the justices of the peace constituting them, have jurisdiction to hear and determine:<sup>91</sup>

- matters of complaint that are breaches of the by-laws applicable within their respective areas;
- disputes concerning any matter that:
  - (1) is a matter accepted by the community resident in its areas as a matter rightly governed by the usages and customs of that community; and
  - (2) is not a breach of the by-laws applicable within its area or of a law of the Commonwealth or the State or a matter arising under a law of the Commonwealth or the State; and
- matters committed to its jurisdiction by the regulations.

**(c) Recent developments in Aboriginal, Torres Strait Islander and remote communities**

**(i) Introduction**

The *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Act 1997* (Qld), which commenced on 1 August 1997, has amended the *Criminal Code* (Qld) by making a number of changes with respect to the powers of certain justices of the peace in specified Aboriginal and Torres Strait Islander communities, and in remote communities. As a result, designated justices of the peace in Aboriginal, Torres Strait Islander, and remote communities may hear and determine certain indictable offences summarily.

The Explanatory Notes to the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld) provide background information to these changes. They also explain the pilot projects to be conducted in two communities in relation to the effectiveness of the changes in

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<sup>90</sup> This is one of the limitations imposed by s 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

<sup>91</sup> *Community Services (Aborigines) Act 1984* (Qld) s 43(2); *Community Services (Torres Strait) Act 1984* (Qld) s 41(2).

a number of particular areas:<sup>92</sup>

To date the use of Justices of the Peace in local Magistrates Courts has been limited. The training of Justices of the Peace also created the option of communities convening Community Courts under the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* for the purposes of hearing breaches of by-laws passed by local Aboriginal or Islander Councils. However, due to shortcomings in the legislative provisions governing Community Courts and difficulties in Councils adequately resourcing and administering them, many communities have chosen not to establish Community Courts.

It has been decided to pilot the use of Justices of the Peace to convene Magistrates Courts on two remote Aboriginal and Torres Strait Islander communities, namely Kowanyama and Thursday Island. The pilots will examine the benefits of using Justices of the Peace to constitute Magistrates Courts in the communities.

The pilots will establish whether the use of local Justices of the Peace will aid in a more efficient system of justice. Quicker response times may have a deterrent effect for offenders. Further, the pilot will study the effect of culturally appropriate processes and sentencing.

## (ii) Jurisdiction

Before its recent amendment by the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Act 1997* (Qld), section 552C of the *Criminal Code* (Qld)<sup>93</sup> provided that the summary hearing and deciding of an indictable offence under Chapter 58A of the Code had to be heard by a Magistrate.

The *Criminal Code* now provides that certain justices of the peace may, in limited circumstances, constitute a Magistrates Court for the purpose of dealing summarily with an indictable offence under Chapter 58A of the Code.<sup>94</sup> The jurisdiction of these justices of the peace in relation to these indictable offences is limited in that:<sup>95</sup>

- the offence must be one that is dealt with on a guilty plea; and
- the justices of the peace must consider that they may adequately punish the defendant by imposing a penalty that is not more than 100 penalty

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<sup>92</sup> Explanatory Notes to the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld) at 3.

<sup>93</sup> S 552C was inserted by s 96 of the *Criminal Law Amendment Act 1997* (Qld).

<sup>94</sup> *Criminal Code* (Qld) s 552C(1).

<sup>95</sup> *Criminal Code* (Qld) ss 552C(2) and 552H(1)(b).

- units<sup>96</sup> or six months imprisonment; and
- if the offence involves property, or property damage or destruction, the property is not more than \$2,500 in value.

### (iii) Appointment

In order to be appointed to exercise these powers, the person must be a justice of the peace (magistrates court) and the Attorney-General must be satisfied that the person has “appropriate qualifications”.<sup>97</sup>

The justice of the peace may be appointed by the Attorney-General for a place specified in a gazette notice,<sup>98</sup> which may specify a place appointed for holding a Magistrates Court only if:<sup>99</sup>

- the place is within a trust area under the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld); or
- the Attorney-General considers the place to be remote.

Justices of the peace who constitute a Magistrates Court under these provisions to deal summarily with an indictable offence under Chapter 58A of the *Criminal Code* (Qld) must actually be appointed for the place at which the Magistrates Court is being held. It is not sufficient if they have been appointed for a different place.

In effect, these provisions create a special class of justices of the peace (magistrates court) who may exercise additional powers to those that may be exercised by an ordinary justice of the peace (magistrates court).<sup>100</sup> In the absence of section 552C(1)(b) of the *Criminal Code* (Qld), no justice of the peace would be able to deal summarily with an indictable offence under Chapter 58A of the Code; such matters would have to be heard by a magistrate.

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<sup>96</sup> The value of a penalty unit is \$60 for part 4A of the *Justices Act 1886* (Qld) or an infringement notice penalty under that Part, \$100 for the *Cooperatives Act 1997* (Qld), or \$75 in any other case: *Penalty and Sentences Act 1992* (Qld) s 5.

<sup>97</sup> *Criminal Code* (Qld) s 552C(4).

<sup>98</sup> *Criminal Code* (Qld) s 552C(3).

<sup>99</sup> *Criminal Code* (Qld) s 552C(5).

<sup>100</sup> S 552C(6) of the *Criminal Code* (Qld) expressly provides that s 29(4)(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which imposes a number of limitations on the powers that may be exercised by a justice of the peace (magistrates court), is subject to s 552C(1) to (3) of the Code.

However, section 552C permits a limited subset of justices of the peace (magistrates court) to exercise those powers.

## CHAPTER 4

### APPOINTMENT TO OFFICE

#### 1. APPOINTMENT OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS

Section 15(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that the Governor in Council may appoint as justices of the peace as many persons as the Governor in Council thinks necessary to keep the peace in Queensland.<sup>101</sup>

Section 15(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that the Governor in Council may appoint as many persons as the Governor in Council thinks fit to be commissioners for declarations.

#### 2. QUALIFICATIONS FOR OFFICE

A person is not qualified to be appointed under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) as a justice of the peace or as a commissioner for declarations unless -<sup>102</sup>

- (a) the Governor in Council considers the person to be fit and proper; and
- (b) the person is of or above the age of 18 years; and
- (c) if the Minister has approved a training course that the person is required to complete before being so appointed - the person has completed the course.<sup>103</sup>

As a result of an amendment to the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in 1996, the last of these qualifications does not apply to the appointment of a lawyer as a justice of the peace or commissioner for

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<sup>101</sup> A justice of the peace appointed under this subsection is to be appointed either as a justice of the peace (qualified) or as a justice of the peace (magistrates court): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(2).

<sup>102</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(1).

<sup>103</sup> See the discussion about training at pages 32-33 of this Issues Paper.

declarations.<sup>104</sup>

In addition, a person must be an Australian citizen to qualify for appointment.<sup>105</sup> However, this qualification does not apply to a person who holds office as a justice of the peace as a result of the transitional provisions contained in the 1991 Act.<sup>106</sup>

### 3. DISQUALIFICATIONS FROM OFFICE

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides for a number of grounds that disqualify a person from being appointed to, or continuing in, office as a justice of the peace or commissioner for declarations.

#### (a) Bankruptcy

An undischarged bankrupt or a debtor taking advantage of the laws in force relating to bankrupt or insolvent debtors is disqualified from being appointed to, or continuing in, office as a justice of the peace or as a commissioner for declarations.<sup>107</sup>

#### (b) Conviction of certain offences

##### (i) Disqualifications from appointment to, or from, continuing in office

A person who is convicted of either of the following categories of offences is disqualified from being appointed to, or continuing in, office as a justice of the peace or as a commissioner for declarations:

- an indictable offence (whether on indictment or summarily);<sup>108</sup> or

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<sup>104</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(2). Under the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld), lawyers were originally disqualified from being appointed to, or continuing in, office as a justice of the peace. This disqualification no longer applies. See the discussion of this amendment at page 26 of this Chapter.

<sup>105</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 7(1).

<sup>106</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 7(2). See pages 9-10 of this Issues Paper for a discussion of the transitional provisions of the Act.

<sup>107</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(a).

<sup>108</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(b).



- an offence defined in Part 4 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld),<sup>109</sup> for example, seeking any reward in connection with performing the functions of office.<sup>110</sup>

These disqualifications apply to a justice of the peace whether the person is appointed as a justice of the peace or as a commissioner for declarations under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), or holds office as a justice of the peace because that person's office is preserved under the transitional provisions of the Act.<sup>111</sup>

## (ii) Disqualifications from appointment to office

In addition to the disqualifications discussed above, the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) imposes further disqualifications specifically in relation to the appointment of a person as a justice of the peace. Unlike the disqualifications in section 17 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), these disqualifications are not expressed to disqualify a person from continuing in office as a justice of the peace or commissioner for declarations - only from being appointed as a justice of the peace or commissioner for declarations.

Accordingly, these grounds would not disqualify a person who had previously been appointed as a justice of the peace or as a commissioner for declarations from continuing in that office. The existence of these grounds of disqualification would only be relevant at the appointment stage.<sup>112</sup>

The additional disqualifications contained in the Regulation relate to convictions of offences generally and, more specifically, to convictions of various offences under the *Traffic Act 1949* (Qld).<sup>113</sup> Unlike the disqualification found in section 17(b) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), these disqualifications are not confined to convictions of indictable

<sup>109</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(d).

<sup>110</sup> This conduct is prohibited by s 35 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

<sup>111</sup> See the discussion of the transitional provisions of the Act at pages 9-10 of this Issues Paper and of the general category of "justice of the peace" at pages 14-15 of this Issues Paper.

<sup>112</sup> It is possible, however, that the occurrence of these grounds after a person had been appointed could be taken into account under s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which gives the Governor in Council the power to revoke the appointment of a justice of the peace or commissioner for declarations as the Governor in Council thinks fit.

<sup>113</sup> S 3 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) defines "offence" to exclude an offence in relation to regulated parking under Part 6A of the *Traffic Act 1949* (Qld).

offences.

### **Offences generally**

A person is not qualified to be appointed as a justice of the peace or as a commissioner for declarations if:

- the person has been convicted of more than two offences;<sup>114</sup> or
- the person has, within five years before appointment, been convicted of an offence.<sup>115</sup>

### **Offences under the Traffic Act 1949 (Qld)**

A person is not qualified to be appointed as a justice of the peace or as a commissioner for declarations if the person has:<sup>116</sup>

- within five years before appointment, been convicted of an offence under sections 16 or 16A of the *Traffic Act 1949* (Qld);<sup>117</sup> or
- within four years before appointment, been convicted of more than two offences under the *Traffic Act 1949* (Qld);<sup>118</sup> or
- within five years before appointment, been given a notice under section 10(3) of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).<sup>119</sup>

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<sup>114</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(a). Note that unlike s 17(b) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), this disqualification is not confined to conviction of an indictable offence.

<sup>115</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(b).

<sup>116</sup> The Minister may exempt an applicant for appointment as a commissioner for declarations from a disqualification mentioned in the last two of these grounds: *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(4).

<sup>117</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(a).

<sup>118</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(b).

<sup>119</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(c). S 10(3) provides:

If on consideration of an application by a person for appointment as a justice of the peace or as a commissioner for declarations, the registrar determines that the applicant has been convicted, for the purposes of subsection [10](1)(b), of more than 6 offences under the *Traffic Act 1949* within 4 years before the determination, the registrar is to give notice to the applicant that the applicant is disqualified from appointment as a justice of [the peace or as](#)

**(c) Patient under the *Mental Health Act 1974 (Qld)***

A person is also disqualified from holding office as a justice of the peace or commissioner for declarations if the person is a patient within the meaning of the *Mental Health Act 1974 (Qld)*.<sup>120</sup>

**(d) Previous disqualifications from office**

Section 11 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991 (Qld)* originally disqualified a person who practised as a barrister or solicitor from being appointed to, or continuing in, office as a justice of the peace.<sup>121</sup>

Section 11 was repealed in 1996,<sup>122</sup> with the result that there is no longer any impediment to a practising barrister or solicitor being appointed to, or continuing in, office as a justice of the peace. Indeed, a barrister or solicitor is now not even required to complete an approved course to qualify as a justice of the peace.<sup>123</sup>

#### **4. PROCESS OF APPOINTMENT**

Application by a person for appointment as either a justice of the peace (of either category) or as a commissioner for declarations is to be made in the manner prescribed by the regulations.<sup>124</sup> Application for appointment must be made in the prescribed form.<sup>125</sup>

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a commissioner for declarations for a period of 5 years after the notice is given.

<sup>120</sup> *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* s 17(d).

<sup>121</sup> This section did not, however, affect the office held by a justice of the peace who, immediately before the commencement of the subsection, practised as a barrister or solicitor, or who held office under s 41 of the Act (that is, a person who was a justice of the peace immediately before the commencement of the Act pursuant to an appointment under or deemed to have been made under the *Justices of the Peace Act 1975 (Qld)*).

<sup>122</sup> S 11 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991 (Qld)* was omitted by SL No 237 of 1996 s 6.

<sup>123</sup> See page 22 of this Issues Paper.

<sup>124</sup> *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* s 15(5).

<sup>125</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991 (Qld)* s 4.

### (a) Disclosure of offences

The prescribed forms require disclosure of convictions for any offences. Generally, the effect of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) is that, where a certain period of time (“the rehabilitation period”<sup>126</sup>) has passed since the recording of a conviction against a person, the person is not obliged to disclose the conviction.<sup>127</sup>

However, section 9A of that Act provides that a person who applies to be a justice of the peace or commissioner for declarations must, if requested or required to furnish information about his or her criminal history, disclose the information required by the Act, notwithstanding that the rehabilitation period in relation to a particular offence has expired. Such a person must, if requested, disclose his or her criminal history concerning contraventions of, or failures to comply with, any provision of law, whether committed in Queensland or elsewhere.<sup>128</sup>

### (b) Nomination

An applicant is required to be nominated by:<sup>129</sup>

- his or her member of State Parliament; or
- where the applicant seeks appointment to carry out duties in a financial institution or in the Commonwealth or State public services - by the General Manager of the institution or by the Chief Executive of the Department concerned; or
- any member of a Parliament in Australia.

In the first case, the member is required to state that he or she is unaware of any reason to suggest that the applicant is not a fit and proper person to be appointed to the office.

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<sup>126</sup> Depending on the circumstances, this will usually be five or ten years from the recording of the conviction. The term “rehabilitation period” is defined in s 3 of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

<sup>127</sup> See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 6.

<sup>128</sup> The person’s obligation of disclosure extends to all convictions recorded against the person being convictions that, pursuant to any law, are deemed not to be convictions: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A(1).

<sup>129</sup> Application for Appointment as a Commissioner for Declarations - Form 1; Application for Appointment as a Justice of the Peace (Qualified) - Form 2.

### (c) Inquiries as to fitness

The registrar is required to make inquiries to ascertain whether the applicant is a fit and proper person.<sup>130</sup> Checks are routinely made with referees and with the Department of Transport, as well as police history checks throughout Australia.

## 5. CESSATION OF OFFICE

### (a) Change in office

If a person who holds office as a justice of the peace is subsequently appointed to another category of justice of the peace or as a commissioner for declarations, the person ceases to hold the original office of justice of the peace.<sup>131</sup> Similarly, if a person who holds office as a commissioner for declarations is appointed as a justice of the peace, the person ceases to hold office as a commissioner for declarations.<sup>132</sup>

In both cases, the registrar is required to remove the person's name from the register as the holder of the original office and insert an entry that the person holds the later office.<sup>133</sup> When the entry is made, the person ceases to hold the original office and holds the office to which he or she has subsequently been appointed.<sup>134</sup>

### (b) Resignation

A person who is appointed as a justice of the peace or as a commissioner for declarations may resign from office at any time by giving written notice to the registrar. The person ceases to hold office when notification of the resignation is published in the Gazette.<sup>135</sup>

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<sup>130</sup> *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 5.

<sup>131</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A. However, ss 42 and 44 of the Act provide transitional arrangements for certain office holders to become a justice of the peace (commissioner for declarations) or a commissioner for declarations.

<sup>132</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A.

<sup>133</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(2).

<sup>134</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(3).

<sup>135</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 23.

**(c) Cessation on disqualification**

A person who holds office as an appointed justice of the peace or appointed commissioner for declarations ceases to hold office on becoming disqualified from continuing in the office.<sup>136</sup>

**(d) Cessation by revocation of appointment**

A general power to revoke the appointment of a person as a justice of the peace or commissioner for declarations is found in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Section 24 of that Act provides:

- (1) The Governor in Council, by notification published in the Gazette, may revoke the appointment of a person as an appointed justice of the peace or an appointed commissioner for declarations for such reason as the Governor in Council thinks fit.
- (2) Upon publication in the Gazette of a notification -
  - (a) the person ceases to hold office; and
  - (b) the registrar is to remove the person's name from the register;as a justice of the peace or, as the case may be, a commissioner for declarations.

The grounds for revocation are not prescribed by this section.

**6. PERSONS WHO ARE JUSTICES OF THE PEACE BY VIRTUE OF HOLDING ANOTHER OFFICE****(a) Introduction**

As discussed in this paper,<sup>137</sup> a person may hold office as a justice of the peace or as a commissioner for declarations by:

- being appointed to the office of justice of the peace (qualified), justice of the peace (magistrates court), or commissioner for declarations under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld);
- having held the office of justice of the peace under the *Justices Act 1975* (Qld),

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<sup>136</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 18.

<sup>137</sup> At pages 12-16 of this Issues Paper.

which office has been preserved by the transitional provisions of the 1991 Act;

- at the expiry of the transitional period for the 1991 Act, becoming a justice of the peace (commissioner for declarations); or
- transferring from the office of justice of the peace to the office of commissioner for declarations under section 44 of the 1991 Act.

A person who holds office by reason of one of these means is referred to in the Act as an “appointed justice of the peace” or as an “appointed commissioner for declarations”.<sup>138</sup>

That distinction is made because the Act also provides for other people to hold office as a justice of the peace or as a commissioner for declarations by virtue of holding, or having held, some particular office. The provisions discussed above in relation to appointment to office, disqualifications from office and cessation of office do not apply to persons who hold office by this means.

Broadly stated, Judges and Magistrates automatically hold office as a justice of the peace; registrars and clerks of courts hold office as a justice of the peace (magistrates court) or a justice of the peace (qualified) depending on whether they are legal practitioners; and clerks employed in the courts automatically hold office as commissioners for declarations. These categories are discussed in more detail below.

## **(b) Justice of the peace**

Every person who holds office as a Supreme Court Judge, District Court Judge, or Magistrate automatically holds office as a “justice of the peace”.<sup>139</sup> Further, a person who has retired, or resigned, from office as a Supreme Court judge, District Court Judge or Magistrate also automatically holds office as a justice of the peace.<sup>140</sup>

The effect of section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that such a justice of the peace may exercise all the powers of a justice of the peace that are conferred on a justice of the peace or on a commissioner for declarations by the *Justices Act 1886* (Qld) or any other Act.

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<sup>138</sup> See the definitions of these terms in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

<sup>139</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(1).

<sup>140</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(1A). Accordingly, a judge or magistrate who was removed from office would cease to hold office as a justice of the peace.

The limitations imposed by subsections 29(3) to (5) of the Act<sup>141</sup> on the exercise of powers by a justice of the peace (qualified), a justice of the peace (magistrates court) or a justice of the peace (commissioner for declarations) do not apply to a justice who holds office by virtue of being a Supreme Court Judge, District Court Judge, or Magistrate.<sup>142</sup>

**(c) Justice of the peace (magistrates court)**

**(i) Persons holding certain offices before 1 November 1991**

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that a person who:

- holds office as a registrar of the Supreme Court or of a District Court;
- holds office as a clerk of the court or registrar of a Magistrates Court who is not a police officer; or
- is a clerk employed as an officer of the public service in an office of the Supreme Court, a District Court or a Magistrates Court;

and who held that office or was so employed on 31 October 1991 (that is, immediately prior to the commencement of the 1991 Act) will also automatically hold office as a justice of the peace (magistrates court) for as long as he or she continues to hold that office or continues in the employment, whether or not the person is a legal practitioner.<sup>143</sup>

These people were, under section 9(iv) to (vi) of the *Justices of the Peace Act 1975* (Qld), justices of the peace by virtue of the offices held by them. Upon the commencement of the 1991 Act, they automatically became justices of the peace (magistrates court) under that Act.

**(ii) Persons holding certain offices from 1 November 1991 onwards**

However, the 1991 Act imposes additional qualifications for persons who have been appointed to those positions after the commencement of that Act. A

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<sup>141</sup> See pages 11-16 of this Issues Paper for a discussion of these provisions.

<sup>142</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6).

<sup>143</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(4). Note: "legal practitioner" is defined in s 3 of the Act to mean a person duly admitted as a barrister or solicitor of the Supreme Court whose name is currently enrolled on either the Roll of Barristers or on the Roll of Solicitors of that court.



person who holds office as:

- a registrar of the Supreme Court or of a District Court; or
- a clerk of the court or registrar of a Magistrates Court who is not a police officer;

automatically holds office as a justice of the peace (magistrates court) only if the person is also a legal practitioner.<sup>144</sup>

Further, while a clerk who was, as at 31 October 1991, employed as an officer of the public service in an office of the Supreme, District, or Magistrates Courts is automatically a justice of the peace (magistrates court), a clerk who has been employed after the commencement of the 1991 Act (that is, after 31 October 1991) is only a commissioner for declarations.<sup>145</sup>

#### **(d) Justice of the peace (qualified)**

A person who holds office as:

- a registrar of the Supreme Court or of a District Court;
- a clerk of the court or registrar of a Magistrates Court who is not a police officer;

but has held that office only after 31 October 1991, automatically holds office as a justice of the peace (qualified) if that person is not a legal practitioner.<sup>146</sup>

#### **(e) Commissioner for declarations**

Every clerk of or above the age of eighteen who is employed as an officer of the public service in an office of the Supreme Court, a District Court or a Magistrates Court is automatically, for as long as the clerk is so employed, a commissioner for declarations.<sup>147</sup>

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<sup>144</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(2).

<sup>145</sup> See the discussion at page 32 of this chapter of persons who are commissioners for declarations by virtue of their employment.

<sup>146</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(2). If the person held that office on 31 October 1991, the person would automatically have become a justice of the peace (magistrates court), whether or not the person was a legal practitioner: see s 19(4).

<sup>147</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(3).

## 7. TRAINING

### (a) Appointment

As mentioned earlier in this chapter,<sup>148</sup> if the Minister has approved a training course, a person is required to complete the course before being appointed as a justice of the peace or as a commissioner for declarations.

The general requirements are:<sup>149</sup>

- commissioner for declarations - no compulsory course or examination, although training is available;
- justice of the peace (qualified) - applicants are required to pass an examination. Training is strongly recommended by the Department of Justice, but is not compulsory; and
- justice of the peace (magistrates court) - applicants are required to undergo training and take an examination.

### (b) Training manuals

In addition to the provision of training courses, the Department of Justice also issues training manuals for the training of commissioners for declarations, justices of the peace (qualified) and justices of the peace (magistrates court).

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<sup>148</sup> At page 22 of this Issues Paper.

<sup>149</sup> Department of Justice and Attorney-General (Qld), *Justice Papers* (No 4, 1996) at 2.

## CHAPTER 5

### POWERS OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS

#### 1. INTRODUCTION

The terms of this reference require the Commission to review the role of justices of the peace in Queensland.<sup>150</sup> However, it is apparent from the discussion in Chapter 3 of the various categories of justices of the peace that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not generally confer substantive powers on justices of the peace. Rather, the Act circumscribes the powers of different categories of justices of the peace by reference to the nature of the powers conferred on them by other Acts.<sup>151</sup> The effect of this is to create a tiered system, with a differential exercise of powers by the various categories of office.

For this reason, a review of the role of justices of the peace is broader than simply reviewing the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and considering whether the existing allocation of powers as between the existing categories of justices of the peace and commissioners for declarations is appropriate. The substantive powers of justices of the peace are derived almost entirely from legislation other than the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). It is therefore necessary to examine the main powers currently exercisable by justices of the peace (which constitute their role) with a view to inquiring whether it is appropriate for those powers to be exercised by any justice of the peace (or, indeed, whether there are additional powers that could appropriately be exercised by a justice of the peace).<sup>152</sup>

Given the large number of Acts that confer powers on justices of the peace and commissioners for declaration, it is not possible to set out in this paper all the powers that may be exercised by a justice of the peace or by a commissioner for declarations. The purpose of this chapter is to set out the main types of functions performed by justices of the peace and commissioners for declarations, in order to give an overview of the current scope of those roles.

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<sup>150</sup> The terms of reference are set out at page 1 of this Issues Paper.

<sup>151</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29. See the discussion of this provision at pages 11-16 of this Issues Paper.

<sup>152</sup> These issues are raised more specifically in Chapter 8.

## 2. EXERCISE OF POWERS WHEN A STIPENDIARY MAGISTRATE IS AVAILABLE

The functions performed by justices of the peace and commissioners for declarations are commonly referred to as being either bench duties or non-bench duties. “Bench duties” is a reference to the power of certain justices of the peace to constitute a court for certain purposes within the criminal jurisdiction of the Magistrates Courts,<sup>153</sup> for example, to hear and determine a charge of an offence or to conduct a committal hearing. The main bench duties of a justice of the peace are discussed in this chapter. “Non-bench duties” is a reference to the balance of the powers that may be exercised by a justice of the peace.

It should be noted in relation to the discussion of those duties that the *Justices Act 1886* (Qld) provides generally that justices of the peace may not constitute a court where a stipendiary magistrate is available to do so. Section 30(2) of that Act provides:

Unless otherwise expressly provided, when a stipendiary magistrate is present at a place appointed for holding Magistrates Courts and is available to constitute any such court to be held at that place the court shall be constituted by the stipendiary magistrate alone.

However, the *Justices Act 1886* (Qld) also provides exceptions to that general proposition. Section 30(3) provides:

Nothing in subsection (2) shall be construed to abridge or prejudice the ministerial power of justices in taking an examination of witnesses in relation to an indictable offence, or the powers of justices to receive a complaint or to issue, grant or endorse a summons or warrant, to grant bail or to adjourn a hearing of a complaint of a simple offence or breach of duty.

The effect of this subsection is that it is really only in relation to the hearing and determining of charges that the presence and availability of a stipendiary magistrate to constitute a court means that the court should be constituted by a magistrate rather than by justices of the peace.

## 3. HEARING AND DETERMINING CHARGES

### (a) Source of power

The *Justices Act 1886* (Qld) provides that, subject to the provisions of any other Act,

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An appointed justice of the peace does not have any powers in the civil jurisdiction of the Magistrates Courts. S 16 of the *Magistrates Courts Act 1921* (Qld) provides that every action shall be heard and determined by a magistrate sitting alone.

every complaint shall be heard and determined by a Magistrates Court constituted by two or more “justices”.<sup>154</sup> Generally, all proceedings under the *Justices Act 1886* (Qld) are commenced by a complaint,<sup>155</sup> which sets out the conduct of the defendant that is alleged to constitute a particular offence.

### (b) Justices of the peace who may exercise this power

Although the *Justices Act 1886* (Qld) confers jurisdiction generally on two “justices” to hear and determine a complaint, a justice of the peace (qualified) is not authorised to constitute a court for this purpose.<sup>156</sup>

A justice of the peace (magistrates court) may constitute a court (with another justice having jurisdiction) for this purpose, but is limited in exercising this power to hearing and determining a charge of a simple offence or a regulatory offence<sup>157</sup> in a case where the defendant pleads guilty.<sup>158</sup> In effect, a justice of the peace (magistrates court) is limited to sentencing in respect of these offences.

An old system justice of the peace (that is, one who held office prior to the 1991 Act and whose office is preserved by the transitional provisions of the Act) may exercise this power without reference to the limitations imposed on a justice of the peace (magistrates court), as these limitations do not apply to an old system justice of the peace.<sup>159</sup>

Although section 29(4)(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) permits a justice of the peace (magistrates court) to hear and determine a charge of a simple offence, which is defined to include an indictable

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<sup>154</sup> *Justices Act 1886* (Qld) s 27(1). “Justice” is defined in s 4 of the *Justices Act 1886* (Qld) as follows:

“**justices**” or “**justice**” means justices of the peace or a justice of the peace having jurisdiction where the act in question is, or is to be, performed, and includes a stipendiary magistrate and, where necessary, a Magistrates Court.

Note that a stipendiary magistrate has the power to do alone what may be done by two or more justices constituting a Magistrates Court: *Justices Act 1886* (Qld) s 30(1).

<sup>155</sup> *Justices Act 1886* (Qld) s 42(1).

<sup>156</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3). See the discussion of this provision at pages 13-14 of this Issues Paper.

<sup>157</sup> See the *Regulatory Offences Act 1985* (Qld).

<sup>158</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a). See the discussion of this provision at pages 12-13 of this Issues Paper.

<sup>159</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

offence that may be dealt with summarily,<sup>160</sup> in a case where the defendant pleads guilty, other legislation may exclude or further limit the exercise of that power by a justice of the peace (magistrates court).

For example, section 552C(6) of the *Criminal Code* (Qld) expressly provides that section 29(4)(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is subject to subsections 552C(1) to (3) of the Code. Those subsections provide that a Magistrates Court that deals summarily with an indictable offence under Chapter 58A of the Code may be constituted by a magistrate or by certain specially appointed justices of the peace. A justice of the peace must not only be a justice of the peace (magistrates court), but must also be appointed by the Attorney-General for a place that is within a trust area under the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld), or is in a place that the Attorney-General considers is remote.<sup>161</sup>

The jurisdiction of justices of the peace who may under section 552C of the Code constitute a Magistrates Court to deal summarily with an indictable offence under Chapter 58A of the *Criminal Code* (Qld) is limited to cases where the defendant pleads guilty.<sup>162</sup>

Other Acts also exclude a justice of the peace from hearing summarily a charge of an indictable offence that may under those Acts be heard summarily.<sup>163</sup> In that event, the matter must be heard before a magistrate.

## 4. CONDUCTING AN EXAMINATION OF WITNESSES

### (a) Source of power

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<sup>160</sup> A “simple offence” is defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) to mean a simple offence or breach of duty within the meaning given to the term by s 4 of the *Justices Act 1886* (Qld), which in turn defines “simple offence” to mean:

any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise.

<sup>161</sup> *Criminal Code* (Qld) s 552C. See the discussion of justices of the peace appointed under this provision at pages 19-21 of this Issues Paper.

<sup>162</sup> Other limitations are also imposed by s 552C(2) of the *Criminal Code* (Qld). These limitations are set out at pages 20-21 of this Issues Paper.

<sup>163</sup> See, for example, the *Coastal Protection and Management Act 1995* (Qld) s 82; the *Environmental Protection Act 1994* (Qld) s 186; the *Keno Act 1996* (Qld) s 223; and the *Sewerage and Water Supply Act 1949* (Qld) s 17D.

Section 104 of the *Justices Act 1886* (Qld) authorises a single “justice”<sup>164</sup> to conduct an examination of witnesses in relation to an indictable offence. This is commonly referred to as conducting a “committal hearing”.

### **(b) Nature of the hearing**

Some indictable offences may be heard summarily, that is, by a magistrate sitting alone, rather than before a judge and jury.<sup>165</sup> However, most indictable offences are required to be heard before a judge and jury in either the District or Supreme Courts.

The purpose of a committal hearing is for the justice to determine whether there is sufficient evidence for the defendant to be tried. Evidence is called on behalf of the prosecution<sup>166</sup> and may also be offered by the defendant if the defendant wishes.<sup>167</sup> If, having considered all the evidence called in relation to the indictable offence, the justice is of the opinion that the evidence is sufficient for the defendant to be put on trial, the justice must order the defendant to be committed to be tried for the offence before a court of competent jurisdiction, that is, depending on the nature of the offence, in either the District Court or the Supreme Court.<sup>168</sup>

### **(c) Justices of the peace who may exercise this power**

This power may be exercised by a justice of the peace (magistrates court),<sup>169</sup> but not by a justice of the peace (qualified), who is, in the exercise of any power to constitute a court, limited to taking or making procedural actions or orders.<sup>170</sup> The power to conduct a committal hearing obviously exceeds that limited power.

As the limitations imposed by section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) do not apply to a justice of the peace

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<sup>164</sup> See note 154 of this Issues Paper as to the definition of “justice” in the *Justices Act 1886* (Qld).

<sup>165</sup> See Chapter 58A of the *Criminal Code* (Qld) - indictable offences dealt with summarily - and the discussion of Chapter 58A at pages 19-21 of this Issues Paper.

<sup>166</sup> *Justices Act 1886* (Qld) s 104(2).

<sup>167</sup> *Justices Act 1886* (Qld) s 104(4).

<sup>168</sup> *Justices Act 1886* (Qld) s 108(1) .

<sup>169</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(b).

<sup>170</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

whose office is preserved by the transitional provisions of that Act,<sup>171</sup> an old system justice of the peace may also exercise the power under the *Justices Act 1886* (Qld) to conduct an examination of witnesses.

## 5. CONSTITUTING THE CHILDRENS COURT

### (a) Introduction

The Childrens Court is a specialised court designed to deal with matters concerning young people. The Court has the jurisdiction conferred on it by any Act.<sup>172</sup> Its jurisdiction ranges from criminal proceedings involving young people charged with criminal offences to non-criminal proceedings, such as applications for the care and protection of young people.<sup>173</sup>

### (b) Source of power

In certain circumstances, the Childrens Court may be constituted by two justices of the peace. If the Court is not expressly required by an Act to be constituted by a Childrens Court judge,<sup>174</sup> it may be constituted by two justices of the peace, but only if neither a Childrens Court magistrate nor a stipendiary magistrate is available.<sup>175</sup> This does not, however, affect the limitations placed on a justice of the peace by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld)<sup>176</sup> or by any other Act.<sup>177</sup>

The main ground expressed for allowing justices of the peace to decide matters concerning young people was to provide for a speedier resolution of proceedings in certain circumstances. In the second reading speech for the *Childrens Court Bill 1992* (Qld), the Honourable AM Warner, the then Minister for Family Services and Aboriginal

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<sup>171</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

<sup>172</sup> *Childrens Court Act 1992* (Qld) s 6.

<sup>173</sup> The principal Acts conferring jurisdiction on the Childrens Court are the *Children's Services Act 1965* (Qld) and the *Juvenile Justice Act 1992* (Qld).

<sup>174</sup> Note that the Childrens Court must be constituted by a Childrens Court judge if that is expressly required by an Act: *Childrens Court Act 1992* (Qld) s 5(2).

<sup>175</sup> *Childrens Court Act 1992* (Qld) s 5(3).

<sup>176</sup> See Chapter 3 for a discussion of the limitations imposed on the powers that may be exercised by particular categories of justices of the peace.

<sup>177</sup> *Childrens Court Act 1992* (Qld) s 5(4).



and Islander Affairs, stated:<sup>178</sup>

In areas where a magistrate is not readily available, a court may be constituted by two justices of the peace who are trained in the conduct and proceedings of court. This will allow for matters to be brought before the court speedily, even in remote areas. I am sure most members would appreciate the urgency of having a court determine the temporary custody arrangements of children who have been removed from their parents as a result of a care and protection application.

### **(c) Particular powers and limitations**

Because the jurisdiction of the Childrens Court is conferred by a number of Acts, the purpose of this section of the paper is simply to give a brief overview of the scope of the role of justices of the peace who may constitute the Childrens Court.

#### **(i) Jurisdiction in criminal matters**

All proceedings under the *Justices Act 1886* (Qld) for the hearing and determination of charges<sup>179</sup> against children for offences, including committal proceedings,<sup>180</sup> must be heard and determined before a “Childrens Court magistrate”.<sup>181</sup> The definition of “Childrens Court magistrate” in section 5 of the *Juvenile Justice Act 1992* (Qld) includes a justice of the peace.

The *Juvenile Justice Act 1992* (Qld) imposes limitations on the jurisdiction of the Childrens Court when it is constituted by two justices of the peace. In those circumstances, the Court’s jurisdiction is limited to:

- hearing and determining a charge of a simple offence in a case where the young person pleads guilty; and
- taking or making procedural actions or orders, for example, charging a defendant, issuing a warrant, granting bail, remanding a defendant or

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<sup>178</sup> *Hansard*, Legislative Assembly (Qld) (18 June 1992) at 5935.

<sup>179</sup> See the general discussion at pages 35-37 of this Issues Paper about the jurisdiction of justices of the peace in the hearing and determination of charges.

<sup>180</sup> See the general discussion at pages 37-38 of this Issues Paper about the jurisdiction of justices of the peace in relation to committal hearings.

<sup>181</sup> *Juvenile Justice Act 1992* (Qld) s 51(1). More serious matters are, depending on the nature of the offence, required to be tried in either the Supreme or District Courts, or before a Childrens Court judge sitting without a jury: see Division 2 of Part 4 of the *Juvenile Justice Act 1992* (Qld).

adjourning a proceeding.<sup>182</sup>

Justices of the peace may not make a detention order or an immediate release order.<sup>183</sup>

These limitations do not affect a limitation placed on the power of a justice of the peace under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).<sup>184</sup> Accordingly, a justice of the peace (qualified) would not have jurisdiction to hear and determine a charge against a young person, but would still be confined to taking or making procedural actions and orders.<sup>185</sup>

## (ii) Jurisdiction in non-criminal matters

Under the *Children's Services Act 1965* (Qld), justices of the peace constituting the Childrens Court have quite wide powers. These include:

- ordering that a child be admitted to the care and protection of the Director of the Department of Families;<sup>186</sup> and
- ordering that a child who is in need of care and control be committed to the care and control of the Director of the Department of Families.<sup>187</sup>

The *Children and Families Bill 1997* (Qld), which will replace the *Children's Services Act 1965* (Qld), proposes further restrictions on the powers of the Childrens Court when it is constituted by two justices of the peace. The Court will have jurisdiction to make interim court assessment orders, interim child protection orders, and adjourn the hearing of these applications.<sup>188</sup> It will not have jurisdiction to make final orders on these applications.

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<sup>182</sup> *Juvenile Justice Act 1992* (Qld) s 54(1).

<sup>183</sup> *Juvenile Justice Act 1992* (Qld) s 54(2).

<sup>184</sup> *Juvenile Justice Act 1992* (Qld) s 54(3).

<sup>185</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>186</sup> *Children's Services Act 1965* (Qld) s 49(4)(a)(iii).

<sup>187</sup> *Children's Services Act 1965* (Qld) s 61(4)(a)(iii).

<sup>188</sup> *Children and Families Bill 1997* (Qld) cl 79 (1), (2) . These restrictions have effect despite s 29(3) and (4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld): *Children and Families Bill 1997* (Qld) cl 79(4). See Chapter 3 for a discussion of the limitations imposed on the powers that may be exercised by particular categories of justices of the peace.

### (d) Justices of the peace who may exercise these powers

As mentioned above,<sup>189</sup> section 5(3)(c) of the *Childrens Court Act 1992* (Qld), which enables two justices of the peace to constitute the Childrens Court, is expressed not to affect the limitations placed on justices of the peace under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Accordingly, the question as to which powers of the Childrens Court may be exercised by two justices of the peace will depend on the nature of the power itself.<sup>190</sup>

Depending on the nature of the particular power in question, it could be exercised by a justice of the peace (qualified)<sup>191</sup> or a justice of the peace (magistrates court),<sup>192</sup> or, in either case, by an old system justice of the peace whose office is preserved by the transitional provisions of the 1991 Act.<sup>193</sup>

## 6. REMANDING A DEFENDANT AND ADJOURNING PROCEEDINGS

### (a) Sources of powers

Section 84 of the *Justices Act 1886* (Qld) provides that, in any case of a charge of an indictable offence, if from the absence of witnesses or from any other reasonable cause it becomes necessary or advisable to defer the hearing of the case, the justices before whom the defendant appears may adjourn the hearing, and may remand the defendant to a gaol or lockup for a period of not more than eight days at any one time.<sup>194</sup>

Section 88 of the *Justices Act 1886* (Qld) authorises “the justices present, or, if only 1 justice is present, that justice” to adjourn a hearing of a charge of a simple offence or breach of duty to a time and place to be then appointed, or to adjourn the hearing and leave the time and place at which it is to be continued to be later determined by the justices then present.

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<sup>189</sup> At page 39 of this Issues Paper.

<sup>190</sup> For example, unless specifically authorised, the powers of justices of the peace (qualified) are limited to “taking or making a procedural action or order”: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>191</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>192</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4).

<sup>193</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

<sup>194</sup> The justices also have the power under s 8 of the *Bail Act 1980* (Qld) to grant the defendant bail. See pages 43-45 of this Issues Paper.

Other legislation also confers power on a justice of the peace to hear and determine an application for a remand or adjournment of a case.<sup>195</sup>

## **(b) Justices of the peace who may exercise these powers**

The remand of a defendant and the adjournment of proceedings are both included in the definition of “procedural action or order” in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). They are, therefore, powers that may be exercised by a justice of the peace (qualified),<sup>196</sup> a justice of the peace (magistrates court),<sup>197</sup> or an old system justice of the peace whose office is preserved by the transitional provisions of the Act.<sup>198</sup>

## **7. GRANTING BAIL**

### **(a) Introduction**

After being arrested and charged with an offence, and before the matter is finally resolved by conviction or acquittal in the appropriate court, a person (the defendant) may be remanded in custody, or may be released from custody in the intervening period through a grant of bail.

Bail is a procedure that allows a person who has been accused of a criminal offence, and arrested, to be released from custody until he or she stands trial. It recognises that the liberty of a person who has not been convicted of an offence should not be restricted unless it is necessary in the interests of the community that the person be detained.

The *Criminal Code* (Qld) imposes on a person who has arrested another person on the charge of an offence an obligation to take that person “forthwith before a justice to be dealt with according to law”.<sup>199</sup>

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<sup>195</sup> See, for example, the *Health Act 1937* (Qld) s 145; and the *Penalties and Sentences Act 1992* (Qld) s 182(4).

<sup>196</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>197</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

<sup>198</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

<sup>199</sup> *Criminal Code* (Qld) s 552. A person who, in those circumstances, wilfully delays taking the person before a justice to be dealt with according to law is guilty of a misdemeanour and liable to imprisonment for two years: *Criminal Code* (Qld) s 137.

## (b) Source of power

Under the *Bail Act 1980* (Qld), a “court” has various powers with respect to the granting of bail:<sup>200</sup>

A court, subject to this Act -

- (a) may grant bail to a person held in custody on a charge of or in connection with an offence if -
  - (i) the person is awaiting a criminal proceeding to be held by that court in relation to that offence; or
  - (ii) the court has adjourned the criminal proceeding; or
  - (iii) the court has committed or remanded the person in the course of or in connection with a criminal proceeding to be held by that court or another court in relation to that offence;
- (b) may enlarge, vary or revoke bail so granted.

The definition of “court” in the *Bail Act 1980* (Qld) includes a “justice” sitting in court, as well as any justice or justices conducting an examination of witnesses in relation to an indictable offence.<sup>201</sup> Although “justice” is not defined in the *Bail Act 1980* (Qld), it is defined in the *Acts Interpretation Act 1954* (Qld) to mean a justice of the peace.<sup>202</sup> The police officer in charge of a police station or watchhouse has a general power to grant bail to a person in his or her custody.<sup>203</sup> Such a grant of bail discharges the duty of taking the person before a justice to be dealt with according to law.<sup>204</sup>

However, if a person is refused bail by the police officer in charge of the police station or watchhouse, the person must be taken before a court.<sup>205</sup> If bail is refused, the defendant must be remanded in custody.<sup>206</sup>

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<sup>200</sup> *Bail Act 1980* (Qld) s 8(1). Generally, see Queensland Law Reform Commission, *The Bail Act 1980* (R 43, June 1993).

<sup>201</sup> *Bail Act 1980* (Qld) s 6.

<sup>202</sup> *Acts Interpretation Act 1954* (Qld) s 36.

<sup>203</sup> *Bail Act 1980* (Qld) s 7(1).

<sup>204</sup> *Bail Act 1980* (Qld) s 7(4).

<sup>205</sup> For some offences, however, such as murder, only a Supreme Court Judge may grant bail: *Bail Act 1980* (Qld) s 13.

<sup>206</sup> *Bail Act 1980* (Qld) s 8(2).

### (c) Justices of the peace who may exercise this power

The granting of bail is included in the definition of “procedural action or order” in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). It is, therefore, a power that may be exercised by a justice of the peace (qualified),<sup>207</sup> a justice of the peace (magistrates court),<sup>208</sup> or an old system justice of the peace whose office is preserved by the transitional provisions of the Act.<sup>209</sup>

## 8. ISSUING SUMMONSES

### (a) Source of power

Generally, all proceedings under the *Justices Act 1886* (Qld) are commenced by a complaint in writing.<sup>210</sup> When a complaint is made before a justice that any person is guilty of or is suspected of having committed any indictable offence, simple offence, or breach of duty that is within the jurisdiction of the justice, then the justice may issue the justice’s summons.<sup>211</sup> Every summons shall be directed to the defendant and shall require the defendant to appear at a certain time and place before the Magistrates Court, or, as the case may require, before justices taking an examination of witnesses in relation to an indictable offence, to answer the complaint and to be dealt with according to law.<sup>212</sup>

Under the *Justices Act 1886* (Qld), a justice may also issue a summons to a witness to require the witness to appear at a hearing to give evidence<sup>213</sup> or to produce documents.<sup>214</sup>

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<sup>207</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>208</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

<sup>209</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

<sup>210</sup> *Justices Act 1886* (Qld) s 42(1). When it is intended in the first instance to issue a summons against the party charged, the complaint in writing need not be on oath. However, the complaint must be on oath if it is intended to issue a warrant in the first instance against the party charged: *Justices Act 1886* (Qld) s 51.

<sup>211</sup> *Justices Act 1886* (Qld) s 53(1).

<sup>212</sup> *Justices Act 1886* (Qld) s 54(1).

<sup>213</sup> *Justices Act 1886* (Qld) s 78.

<sup>214</sup> *Justices Act 1886* (Qld) s 83.

There are also many Acts, other than the *Justices Act 1886* (Qld), under which a justice of the peace may issue a summons.<sup>215</sup>

It has been held that in issuing a summons, a justice (which includes a justice of the peace) must exercise a discretion in a judicial manner:<sup>216</sup>

Section 60 of the *Justices Act* [of New South Wales] provides that whenever an information is laid before a justice, against any person, he may issue his summons for the appearance of such person. He is not bound to issue a summons. Before doing so he should consider the information to see what it alleges.

“A summons”, said Lord Goddard CJ, “is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons” *R v Wilson; Ex parte Battersea Borough Council*. This does not mean that the issuing of a summons is a judicial act in the same sense as is an adjudication to determine the rights of parties. Probably it would be better described as an administrative or ministerial act, or, as this Court said in *Donohue v Chew Ying*, as a matter of procedure. But, however described, a justice who receives an information must decide whether or not he should issue a summons. He has a discretion and he must exercise it in a judicial manner. [footnotes omitted]

#### **(b) Justices of the peace who may exercise this power**

The issuing of a summons is not included in the examples in the definition of “procedural action or order” in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). However, it would certainly constitute “an action taken ... for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate”.

It is, therefore, a power that may be exercised by a justice of the peace (qualified),<sup>217</sup> a justice of the peace (magistrates court),<sup>218</sup> or an old system justice of the peace whose office is preserved by the transitional provisions of the Act.<sup>219</sup>

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<sup>215</sup> See, for example, the *Dividing Fences Act 1953* (Qld) s 18 ; the *Domestic Violence (Family Protection) Act 1989* (Qld) s 47; the *Peace and Good Behaviour Act 1982* (Qld) s 4; and the *Property Law Act 1973* (Qld) s 144.

<sup>216</sup> *Electronic Rentals Pty Limited v Anderson* (1971) 124 CLR 27 per Windeyer J at 39.

<sup>217</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>218</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

<sup>219</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

A single justice of the peace may grant a summons, notwithstanding that the case must be heard and determined by two or more justices.<sup>220</sup>

## 9. ISSUING WARRANTS UNDER QUEENSLAND LEGISLATION

Whereas a summons requires a defendant to attend at court, an arrest warrant calls on the police to apprehend the person and take him or her into custody. Many Acts confer power on a justice of the peace to issue a warrant. Examples of different types of warrants that may be issued by a justice of the peace are discussed below.

### (a) Search and seizure warrants

Section 679(1) of the *Criminal Code* (Qld) provides:

- (1) If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place:
  - (a) anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or
  - (b) anything whether animate or inanimate and whether living or dead as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of any offence; or
  - (c) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;

the justice may issue a warrant directing a police officer or police officers named therein or all police officers to enter, by force if necessary, and to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.

A warrant issued pursuant to section 679 authorises the police officers to whom it is directed to do what is otherwise unlawful - to enter peacefully occupied premises and seize and take away the property of people who may have no connection with any criminal activity.<sup>221</sup>

The opening words of section 679 of the *Criminal Code* (Code) - "If it appears to a

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<sup>220</sup> *Justices Act 1886* (Qld) s 24.

<sup>221</sup> *Hedges v Grundmann* [1985] 2 Qd R 263 per Moynihan J at 268.



justice” - impose on a justice<sup>222</sup> to whom an application for a search warrant is made the duty of satisfying himself or herself that the conditions for the issue of the warrant are fulfilled.<sup>223</sup> It must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds exist for the relevant suspicion and belief.<sup>224</sup>

It is a requirement of section 679 that the sworn complaint should contain sufficient facts to found the reasonable suspicion and the reasonable belief respectively mentioned in section 679.<sup>225</sup>

If that requirement is not satisfied, the information otherwise conveyed to the issuing justice is immaterial but, if that requirement is satisfied, the justice may seek confirmation by inquiry of the complainant.

In exercising this power, a justice of the peace exercises a very important function. In *Parker v Churchill*,<sup>226</sup> Burchett J said of a justice of the peace’s duty in relation to an information for a search warrant under section 10 of the *Crimes Act 1914* (Cth):<sup>227</sup>

The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal business affairs.

## (b) Arrest warrants

Under section 5 of the *Criminal Code* (Qld), the definition of an offence as a crime

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<sup>222</sup> See note 59 of this Issues Paper as to the definition of “justice” in the *Acts Interpretation Act 1954* (Qld).

<sup>223</sup> *George v Rockett* (1990) 170 CLR 104 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 111.

<sup>224</sup> Id at 112. The High Court held (at 112) that the requirement held by the Full Court of the Supreme Court of Queensland in *Hedges v Grundmann* [1985] 2 Qd R 263 that the justice must be satisfied not only that there are reasonable grounds for suspicion and belief, but that the justice must also entertain the relevant suspicion and belief, was excessive.

<sup>225</sup> *George v Rockett* (1990) 170 CLR 104 at 114. The Court rejected an argument that the basis of the justice’s satisfaction was not required to be on oath, although the complaint itself was required to be on oath.

<sup>226</sup> (1985) 63 ALR 326.

<sup>227</sup> Id at 333. S 10 of the *Crimes Act 1914* (Cth), which was repealed by s 5 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth), was in substantially the same terms as s 679 of the *Criminal Code* (Qld).

imports that the offender may be arrested without warrant, whereas a warrant is generally required for arrest in the case of a misdemeanour.<sup>228</sup> Under the *Justices Act 1886* (Qld) a justice of the peace has certain powers in relation to the issuing of warrants for the arrest of a person. Section 57 provides:

If a complaint is made before a justice -

- (a) that a person is suspected of having committed an indictable offence within the justice's jurisdiction; or
- (b) that a person charged with committing an indictable offence elsewhere within the State is suspected of being within the justice's jurisdiction; or
- (c) that a person charged with committing an indictable offence on the high seas, or elsewhere outside the State, of which notice may be taken by the courts of the State, is suspected of being within the justice's jurisdiction;

the justice may issue a warrant -

- (d) to apprehend the person; and
- (e) have the person brought before justices to answer the complaint and to be further dealt with according to law.

Justices of the peace also have the power to issue warrants for the arrest of a person under other Acts.<sup>229</sup>

### **(c) Justices of the peace who may exercise this power**

The issuing of a warrant is included in the definition of "procedural action or order" in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). It is, therefore, a power that may be exercised by a justice of the peace (qualified),<sup>230</sup> a justice of the peace (magistrates court),<sup>231</sup> or an old system justice of the peace whose office is preserved by the transitional provisions of the Act.<sup>232</sup>

A single justice of the peace may issue a warrant, notwithstanding that the case must

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<sup>228</sup> Kenny G, *An Introduction to Criminal Law in Queensland and Western Australia* (4th ed 1997) at para 4.4.

<sup>229</sup> See, for example, the *Gaming Machine Act 1991* (Qld) s 208; and the *Racing and Betting Act 1980* (Qld) s 231(2)(h).

<sup>230</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

<sup>231</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

<sup>232</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

be heard and determined by two or more justices.<sup>233</sup>

## 10. ISSUING WARRANTS UNDER FEDERAL LEGISLATION

Justices of the peace also have powers to issue warrants under some Federal legislation.<sup>234</sup> “Justice of the peace” is defined in the *Acts Interpretation Act 1901* (Cth) to include “a Justice of the Peace for a State or part of a State or for a Territory”.<sup>235</sup> Accordingly, the powers conferred by Federal legislation simply on a “justice of the peace” to issue warrants could be exercised by a justice of the peace (qualified), a justice of the peace (magistrates court), or by an old system justice of the peace.

Some Acts draw a distinction between the lay justice of the peace and a justice of the peace (or other person with similar powers) who is employed in the court of a State or Territory.

For example, section 198 of the *Customs Act 1901* (Cth) prescribes the circumstances in which a “judicial officer” may issue a warrant to search premises. Although the definition of “judicial officer” includes a justice of the peace, it is restricted to:<sup>236</sup>

a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants.

This particular power may be exercised only by a justice of the peace who holds office by virtue of being employed in the court system.<sup>237</sup>

## 11. ATTENDING POLICE INTERVIEWS OF JUVENILES

### (a) Source of power

Section 9E of the *Juvenile Justice Act 1992* (Qld) provides:

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<sup>233</sup> *Justices Act 1886* (Qld) s 24.

<sup>234</sup> See, for example, the *Quarantine Act 1909* (Cth) ss 74AB, 74A, 74B and 74BA; the *Insurance Act 1973* (Cth) s 115A; the *Environment Protection (Impact of Proposals) Act 1974* (Cth) s 24; the *Export Control Act 1982* (Cth) s 10; and the *Dairy Produce Act 1986* (Cth) s 116.

<sup>235</sup> *Acts Interpretation Act 1901* (Cth) s 26(e).

<sup>236</sup> *Customs Act 1901* (Cth) s 183UA.

<sup>237</sup> See the discussion of these offices in Chapter 4. For a similar provision, see the definition of “issuing officer” in s 3E of the *Crimes Act 1914* (Cth).

- (1) In a proceeding for an indictable offence, a court must not admit into evidence against the defendant a statement made or given to a police officer by the defendant when a child, unless the court is satisfied that there was present at the time and place the statement was made or given, a person mentioned in subsection (2).
- (2) The person required to be present is -
  - (a) a parent of the child; or
  - (b) a legal practitioner acting for the child; or
  - (c) a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or
  - (d) **a justice of the peace** other than -
    - (i) a justice of the peace who is a member of the Queensland Police Service; or
    - (ii) a justice of the peace (commissioner for declarations); or
  - (e) an adult nominated by the child.
- (3) Subsection (1) does not apply if -
  - (a) the prosecution satisfies the court that there was proper and sufficient reason for the absence of a person mentioned in subsection (2) at the time the statement was made or given; and
  - (b) the court considers that, in the particular circumstances, the statement should be admitted into evidence.
- (4) This section does not require that a police officer permit or cause to be present when a child makes or gives the statement a person whom the police officer suspects on reasonable grounds -
  - (a) is an accomplice of the child; or
  - (b) is, or is likely to become, an accessory after the fact;in relation to the offence or another offence under investigation.
- (5) This section does not limit the power of a court to exclude evidence from admission in a proceeding. [emphasis added]

The courts have held that, even when the formal requirements of section 9E of the *Juvenile Justice Act 1992* (Qld) have been met, there is still a discretion to exclude the statement of a child<sup>238</sup> on the ground that there is doubt as to its voluntariness or fairness.

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<sup>238</sup>

"Child" is defined in s 5 of the *Juvenile Justice Act 1992* (Qld) as a person who is under 17 years of age. There is provision in the Act for the age to be increased by one year by regulation: see s 6.

In three recent cases the alleged admission of a young person has been held to be inadmissible because of inadequacies in the conduct of the justice of the peace who was present at the young person's interview.

In *R v C*,<sup>239</sup> the Court of Appeal quashed the conviction of a juvenile, even though a justice of the peace was present when the juvenile was interviewed by the police. The Court commented adversely on the state of the justice of the peace who was present during the interview, and rejected the admissions made by the juvenile in her presence.<sup>240</sup>

So this was the justice of the peace: a "nervous wreck", annoyed at being called out, not understanding the rights of the suspect, and - as if that were not enough - found to be unreliable in giving an account of the events in question.

The most that could be said from this is that the requirements of s. 9E were formally complied with .... Just as it is necessary that a suspect be in a fit physical and mental condition to be interviewed, so it is necessary for a person present when a child is being interviewed to be in a fit physical and mental condition to act in that role, otherwise formal compliance with s. 9E will be little more than a solemn farce.

In *R v W*,<sup>241</sup> the justice of the peace admitted during cross-examination that she had told the juvenile that "it would be best to co-operate with the police"; that "you will have to go through a record of interview with the police before you can be released"; and that "you could be charged with perjury if you don't tell the police the truth". The justice of the peace also gave evidence that she had told alleged juvenile offenders, "The best thing to do is to tell the truth and get it over with and then you can get out of here". When questioned as to her understanding of the role as an independent witness, the justice of the peace answered:

To see that the operations of the interview would come off without any trouble, no - that's not the way to put it. That nobody gets any preferences as to answers or questions ... I tell them that I'm not on anybody's side.

In *R v J*,<sup>242</sup> a justice of the peace (qualified) was present when a juvenile was being interviewed by the police in respect of the death of a person who had been beaten to death. The parents of the juvenile were unavailable and the justice of the peace was contacted in an effort to satisfy section 9E of the *Juvenile Justice Act 1992* (Qld). In a private interview with the juvenile, the justice of the peace made some comments to the juvenile in accordance with statements contained in the training manual.

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<sup>239</sup> [1997] 2 Qd R 465.

<sup>240</sup> Id at 471.

<sup>241</sup> Unreported, McMurdo J, District Court, Brisbane, 4 June 1997.

<sup>242</sup> Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996.

In the murder trial of the juvenile, the admissions made by the juvenile when interviewed by the investigating police officers in the presence of the justice of the peace were held by the trial judge to be inadmissible because the Crown had failed to prove that the statements relied on were made voluntarily. The trial judge considered that certain advice that was given to the juvenile by the justice of the peace, in which the justice of the peace had followed strictly the terms of the training manual,<sup>243</sup> may have been construed by the juvenile to mean that he would be in trouble if he did not give his account then and there.

### **(b) Justices of the peace who may exercise this power**

Section 9E(2)(d) provides that this role may be performed by a justice of the peace other than a justice of the peace (commissioner for declarations). It is, therefore, possible for this role to be undertaken by a justice of the peace (qualified),<sup>244</sup> a justice of the peace (magistrates court),<sup>245</sup> or an old system justice of the peace whose office is preserved by the transitional provisions of the Act.<sup>246</sup>

## **12. WITNESSING STATUTORY DECLARATIONS AND AFFIDAVITS**

### **(a) Statutory declarations**

Under the *Oaths Act 1867* (Qld) a “justice”<sup>247</sup> and a commissioner for declarations are among the persons authorised to take a statutory declaration.<sup>248</sup>

They may take a declaration for Queensland law, whether it is taken inside or outside Queensland, or even outside Australia.<sup>249</sup>

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<sup>243</sup> See page 33 of this Issues Paper.

<sup>244</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

<sup>245</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

<sup>246</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

<sup>247</sup> See note 59 of this Issues Paper as to the definition of “justice”.

<sup>248</sup> *Oaths Act 1867* (Qld) s 13(1).

<sup>249</sup> *Oaths Act 1867* (Qld) s 13(2).

## (b) Affidavits

Under the *Oaths Act 1867* (Qld) a “justice”<sup>250</sup> and a commissioner for declarations are among the persons authorised to take a person’s affidavit.<sup>251</sup>

They may take an affidavit for Queensland law, whether it is taken inside or outside Queensland, or even outside Australia.<sup>252</sup>

## (c) Justices of the peace who may exercise these powers

These powers may be exercised by a justice of the peace (qualified),<sup>253</sup> a justice of the peace (magistrates court),<sup>254</sup> an old system justice of the peace whose office is preserved by the transitional provisions of the Act,<sup>255</sup> a commissioner for declarations, or a justice of the peace (commissioner for declarations).<sup>256</sup>

## 13. WITNESSING AN ENDURING POWER OF ATTORNEY

An enduring power of attorney is a formal document by which one person (the donor of the power) empowers another person (the donee of the power) to act on his or her behalf for certain purposes.

Unlike an ordinary power of attorney, which is automatically revoked if the donor of the power loses the legal capacity to make decisions that are the subject of the power,<sup>257</sup> an enduring power of attorney is not revoked by the subsequent legal incapacity of the donor (other than by death).<sup>258</sup> That means that, even though a person is no longer

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<sup>250</sup> See note 59 of this Issues Paper as to the definition of “justice”.

<sup>251</sup> *Oaths Act 1867* (Qld) s 41(1).

<sup>252</sup> *Oaths Act 1867* (Qld) s 41(2).

<sup>253</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b).

<sup>254</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b).

<sup>255</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b).

<sup>256</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5), (8).

<sup>257</sup> *Drew v Nunn* (1879) 4 QBD 661; *Yonge v Toynbee* [1910] 1 KB 215.

<sup>258</sup> *Property Law Act 1974* (Qld) s 175B.

capable at law of making certain decisions, the person's enduring attorney is still authorised to make those decisions on the person's behalf. An enduring power of attorney is therefore a very important document, as it may authorise the donor to act under it, even once the donor has lost the capacity to supervise the donee.

An enduring power of attorney may be witnessed by a justice of the peace.<sup>259</sup> However, the witness's role is not confined to making sure that the donor's signature is genuine; the witness must also certify as to the capacity of the person making the enduring power of attorney.<sup>260</sup> A witness to an enduring power of attorney therefore has a high degree of responsibility.<sup>261</sup>

These powers may be exercised by a justice of the peace (qualified),<sup>262</sup> a justice of the peace (magistrates court),<sup>263</sup> an old system justice of the peace whose office is preserved by the transitional provisions of the Act,<sup>264</sup> a commissioner for declarations, or a justice of the peace (commissioner for declarations).<sup>265</sup>

#### 14. WITNESSING SIGNATURES

Many Acts require documents to be witnessed by a justice of the peace. For example, under section 42 of the *Marriage Act 1961* (Cth), a marriage shall not be solemnized unless notice of the intended marriage is received by the authorised celebrant within a certain time before the marriage. The notice is required to be signed in the presence of one of a specified list of persons, which includes a justice of the peace.

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<sup>259</sup> *Property Law Act 1974* (Qld) s 175A(ii). This section provides that a legal practitioner may also witness an enduring power of attorney.

<sup>260</sup> The witness must certify on the enduring power of attorney that, at the time the donor executed the power, the donor appeared to the witness to understand the nature and effect of the power: *Property Law Act 1974* (Qld) s175A(ii).

<sup>261</sup> Under the *Powers of Attorney Bill 1997* (Qld), it is proposed that a justice of the peace and a commissioner for declarations will retain these powers: see clauses 43 (formal requirements) and 44 (eligible witness). This Bill is based, in part, on the Queensland Law Reform Commission's Report, *Assisted and Substituted Decisions* (R 49, June 1996).

<sup>262</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b).

<sup>263</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b).

<sup>264</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b).

<sup>265</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5), (8).



These powers may be exercised by a justice of the peace (qualified),<sup>266</sup> a justice of the peace (magistrates court),<sup>267</sup> an old system justice of the peace whose office is preserved by the transitional provisions of the Act,<sup>268</sup> a commissioner for declarations, or a justice of the peace (commissioner for declarations).<sup>269</sup>

## 15. CONCLUSION

The powers of a justice of the peace are both extensive and diverse. Although not all of these powers would be exercised by justices of the peace on a regular basis, they are, nevertheless, capable of being exercised by justices of the peace. In Chapter 8 of this paper, the Commission raises a number of specific issues about the appropriateness of these powers remaining vested in justices of the peace.

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<sup>266</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

<sup>267</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

<sup>268</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

<sup>269</sup> *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5), (8).

## CHAPTER 6

### LIABILITY OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS

#### 1. INTRODUCTION

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the extent to which a civil action may be brought against a justice of the peace or a commissioner for declarations.

Section 36 of the Act provides:<sup>270</sup>

- (1) A person injured -
  - (a) by an act done by a justice of the peace or a commissioner for declarations purportedly in the performance of the functions of office but which the justice of the peace or commissioner for declarations knows is not authorised by law; or
  - (b) by an act done by a justice of the peace or a commissioner for declarations in the discharge of the functions of office but done maliciously and without reasonable cause;

may recover damages or loss sustained by the person by action against the justice of the peace or commissioner for declarations in any court of competent jurisdiction.
- (2) Subject to subsection (1), action is not to be brought against a justice of the peace or commissioner for declarations in respect of anything done or omitted to be done in, or purportedly in, the performance of the functions of office.

This statutory regime of liability essentially deals with two situations:

- where an act is knowingly done without, or in excess of, jurisdiction; and
- where an act is within jurisdiction, but is done maliciously and without reasonable cause.

#### 2. ACTS KNOWINGLY DONE WITHOUT, OR IN EXCESS OF, JURISDICTION

A justice of the peace who purports to exercise a power that he or she does not at law have, will be liable to a person injured by that act only if the justice of the peace knows

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<sup>270</sup> S 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is in substantially the same terms as s 24 of the *Justices of the Peace Act 1975* (Qld), which Act was repealed by the 1991 Act.

that the act is not authorised at law.<sup>271</sup> If, however, the justice of the peace does not know that the act is not authorised, he or she will be protected under section 36(1)(a).

For example, if a justice of the peace purported to issue an arrest warrant that could not be issued by that particular class of justice of the peace, a person who was injured by that act could recover damages from the justice of the peace, but only if the justice of the peace knew that the issuing of the warrant was not authorised by law.

### **3. ACTS WITHIN JURISDICTION, BUT DONE MALICIOUSLY AND WITHOUT REASONABLE CAUSE**

Even if a justice of the peace does an act that he or she is empowered to do, the justice of the peace may nevertheless be liable to a person who is injured by that act if it was done maliciously and without reasonable cause. The justice of the peace will not be liable if the act is simply done without reasonable cause. The act must also be done maliciously for the justice of the peace to be liable under section 36(1)(b).

### **4. INSURANCE ISSUES**

Because of the protection afforded by section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), the potential liability of a justice of the peace in respect of acts done in the performance of that office is relatively small. Unless the justice of the peace knows that a particular act is not authorised by law, or, in relation to an authorised act, does it both maliciously and without reasonable cause, the justice of the peace will be protected from liability in civil actions.

Notwithstanding this, a number of justices of the peace have taken out professional indemnity insurance policies. The Commission has been provided with a copy of the Master Professional Indemnity Insurance Policy negotiated for the members of one of the justices of the peace associations.

Not surprisingly, the policy expressly excludes a claim arising from an act described in section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and actually committed by the justice of the peace. That is, the justice of the peace will not be indemnified under the policy if found liable for an act that the justice of the peace knew was not authorised, or for an act that was done maliciously and without reasonable cause.

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<sup>271</sup>

*Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 36(1)(a).

Given that section 36 protects a justice of the peace except in certain limited circumstances, and that a claim arising under those limited circumstances is excluded by the policy, this raises the question of the purpose of the policy.

A justice of the peace who is sued might successfully defend the action on the basis that the act alleged to give rise to the plaintiff's claim is not one within section 36(1). Even though the justice of the peace succeeds in defending the claim, he or she might nevertheless incur legal costs in doing so. The justice of the peace might not be able to recover all or any of those costs from the plaintiff, depending on the plaintiff's financial situation.

In the absence of insurance to cover those costs, the justice of the peace will be solely responsible for meeting them. Although section 36 limits the circumstances in which a justice of the peace may be sued, the Act does not contain any provisions that would result in the justice of the peace being indemnified in respect of the legal costs of successfully defending an action.

Under the Master Policy that has been provided to the Commission, the insurer agrees to indemnify the justice of the peace in respect of a claim covered by the policy, including costs and expenses incurred with the written consent of the insurer in the investigation, defence or settlement of a claim covered by the policy.

In the United Kingdom, legislation provides for a justice of the peace to be indemnified in respect of costs reasonably incurred in connection with proceedings taken against the justice of the peace provided that, in respect of the matters giving rise to the claim, the justice of the peace acted reasonably and in good faith.<sup>272</sup>

## 5. CRIMINAL LIABILITY

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not afford any protection to a justice of the peace in respect of criminal liability.

However, in the United Kingdom, legislation provides for a justice of the peace to be indemnified, in certain circumstances arising from criminal matters, in respect of costs reasonably incurred in connection with proceedings or other amounts payable by the justice of the peace. The justice of the peace will be indemnified unless it is proved, in respect of these matters, that he or she acted in bad faith.<sup>273</sup>

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<sup>272</sup> *Justices of the Peace Act 1997* (UK) s 54(2)(b). Under that section a justice of the peace is also indemnified in respect of any damages awarded against him or her or in respect of any sums payable in connection with a reasonable settlement of any such proceedings.

<sup>273</sup> *Justices of the Peace Act 1997* (UK) s 54(2)(a).

## CHAPTER 7

# THE ROLE OF JUSTICES OF THE PEACE IN OTHER JURISDICTIONS

### 1. INTRODUCTION

The purpose of this chapter is to examine briefly the role of justices of the peace in a number of jurisdictions where the role differs in significant respects from the role of justices of the peace in Queensland. Accordingly, this chapter does not canvass the role of justices of the peace in every jurisdiction in Australia.<sup>274</sup>

### 2. AUSTRALIAN CAPITAL TERRITORY

In the Australian Capital Territory, justices of the peace do not have the power to constitute a court for any purpose. Under the *Magistrates Court Act 1930* (ACT) the jurisdiction of a Magistrates Court may be exercised only by a Magistrate or a Special Magistrate.<sup>275</sup>

The main function of a justice of the peace in the Australian Capital Territory is to witness the signing or execution of documents.<sup>276</sup> A justice of the peace may administer oaths and affirmations and take statutory declarations.<sup>277</sup> Under Commonwealth legislation, a justice of the peace has a wider range of powers, including the power to issue search warrants in certain circumstances.<sup>278</sup>

With the exception of those powers conferred by Commonwealth legislation, the role of a justice of the peace in the Australian Capital Territory is similar to that of a commissioner for declarations in Queensland.<sup>279</sup> Generally, however, the exercise by

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<sup>274</sup> For example, the powers of justices of the peace in Tasmania under the *Justices Act 1959* (Tas) are similar to those that may be exercised by justices of the peace in Queensland under the *Justices Act 1886* (Qld).

<sup>275</sup> *Magistrates Court Act 1930* (ACT) s 18(2). A Special Magistrate is a type of magistrate who sits on a part-time basis: see *Magistrates Court Act 1930* (ACT) ss 10H, 10J, 10K and 10L.

<sup>276</sup> The Australian Capital Territory Attorney-General's Department, *Guidance Notes for Justices of the Peace of the Australian Capital Territory* (September 1993) at 6.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.* See page 50 of this Issues Paper for a discussion of powers conferred on justices of the peace by Commonwealth legislation.

<sup>279</sup> See the discussion of this office at page 14 of this Issues Paper.

a justice of the peace of the wider powers conferred by Commonwealth legislation would appear to be discouraged in the Australian Capital Territory. In the *Guidance Notes for Justices of the Peace of the Australian Capital Territory* the following advice is given to a justice of the peace who is approached to issue a search warrant:<sup>280</sup>

Although a Justice has the power under some Commonwealth Acts to issue a search warrant, it is most unlikely for a Justice (other than one who is a Court official) to be asked to exercise that power. In such a rare event, the power should be exercised cautiously ...

As a general rule, unless the circumstances are most exceptional in nature, it would be appropriate to refer any member of the police force requesting a warrant to the Magistrates Court.

### 3. VICTORIA

#### (a) Introduction

In Victoria, the role of justices of the peace underwent two significant changes in 1989 as a result of the *Magistrates' Court Act 1989* (Vic) and the *Magistrates' Court (Consequential Amendments) Act 1989* (Vic):

- the general role of justice of the peace was greatly reduced;
- a specialised role of bail justice was created.

#### (b) Reduction of powers of a justice of the peace

Although the office of justice of the peace is preserved by the *Magistrates' Court Act 1989* (Vic),<sup>281</sup> the effect of that Act and consequential amendments made by the *Magistrates' Court (Consequential Amendments) Act 1989* (Vic) is that the role is now similar to that of a justice of the peace in the Australian Capital Territory.

Section 150 of the *Magistrates' Court Act 1989* (Vic) provides:

- (1) Schedule 8 contains saving and transitional provisions.
- (2) The provisions contained in Schedule 8 are subject to any contrary intention appearing in the *Magistrates' Court (Consequential Amendments) Act 1989*.

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<sup>280</sup> The Australian Capital Territory Attorney-General's Department, *Guidance Notes for Justices of the Peace of the Australian Capital Territory* (September 1993) at 7.

<sup>281</sup> *Magistrates' Court Act 1989* (Vic) s 115.

Clause 4 of Schedule 8 to that Act then provides:

Unless the context otherwise requires, any reference in any Act (other than this Act or the *Evidence Act 1958*) or in any subordinate instrument to a justice of the peace is to be taken to refer to a magistrate.

The reference in Schedule 8 to the *Evidence Act 1958* (Vic) preserves the references in that Act to a justice of the peace as one of many people who may witness the signing of a statutory declaration<sup>282</sup> or who may take an affidavit.<sup>283</sup> However, the powers conferred by most other Acts on a “justice of the peace” may be exercised only by a magistrate.

The *Magistrates’ Court (Consequential Amendments) Act 1989* (Vic) also amended a large number of Acts so that references in those Acts to “a justice” or to “a Justice of the Peace for Victoria” were omitted.<sup>284</sup>

A justice of the peace whose office is preserved by the *Magistrates’ Court Act 1989* (Vic) would still be able to exercise any powers conferred by Commonwealth legislation<sup>285</sup> on a justice of the peace.

### (c) Bail justices

The *Magistrates’ Court Act 1989* (Vic) provides for the appointment of bail justices.<sup>286</sup> In addition, certain office holders are, by virtue of holding those offices, bail justices without further appointment.<sup>287</sup> The Act also amended the *Bail Act 1977* (Vic) to enable a bail justice to grant bail.<sup>288</sup>

## 4. UNITED KINGDOM

At the other end of the spectrum is the role of the justice of the peace in the United

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<sup>282</sup> *Evidence Act 1958* (Vic) s 107A.

<sup>283</sup> *Evidence Act 1958* (Vic) s 123C.

<sup>284</sup> *Magistrates’ Court (Consequential Amendments) Act 1989* (Vic) s 3 and Schedule.

<sup>285</sup> See the discussion of these powers at page 50 of this Issues Paper.

<sup>286</sup> *Magistrates’ Court Act 1989* (Vic) s 120.

<sup>287</sup> *Magistrates’ Court Act 1989* (Vic) s 121.

<sup>288</sup> *Magistrates’ Court Act 1989* (Vic) s 142.

Kingdom. Mr Justice Thomas has observed in relation to the differences between that role and the role of justices of the peace in Australia.<sup>289</sup>

The contrast with the position in England could not be more marked. In the United Kingdom there are fewer than 100 full-time paid magistrates. The great bulk of the matters coming before the courts are dealt with by almost 28,000 unpaid and largely untrained citizens who are known as the lay magistrates. That system is far removed from that in Australia where the professionalisation of the magistracy is almost complete. [footnote omitted]

A justice of the peace in the United Kingdom is assisted by a justice's clerk. Generally, a justice's clerk is a barrister or solicitor who has served for not less than five years as assistant to a justice's clerk.<sup>290</sup> The functions of a justice's clerk include giving advice to the justices to whom he or she is clerk, at their request, about law, practice or procedure on questions arising in connection with the discharge of their functions.<sup>291</sup> The powers of a justice's clerk also include, at any time he or she thinks it should be done, bringing to the attention of those justices any point of law, practice or procedure that is or may be involved in any question that arises.<sup>292</sup>

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<sup>289</sup> The Hon Mr Justice J B Thomas, "The Ethics of Magistrates" (1991) 65 *Australian Law Journal* 387 at 388, paper presented to the Conference of Australian Stipendiary Magistrates, Alice Springs, 9 June 1990.

<sup>290</sup> *Justices of the Peace Act 1997* (UK) s 43.

<sup>291</sup> *Justices of the Peace Act 1997* (UK) s 45(4).

<sup>292</sup> *Justices of the Peace Act 1997* (UK) s 44(5).



## CHAPTER 8

### ISSUES FOR CONSIDERATION

#### 1. THE TERMS OF REFERENCE

The terms of this reference require the Commission to review the role of justices of the peace in Queensland, in particular, the desirability of maintaining this office in the light of a changing society.

##### (a) Relevant changes

The office of justice of the peace now bears little resemblance to its historical origins in the fourteenth century.<sup>293</sup> Over time, the law has also become increasingly complex, arguably placing greater demands on judicial officers. Quite apart from the changes that have occurred in the nature of the role of justice of the peace and in the law generally, other changes in society, such as advances in technology, have made possible a number of changes that are beginning to have an impact on the administration of justice. For example, there is no longer the same emphasis on having a judicial officer permanently available within a particular community in order to ensure access to justice.

##### (i) Professionalisation of courts of summary jurisdiction

When justices of the peace were first introduced into the colony of New South Wales, they formed part of a judicial system whose officers were not generally legally qualified.<sup>294</sup> That is no longer the case.

In relatively recent times, there have been some significant changes in the courts of summary jurisdiction (such as the Magistrates Court in Queensland) that reflect certain views about how the justice system should be administered. Mr Justice Thomas observed, in relation to changes within Magistrates Courts

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<sup>293</sup> See the discussion of the origins of the office at pages 3-4 of this Issues Paper.

<sup>294</sup> Bennett JM, "Early Days of the Law in Country Districts" (1972) 46 *Australian Law Journal* 578 at 579. Bennett notes in relation to the early appointments of magistrates (at 579):

By 1837 the Legislative Council had constituted fifteen Police Magistracies and contemplated three further appointments in the following year ...

Although the official magistracy brought greater safeguards for the community, the appointees were generally untrained in law ...

Australia-wide, in a paper delivered in 1990:<sup>295</sup>

The professionalisation of the magistracy has been one of the most notable changes in legal professional life over the past two decades. That is the period over which the magistracy has been transformed in substance from a body of persons largely public service trained to a body of professionally trained and legally qualified practitioners. From 1985, all new appointments to Magistrates' Courts throughout the Commonwealth have been qualified legal practitioners. The change has occurred quickly. In Queensland now there are only four magistrates who do not have the legal qualification of a barrister or solicitor. Although the position varies around the country, the transformation is substantial and inevitably it will soon be complete. [original emphasis, footnote omitted]

In Queensland, the *Stipendiary Magistrates Act 1991* (Qld) made some important changes to the appointment of stipendiary magistrates. It provided for them to be appointed and hold office under that Act, rather than as public servants under the *Public Service Management and Employment Act 1988* (Qld).<sup>296</sup> It also imposed, as a qualification for appointment as a magistrate, a requirement that a person be a barrister or solicitor of at least five years standing.<sup>297</sup>

One of the factors recognised as driving the professionalisation of the magistracy is the increasing complexity of the law. During the second reading debate of the *Stipendiary Magistrates Bill 1991* (Qld), the Hon Matt Foley MLA commented:<sup>298</sup>

In modern times, this village society is simply not applicable so we need to have stipendiary magistrates on a professional, full-time basis in order to administer justice in our courts. This is because we ask so much of the law. We ask the law to regulate our traffic. We ask the law to regulate our domestic affairs. We ask the law to administer the Criminal Code, which is a traditional function of law. In modern times, however, the increasing web of simple offences administered through the Magistrates Courts indicates that those courts are being used to regulate the economic and social affairs of society ...

The questions that fall for determination in the Magistrates Courts are questions which directly affect the property, the liberty and, indeed, the reputations of many citizens. It is necessary, then, to ensure that magistrates who are now cloaked with such great powers and with the jurisdiction of weighty

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<sup>295</sup> The Hon Mr Justice J B Thomas, "The Ethics of Magistrates" (1991) 65 *Australian Law Journal* 387 at 389, paper presented to the Conference of Australian Stipendiary Magistrates, Alice Springs, 9 June 1990.

<sup>296</sup> *Stipendiary Magistrates Act 1991* (Qld) s 5. Since the repeal of the *Public Service Management and Employment Act 1988* (Qld), s 5 of the *Stipendiary Magistrates Act 1991* (Qld) refers to the *Public Service Act 1996* (Qld).

<sup>297</sup> *Stipendiary Magistrates Act 1991* (Qld) s 4(1).

<sup>298</sup> *Hansard*, Legislative Assembly (Qld) (14 November 1991) at 2962-2963.

responsibilities in both civil and criminal areas are persons who are properly qualified as lawyers. This represents a change from the traditional public service background for magistrates. However, I believe that it is a change which will work to the good of delivering proper legal services to the ordinary Queensland citizen ...

It is obviously important, having regard to the increasing complexity of the law, that whoever administers it has training and experience appropriate for the work being undertaken.

## (ii) Advances in technology

Advances in technology have created opportunities for courts to conduct their proceedings in a manner that is now quite different from when they were first established.

For example, many special leave applications to the High Court of Australia are now conducted by video link connections with the Court, rather than having the parties appear personally. Even in trial work, it is now becoming more common for some witnesses to give their evidence by means of telephone or video link where the cost and inconvenience of requiring the witness to attend personally are not warranted.<sup>299</sup>

Admittedly, Queensland is a large State with quite a dispersed population. Nevertheless, these advances in technology raise the issue of whether the infrastructure is available, or could be put in place, to reduce the need to have justices of the peace available within more remote communities while still ensuring an appropriate level of access to justice.

Some models of law enforcement, such as the PERIN (penalty enforcement by registration of infringement notice) system in Victoria,<sup>300</sup> have also been facilitated by advances in technology. The equivalent (but less extensive) system in Queensland is known as the SETONS (self-enforcing ticketable offence notice) system.<sup>301</sup> The PERIN system is essentially an expanded system

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<sup>299</sup> See the discussion of the availability of video and audio links and document display video cameras in Supreme Court of Queensland, Supreme Court Brochure Series No 8, *Technology in Trial in the Supreme Court* (October 1997). See also the Commission's forthcoming Discussion Papers, *The Receipt of Evidence by Queensland Courts: The Evidence of Young People* and *The Receipt of Evidence by Queensland Courts: Information that is Produced, Stored and/or Conveyed in Electronic, Magnetic or Similar Form* for specific applications of new technology.

<sup>300</sup> For a discussion of this type of law enforcement see Fox R, "Infringement Notices: Time for Reform?", Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice* (No 50, November 1995).

<sup>301</sup> See part 4A of the *Justices Act 1886* (Qld).

of on-the-spot fines. Its main features are as follows:<sup>302</sup>

- The procedure provides a means for imposing punishment without the costs of prosecution or court resources ....
- The procedure contains incentives designed to avoid a court hearing. These include a discount from the normal maximum penalty and the promise of reduced stigma by avoiding conviction.
- The imposition and enforcement of the penalty is supported by high technology. This allows many of the most common offences (particularly motoring ones) to be detected automatically and increases administrative efficiency in issuing infringement notices and following them up.

In Victoria, a special PERIN Court has been established “to process, by largely computerised means, the steps necessary for the recovery of unpaid amounts fixed by the notices”.<sup>303</sup>

This type of system of law enforcement is not without its critics.<sup>304</sup> Nevertheless, it is one example of how the availability of certain technology can reduce the demand for court time. The following observation has been made about the reduction in court time that is now devoted to dealing with certain types of matters.<sup>305</sup>

Before the infringement notice scheme was established, figures on offences brought before Australian lower courts supported United Kingdom estimates that up to 70 per cent of Magistrates’ Court time was devoted to road traffic offences (UK 1983). In 1971 in Victoria, of 270 045 convictions recorded in the Magistrates’ Courts, 69.4 per cent (187 328) were for driving offences. Twenty

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<sup>302</sup> Fox R, “Infringement Notices: Time for Reform?”, Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice* (No 50, November 1995) at 2.

<sup>303</sup> Id at 3.

<sup>304</sup> Id at 4. The criticisms made of the system (at 4) include:

- The real risk of the system being driven by fiscal rather than correctional objectives.
- The likelihood of proceedings being initiated by way of an infringement notice when the case is weak because the authorities know it is rare for anyone served with such a notice to insist on a full hearing in open court.
- The risk that persons who believe themselves innocent will nevertheless settle allegations by paying up because of the pressure of convenience, discounted penalties, threat of costs and the limited availability of legal aid for defended summary matters.
- The undesirability of enforcement authorities imposing penalties without independent scrutiny of the facts by a court.

<sup>305</sup> Fox R, “Infringement Notices: Time for Reform?”, Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice* (No 50, November 1995) at 3-4.

years later, in 1991, after on-the-spot tickets were well in place in the State, these offences amounted only to 28.8 per cent of all offences charged.

### (iii) Other factors

Other factors that are relevant to the context in which the role of justices of the peace should be considered include a perception of a greater emphasis, in recent times, on increasing access to justice, on the importance of natural justice, and on the importance of involving indigenous communities, where possible, in the administration of justice within those communities.

### (b) Issues raised by the terms of reference

The terms of this reference are quite broad. There are many factors that could be considered relevant to forming a view about the desirability of maintaining the office of justice of the peace. At the outset, however, the Commission considers it important to examine the main powers that are currently exercisable by justices of the peace, and to invite comment on whether it is appropriate for these powers to continue to be exercised by justices of the peace.

This immediately raises two issues, the answers to which may be different with respect to different powers, or even within different localities in Queensland:

- Is there a need within the community where the powers are being exercised for those powers to be exercised by a justice of the peace (as opposed to, for example, by a stipendiary magistrate)? Are there enough magistrates - located within the community, able to visit the community "on circuit" on a regular basis, or available to the community through some technological means - to perform those duties?
- Quite separately from the issue of need, are there other factors that make it desirable (or undesirable) for those powers to be exercised by a justice of the peace?

Queensland has approximately 48,500 justices of the peace.<sup>306</sup> This is a very high figure when compared with the position in most other Australian jurisdictions.<sup>307</sup> It is not

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<sup>306</sup> This figure excludes appointments as commissioners for declarations, of whom there are approximately 13,942. The breakdown by reference to the category of justice of the peace is approximately 482 justices of the peace (magistrates court), 13,301 justices of the peace (qualified), and 34,717 old system justices of the peace (information provided to the Commission by the Manager of the Justices of the Peace Branch of the Queensland Department of Justice, February 1998).

<sup>307</sup> The number of justices of the peace in Queensland is second only to New South Wales (where the system of justices of the peace is also under review). [The following information](#)

known whether Queensland justices of the peace actually exercise the various powers of their offices on a regular basis, or whether large numbers of them are inactive, or exercise only some of their many powers on a regular basis. It is anticipated that submissions to this paper will, to some extent, provide this information.

If there is to be a continued role for justices of the peace in Queensland, the primary issue will be to determine what powers should continue to be exercised by them.

As a general proposition, the Commission is of the view that, if there are powers that are not being exercised by any justices of the peace, it is undesirable for those powers to remain technically vested in justices of the peace. The powers of the office of justice of the peace should reflect the reality of the role.

The Commission is also of the view that it is undesirable for individual justices of the peace who do not exercise any of their powers, that is, who are essentially inactive, to continue in office. There are several reasons for these views:

- There are significant additional costs involved in administering a system of justices of the peace if it is larger than it need be.
- Training resources are diverted from where they might be more usefully expended.
- The infrequent exercise of powers makes it less likely that a justice of the peace will develop experience in the performance of particular functions. This could lead to a misunderstanding of the nature of the role of a justice of the peace, and to an inconsistent and unjust exercise of powers by the justice of the peace. This could, in turn, reflect poorly on the system of justices of the peace as a whole.
- The office of justice of the peace could come to be regarded as an entitlement for the office holder, rather than as a necessary service for the community.

These general comments are based on an assumption that there will continue to be a role for justices of the peace in Queensland. The purpose of this paper is, however, to invite comments on a number of issues that are relevant to forming a view about that

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has been provided to the Commission by the Department responsible for the administration of justices of the peace in each jurisdiction (as at February 1998).

New South Wales: it is estimated that there are up to 200,000 justices of the peace.

Victoria: just under 4,000 justices of the peace and approximately 500 bail justices.

Tasmania: approximately 2,000 justices of the peace.

South Australia: approximately 9,300 justices of the peace.

Western Australia: approximately 3,210 justices of the peace.

Northern Territory: just over 200 justices of the peace.

Australian Capital Territory: approximately 715 justices of the peace.

central issue - namely, whether the role of justice of the peace should continue and, if so, what the scope of that role should be.

In relation to those questions, the Commission has broken the role down into what it regards as the main powers that may be exercised by justices of the peace.

## **2. POWER TO CONSTITUTE A COURT FOR CERTAIN PURPOSES**

In Chapter 5 of this paper, the Commission has discussed the main purposes for which some justices of the peace may sit as a court. They are:

- hearing and determining charges (that is, sentencing);<sup>308</sup>
- conducting committal hearings;<sup>309</sup>
- remanding a defendant and adjourning proceedings;<sup>310</sup> and
- granting bail.<sup>311</sup>

In making decisions about who should exercise these powers, it will be necessary to balance the need to ensure that these powers are exercised by appropriately qualified persons against the need to ensure that there is proper access to justice for persons who might be the subject of the exercise of such powers.

These are very significant powers. Justices of the peace have (in relation to certain offences) the power to impose fines and custodial sentences; to decide whether or not a person should be committed to trial on the charge of an indictable offence; and to make decisions about bail that could result in a person remaining in custody pending trial.

**In relation to each of the court powers set out above, the Commission specifically seeks submissions on the following questions:**

### **2.1 How often, if at all, do justices of the peace exercise these powers?**

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<sup>308</sup> See the discussion of this power at pages 35-37 of this Issues Paper.

<sup>309</sup> See the discussion of this power at pages 37-38 of this Issues Paper.

<sup>310</sup> See the discussion of this power at pages 42-43 of this Issues Paper.

<sup>311</sup> See the discussion of this power at pages 43-45 of this Issues Paper.

- 2.2 In what localities do justices of the peace exercise these powers (for example, in metropolitan areas, country towns, or remote communities)?**
- 2.3 Is there a need in those localities for these powers to be exercised by justices of the peace, rather than by magistrates?**
- 2.4 If so, could that need be met, or at least reduced, by a greater use of technology (for example, by the use of a video link) so that a magistrate in another part of the State could deal with the matter?**
- 2.5 What are the perceived advantages and disadvantages, if any, of having these powers exercised by justices of the peace, rather than by a magistrate?**
- 2.6 Is there a special case in Aboriginal and Torres Strait Islander communities for having Aboriginal and Torres Strait Islander justices of the peace exercise these powers?<sup>312</sup>**
- 2.7 To the extent that magistrates may not be able to meet the needs of a particular locality in relation to the exercise of these powers, would it be more appropriate for the powers to be exercised by:**
- a court official, for example, the Clerk of the Court of a Magistrates Court, rather than by a justice of the peace who does not work within the court system;<sup>313</sup> or**
  - a barrister or solicitor practising in the area who has no connection with the case?**

### **3. SIGNIFICANT NON-COURT POWERS**

In Chapter 5 of this paper, the Commission has discussed a number of powers that may be exercised by certain justices of the peace, which, although they do not involve the

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<sup>312</sup> See the discussion at pages 17-21 of this Issues Paper about the powers of justices of the peace in Aboriginal and Torres Strait Islander communities.

<sup>313</sup> See pages 29-32 of this Issues Paper for a discussion of the powers of certain court officials.



justice of the peace in sitting as a court, are nevertheless significant in the consequences they have for people's liberty and property. These powers are:

- issuing summonses,<sup>314</sup> and
- issuing warrants.<sup>315</sup>

**The Commission specifically seeks submissions on the following questions about the issuing of summonses and warrants:**

- 3.1 How often do justices of the peace exercise these powers?**
- 3.2 In what localities do justices of the peace exercise these powers (for example, in metropolitan areas, country towns, or remote communities)?**
- 3.3 Is there a need in those localities for these powers to be exercised by justices of the peace, rather than by magistrates?**
- 3.4 If so, could that need be met, or at least reduced, by using the telephone and/or facsimile (or some other technological means) so that the application for the summons or warrant could be made to a magistrate in another part of the State?**
- 3.5 What are the perceived advantages and disadvantages, if any, of having summonses and warrants issued by justices of the peace, rather than by magistrates?**
- 3.6 To the extent that magistrates may not be able to meet the needs of a particular locality for the issuing of summonses and warrants, should this role be undertaken by a court official, for example, the Clerk of the Court of a Magistrates Court, rather than by a justice of the peace who does not work within the court system?<sup>316</sup>**

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<sup>314</sup> See the discussion of this power at pages 45-47 of this Issues Paper.

<sup>315</sup> See the discussion of this power at pages 47-50 of this Issues Paper.

<sup>316</sup> See pages 29-32 of this Issues Paper for a discussion of the powers of certain court officials.

#### 4. ATTENDANCE AT POLICE INTERVIEWS OF JUVENILES

A justice of the peace is one of a number of people<sup>317</sup> whose attendance at a police interview of a juvenile will satisfy the requirements of section 9E of the *Juvenile Justice Act 1992* (Qld).<sup>318</sup> In Chapter 5 of this paper, the Commission has discussed several cases which give rise to a concern about the manner in which some justices of the peace are fulfilling this role.<sup>319</sup> The conduct of justices of the peace in these interviews has also been criticised in a submission to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission:<sup>320</sup>

Young people are critical of the performance of some Justices of the Peace in this role because they usually tell children to assist the police by answering their questions.

The role is undoubtedly a difficult one to carry out. Certainly, no assistance as to the required standard of conduct can be derived from the terms of section 9E. Nevertheless, the role is an extremely important one.

**The Commission specifically seeks submissions on the following questions:**

- 4.1 How often do justices of the peace undertake this role as compared with the other persons listed in section 9E of the *Juvenile Justice Act 1992* (Qld)?**
- 4.2 Is there a need for this role to be undertaken by justices of the peace, or is the list of other adults in section 9E otherwise sufficient to meet the demand for such a person?**
- 4.3 What are the perceived advantages and disadvantages, if any, of having this role undertaken by a justice of the peace, rather than by any of the**

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<sup>317</sup> The other people specified in s 9E of the *Juvenile Justice Act 1992* (Qld) whose presence at a juvenile interview will satisfy the requirements of the section are: a parent of the child; a legal practitioner acting for the child; a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or an adult nominated by the child.

<sup>318</sup> S 9E of the *Juvenile Justice Act 1992* (Qld) is set out at pages 50-51 of this Issues Paper. See the discussion about the deficiencies in this provision in the Commission's forthcoming Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Young People*.

<sup>319</sup> See pages 51-53 of this Issues Paper.

<sup>320</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process* (Report No 84, 1997) at 501.

### other persons listed in section 9E?

#### 4.4 If justices of the peace were not to undertake this role, by which additional categories of people, if any, could the role be appropriately undertaken?

## 5. POWERS IN RELATION TO WITNESSING DOCUMENTS

In Chapter 5 of this paper, the Commission has discussed a number of powers that justices of the peace and commissioners for declarations may exercise in relation to the witnessing of various types of documents. These powers are:

- witnessing statutory declarations and affidavits;<sup>321</sup>
- witnessing enduring powers of attorney;<sup>322</sup> and
- witnessing the execution of documents generally.<sup>323</sup>

Some jurisdictions have extended the range of persons who are authorised to witness statutory declarations, thereby reducing the need to appoint as many people to witness various documents. For example, in the Northern Territory, a statutory declaration may be made in the presence of a person who has attained the age of 18 years.<sup>324</sup>

Other jurisdictions make reference to specific occupations. The Schedule to the *Statutory Declarations Regulations 1993* (Cth), which prescribes the persons who may witness a statutory declaration made under the *Statutory Declarations Act 1959* (Cth), is very extensive. It includes a chiropractor, a dentist, a legal practitioner, a medical practitioner, a nurse, a patent attorney, a pharmacist, a veterinary surgeon, a bank officer with five years continuous service, a teacher employed on a full-time basis at a school or tertiary institution and many others.<sup>325</sup> The majority of the designated

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<sup>321</sup> See pages 53-54 of this Issues Paper.

<sup>322</sup> See pages 54-55 of this Issues Paper.

<sup>323</sup> See pages 55-56 of this Issues Paper.

<sup>324</sup> *Oaths Act* (NT) s 23C(1)(b).

<sup>325</sup> This Schedule is similar, although not identical, to the list of persons who may complete the proof of identity declaration for a passport application under the *Passport Regulations* (Cth). The prescribed application form lists persons in the following occupations: accountants, bailiffs, bank managers, barristers, solicitors and patent attorneys, chartered professional engineers, clerks of courts, clerks of petty sessions, certain members currently serving in [the regular](#)

occupations would be readily accessible within the community.

The *Evidence Act 1910* (Tas) has been amended recently so that the persons listed in the Schedule to the *Statutory Declarations Regulations 1993* (Cth) are (if they are not seventy years of age) automatically commissioners for declarations.<sup>326</sup> The *Evidence Act 1958* (Vic), on the other hand, contains an extensive list of persons who may witness a statutory declaration.<sup>327</sup> This list is similar to the Schedule to the *Statutory Declarations Regulations 1993* (Cth).

**The Commission specifically seeks submissions on the following questions about the various witnessing functions of justices of the peace and commissioners for declarations:**

- 5.1 Is there a need, or is it desirable, for the function to be performed by a justice of the peace or commissioner for declarations, rather than by some other person in a designated occupation?**
- 5.2 What are the perceived advantages and disadvantages, if any, of having this function undertaken by a justice of the peace or commissioner for declarations, rather than by a person in a designated occupation?**
- 5.3 Have people experienced difficulties obtaining access to a justice of the peace or commissioner for declarations in order to have a document witnessed?**

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Australian Defence Force, dentists, registered medical practitioners, members of State, Federal and Territory Parliaments and Shire Councils, certain holders of statutory offices, judges, members of the Chartered Institute of Company Secretaries in Australia, marriage celebrants, pharmacists, certain police officers, postal managers, certain public servants, sheriffs, stipendiary magistrates, certain teachers, registered veterinary surgeons, and registered nurses.

<sup>326</sup> A new s 131B of the *Evidence Act 1910* (Tas) was inserted by s 4 of the *Evidence Act Amendment Act 1997* (Tas).

<sup>327</sup> *Evidence Act 1958* (Vic) s 107A(1).

## **6. OTHER POWERS OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS**

The Commission has set out in Chapter 5 of this paper what it regards as the main powers exercisable by justices of the peace and commissioners for declarations. If, however, there are any other powers that are regarded as significant powers, the Commission seeks information regarding those powers.

**The Commission specifically seeks submissions on the following questions:**

- 6.1 What significant powers, other than those discussed previously in this paper, may be exercised by either a justice of the peace or commissioner for declarations?**
- 6.2 How often are these powers exercised?**
- 6.3 In what localities do justices of the peace or commissioners for declarations exercise these powers (for example, in metropolitan areas, country towns, or remote communities)?**
- 6.4 Is there a need in those localities for these powers to be exercised by justices of the peace or commissioners for declarations, rather than by some other person, for example, by a magistrate?**
- 6.5 If so, could that need be met in some other way, or reduced by some means, for example, by a greater use of technology?**
- 6.6 What are the perceived advantages and disadvantages, if any, of having these powers exercised by justices of the peace or commissioners for declarations, rather than by some other person?**

## **7. SUBSIDIARY ISSUES**

If there is to be a continued role for justices of the peace, a number of subsidiary issues will need to be considered to ensure that their powers are appropriately exercised.

## **(a) The appropriate range of powers**

The present regime for justices of the peace and commissioners for declarations was intended to introduce a tiered approach, with commissioners for declarations, justices of the peace (qualified) and justices of the peace (magistrates court) exercising an increasingly more significant range of powers. However, there is still quite a diverse range of powers within those tiers.<sup>328</sup> For example, the skills and experience that are desirable for a person who is called upon to issue a search warrant are arguably different from those that are desirable for a person attending a police interview of a juvenile. Both of these powers may be exercised by a justice of the peace (qualified).

To the extent that there is a need for some functions to continue to be undertaken by justices of the peace, this raises an issue about specialisation, that is, whether a person should be appointed for a particular purpose (for example, a bail justice as in Victoria<sup>329</sup>) or for a more general, broader range of purposes.

### **7.1 If there is a demonstrated need to use justices of the peace for a particular purpose, should appointments be made for that particular, specialised purpose, or should appointments be made conferring a broader range of powers?**

## **(b) Safeguards**

If justices of the peace are to continue to exercise some, or all, of their present powers, it is important to consider what safeguards can be built into the system to ensure, as far as possible, that their powers are properly exercised, and not subject to abuse.

### **7.2 What, if any, safeguards should be implemented to ensure that the powers of justices of the peace are properly exercised?**

### **7.3 What changes could be made to the system to enhance the independence of justices of the peace?**

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<sup>328</sup> See Chapters 3 and 5 for a discussion of the powers of the different categories of justice of the peace.

<sup>329</sup> See pages 61-62 of this Issues Paper.

For example, in relation to powers such as the issuing of warrants or the attendance at juvenile interviews (if they are to continue to be performed by justices of the peace), could a system of a rolling roster of justices of the peace be implemented, to avoid the situation where there can be a suggestion that certain justices of the peace are being cultivated by some police officers?

**(c) Appointment<sup>330</sup>**

**7.4 What qualifications should apply to ensure that justices of the peace and commissioners for declarations are appropriately qualified to exercise particular powers?**

**7.5 Should there be different qualifications for different powers?**

**7.6 What disqualifications, if any, should apply?**

**7.7 At present, a person wishing to be appointed as a justice of the peace or commissioner for declarations generally requires the nomination of his or her Member of Parliament.<sup>331</sup> What purpose does this requirement serve? Is this requirement necessary or desirable?**

**7.8 Should appointments be subject to any limitations?**

For example, in the Northern Territory, appointments may be limited for a fixed period or conditional upon the person residing in a particular locality.<sup>332</sup>

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<sup>330</sup> The process of appointment for justices of the peace is discussed in Chapter 4.

<sup>331</sup> See the discussion of this requirement at page 27 of this Issues Paper.

<sup>332</sup> *Justices of the Peace Act* (NT) s 5(2). Such a person ceases to hold office if the appointment was subject to a condition and the condition ceases to be fulfilled; or if the appointment was for a specified period which has expired: *Justices of the Peace Act* (NT) s 9(c), (d). In practice, appointments are made for life, or for five or ten year terms (information provided to the Commission by the Statutory Appointments Officer, Northern Territory, February 1998).

**(d) Liability<sup>333</sup>**

**7.9 To what extent should a justice of the peace (or any other person performing that role) be protected from, or indemnified against, liability in respect of acts done in the performance of his or her duties?**

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<sup>333</sup> The liability of justices of the peace and commissioners for declarations is discussed in Chapter 6 of this Issues Paper.