The Supreme Court of Western Australia
1861 - 2011

Administering Justice for the Community for 150 years

by

The Honourable Wayne Martin
Chief Justice of Western Australia

Ceremonial Sitting - Court No 1
17 June 2011

The court sits today to commemorate the 150th anniversary of the creation of the court. We do so one day prematurely, as the ordinance creating the court was promulgated on 18 June 1861, but today is the closest sitting day to the anniversary, which will be marked by a dinner to be held at Government House tomorrow evening.

Welcome

I would particularly like to welcome our many distinguished guests, the Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand, the Hon Terry Higgins AO, Chief Justice of the ACT, the Hon Justice Geoffrey Nettle representing the Supreme Court of Victoria, the Hon Justice Roslyn Atkinson representing the Supreme Court of Queensland, Mr Malcolm McCusker AO, the Governor Designate, the Hon Justice Stephen Thackray, Chief Judge of the Family Court of WA, His Honour Judge Peter Martino, Chief Judge of the District Court, President Denis Reynolds of the Children's Court, the Hon Justice Neil McKerracher of the Federal Court of Australia and many other distinguished guests too numerous to mention.

The Chief Justice of Australia, the Hon Robert French AC had planned to join us, but those plans have been thwarted by a cloud of volcanic ash. We are, however, very pleased that Her Honour Val French is able to join us.

I should also mention that the Chief Justice of New South Wales, the Hon Tom Bathurst, is unable to be present this afternoon, but will be attending the commemorative dinner to be held tomorrow evening.

I would also like to particularly welcome those who will address the court this afternoon being the Hon Christian Porter MLA, Treasurer and Attorney General appearing on behalf of the government, Mr Hylton Quail, President of the Law Society of WA and Mr Grant Donaldson SC, President of the WA Bar Association.

Acknowledgement of the traditional owners

It is important that I commence by acknowledging and paying my most sincere respects to the traditional owners of not just the lands upon which we meet, but all the lands of the State that fall within the jurisdiction of this court, and their Elders past and present. Although it is not the usual practice to commence sittings of this court with such an acknowledgement, it is important that we do so today because the event which we commemorate came about as the direct consequence of the colonisation of the lands now known as Western Australia, and the consequential dispossession of the original occupants of those lands, who had been their traditional custodians for around 50,000 years. That time scale provides some perspective for the much shorter period of 150 years which we commemorate today, and appropriately places the period in which these lands have been occupied by settlers originally from Europe, and later from other continents, into the broader historical context.

The settlement founded by Governor Stirling in 1829 created an inevitable clash between the culture, laws and traditions of the settlers, and the culture, laws and traditions of the original inhabitants. The first settlers, perhaps understandably, had little or no appreciation of Aboriginal culture, law or tradition[1]. Just as the High Court has pointed

[1] See the letter from Swan River Colony Settler J Akoy Davis, dated 20 January 1832, cited in Pamela Statham Drew's biography of James Stirling (UWA Press 2003), at 211.

out that the doctrine of *terra nullius* had no application to Australia[2], it is abundantly clear that the early settlers were quite mistaken in their view of Aboriginal culture and law. Perhaps because of their ignorance of Aboriginal law and culture, the colonists made no attempt to recognise or accommodate those matters within the legal system which they brought with them from England. Instead of compromise and accommodation, there was a head-on collision between two radically different cultures and legal systems. That clash led to confrontations and skirmishes which were sometimes bloody[3].

Of course the colonists prevailed, by force of arms, and the laws and culture which they imported have been dominant since the early days of the colony. The system of courts founded by Governor Stirling in 1829 has been a vital component of the systems for the enforcement of those laws, and this court has been at the apex of those systems since its creation in 1861. It is important to recognise and acknowledge that the creation of this court was a significant step in the process by which the original inhabitants of these lands were forcibly dispossessed and largely prevented from living in accordance with the laws, cultures and traditions which had governed their lives, and the lives of their ancestors, for tens of thousands of years prior to colonisation. The devastating consequences of that process for Aboriginal people and their descendants, presents this court, and the other courts of this State, with one of their greatest contemporary challenges - a matter to which I will return.

[2] *Mabo v The State of Queensland* (1992) 175 CLR 1.
[3] One of the earliest and most significant confrontations was the conflict near Pinjarra on 28 October 1834, which white historians describe as "The Battle of Pinjarra", but which is described as the "Pinjarra Massacre" by Nyungar people.

That is why it is important that we commence today's sitting with the paying of our respect to all the Aboriginal peoples and language groups who live within the jurisdiction of this court. It is also why the unveiling of a piece of art which symbolises Aboriginal law and culture, by a prominent Nyungar artist, Mr Toogarr Morrison, is the centrepiece of the function which will follow today's sitting.

Serving the community

This court exists to serve the community. In order to engage the broader community in the events marking our sesquiecentenary celebrations, in addition to this public sitting, we are opening the court to the public on Sunday, 19 June 2011, between the hours of 11 am and 4 pm. Historical artefacts will be on display, judges will be on hand to deliver short addresses on the history of the court, and areas of the court from which the public are usually excluded, including my chambers and some of the other judges' chambers and the holding cells will be open for inspection.

We are also deploying funds generously provided by the State Government, and for which we are most grateful, to subsidise visits to the Education Centre which operates in the Old Court House by schools which would not otherwise be in a position to meet the costs of travel and attendance, over a programme which will run from now until September and which will include art and essay competitions for visiting students. Selected entries will be published on our website.

The foundation of the Swan River Colony

Captain Stirling set sail from England for what was to become the Swan River Colony in the *Parmelia* on 8 February 1829. This was some months prior to the passage of the legislation of the British Parliament

which made specific provision for the establishment of the colony, and which named it Western Australia, and of which Stirling was unaware at the time he founded the settlement in June 1829. At the time he set out, all Stirling had was a very general instruction from the Secretary of the Colonial Office to take possession of the western part of New Holland, and to assume the title of Lieutenant Governor until a formal commission authorising the creation of a government could be despatched to him. Stirling relied upon this scant authority to assert dominion over the lands which he and his troops occupied in a proclamation which he read to assembled troops at Arthur's Head in Fremantle on 18 June 1829, in which he purported to apply all the laws of the United Kingdom to all the lands of the colony. Some indication of the contemporary attitude towards Aboriginal people is to be found in that part of the proclamation which expressly provided that the laws of the United Kingdom would apply to any person committing an offence against the Aboriginal inhabitants of the lands "as if the same had been committed against any others of His Majesty's subjects".

The first court in the colony

Ignorant of the Act which had been passed, and to which I will shortly refer, Stirling appears to have been under the view that he had no authority to create systems for the enforcement of law and order, as on 25 August 1829, he wrote to the Parliamentary Under Secretary for Colonies urging that early provision be made for the punishment of crime and the administration of justice in civil cases[4]. However, notwithstanding his apparent lack of authority, disorder within the colony prompted Stirling to appoint 14 police constables and eight Justices of the

[4] See Russell - A History of the Law in Western Australia, 11.

Peace to administer law within the fledgling colony, by a notice issued on 9 December 1829.

Two of the justices had legal qualifications. William Henry Mackie, who was 31 years of age, had been educated at Cambridge although never called to the Bar. He was appointed Chairman of the Court of Quarter Sessions at a salary of £290 per annum. The other justice with legal qualifications was Alfred Hawes Stone, who was 28 years old when he arrived at the colony. He was appointed to a position which was the equivalent of clerk of the court, although it carried with it a right of private practice. Two years later he was joined by his younger brother, George Frederick Stone, who will be mentioned again a little later. Alfred Stone founded a dynasty which provided four generations to the legal profession of Western Australia, including Sir Edward Stone, who was Chief Justice between 1901 and 1906.

Although public disorder had forced Stirling to act to create a criminal court before the arrival of his commission from England, he deferred the creation of a Civil Court until that commission had arrived.

The Western Australia Act (1829)

The legislation which I have mentioned, providing "for the government of His Majesty's settlements in Western Australia, on the western coast of New Holland", was passed by the UK Parliament on 14 May 1829, some months after Stirling had set out from England and shortly before he arrived off the coast of Fremantle. Interestingly, the legislation contained what is now described as a "sunset clause" as it remained in force only until the end of the next session of Parliament after 31 December 1834. The preamble to the Act referred to "divers of His Majesty's subjects"

having effected a settlement "upon certain wild and unoccupied lands on the western coast of New Holland and the islands adjacent" to be known by the name of Western Australia. The lands may have been wild but they were certainly not unoccupied. The Act authorised the Crown to issue orders authorising and empowering any three or more persons resident within the settlement:

> "To make, ordain and establish all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers as may be necessary for the Peace, Order and good Government of His Majesty's Subjects and others within the said Settlements."

Stirling's Commission

Despite Stirling's regular entreaties for formal authority, no Order in Council was issued pursuant to the authority conferred by the Western Australia Act until Stirling's commission, appointing him Governor and Commander in Chief of the new colony was issued on 4 March 1831. Fortunately, given that Stirling had by then already appointed Justices of the Peace and police constables, his commission conferred that authority upon him and also gave him:

> "Full power and authority where you shall see cause or shall judge any Offender or Offenders in any criminal matters or for any fines or forfeitures due under Us, fit objects of our mercy to pardon all such Offenders and to remit all such Offences, fines and forfeitures, Treason and wilful murder only excepted in which case you shall likewise have power upon extraordinary occasions to grant reprieves to the Offenders until and to the intent our royal pleasure may be known."

Interestingly, this commission contains the first reference to the Supreme Court of Western Australia, in the context of the reference to those provisions of the Act of 1829 which authorised the constitution of courts for the colony. However, it was to be another 30 years before a court bearing that name was created.

The commission also made provision for the colony to be governed by the senior Executive Councillor if there were no Lieutenant Governor appointed, and if the Governor were absent from the colony, but on the proviso that:

> "It is nevertheless our Will and pleasure that no Judge of any of our Courts of Judicature shall in any case take upon him the Administration of the Government."

This approach to the separation of powers may have been motivated by the writings of Montesquieu, but seems out of step with the then structure of government in England, in which senior members of the judiciary took active roles in both the executive and legislative branches of government. At all events, it is not an attitude which persisted, and ever since the second Chief Justice of Western Australia was appointed in 1880, it has been the practice for the Chief Justice also to serve as Lieutenant Governor[5]

Stirling's Instructions

Stirling's commission was despatched to him with two other significant documents. The first was a formal set of instructions which contained 34 numbered clauses containing detailed stipulations as to the manner in

[5] I am currently serving as Administrator of the State pending the appointment of Governor Designate McCusker.

which the powers conferred by his commission were to be exercised. The second was a letter from the secretary of the Colonial Office, Lord Goderich, responding to three unanswered letters which Stirling had sent requesting authority to create a system of courts (which Stirling had in fact gone ahead and done anyway, at least in respect of criminal courts). The letter enclosed a copy of the *Western Australia Act*, drawing attention to the authority which it conferred for the creation "of all necessary courts". The letter also explained that by the terms of the commission which had been issued under the authority of that Act, the persons who were to be chosen to assist Stirling were to comprise not only a Legislative Council for the passage of laws, but also an Executive Council for his assistance in the administration of the government of the colony. The letter informed Stirling that the Western Australia Act was necessary because:

> "The Royal Authority was not competent to the creation of a Legislature except by Popular Representation, nor to the establishment of Courts constituted on different principles from those of Westminster Hall. The Colony not being yet right for Institutions of this nature, it was necessary to invoke the aid of parliament to render legal the establishment of a Legislature and Tribunals of a more simple, though less popular character."

The instruction to create courts

Stirling's view of the importance of the immediate creation of a system of courts was apparently shared by Goderich. Goderich wrote that:

> "Amongst the earliest objects of the attention of the Council will be the institution of Courts and Justice, exercising jurisdiction in all cases, civil and criminal, arising within the Settlements. This is a power to the exercise of which they are especially called by

> Parliament, and to which effect must be given with the least possible delay."

Goderich acknowledged that the creation of a system of courts by a Legislative Council made up of those without legal training or experience might be difficult. He justified that course in the following terms:

> "In imposing this task upon yourself and other Gentlemen not regularly educated to the practice of the Law, as a profession, His Majesty's Government may at first sight seem to be making a very unreasonable demand. To regulate whatever relates to the administration of Justice, of course, presupposes so exact and comprehensive an acquaintance with the whole business of Jurisprudence, as is possessed by a comparatively small number even of those who have made the Law their peculiar study.
>
> I should therefore have been happy to relieve you from so arduous and inappropriate an office. But great as may be the difficulty of instituting Courts without a profound knowledge of Law, the objections to undertaking that duty in this Country without the advantage of the minute local information essential on such an occasion, has appeared even yet more formidable."

The utmost simplicity and economy

This was, of course, Goderich's way of saying politely - "Over to you". However, he went on to provide some observations which he thought would be of assistance to Stirling in the performance of this "very unreasonable demand". He commenced by referring to complaints with respect to the complexity, technicality and expense associated with legal proceedings which have a very familiar ring.

> "It is almost needless to say that the administration of the Law both Civil and Criminal in England is encumbered with a multitude of forms, and attended by a degree of expense, which have recently attracted the anxious deliberations of Parliament, and of His Majesty's Government. If the same system were transferred to an Infant Colony, it would, of course, be subversive of the very end it was designed to promote. Whatever may be the advantages, real or imaginary, of the complex Judicial processes, which prevail in the Courts in Westminster Hall, it will be at once admitted that in Western Australia Justice should be administered with the utmost possible degree of simplicity and economy."

It seems clear that Goderich was not enamoured of the procedures adopted by the courts at Westminster. His plea for the law to be administered in Western Australia "with the utmost possible degree of simplicity and economy" is one that we should strive constantly to achieve.

Goderich went on to suggest to Stirling that the Colonial Office had addressed the problem of creating courts in the colonies of New South Wales and Van Diemen's Land but did not consider those models fit for imitation in Western Australia because Western Australia was not a penal colony. As Goderich observed:

> "The character of the Convict Population exacted deviations from the English mode of Trial in Criminal cases which nothing but that very peculiar exigency could have justified."

The appointment of Judges

In relation to the appointment of judges to serve in the courts which Stirling was to create, Goderich warded off any possible request by Stirling for the Colonial Office to source and fund an appropriately qualified lawyer from England. He wrote in these terms:

> "To provide for the Constitution of the Courts it will be scarcely a more difficult office than to select proper Persons on whom the duty of presiding in them must be devolved. At no remote period it will of course be necessary to appoint one professional Lawyer at least as Judge. For the present, it may not be necessary to incur that expense. The transactions of life in a Colony so recently settled, must be exceedingly simple, and I see no reason to doubt that, for some short period at least, Justice may be satisfactorily administered by the same body of Gentleman whom you appear to have nominated as Magistrates, or by such of their number as are most distinguished by probity, general education and aptitude for business. From amongst Persons of this description, you will select, at your own discretion, such as you may deem best qualified to act as Judges. That occasional errors will be committed, must of course be anticipated, and for those mistakes which result from an unavoidable ignorance of the positive Rules of Law, you will make every allowance. But with a firm purpose to administer Justice impartially, and with a Patient attention to the merits of every controverted question brought under their cognisance, I entertain no doubt that Judges, so chosen, will promote the general interests of Society, and protect the Rights of Individuals until the arrival of that time when in Western Australia, as in more advanced countries, the administration of the Law shall occupy the entire time and attention of Persons devoted exclusively to that

> profession. In any event, the more alarming violation of the public Peace, and all palpable encroachments on private property, will be effectually repressed, and an object of the first importance in Society will thus be secured to a very great extent, even though in an imperfect manner."

In other words, Goderich was advising that rather than defray the expense of despatching a professional lawyer to serve as judge in the colony, the Colonial Office was prepared to accept that mistakes would be made.

The economic theme was maintained in another paragraph in the letter which advised Stirling that the cost of administering justice in a new colony was to be defrayed exclusively by fees levied by the courts.

The Civil Court

Stirling's commission and accompanying instructions did not arrive in the colony until early 1832. Upon their arrival, Stirling created the Executive Council and the Legislative Council, made up of precisely the same persons, and which were authorised by his commission. The first legislative action of that Council was the creation of a court to exercise civil jurisdiction, termed the Civil Court. Some indication of the priorities of the early colonists can be gleaned from the fact that this was the first act of the newly-appointed Council.

George Fletcher Moore, who was the third person to arrive in the colony with legal qualifications (having arrived in October 1830) was appointed Commissioner of the Civil Court on 17 February 1832. Like Mackie, who was Chairman of Quarter Sessions, he was an Irish protestant although, unlike Mackie, he had been admitted to the Bar.

Moore was appointed on an annual salary of £300 a year, which was £10 more than Mackie's starting salary. It can be inferred from a letter written by Moore's father shortly after his appointment that he was not pleased with his salary. Moore's father wrote:

> "I find by my son's last letter that the Governor has been pleased to appoint him Judge of the Civil Courts of Western Australia at a salary which I am sure no man, no lawyer at home, will covet - at a salary that will not afford him a horse - not so much as many noblemen in England pay their servants."

The legislation establishing the Civil Court vested it with all the jurisdiction within Western Australia that was enjoyed by the common law courts in England together with the power to grant probate of wills, and authorise the administration of estates and powers with respect to the appointment of guardians "over the Persons and Property of Infants, Idiots and Lunatics". The failure to specify that the court was also invested with equitable and prerogative jurisdiction was later to become a source of controversy, indeed it became the cause of the creation of the Supreme Court. However, it seems clear that it was simply assumed that the court had plenary civil jurisdiction until almost 30 years later.

The ordinance provided that all pleadings in the court were to be oral, and that cases involving a subject matter with a value great than £20 were to be tried with a jury. If the value of the subject matter exceeded £100, there was a right of appeal to the Governor in Council.

A busy Civil Court

The Civil Court was busy from its inception. Enid Russell observed that:

> "It is apparent from the record books and the early newspapers that during the years 1832 to 1836 the volume of litigation was out of all proportion to the population."

She postulates that:

> "The lack of other forms of amusement may have been one inducing factor and the smallness of the population no doubt made it certain that personal quarrels would be widely discussed and kept alive."[6]

The business of the court from its inception is corroborated by an entry in Moore's diary from February 1832. He wrote:

> "I have already sat four times: the average number of cases has been about 15 each day; some of them trifling, and some important and complicated; the pleadings are oral; the case is heard in a week after its commencement; judgment is given immediately; the costs of court in each case are very trifling, and a man may have his case tried, judgment given and execution and sale within a fortnight."

We have some way to go to match those standards of expedition.

Business did not abate following the creation of the court. In 1833, Moore wrote that instead of sitting the two days a week which he had allotted for hearings:

> "This week I have been obliged to sit from Tuesday to Saturday, day after day, commencing at 10, and sitting some days until 7; for people are as fond of litigation here as in the parent state."

[6] Russell, page 114.

A busy Criminal Court

The Court of Quarter Sessions over which Mackie presided was equally busy dispensing criminal justice. Mackie was apparently fond of ensuring that trials were completed at one sitting. In 1841, the *Perth Gazette* recorded that an 18 hour trial had finished at about 3 am. The paper reported:

> "At one point the prisoner stirred the jurymen from their late night torpor so that they would listen to his defence."

This practice was also recorded by Chief Justice Sir Edward Stone, in the memoirs of his boyhood[7]:

> "The criminal court very seldom adjourned before 10 o'clock at night. Knowing the late hours kept by the court, the Registrar, who was a very methodical gentleman, always brought refreshments in the shape of sandwiches and a little flask of wine. After a short adjournment he would partake of this and then indulge in 40 winks."

As Bolton and Byrne point out, the Registrar to whom Sir Edward Stone was referring was his Uncle Alfred.

Premises

The Court of Quarter Sessions sat in Fremantle and in Perth, whereas the Civil Court sat mainly in Perth. For the first seven years of the colony, the Anglican church known as the "rush church" was used for court sittings in Perth. Its walls were made of rush, and its roof was thatch. The building was not weatherproof, and on days of heavy rain the court

[7] Reported in Bolton and Byrne - History of the Supreme Court of Western Australia from 1861-2005.

had to sit in the Registrar's office[8]. Interestingly however, the rush church was situated on the corner of Hay and Irwin Streets. The Central Law Courts and the District Court building are located on the same intersection today.

The premises used in Fremantle were no more satisfactory. In 1835, the *Perth Gazette* described them in these terms:

> "The building is not worth noticing as a public edifice and the general arrangement of the Justice room reflects but little credit on the sheriff whose duty we believe it is to attend to these matters … the dark hole called the grand jury room appeared to us to be in a most unwholesome and filthy state."[9]

The inadequacy of the premises used for court business caused Stirling to commission the construction of a purpose built courthouse. The site chosen was on the bank of the Swan River adjacent to the commissariat store, which was itself adjacent to the pier in the river, served by Pier Street. The court building was designed by Henry Reveley, a civil engineer, who had also designed the commissariat store. Reveley also designed the Round House at Fremantle.

The building was completed in December 1836, at a cost of £736. Significantly more than that has been spent on recent renovations to the building, including the replacement of its shingle roof. Happily, however, it still stands and is the oldest building still extant within the City of Perth. It and the Round House are the only surviving examples of Reveley's work. Several months after the courthouse opened, Stirling

[8] Bolton and Byrne at 10.
[9] Bolton and Byrne at 13.

was chastened by the Colonial Office for not having sought approval prior to proceeding with its construction.

The shortage of buildings in the new colony resulted in the continuation of the joint use arrangements that had existed in relation to the rush church, and the building was used for religious services when not in use as a courthouse. It was also used for community gatherings, including a piano recital given by Bishop Salvado for the purpose of soliciting funds for the monastery at New Norcia.

Colourful business - a duel

As I have mentioned, the courts of the new colony were extremely busy from their inception. Their business was varied and colourful. Colour was added by two legally qualified Scots who had arrived in 1830, William Graham and William Nairne Clark. In 1832, Clark accused a merchant, George Johnson, of defrauding his client. Johnson challenged Clark to a duel, and Clark accepted the challenge. Happily, legal practitioners are no longer expected to put their lives on the line in the pursuit of their client's interests, at least not in Australia. The duellists met at dawn on a site near the north end of Cantonment Street in Fremantle. Graham acted as Clark's second. A single shot was fired by each duellist. Johnson was wounded and later died. Clark, Graham and Johnson's second were each committed to stand trial for murder. However, in October 1832, each was acquitted. Graham and Clark each went on to publish newspapers within the colony, and the claims for defamation which followed those publications were another reliable and fertile source of business for the first courts of the colony.

Capital Punishment

In the first 25 years of the colony, only eight executions took place. Six of those executed were Aboriginal and two were English born. The first English person to suffer the death penalty in Western Australia was John Gaven, who was only 15 when executed in 1844, following his conviction for murdering the son of his employer, George Pollard. Gaven confessed to killing his sleeping victim with an axe in a fit of rage. Three days following his conviction he was hanged, in public, outside the Round House in Fremantle and buried in the sandhills to the south.

The rate of executions in the colony increased significantly following the arrival of convicts in June 1850. Between 1854 and 1857, 13 people were executed, including four Aboriginals. One of those executed was Brigid Hurford, who was the first woman executed in the colony. She was convicted of murdering her elderly husband after forging a will in her own favour.

The Beaufort Street court house

Around this time, it was decided to shift court sittings to the new gaol which had been erected in Beaufort Street. However, it seems that the accommodation at Beaufort Street was not a significant improvement. Richard Birnie, the Advocate General of the day, complained about the accommodation at Beaufort Street in these terms:

> "The misery of the judge is the misery of the Bar. The amount of unmerited annoyance he can cause is scarcely conceivable, and the public must suffer if his nerves give way. Indeed I scarcely exaggerate when I say that stronger nerves than those of his present Honour might give way under the dreadful pressure of a stream of

> cold air coming in behind the head and of hot air in front with the feet cold and nerves on the stretch."

Mackie had by this time replaced Moore as Commissioner of the Civil Court.

A jurisdictional issue

Mackie retired in 1858. He was replaced by Alfred MacFarland, who arrived in February 1858, and was immediately unpopular. Like Moore, he was unhappy with his salary, although it had by then doubled to £600 per annum. However, in order to secure an increase in salary, MacFarland went on a "work to rules" which heartily annoyed Governor Kennedy. Nor was MacFarland popular with the public. Referring to Moore's determination that the Civil Court enjoyed equitable jurisdiction, the *Perth Gazette* referred to MacFarland in these terms:

> "The first commissioner ruled that he possessed the equitable powers and jurisdictions of the Court of Exchequer, and the succeeding commissioner, with more enlarged views, decided that he was personally endowed with the functions and authority of the late Doge of Venice and the Great Mogul."

However, there must be some doubt about the accuracy of this description because MacFarland, in fact, took the view that the Civil Court had no equitable jurisdiction, and ruled accordingly, to the consternation of the legal profession and Governor. He used that ruling as a basis for advancing the proposition that a Supreme Court should be established, and he prepared draft legislation to that end. Perhaps unwisely, he included within the draft a provision doubling his own salary. MacFarland further enraged not only Governor Kennedy but also the

Colonial Office by ruling, perversely, that English legislation did not apply in Western Australia unless adopted by the Legislative Council of Western Australia, a view which the Advocate General of the day described as "an absurdity that I expect no English lawyer to defend, but a contumacity which (I suspect) no Minister would endure." The Colonial Office despatched an Order in Council removing MacFarland from office, but wisely, he resigned before the despatch was received.

Sir Archibald Burt

The first Chief Justice of Western Australia was Sir Archibald Paull Burt. The unusual spelling of his second name derives from it being the surname of his godfather. He was born at St Christopher (now known as St Kitts) in the Leeward Islands of the Caribbean on 1 September 1810. The Burt family had been in the Leeward Islands since Colonel William Burt, who had been born in England in about 1610, became a sugar planter at Nevis during the 17th century. Archibald's parents resolved that he should be educated in England and read for the Bar. He was sent to a private school in Richmond, in Surrey, and admitted to the Middle Temple in April 1825, concluding all the requirements of readership by 1830. However, still being a minor, he was not eligible to be called to the Bar, so he returned to St Christopher, joining the Bar on that island. Although Russell asserts that he was appointed King's Counsel for St Christopher in February 1836 (at the age of 25!), this is not endorsed by other texts, who report his appointment as a notary public in 1838 - which was then an office of consequence. At all events it is clear that Burt was an eminent and successful practitioner in the West Indies. He also took an interest in the family sugar plantations and, by 1834, was the

owner of three slaves. J M Bennett observes that he appears to have been the only Australian Chief Justice who was ever an owner of slaves[10].

Burt took an appointment as Attorney General for St Christopher and Anguilla in 1848, at an annual salary of £300, together with a right of private practice. When asked by the Colonial Office to comment on the appointment, the Lieutenant Governor reported that Burt was "reputed to be the ablest lawyer in the West Indies"[11].

In November 1856, the Chief Justice of St Christopher died while sitting on the bench at Nevis. The Lieutenant Governor of St Christopher, Sir Hercules Robinson, proposed that he be replaced by Sir Archibald Burt, notwithstanding that Burt had previously twice declined appointment to that position (as it would have obliged him to relinquish his more lucrative private professional avocations)[12]. However, times had changed, and because of a drop in legal business, Burt had become "anxious" for judicial office.

However, the Governor of Antigua, Ker Hamilton, rejected the Lieutenant Governor's recommendation on the basis of an asserted principle that it was undesirable for men to be appointed to the bench in colonies in which they had long practised and been resident. This led to a heated dispute between the Lieutenant Governor and Governor, which was referred to the Colonial Office for resolution. In the result, the Colonial Office endorsed Hamilton's position and refused Burt's appointment. Burt was offered a consolation prize in the form of appointment to the position of Assistant Judge in Jamaica. However,

[10] J M Bennett - "Sir Archibald Burt" (2002 - Federation Press) at 3.
[11] J M Bennett at 5.
[12] J M Bennett at 7.

Burt pointed out that he was ineligible for appointment, not having practised for at least three years at the Bar of either the United Kingdom or of Jamaica[13].

By 1859, Robinson had been appointed Governor of Hong Kong. Because the Chief Justice of that colony was absent, Robinson suggested to Burt that he might take up the position, for which Burt then applied. However, he was advised by the Colonial Office that the Chief Justice of Hong Kong was merely on leave and would return to his duties in due course. Burt then travelled to London to press his thwarted claims for judicial appointment in one of Her Majesty's colonies. It was around this time that it was decided to dismiss MacFarland, creating a vacancy in Western Australia, which was offered to Burt. The positions offered were the position of Civil Commissioner and Chairman of Quarter Sessions at a salary of £1000 per year (which was significantly above that offered to MacFarland). Burt accepted the position, and he, his wife Louisa, and four of their twelve children set out to travel from the West Indies to Western Australia via Southampton. In Southampton they were joined by another of their children, travelling to Perth in the *Hastings* arriving on 29 January 1861. Burt's arrival calmed some of the disquiet that had followed from MacFarland remaining in office, in an acting capacity.

Burt's arrival in Western Australia was soured by two legacies of his time in the West Indies. First, the Admiralty Office was convinced (wrongly) that Burt had failed to pay for the cost of his family's voyage from the West Indies to England and demanded that the Governor, Sir Arthur Kennedy, recover the cost of the fare (£130) from Burt. The demand

[13] J M Bennett at 10.

persisted for two years, until it was finally accepted that Burt had proven that he had paid for the fare.

The second difficulty arose from the fact that John Foreman of Antigua instituted proceedings against Burt after his departure from the West Indies, and obtained judgment against Burt *ex parte*. A copy of the judgment was sent to the secretary of State for the colonies, who passed it on to Kennedy. The circumstances of the claim are complicated[14] - it is sufficient for present purposes to note that after two years, Burt had satisfied the Colonial Office that he had not acted improperly in relation to the matter.

An unimpressive legal profession

Burt took the oaths of office on 31 January 1861. He sat for the first time in Chambers on 5 February 1861. Burt was not impressed with the capacities of the Western Australian legal profession. Shortly after his arrival he wrote:

> "I experience much more difficulty with the execution of my duties on account of the extreme inexperience of the members of the Bar. They do not exhaust a subject as lawyers should. I have to draw their attention to the points of law applicable to the cases they argue. Now in the West Indies I should have hung my head if a judge had found occasion to suggest that there were cases which had escaped my attention in getting up my argument."[15]

[14] J M Bennett at 23.
[15] J M Bennett at 25.

The jurisdictional issue resurfaces

The issues of jurisdiction that had spelled MacFarland's fate also attracted Burt's attention. Within two months of his appointment, in March 1861, he had ruled in *Ex parte Friend* that it was not possible to issue certiorari on behalf of a prisoner. In his view, the Civil Court could not exercise powers in relation to criminal cases and the only court that had criminal jurisdiction, the Court of Quarter Sessions, had no power to grant prerogative relief. In the same month, Burt endorsed MacFarland's earlier view that there was no court in the colony which possessed equitable jurisdiction which could, therefore, only be exercised by the Governor.

The *Perth Gazette* expressed displeasure at Commissioner Burt's rulings with respect to the limited jurisdiction of the colonial courts:

> "He declines to manufacture laws *ex improviso* to meet the occasion, and evidently intends to do nothing more than rigidly administer those already in force. This is certainly a falling off from what we have been accustomed to, and betokens a want of originality and of genius."[16]

The consequence of these rulings was to cause George Stone (mentioned earlier), who then held the position of Advocate General, to urge the Governor to create a Supreme Court with full powers to discharge civil, criminal and equitable jurisdiction. Kennedy accepted that advice and the bill which had been drawn by MacFarland was dusted off and, after some modification, passed by the Legislative Council.

[16] J M Bennett at 27.

The Supreme Court Ordinance 1861

The Supreme Court ordinance received royal assent on 18 June 1861. Section 4 of the ordinance established the Supreme Court and invested it with all the jurisdiction, in respect of the colony of Western Australia, as the courts of common law and equity enjoyed in respect of England. This provision has an unfortunate historical legacy in that the jurisdiction of the Supreme Court continues to be defined by reference to the jurisdiction of the English courts on 18 June 1861[17], which occasionally gives rise to unnecessary and complicated historical inquiries into the precise extent of that jurisdiction (the last occurring as recently as two weeks ago in the course of argument before the Court of Appeal).

The new court was also given extensive probate and ecclesiastical jurisdiction. It was not given jurisdiction with respect to divorce until 1863 although, like the Civil Court, it was given jurisdiction in relation to guardianship, infants and "natural fools" from its inception.

The ordinance provided that the court was to be constituted by one judge, who was to be called "the Chief Justice of Western Australia"[18]. Calling oneself the Chief Justice when there are no other Justices seems a little grandiose, but at least it would have been quite easy to obtain a consensus at a meeting of the judges. The ordinance also provided for the appointment of an Attorney General, a sheriff, who was to be an officer of the court, and other officers including a registrar, master and keeper of records. George Stone became Attorney General, and Alfred Stone became Registrar of the court.

[17] See section 16 Supreme Court Act 1935 (WA).
[18] This is the title of my office, having been restored from the title "Chief Justice of the Supreme Court of Western Australia" as a result of amendments to the Supreme Court Act in 2004.

The ordinance also made provision for the admission of legal practitioners as "barristers, solicitors, attorneys and proctors".

Because of the dispute relating to the equitable jurisdiction of the Civil Court, the ordinance also validated all orders and decrees of that court in equity.

In relation to appeals, the ordinance provided that there was a right of appeal to the Privy Council in respect of any matter which involved a claim having a value of £500 or more (a qualification which persisted until the abolition of the right of appeal to the Privy Council by the Australia Act in 1986). The ordinance provided an alternative avenue of appeal to the Governor in Executive Council, to be called "the Court of Appeal of Western Australia", although its jurisdiction was limited to error of law apparent on the record. Appellants may have been discouraged from pursuing this avenue of appeal however as a consequence of the provision in the ordinance which provided that the "Court of Appeal" could be assisted in the hearing and determination of all appeals from the Supreme Court by the Chief Justice (who would, of course, of necessity be the author of the judgment under appeal).

1861

It is interesting to place the events of 1861 which we commemorate today in some historical context. In Europe, the States and Principalities which combined to form Italy were unified on 17 March 1861 (although the unification of Germany was not to occur for another 10 years - on 18 January 1871).

Across the Atlantic, in North America, the theme was not unity but disunity, given that the American Civil War commenced on 12 April 1861.

In Australia, 1861 marked the commencement of two sporting events of national significance. In November of that year, the first Melbourne Cup was run and won by Archer. 1861 is also considered to mark the beginning of the series of cricket matches between Australia and England that would in time come to be known as the Ashes series. The development of Australian contemporary culture was enhanced by the foundation of Australia's oldest public art gallery, the National Gallery of Victoria. Less happily, 28 June 1861 is considered to be the approximate date upon which Burke and Wills met their demise in the outback.

In Western Australia, 1861 was the year in which Edith Cowan was born. She was to become the first woman elected to an Australian Parliament. On 11 February 1861, the convict transport *Palmerston* arrived into Fremantle carrying 106 passengers and 293 convicts. Amongst the convicts were Richard Martin and Thomas Martin, who had been transported for the offences of larceny and rape respectively. Martin is a very common surname and, to the best of my knowledge, I have no family relationship with either of those convict settlers.

With these other distractions, the creation of the Supreme Court may not have been at the forefront of the minds of the colonists. The creation of the court was announced in the edition of the *Perth Gazette* of 21 June 1861, along with the appointments of the Chief Justice, Attorney General and Registrar. However, preceding the announcement, and taking pride

of place in notification of matters of importance of the day in the "general intelligence" section of the *Gazette*, was advice to the effect that:

> "The usual monthly mail for Albany will be made up at the general post office on Tuesday next the 25th inst, at 10 o'clock am."

Other Supreme Courts

The oldest Supreme Court in Australasia is the Supreme Court of Tasmania which was established (as the Supreme Court of Van Diemen's land) on 7 May 1824. The Supreme Court of New South Wales was established seven days later. Although the colony of South Australia was founded eight years after the colony of Western Australia, its Supreme Court was created by an ordinance proclaimed on 2 January 1837 - five days after the founding of the colony. When the colonies of New Zealand, Victoria and Queensland were separated out from the colony of New South Wales, Chief Justices of the new Supreme Courts in each of those colonies took their oaths of office in January 1842, June 1852, and February 1863 respectively, although the Supreme Court of Queensland had been brought into existence in August 1861, less than two months after the creation of our Supreme Court. The High Court of Australia was established in 1903. Only last month the Supreme Court of the Northern Territory celebrated its 100th anniversary (having been established in 1911), whereas the Supreme Court of the ACT celebrated its 75th anniversary in 2009 (having been established in 1934). The most recent arrival is the Supreme Court of Norfolk Island which celebrated its 50th anniversary last year, having been established in 1960. It is particularly pleasing to note how many of these courts are represented at this sitting and at the dinner which is to be held tomorrow evening.

The first sitting

Burt CJ conducted the first sitting of the court on Wednesday, 3 July 1861. At that time the population of the colony was estimated at 15,593 (presumably excluding Aboriginals). Today, the population of the State is estimated at approximately 2.32 million. Coincidentally, over the last 150 years, the population of Western Australia has increased by a factor of about 150, whereas the number of Supreme Court judges has increased by a factor of only 22. I look forward to budgetary provision being made for the appointment of the additional 128 judges we are owed according to the judge to population ratio which applied when the court was created. Of course, even if one counted all the judges and all the magistrates of all the courts in Western Australia, their number would fall significantly short of 150.

The first case tried by the court was the hearing of a charge brought against Robert Palin of "having burglariously entered the dwelling house of Samuel Harding and committed an assault under force of arms"[19]. The jury retired for only half an hour and returned with a verdict of guilty. According to the *Perth Gazette*, "the prisoner was sentenced to death in a very impressive address from the judge". The death sentence was carried out six days later. As sentences of death had to be confirmed by the Governor, and the Governor was the only avenue of clemency, once the Governor's view was known, there was little point in delaying the inevitable.

Aboriginal defendants

Many of the criminal cases tried in the new Supreme Court involved charges brought against Aboriginal people. Regrettably, there is still a

[19] *Perth Gazette* Friday, 5 July 1861, page 2.

disproportionate number of charges brought against Aboriginal people. Amongst the many early cases involving Aboriginal people were the cases of four who were accused of murder arising from a pay-back killing which was of course justified under Aboriginal law and custom. Each was sentenced to death and publicly executed in front of a large crowd. The victims declined to co-operate with the hangman and, as a consequence it took an hour and a half, and the assistance of several policemen, to hold the prisoners in a place where their lives could be ended amidst what the *Perth Gazette* described as a "dreadful scene of yelling, groaning and supplications for mercy"[20].

Some contempt cases

The civil business of the new Supreme Court was not nearly as voluminous as in the early days of the colony. Much of it was concerned with probate and inheritance issues. In an affidavit sworn in one such case, a young practitioner, Mr S H Parker, contradicted the testimony of the Comptroller-General of Prisons. As a result, Burt CJ caused Parker to be brought before the court charged with contempt. He was convicted and fined £25.

Parker wrote a letter which was published in the *Inquirer* newspaper complaining of his treatment. A few days later, the *Perth Gazette* published an editorial on the subject, asserting that Mr Parker had been punished for simply doing his duty. The editors of both newspapers were brought before the Chief Justice for contempt. The editors of the Inquirer were each sentenced to one month in prison, and the editor of the *Perth Gazette*, Mr W K Shenton, was sentenced to two months imprisonment together with a fine of £100. However, all three submitted a full and

[20] J M Bennett at 47.

abject apology, and were released. Parker was then brought before the court again for contempt, in respect of the letter which he had written to the *Inquirer*. Burt CJ took into account his youth and inexperience, and declined to imprison him, but imposed a fine of £100.

Understandably enough, the Perth press was reluctant to comment further on these incidents. However, similar restraint was not felt in Melbourne. As a result of these incidents, the Melbourne *Argus* wrote of Burt CJ in these terms:

> "We have read and heard of many singular freaks of men dressed in a little brief authority, but we have never yet met with such a case as that of which we yesterday stated the leading facts. In any of the free colonies, or indeed in any place where the feelings of free born Englishmen are not stifled by the pestilent exaltations of convictism, such an occurrence would have been simply impossible."

The Melbourne *Age* commented in these terms:

> "The new theatre of operations, in the effort to silence the press and to crush public journalists, is the heretofore penal colony of Western Australia, and the angry potentate who hurls his thunderbolts against those who dare impugn the doings of official authority, is not the sovereign ruler of the State as represented by the local head of the executive in the person of the Governor of the colony, but the Chief Justice in the Supreme Court of the despotically governed Little Pedlington … The Chief Justice, in a tone and style of speech the most intensely redolent of the Pecksniff spirit that our experience has ever been cognisant of, at

> once commenced his bitter vengeance by extolling his own conscientiousness."
>
> (It is to be noted that the editors missed no opportunity to exalt the virtues of Victoria, as a colony without convict settlers.)

Back to the Reveley court house

In 1863, the court returned from Beaufort Street to the Reveley premises on the banks of the Swan River, which were refurbished and refurnished. However, there were still complaints about their conditions and, as can be seen, the premises were very small for the conduct of all the business of the court. Like the rush church it had replaced, the roof of the Reveley building was not water tight and it is reported that, in 1867, Burt CJ had to hold an umbrella above his head while sitting, as the leaks were so bad, until in the end the hearing had to be abandoned until the weather improved.

Judicial independence

In the latter part of the 1860s, George Stone, the Attorney General, took ill and was unable to advise the Governor, or to prepare legislation for the Legislative Council. Burt CJ saw no impediment to filling that role himself, and drafting the legislation to be considered by the Executive Council notwithstanding that he would later be called upon to interpret that legislation in his judicial capacity. This would not have been considered at all unusual as it was the common practice for colonial Chief Justices to be made members of the Executive or Legislative Councils, and this practice was followed in a number of the eastern colonies of Australia. It is, of course, to be remembered that until very recently indeed, the British saw no difficulty in an overlap between legislative,

executive and judicial functions, the United Kingdom's highest court having been a committee of the Parliament, and the highest judge, the Lord Chancellor, having been a member of the government.

However, issues relating to the independence of Burt CJ arose from another quarter. Burt's son, Septimus, had been his Associate, and after reading law, was admitted to practise. Burt CJ saw no reason why his son should not appear before him, and he did so regularly, which is hardly surprising, given that Burt CJ was still the only judge in the colony. However, this gave rise to complaints and one member of the Legislative Council[21] moved an amendment to the Supreme Court ordinance to preclude immediate family members of the judge from appearing before him. However, the amendment was rejected by the Legislative Council, which endorsed Burt's practice of deciding cases argued by his son.

The commissariat store

In November, Burt shifted the Supreme Court from the Reveley building to the much larger commissariat store adjacent to the Reveley building on the banks of the river. Burt died in office two weeks later, on 21 November 1879. That is not the exit strategy which I propose to adopt. Notwithstanding the disputes between the court and the press, the newspapers universally extolled Burt's virtue in their obituaries.

Chief Justice Wrenfordsley

Following the death of Archibald Burt, George Leake acted as Chief Justice pending the appointment of Burt's replacement. Sir Henry Wrenfordsley had been serving as a judge in Mauritius, where he had lobbied for appointment as Chief Justice. His lobbying having been

[21] Major Logue.

unsuccessful, he was offered the post of Attorney General for Jamaica, and he was travelling to that posting, through London, when the vacancy in Western Australia came up. The position was offered to Wrenfordsley, who accepted immediately. He arrived in Western Australia in March 1880.

During his second day on the bench he passed his first death sentence for house breaking and attempted rape. Wrenfordsley heard the colony's first divorce case in 1880 even though the court had enjoyed jurisdiction in this field since 1863.

A few months after Wrenfordsley took office, a politically representative Legislative Council (which had been formed in 1870) passed the *Supreme Court Act* of 1880. That Act made provision for the appointment of one or more puisne judges and for the Chief Justice and such other judges to constitute a Full Court.

Wrenfordsley was initially popular but, within two years of his arrival in the colony, he had managed to fall out with some of the leading citizens, including the Colonial Secretary, Lord Gifford. Gifford had refused to allow Wrenfordsley to appoint his 17-year-old nephew as his Associate. Their dispute led to a falling out in the course of an evening at the Weld Club, where the Governor, Sir William Robinson was the guest of honour. The Colonial Office solved the personality clashes by despatching all concerned to other colonies. Sir William Robinson became Governor of South Australia, Lord Gifford became the Colonial Secretary of Gilbraltar, and Wrenfordsley was offered an appointment as Chief Justice of Fiji on an improved salary. One of Wrenfordsley's critics

wrote, "there will not be much grief over his departure unless it be among his creditors"[22].

Because Robinson left for South Australia before Wrenfordsley left for Fiji, Wrenfordsley acted as Governor prior to his departure. He revelled in the glory of the role, and travelled overland to Albany to meet the ship to take him to Fiji in a vice-regal cavalcade with a great deal of baggage, including items of china, crystal and cutlery from Government House which he took with him to Fiji.

Chief Justice Sir Alexander Onslow

Sir Alexander Onslow was despatched from England to fill the vacant position of Attorney General for Western Australia in 1880. Apparently he had a fine bass voice that made him welcome in musical circles. Following Wrenfordsley's departure for Fiji, Onslow was appointed Chief Justice about the same time as Edward Stone was appointed to the newly created position of puisne judge. Alfred Hensman was despatched from England to take up the position of Attorney General left vacant by Onslow's appointment as Chief Justice.

A Vice-Regal dispute

Things went well at first for Onslow. However, his relationship with Robinson's replacement as Governor, Sir Frederick Broome, soured after Onslow unwisely showed Hensman and the Surveyor-General, John Forrest, a letter from Broome in which comments critical of each of them were made[23]. Hensman and Onslow were thereafter allies in a war against the Governor, which resulted in Hensman's resignation, and the

[22] Bolton and Byrne, 73.
[23] Bolton and Byrne, 78.

appointment of Septimus Burt as Acting Attorney General. Relations between Broome and Onslow then deteriorated to such a point that, in September 1887, Broome forbade Onslow from exercising his office as Chief Justice, as a result of Onslow disclosing part of a confidential despatch from the Colonial Office in a letter to the editor of *The West Australian*, Winthrop Hackett. In response, a noisy mob burnt the Governor's effigy in Roe Street behind the railway station[24]. *The West Australian*, however, perhaps predictably, sided with the Governor.

The dispute between Broome and Onslow was referred to the Colonial Office which reprimanded Onslow for disclosing the despatch, but ordered him to resume his position as Chief Justice. After Onslow returned to the bench in May 1888, one of the first cases to come before him was a libel action brought by Hensman against Winthrop Hackett. Hackett complained that Onslow should not hear the case because of his friendship with Hensman. Onslow proceeded to hear the case and awarded Hensman £800 in damages. Hackett and the proprietor of *The West Australian*, Harper, petitioned the Governor on the basis of Onslow's bias. Broome conducted a formal inquiry but reached no conclusion and, instead, resolved to send all the papers connected with the petition to the Privy Council. The Colonial Office sought guidance from the Legislative Council which, in April 1989, passed a number of resolutions describing some of Onslow's conduct as hasty, and resolving that:

> "Peace and harmony cannot be hoped for so long as Mr Onslow continues to occupy his present position."

[24] Bolton and Byrne, 81.

At this time Onslow went on leave. Stone indicated that he did not wish to serve as Acting Chief Justice with the result that Wrenfordsley, who had by now returned to eastern Australia, was offered the acting position. As Onslow was out of the colony for almost two years, Wrenfordsley served a substantial term, over the period in which Western Australia moved to responsible government when John Forrest was sworn as Premier and Septimus Burt as Attorney General.

Onslow returns

Onslow eventually returned in 1891 and Wrenfordsley was appointed Chief Justice of the Leeward Islands, a post which he held for 10 years. This was, of course, the post which had been denied Sir Archibald Burt because of his birth in those islands.

Later in 1891, the Western Australian Parliament approved the appointment of a third judge of the court and Forrest offered the position to Hensman who accepted. As it happened, Onslow and Hensman later fell out, but not in a way which produced public scandal. Onslow retired as Chief Justice in 1901 and returned to England. Edward Stone became Chief Justice, and the vacant position created by Onslow's retirement was offered to Septimus Burt QC who refused it. It was then offered to the same S H Parker who had caused so much controversy and had twice been convicted of contempt of court during Sir Archibald Burt's time, but who had since mellowed, gained respectability and the presidency of the Weld Club and founded, with his brother, the leading firm of Parker & Parker. Parker went on to succeed Stone as Chief Justice, and served in that capacity between 1906 and 1913.

A magnificent building

By mid 1898, the judges were openly complaining about the quality of their accommodation in the old commissariat store. One was reported as describing the government's inactivity as "scandalous". There is a sense of *déjà vu* in all of this. In a partial response, during that year, the original Reveley court house was refurbished and recommissioned as a second court room. However, the government of those days showed a much readier willingness to provide a permanent and enduring solution to the court's accommodation problems than more contemporary governments and, by 1899, a committee was appointed to oversee plans for the new court house. Those plans were prepared by John Grainger, chief architect within the Department of Public Works and the father of acclaimed pianist, Percy Grainger. The architectural style was Italian renaissance and, because the building was to stand on an unobstructed site, particular care was taken with the elevations on all four sides. It is regrettable that the unsightly addition created by the construction of an annex in 1987 has obscured public view of the eastern side of the building and diminished the prominence of the Reveley building.

The specifications called for Donnybrook stone but it became apparent that the required volume of stone could not easily be found in a uniform colour. Accordingly, Grainger and his colleagues recommended that instead of Donnybrook stone, the project should utilise the latest building materials available at the time - namely, stucco and cement.

The Premier of the day established a Royal Commission to report on the suitability of the substitution of stucco and cement for Donnybrook stone. The Royal Commission was chaired by the Labor member for the Goldfields. The panel also comprised a rising young architect, Talbot

Hobbs. By a majority of two to one, the Royal Commission recommended in favour of stucco and cement. The building was completed and the foundation stone laid on 2 June 1902. A year later, on 8 June 1903, the Governor, Admiral Sir Frederick Bedford opened the new building. Given the scale of the building, completion within a year was a quite remarkable achievement. Electricity was installed in the building a year later, in 1904.

Like most new public buildings, the building had its share of critics, including members of the press, the legal profession and at least one of the judges. However, the building has served the court well in the period of more than 100 years over which it has been used. Successive governments are to be commended for having maintained the building in an appropriate state of repair, and for the preservation of its very substantial heritage values. It is one of the best preserved heritage courts in Australia. This building and its façade have become, for many Western Australians, an iconic symbol of the rule of law. It is obviously vital that the building remain a seat of justice in perpetuity and I am pleased to report that I have never heard any serious suggestion to the contrary.

The centenary of the court

The celebrations marking the centenary of the court in June 1961 are very fully described by Bolton and Byrne in their excellent work. The celebrations had been prompted by the President of the Law Society, Francis Burt QC, who lobbied the government of the day to ensure that appropriate celebrations took place. In that year, the actual anniversary, 18 June, fell on a Sunday, so the celebratory dinner was held on Friday, 16 June 1961 at the Adelphi Hotel. 205 guests attended, including five

Justices of the High Court although, curiously, only three of the six Justices of the Supreme Court of Western Australia attended. Charles Court represented the then Premier, David Brand, and proposed the toast to the judiciary supported by Sir Owen Dixon.

Chief Justice Sir Francis Burt

Time and space does not permit a detailed analysis of all the court's personnel over the last 150 years. I have referred to the first five Chief Justices because of their particular historical interest. In that vein, it is appropriate to refer also to the 11th Chief Justice, Sir Francis Burt, who was, of course, a direct descendant of the first, Sir Archibald Burt. After founding the independent Bar in Western Australia, Sir Francis was appointed to the court in 1969 and, as the most senior puisne judge, to the position of Chief Justice in 1977, a position which he held until his retirement in 1988. He was subsequently appointed Governor of the State. Sir Francis was an outstanding jurist. His judgments provide examples of economy and lucidity of expression which are without peer.

The expansion of the court

Similarly, a detailed analysis of the expansion of the court by progressively adding to the numbers on the bench is beyond the scope of this paper. To an extent, that expansion was diminished by the conferral of part of the jurisdiction of the court upon other courts - most notably the District Court of Western Australia, when that court was created in 1970, and the Family Court of Western Australia, which was created in 1976. Some of the court's former jurisdiction has been exercised by the Federal Court of Australia since its creation in 1976. Notwithstanding the transfer of some jurisdiction to those courts, the volume of business has required the regular expansion of the judiciary to the point where it is

now extremely difficult for us all to sit on the bench in this court at one time. Following the appointment of Justice Edelman next month, it may be necessary for some members of the court to sit on the laps of others during ceremonial sittings such as this.

Some recurrent themes

The history of the court over its 150 years reveals some recurrent themes that have a contemporary resonance. One is the litigious propensity of the residents of this State, who appear to have maintained that propensity fairly consistently since the foundation of the colony in 1829.

Another is the perceived level and significance of public disorder and criminal conduct. History suggests that there is a tendency for each generation to believe that disorder and crime are greater than at any previous time. The history of this court strongly suggests that crime is no more pervasive or significant at present than at any previous time in the court's existence.

There is a similar tendency, at least among the judiciary, to consider that the media is more intrusive and critical of contemporary judges than in the past. The passages from press reports of the 19th century which I have set out suggest that, if anything, today's media is less critical of the judiciary than was previously the case.

Another recurrent theme, at least up until 1903, was the difficulty the court had in obtaining adequate premises within which to conduct its business.

Finally, the evils of complexity, technicality and expense involved in the litigious process are not new, and have been the subject of lament since the earliest days of the colony.

Mistakes

Over the course of 150 years, any institution comprised of human beings will make mistakes and this court is no exception. It would be impolite to dwell excessively upon our mistakes on a celebratory occasion such as this. Prominent amongst them, however, is the decision of the Full Court in ***Re Haynes***[25]. In 1904, the Barristers' Board refused to permit Edith Haynes to sit an examination which she needed to pass in order to qualify for admission to practice. She brought proceedings against the Board which were referred to the Full Court. Essentially, the question before the court was whether the expression "every person" in the *Legal Practitioners' Act 1893* included women. It is difficult to see how an expression of greater amplitude could have been used by the legislature, especially given the provisions of the *Interpretation Act 1893*, which provided that the word "person" meant "man" and "woman". However, in a feat of extraordinary judicial contortion, the Full Court managed to conclude that the expression "every person" did not include women, on the spurious basis that if it had been the intention of the Parliament to provide that women could be admitted as legal practitioners, it would have said so expressly. It took almost 20 years for legislation promoted by Edith Cowan to overcome this appalling feat of statutory misconstruction.

More recently, criticism has been directed at the court as a result of a number of convictions that have later been found to be unsound and set

[25] (1904) 6 WALR 209

aside. A detailed analysis of each of those cases is beyond the scope of this paper but it is plain that in a number of those cases the cause of the problem was outside the control of the court. It is also important to remember that although a number of those cases have come to light in recent years, over a relatively short period, the convictions in question span a much lengthier period, of almost 50 years, and when viewed in that temporal context, are relatively few in number. But, of course, injustice in any case is a travesty which cannot be condoned, and the members of this court have worked, and continue to work, assiduously to minimise the risk of any such injustice. Notwithstanding those efforts, however, it would be fatuous to suggest that mistakes have not been made, and I do not do so.

Looking forward

It is appropriate, when celebrating an anniversary, to spend a little time looking backward and in this paper I have done so. However, it is also appropriate to use the lessons learned from an historical review to look forward, with a view to identifying the challenges of the future. There are a number of specific challenges for the future which I would now like to address.

The over-representation of Indigenous people in the criminal justice system

As I have noted, Aboriginal people have been consistently and grossly over-represented in the criminal justice system of Western Australia since the foundation of the colony in 1829. I have set out the contemporary statistics detailing that over-representation, and the steady deterioration of the position over recent years, in other papers so that it is unnecessary to repeat them here. Those depressing figures show that the head-on

collision between the law, culture and customs of the European "boat people" and the Aboriginal inhabitants has had enduring ramifications that persist today.

I do not mean to diminish the significance of the role of this court, and of the other criminal courts of Western Australia, by the observation that the causes and, therefore, the solutions to the problem of Aboriginal crime lie outside the court system. The causes lie in all those aspects of Aboriginal disadvantage which are so well known and well documented. They include poor standards of health including infant health and mental health, high levels of substance abuse, family dysfunction, poor school attendance rates, poor rates of participation in employment, low levels of income, inadequate housing, cultural alienation and dispossession from traditional lands. Unless and until these multifaceted aspects of disadvantage are cohesively and holistically addressed, it is inevitable that Aboriginal people will continue to be over-represented in our courts.

It is of great concern that each of these aspects of disadvantage persist despite no lack of good will, resolve or resources having been applied to their alleviation. All mainstream political parties agree that these aspects of disadvantage must be addressed and very substantial public resources have been applied to that end over significant periods. The apparent intractability of these problems suggests that we have not yet found the answers. Perhaps we need to spend more time listening to Aboriginal people and empowering them to take control of their own destiny to arrive at their own solutions. One thing is, however, clear, and that is that the apparent intractability of these problems cannot be allowed to cause any loss of hope or enthusiasm. On the contrary, we must reaffirm our resolve to do anything and everything which we can to improve the living

conditions and prospects of the descendants of those dispossessed by European settlement.

Access to justice

The evils of cost, technicality and complexity appear to have been a feature of litigation since the creation of the colony in 1829. The exhortation of Lord Goderich to administer the law of Western Australia with the utmost possible degree of simplicity and economy remains an unachieved ambition. Delay seems to be a more recent phenomenon, although it is probably the inevitable consequence of complexity and technicality. Of course, these problems combine to diminish the practical capacity of ordinary Western Australians to access their justice system.

This is not the occasion for the delivery of a detailed manifesto on the steps that might be taken to address these issues. Some of those steps are covered in other papers I have given on these topics. One significant step, however, would be the re-enactment of the legislation creating the superior courts of this State with a view to the elimination of unnecessary technicality and complexity and the provision of legislative support for the steps which we have taken, and which we would like to take in the future, to simplify procedures and expedite the resolution of proceedings. An obvious example is the quaint and impractical definition of the jurisdiction of this court by reference to the jurisdiction of certain English courts on 18 June 1861, to which I have already referred.

The previous government endorsed our proposal for a revision of the legislation constituting the court and for the enactment of legislation providing for the procedures to be adopted in all the civil courts of the State. However, that project had not come to fruition at the time of the

change in government. I understand that the Attorney General supports the continuation of that project and it is to be hoped that government endorsement will soon be obtained to enable the project to proceed.

Better utilisation of new technology will also greatly facilitate our endeavours to improve access to justice. Although our use of audio visual communications and electronic imaging for trials and appeals remains well advanced, we are well behind other comparable jurisdictions in relation to electronic filing and document management. Unfortunately, the resources have not been made available to enable the introduction of electronic filing systems that are now taken for granted in many other jurisdictions. The absence of those systems not only impedes access to our court but exacerbates the great inefficiencies arising from the current need to conduct court business on three separate sites around the city. Simplified procedures, forms and the use of plain language, coupled with web-based access to our registry and explanatory information relating to our forms and procedures would significantly enhance practical access to justice. These are important priorities for the future.

Electronic media

Another important aspect of access to justice lies in the provision of information to the community concerning cases that are tried by the court. Of course, our trials and hearings have generally been open to the public since the creation of the court but contemporary Western Australians rely more and more upon all forms of media, printed and electronic, to garner the information which they use to assess the performance of the institutions by which they are governed including the courts. In recent years, this court has actively encouraged and facilitated greater access by all forms of media to our proceedings and we will continue that quest.

One recent example of the steps we have taken is the television broadcast, last night, of a documentary drawn from the video recording of a homicide trial which we believe to have been the first homicide trial in Australia to have been filmed for public dissemination. We are also proposing that as our aging audio visual equipment is replaced, provision be made to enable web-streaming of court proceedings in the new equipment which is installed. This adds little extra cost, but will enable us to utilise web-based media for "virtual" appearances by witnesses and counsel, and perhaps in years to come, streaming of court proceedings to the public. This is not to say that we are presently committed to web-streaming as there are a number of difficulties with that, merely that we think it wise to obtain the capacity to move in that direction if we wish.

Another challenge which we will have to address arises from the impact which the new media is having upon communications from and to the courtroom, and between participants in the court process. Social networks like Facebook, mobile phones with video recording and Twitter capacity, websites like YouTube which enable everyone to publish images, blog sites and so on have all radically changed the ways in which members of our community gather information and communicate with each other. The issues which arise for courtroom management, especially in jury trials, will have to be addressed sooner rather than later.

Court premises

The problem of obtaining suitable premises for the conduct of the business of the court plagued the court during its first 40 years of operation and has resurfaced over the last 20 years of operation. The magnificent building in which we now sit was designed to house three

judges, whereas the court now has 22 judges, a master and nine registrars. At the turn of the last century, executive government realised that the provision of appropriate premises for the court, and which provided an appropriate symbol of the importance of law and order to our community, was a key priority of government. They were prepared to allocate a significant proportion of the financial resources of the State, which had been expanded by a boom derived from the exploitation of natural resources (at that time, gold) in order to meet that need. It is regrettable that over the last 20 years, successive governments experiencing the benefits of a similar boom, but of much greater proportions, have not seen the same priorities and have not found it possible to address the chronic inadequacy of our current accommodation arrangements.

However, at the risk of being branded a naïve optimist, I am hopeful that our accommodation needs will soon be addressed. With the active support of the Premier and the Treasurer and Attorney General, for which we are most grateful, active consideration is being given to the provision of accommodation in a building approximately 35 storeys in height which is to be developed as part of the arrangements for the refurbishment of the Old Treasury building and adjacent precincts. The site is between the Old Treasury building and the Town Hall, immediately adjacent to the spot upon which the felling of a tree is taken to have denoted the establishment of the City of Perth. Although not our preferred site, it is nevertheless appropriate and, subject to some considerations which I will shortly mention, could provide the court with the accommodation it needs to continue to serve the community effectively over the next period of its existence.

If that objective is to be met, there are some minimum requirements that must also be met. First, the building must be designed and constructed as a court building, and not just as another office tower. That portion of the building which is to be occupied by the court must be specifically designed with our needs and requirements in mind and in detailed consultation with the judiciary. Appropriate security arrangements will have to be made throughout the building, including at ground floor level, where all entrants will need to be vetted. Separate circulations will need to be provided to enable the judiciary to travel between relevant portions of the building without intersecting with litigants. Because the court will not initially need to occupy all of a building of this magnitude, there can be no objection to other occupants of the building, but they must be compatible with the fundamental use of the building as a court.

Second, the court must have security of tenure over the premises which it occupies. This court is very different to the many other public institutions for which government provides accommodation. Its continued existence and operation is protected by the Constitution of the Commonwealth and is part of our constitutional framework. The accommodation provided to the court must be provided on a long-term basis. Some guide to what I mean by long-term can be gleaned from the fact that we continue to sit in a building which was constructed over 100 years ago. Security of tenure must be provided for a period of equivalent magnitude if the court is to have a stable base for the conduct of its operations into the future.

Third, the expansion of the court over its first 150 years can be expected to continue into the future. The rate of development of our State, fuelled by a resources boom of unparalleled proportions, will inevitably lead to

equivalent growth in court business. It is therefore essential that plans be made for the future expansion of the premises available to the court within the building to which I have referred. The building is of sufficient magnitude to enable "future proofing" on a scale which will likely solve the court's accommodation problems for the indefinite future.

Some idea of the magnitude of the future proofing required can be gleaned from the history I have related. Taking into account the transfer of some of this court's jurisdiction to the District Court, the Family Court and the Federal Court, today more than 50 judges are required to discharge the work performed by six judges 50 years ago. The future growth of the court can be contained to some extent by increasing efficiencies through the better use of technology, simplification of process, greater use of alternative dispute resolution, more effective case management and further devolution of jurisdiction to other courts. However, despite these measures, the growth in our State will make expansion of the court inevitable and it would be most unwise to plan for growth at any rate less than a doubling of the court's requirements for accommodation between now and 2050.

Plans for the provision of premises for the court in the building to which I refer are still at an early stage of development. Decisions in respect of the allocation of the business of the court between this building and the new building are yet to be made, although it is known that it would not be possible to conduct any criminal work in the building proposed for construction adjacent to the Old Treasury Building. This inevitably means that the criminal work of the court will have to be conducted using the two good criminal courts in this building and the courts that have been made available to us in the District Court building. Obviously the

splitting of functions across sites is less than optimal, but the fundamentally different requirements of a building in which criminal work is conducted predicate this outcome.

As I have noted, no commitment has been made by government for the provision of premises to the court in this new building. The cynic in me notes that government has given similarly active consideration to other proposals to meet the future accommodation requirements of the court many times over the last 20 years, all to no avail. However, it would be churlish to do other than express our considerable gratitude to the Attorney General and Treasurer, and to the Premier, for their support for this possible project, which has the capacity satisfactorily to meet our accommodation needs if the minimum requirements to which I have referred are met.

Conclusion

For 150 years, this court has stood at the apex of the systems that have existed within the colony and later the State of Western Australia for the maintenance of law and order and the administration of justice. The judges of this court have done their best, and will continue to do their best to be faithful to their oath to administer the law for the benefit of all, without fear or favour, affection or ill will. This court has been, and will continue to be, a vital component of the rule of law, which is an essential aspect of our liberal democracy, and which distinguishes our system of government from the despotic and autocratic regimes which exist in too many of the countries of the world. The residents of this State can come to this court confident in the knowledge that they will be given a fair hearing and that the court will do its best to provide an outcome which best meets the justice of the case. The history of the court has not been

without its blemishes and it is certain that mistakes will be made in the future - such is the nature of our business. However, notwithstanding those occasional blemishes, the citizens of this State are entitled to take great pride in the consistent administration of justice by this court over the first 150 years of its existence and can look forward with confidence that this court will continue to protect their rights and interests for the indefinite future.