



Justice

Justices of the Peace

Framework review – consultation paper

August 2018
www.justice.nsw.gov.au

Justices of the Peace framework review

Justice Strategy and Policy
NSW Department of Justice
Email: www.lawlink.nsw.gov.au
Phone: 02 8346 1281
Fax: 02 8061 9370
Level 3, Henry Deane Building, 20 Lee St, SYDNEY 2000
GPO Box 31 SYDNEY 2001

Translating and interpreter service

If you need an interpreter ring 131 450 and ask the operator to ph: 02 8224 5330.
For alternative formats (audio tape, electronic or Braille versions) of this brochure, contact Justice Strategy and Policy on ph: 02 8346 1281 or Diversity Services
Email: diversityservices@agd.nsw.gov.au
Phone: 02 8688 7507
Fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

© State of New South Wales through the Department of Justice 2018. You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the Department of Justice as the owner.

Disclaimer: This document has been prepared by the Department of Justice for general information purposes. While every care has been taken in relation to its accuracy, no warranty is given or implied. Further, recipients should obtain their own independent advice before making any decisions that rely on this information.

ISBN: 978-1-922254-07-81

Table of Contents

| | |
|--|----|
| Options for Reform..... | 2 |
| 1. Overview | 3 |
| How to make a submission | 3 |
| 2. Context: the changing nature of JP functions in NSW | 5 |
| JPs' existing functions..... | 5 |
| Number of NSW JPs | 6 |
| 3. Options for Reform..... | 8 |
| Scope of JPs' Functions | 8 |
| Interstate documents..... | 8 |
| Foreign documents | 8 |
| Statutory declarations | 9 |
| Process of Nomination and Appointment | 10 |
| Employment and Community JPs | 10 |
| Adoption of 'JP (retired)' title | 11 |
| Establishment of community need..... | 12 |
| Assessment of JP knowledge and capacity..... | 12 |
| Involvement of Members of Parliament..... | 13 |

Options for Reform

Option 1

Should NSW JPs be permitted under NSW law to witness interstate and/or overseas documents, for example:

- where another Australian jurisdiction has empowered them to do so; or
- where foreign authorities will accept a form witnessed by a NSW JP?

Option 2

Should the *Oaths Act 1900* be amended to make additional people (for example, all persons authorised to witness Commonwealth statutory declarations under the Statutory Declarations Regulation 1993 (Cth)) authorised witnesses for the purpose of NSW statutory declarations?

Option 3

Should the distinction between employment-based and community-based JPs be abolished?

Option 4

Should the title of 'JP (retired)' be introduced, for elective use by any community-based JP who retires from office on or after their 65th birthday and has had at least 10 years' consecutive service at the date of retirement. People using the 'JP (retired)' title will not be able to exercise JP functions, but must continue to uphold the integrity and reputation of the JP office, with failure to do so leading to removal of that title.

Option 5

Should applicants for appointment as JPs be required to establish why their appointment is required to satisfy a need that is unmet by the number of JPs already appointed in the applicant's postcode?

Option 6

Should applicants be required to establish a minimum level of knowledge of their obligations as a JP before appointment or reappointment? What approach would you support for ensuring JPs have adequate knowledge to perform their functions?

Option 7

Should the *Justices of the Peace Act 2002* be amended to remove the requirement that applicants for appointment must be nominated by their local MPs, and a requirement inserted for applications to be made straight to the Department of Justice for assessment?

1. Overview

- 1.1 Justices of the Peace (**JPs**) have a long history in the New South Wales (**NSW**) legal system. JPs have provided services to their communities, clients and places of employment for over two hundred years, particularly by way of witnessing and certifying documents for people to use for official or legal purposes. However changing community needs, increased reliance on digital communications and reduced use of statutory declarations, have all affected how and the extent to which the NSW community relies on JPs.
- 1.2 NSW has approximately 94,000 JPs, whose appointment, reappointment, functions and removal are regulated under the NSW JP framework. That framework comprises a number of laws and policies, including:
- The *Justices of the Peace Act 2002* (**JP Act**);
 - The Justices of the Peace Regulation 2014 (**JP Regulation**);
 - Code of Conduct for Justices of the Peace (**Code of Conduct**);
 - Guidelines on the Appointment of Justices of the Peace: Assessing Eligibility and Good Character (**Eligibility Guidelines**); and Guidelines on the Appointment of Justices of the Peace: Handling Complaints and Reviewing Appointments (**Complaints Guidelines**);
 - Justices of the Peace Handbook (**JP Handbook**); and
 - Public Register of Justices of the Peace (**JP Register**), which lists the names of all JPs, and the contact details of JPs appointed to serve the community ('community-based JPs').
- 1.3 The NSW JP framework was last reviewed in 2007. The Department of Justice (**the Department**) is undertaking the current review on behalf of the Attorney General, as the Minister responsible for the JP Act, to consider how the framework might be reformed to ensure that it continues to meet changing community needs, and that its operation and administration are efficient and sustainable.
- 1.4 This paper presents a number of options that might improve the sustainability and efficacy of the JP system in NSW. These options relate particularly to the functions of JPs and the process of nomination and appointment. We welcome submissions from interested stakeholders.

How to make a submission

- 1.5 If you wish to comment on the draft proposals presented in this paper, you can make a written submission by email or post to:

Justices of the Peace Review – Submissions

Justice Strategy and Policy

Department of Justice

GPO Box 31

Sydney NSW 2001

Email: policy@justice.nsw.gov.au

- 1.6 Please make any submissions no later than close of business on **17 September 2018**.
- 1.7 Please note that we may publish submissions unless the author requests that their submission be treated as confidential.

2. Context: the changing nature of JP functions in NSW

- 2.1 The role and functions of JPs in Australia have changed substantially over time. Australia's first JPs exercised a range of administrative and quasi-judicial functions in their communities, such as making arrests, taking bail, issuing good behaviour bonds, adjudicating minor civil matters and petty crimes and committing more serious matters for trial.¹ However, as the Australian judicial and policing systems have developed and grown, there has been a corresponding narrowing of JPs' functions and a reduction in the number of JPs needed in the community.
- 2.2 In recent years, the shift towards electronic execution of documents across government has also had an impact on JPs' functions. This trend towards digitisation and simplification calls for consideration of JP's role in witnessing and executing documents.
- 2.3 The NSW Government is on track to achieve its objective of 70 per cent of government transactions to be online by the end of 2019. This has already necessitated development of innovative ways to attest to and verify information online, and has resulted in a number of transactions that used to require statutory declarations now being executed electronically. A range of other legislative instruments that require the use of statutory declarations have also been identified for amendment. We expect that use of statutory declarations will further decrease in coming years, as more transactions are conducted online.

JPs' existing functions

- 2.4 NSW JPs' functions and authority are principally conferred under the *Oaths Act 1900*, which authorises them to:
- witness NSW statutory declarations (written statements provided to attest to certain facts or circumstances);
 - witness affidavits (written statements confirmed by oath or affirmation for use as evidence in legal proceedings);
 - identify persons making statutory declarations and affidavits; and
 - certify copies of original documents as true and accurate.
- 2.5 Some additional functions are conferred under other legislative instruments, for example, authority to witness declarations made by officials appointed under the *Parliamentary Electorates and Elections Act 1912*,² and administering oaths under the *Probate and Administration Act 1898*,³ as well as, in limited circumstances, under the legislation of other jurisdictions.

1 State Archives and Records NSW, 'Justices of the Peace Guide', <https://www.records.nsw.gov.au/archives/collections-and-research/guides-and-indexes/justices-the-peace-guide>; accessed 31 January 2018.

2 *Parliamentary Electorates and Elections Act 1912*, s. 21AO.

3 *Probate and Administration Act 1898* (NSW), s. 151.

- 2.6 A range of other officials and professionals are also authorised to exercise many of the functions JPs are authorised to exercise in NSW. For example, Registrars, commissioners of the court, Australian legal practitioners and notaries public are all authorised to witness statutory declarations, affidavits⁴ and declarations under the *Parliamentary Electorates and Elections Act 1912*; administer oaths;⁵ and certify copies of documents.⁶ Similarly, accountants, police officers, patent attorneys, school principals and medical professionals can all certify copies of documents. Teachers are also authorised to witness declarations under the *Parliamentary Electorates and Elections Act 1912*.
- 2.7 In practice, this means that most members of the NSW community have ready access to a range of professionals or officials to witness declarations and affidavits, and to certify copies of official documents.

Number of NSW JPs

- 2.8 NSW has approximately 94,000 JPs (48,000 employment-based JPs and 46,000 community-based JPs) appointed under the JP Act. Despite a reduced reliance on statutory declarations, and the range of other officials and professionals who can also carry out the functions conferred on JPs, there are more JPs in NSW than any other time in history.
- 2.9 NSW has approximately one JP to every 80 residents. NSW has significantly higher numbers of JPs and JPs per resident than any other Australian jurisdiction:

| Jurisdiction | Approximate number of JPs ⁷ | Approximate number of residents per JP |
|--------------------|--|--|
| ACT | 900 | 1:454 |
| NSW | 94,000 | 1:80 |
| Northern Territory | 300 | 1:706 |
| Queensland | 40,000 | 1:117 |
| South Australia | 3,000 | 1:559 |
| Tasmania | 500 | 1:1,030 |
| Victoria | 7,000 | 1:827 |
| Western Australia | 4,000 | 1:863 |

- 2.10 Administering the NSW JP scheme – including processing 20,000 appointment and reappointment applications each year, investigating and responding to complaints

4. *Oaths Act 1900* (NSW), s. 21.

5. *Parliamentary Electorates and Elections Act 1912* (NSW), s. 21AO.

6. *Oaths Act 1900* (NSW), s. 21.

7. Note: appointees exercising the same functions as NSW JPs are called 'Commissioners of Declaration' in the Northern Territory and Queensland.

and advising the Attorney General on potential removals – involves considerable time and resources. It is important that public resources be spent in a way that delivers the greatest value to the community and drives improvements in service delivery. Given the high ratio of JPs to residents, it is possible that there are a significant number of JPs who are rarely called upon to exercise functions for the community.

- 2.11 With the diminishing need for such a large pool of JPs in NSW, it is timely to explore options for ensuring the NSW JP framework remains sustainable, fit for purpose, and continues to provide value for money services commensurate to the NSW community's needs.

3. Options for Reform

Scope of JPs' Functions

- 3.1 It has been suggested by JP Associations and other stakeholders that JPs should be authorised to witness interstate and foreign documents, including:
- legal documents of other Australian jurisdictions, such as the execution of mortgage documents; and
 - overseas foreign documents, including 'proof of life' documents required to apply for or receive foreign pensions.
- 3.2 It is also timely to consider whether the process for witnessing statutory declarations should be adjusted by expanding the list of authorised witnesses.

Interstate documents

- 3.3 NSW JPs' authority is generally conferred under NSW legislation. NSW can only legislate to empower NSW JPs to exercise functions relating to other Australian jurisdictions where the relevant other jurisdiction's laws also recognise NSW JPs.
- 3.4 Concerns continue to be raised with the Department by both NSW and interstate stakeholders around the execution of interstate documents (such as mortgage documents). Some confusion arises because NSW legislation empowers NSW JPs to take, receive or witness a statutory declaration for use in another state,⁸ whereas there is no power conferred under NSW law for NSW JPs to witness the execution of documents for use in another state.
- 3.5 However, some interstate authorities have made it known that they consider that NSW JPs are able to witness such documents and have issued guidance material to this effect. This inconsistency has led to uncertainty among many NSW JPs and other stakeholders about whether they are able to witness the execution of interstate documents.
- 3.6 An option to support a more consistent regime in NSW is to amend the *Oaths Act 1900* to enable NSW JPs to witness the execution of interstate documents. This would only apply where the law of another state empowers them to do so and would therefore require NSW JPs to be aware of the relevant laws of other states.

Foreign documents

- 3.7 Under the *Public Notaries Act 1997*, public notaries can witness foreign documents for use in another country to assert or confirm rights or obligations in that country. Public notaries are appointed by the NSW Supreme Court following application to the Legal Profession Admission Board, and must:
- be solicitors or barristers of at least five years' standing;

⁸ *Oaths Act 1900*, s 26A.

- have completed the Notarial Practice Course (including study of implications of witnessing, certifying and authorising foreign legal documents);
 - have professional indemnity insurance to protect clients' interests; and
 - pay an application fee of \$480.⁹
- 3.8 The Commonwealth Department of Human Services can also assist people living in Australia to make claims for foreign pensions, including by:
- sending out appropriate claim forms;
 - advising applicants on how the claim process works in the relevant country;
 - advising applicants about which documents they will need; and
 - helping applicants to complete their claims as quickly and easily as possible.¹⁰
- 3.9 We recognise that there may be confusion or frustration that JPs cannot witness foreign documents, particularly given foreign authorities may in some cases advise applicants that they are willing to accept forms witnessed by a NSW JP.
- 3.10 We note that it is likely to be impossible to identify exhaustively the range of foreign documents that JPs may be called upon to witness. As a result, it may create risks if JPs are authorised to witness such documents, particularly given JPs do not have the specialist skills and knowledge of those currently authorised under NSW law. Additionally, JPs are not required to have professional indemnity insurance as public notaries and lawyers are, which may increase their level of personal risk.

Option 1

Should NSW JPs be permitted under NSW law to witness interstate and/or overseas documents, for example:

- where another Australian jurisdiction has empowered them to do so; or
- where foreign authorities will accept a form witnessed by a NSW JP?

Statutory declarations

- 3.11 As traditional, paper-based processes have been replaced with more convenient forms of communication and attestation, a range of legislative instruments have been modernised to either remove the requirement that people make statutory declarations, or adopt alternative ways of making declarations.¹¹ To assist in cases where statutory declarations continue to be required, the Commonwealth and most

9. *Public Notaries Act 1997* (NSW), section 4; Public Notaries Appointment Rules 1998, rr 2, 4, Second Schedule (Fees); Legal Profession Admission Board of New South Wales, (2016), *Guide for Applicants for appointment as a Public Notary in NSW*, pp 2-3.

10. Department of Human Services, 'International Services', <https://www.humanservices.gov.au/individuals/services/centrelink/international-services>; accessed 6 April 2018.

11 See, for example: *Fines Act 1996* (NSW), section 38; *Building Professionals Act 2005* (NSW), section 36; *Conveyancers Licencing Act 2003* (NSW), section 77; *Payroll Tax Act 2007* (NSW), section 54.

other Australian states and territories have made the process of getting declarations witnessed simpler by adopting much more expansive lists of authorised witnesses. This is likely to account, at least in part, for the lower numbers of JPs appointed in these jurisdictions.

3.12 By way of example, the Commonwealth, the Australian Capital Territory (**ACT**), Tasmania, Victoria and Western Australia list over 30 different professionals and public officials as authorised witnesses, including:

- their own (and, in some cases, other jurisdictions') JPs;
- police officers;
- medical and health practitioners (including chiropractors, dentists, doctors, nurses, optometrists, pharmacists, and veterinarians);
- teachers;
- Australian legal practitioners;
- various public servants; and
- accountants and other persons working in the financial sector.¹²

3.13 Unlike JPs, as well as being bound by laws relating to the false witnessing of documents, these authorised witnesses are also bound by various professional obligations, attendant ethical duties and codes of conduct, which can carry serious sanctions if breached. Further, these witnesses are subject to regulation by dedicated industry bodies or regulators, and their appointment and administration generally does not require expenditure of public resources.

Option 2

Should the *Oaths Act 1900* be amended to make additional people (for example, all persons authorised to witness Commonwealth statutory declarations under the Statutory Declarations Regulation 1993 (Cth)) authorised witnesses for the purpose of NSW statutory declarations?

Process of Nomination and Appointment

Employment and Community JPs

3.14 NSW is the only jurisdiction that draws a distinction between community and employment-based JPs. Unlike community-based JPs, employment-based JPs generally exercise their functions in the context of their professional engagement only, for their own, their employers' and/or their clients' benefit. They often receive a practical, financial or professional advantage from their appointment. Further, employment-based JPs are not required to list their location and contact details on the JP Register, making them largely inaccessible to the wider NSW community.

12. See: *Statutory Declarations Regulation 1993* (Cth).

- 3.15 We note that many employment-based JPs work in industries where there are often other professionals or office holders present who can perform the same functions. (For example, it is common for paralegals to be employment-based JPs, despite working with legal practitioners who have the same authorities as JPs.)
- 3.16 For many members of the public, JPs are associated with community service. Individual JPs are often recognised for their contribution and commitment to the community (for example in local media coverage). Providing JP services in the context of employment duties does not align well with this aspect of the role of JPs in the community given that in most cases they do not provide ongoing services to the community. As a result, JPs in this category are effectively appointed to a public office but provide only private benefit to their employer and clients.
- 3.17 It may be appropriate to consider whether the distinction between employment and community-based JPs could be removed. If some of the other proposals in this paper were adopted, there would be a greater pool of authorised witnesses to certify documents and witness statutory declarations, which would minimise the need for employment-based JPs. Additionally, there would be nothing preventing a person applying to be a JP, being placed on the register and also providing JP services as part of his/her employment.

Option 3

Should the distinction between employment-based and community-based JPs be abolished?

Adoption of 'JP (retired)' title

- 3.18 The JP title holds personal significance for many current and former JPs, and continues to carry weight in the NSW community. However, a number of the options proposed in this review, if adopted, may make it more difficult for some appointed JPs to remain eligible, or discourage them from reapplying. We are also aware of instances where JPs seek to retain the title beyond the time when they are capable of providing JP services. This reflects both the significance of the title to individuals as well as to the community.
- 3.19 To recognise their service, we propose that a new title of 'JP (retired)' be considered for community-based JPs, mirroring similar reforms in South Australia, Victoria and New Zealand.
- 3.20 Individuals using the 'JP (retired)' title would not be authorised to exercise JP functions (and may face penalties for acting without authority). We would also propose that, to maintain the integrity and reputation of the JP office, people using the 'JP (retired)' title should be required to continue to meet the good character criteria required of all JPs, and comply with the Code of Conduct, with failure to do so resulting in removal of the title.
- 3.21 Those who adopt the JP (retired) title would not be required to reapply for the title once it was conferred. Given that they would no longer be providing JP services, they would also not appear on the register. Rather the title would ensure that there is ongoing recognition for the contribution that JPs have made to the community in voluntarily providing JP services.

Option 4

Should the title of 'JP (retired)' be introduced, for elective use by any community-based JP who retires from office on or after their 65th birthday and has had at least 10 years' consecutive service at the date of retirement. People using the 'JP (retired)' title will not be able to exercise JP functions, but must continue to uphold the integrity and reputation of the JP office, with proven failure to do so leading to removal of that title.

Establishment of community need

- 3.22 For either category of JP in NSW, there is little guidance on how an applicant is to establish that his or her appointment is required for employment purposes or fulfils a particular community need. Over time this has led to the appointment of a significant surplus of JPs. Most other Australian jurisdictions have much stricter processes to establish the 'need' for an individual applicant's appointment as a JP.
- 3.23 In particular, the Northern Territory, Tasmania and Western Australia require clear evidence of need with reference to the number of JPs already appointed in the applicant's local area.¹³
- 3.24 Although NSW's population and size warrants a greater number of JPs, there is no demonstrable need for over 20 times as many JPs as Victoria, the next most populous state. Further, complaints received by the Department over several years have suggested that some NSW JPs are not readily available or easily accessible to community members who require their services.
- 3.25 Irrespective of whether the two categories of JP are retained or merged into a single generalist JP category, we suggest applicants be required to demonstrate an established, local need for appointment (for example, the applicant speaks a particular language, or regularly volunteers at a particular location where there is not a regular JP).

Option 5

Should applicants for appointment as JPs be required to establish why their appointment is required to satisfy a need that is unmet by the number of JPs already appointed in the applicant's postcode?

Assessment of JP knowledge and capacity

- 3.26 Several Australian jurisdictions – including Queensland, Tasmania, Victoria and Western Australia, as well as New Zealand – require applicant JPs to either pass a knowledge test or undertake mandatory training prior to appointment. This provides

13 See, eg. Northern Territory Department of the Attorney-General and Justice, (2017), *Northern Territory Justice of the Peace Handbook*, https://nt.gov.au/__data/assets/pdf_file/0003/167934/justice-of-the-peace-handbook.pdf; accessed 7 February 2018; Tasmania Department of Justice, 'Justice of the Peace appointments', http://www.justice.tas.gov.au/justices_of_the_peace/how_to_become_a_jp; accessed 7 February 2018; Western Australia Department of Justice, 'Becoming and Justice of the Peace', http://www.courts.dotag.wa.gov.au/B/become_a_jp.aspx?uid=1803-8087-2368-1969; accessed 7 February 2018.

assurance that all appointed JPs have the minimum level of knowledge required to perform their functions, and offers a degree of certainty and confidence to the community.

- 3.27 Currently the Department provides JPs with the JP Handbook to assist them in understanding and guide them in the performance of their functions, as well as ad hoc guidance on the exercise of their functions as necessary. For example, the Department recently published a fact sheet on the witnessing of overseas and interstate documents in response to the questions it was receiving on this issue.
- 3.28 However, stakeholder feedback to the Department has indicated that there is a level of concern about the knowledge base and expertise of some JPs in NSW. Additionally, anecdotal evidence and complaints made to the Department over the past 10 years suggest that not all JPs operating in NSW are fully aware of the scope of their roles and responsibilities. This may create risk for people whose documents they witness and certify, as well as for the JPs themselves, who may face removal or other penalties for failing to comply with their obligations.

Option 6

Should applicants be required to establish a minimum level of knowledge of their obligations as a JP before appointment or reappointment? What approach would you support for ensuring JPs have adequate knowledge to perform their functions?

Involvement of Members of Parliament

- 3.30 Historically, most Australian jurisdictions required that JP applicants be nominated for appointment by their local MPs. This was designed to ensure that an independent third party had a degree of responsibility for vetting nominees and confirming that their appointment was required to meet an existing need in the particular local area (for example an electorate, town or suburb).
- 3.31 Most Australian jurisdictions (the ACT, Northern Territory, South Australia, Tasmania and Victoria) no longer require applicants to be nominated by their local MP. Outside NSW, only Western Australia has retained this step - MPs are still obliged to 'establish' that a nominee is of good standing in the community, and that his or her appointment is needed in the local neighbourhood.¹⁴
- 3.32 In NSW, the MP nomination process has largely become a procedural hurdle only. MPs are not required to:
- know or have met an applicant;
 - confirm the accuracy of any information within the application;
 - confirm that an applicant meets the eligibility criteria; or

14. Note, also, that New Zealand has still requires MPs to determine applicants' suitability and the necessity of each appointment in the local area, as well as to consider the needs of different ethnic groups within the relevant electorate: NZ Department of Justice, 'Lawyers and service providers', <https://www.justice.govt.nz/about/lawyers-and-service-providers/service-providers/justice-of-the-peace/>; accessed 6 February 2018. Royal Federation of NZ Justices' Associations, 'What it means to be a JP', <http://justiceofthepeace.org.nz/About+JPs/What+it+means+to+be+a+JP.html>; accessed 6 February 2018.

- determine whether a particular appointment is required for employment related reasons, or to meet a community need.
- 3.33 In addition, the JP Act and the JP Regulation provide no guidance on how, or how quickly, an MP is to decide whether to nominate an applicant. They also do not require MPs to notify applicants of whether they have elected or refused to make a nomination. This has potential to lead to:
- arbitrary decisions;
 - disproportionate numbers of appointments across electorates, as well as potential over or undersupply of JPs in certain electorates;
 - suitable applicants being refused nomination; and
 - applicants being nominated, but subsequently being refused appointment because they do not meet the eligibility criteria.
- 3.34 To streamline the appointments process, an amendment could be made to the JP Act to remove the requirement for MP nomination, and instead require all applications to be made directly to the Department.

Option 7

Should the *Justices of the Peace Act 2002* be amended to remove the requirement that applicants for appointment must be nominated by their local MPs, and a requirement inserted for applications to be made straight to the Department of Justice for assessment?