
WESTERN AUSTRALIAN FORUM

The Judges of Western Australia



KATE OFFER[†]

This is the first of a series of pen portraits of the judges of Western Australia. In this issue Kate Offer provides profiles of Chief Justice David Malcolm and two senior judges of the Supreme Court, Geoffrey Kennedy and Bill Pidgeon.

CHIEF JUSTICE MALCOLM

The Honourable Chief Justice David Kingsley Malcolm AC was born in Bunbury, Western Australia on 6 May 1938. Both his parents were born in Western Australia. His father worked for Elder Smith & Co as a livestock salesman, and was manager of the South-West district for a number of years before becoming manager of the Land Department in Perth. His mother, whose maiden name was Cowan, ran a ballet school and then established a kindergarten. She was a foundation member of the kindergarten union in Western Australia.

There is a strong legal tradition in the Cowan family. His Honour's great-grandfather, Walkinshaw Cowan, who came to Western Australia in 1839, was a Scottish lawyer. He arrived in Western Australia to take up the position of Official Secretary to Governor Hutt, the second Governor of the State. He was, until 1848, Clerk of the Executive Council and the Legislative Council, thereafter becoming the resident magistrate at York. Two of Walkinshaw Cowan's three sons, William and James, were lawyers. James became a Master of the Supreme Court in the latter part

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of the 19th century and, in the first decade of the 20th century, served as the Chief Stipendiary Magistrate of the State. James was married to Edith Cowan. Chief Justice Malcolm's grandfather, Lewis Cowan, was the third and youngest son of Walkinshaw Cowan and was Collector of Customs in Western Australia at the time of Federation.

The Chief Justice was educated at Guildford Grammar School and the University of Western Australia. He graduated from the University with a Bachelor of Laws degree (First Class) in 1959. After being awarded the Rhodes Scholarship in 1960, his Honour went to Oxford where he entered Wadham College. He obtained a Bachelor of Civil Law (First Class) after two years of study, coming second overall in his year.

The Chief Justice undertook his articles over an extended period between December 1959 and April 1964. For the eight months before he went to Oxford, he articulated at Stone James & Co with Robert Blankensee, and resumed articles with him after returning in the latter part of 1962. He was offered partnership with the firm but

only on condition that he sign a deed agreeing not to go to the Independent Bar. Instead he accepted an offer of partnership at what was then Muir Williams Nicholson. In 1964, on the day of his admission, he became a partner and was soon in charge of the litigation department, succeeding Ian Viner QC who had left for the Bar.

In the early part of 1967, the Chief Justice was asked to join the legal team being set up for the Asian Development Bank in Manila, which had been established in late 1966. His appointment as counsel in the office of General-Counsel from July 1967 meant taking leave of absence from his firm which he anticipated would be for a maximum of two years. In 1968, however, he was appointed Deputy General-Counsel and remained in that position until the end of 1970. The position gave him the opportunity for extensive travel and work in many countries and is something which he regards as a tremendous experience.

At the end of 1970 his Honour returned to Perth. He felt that although a career in the international arena was attractive, Perth was his home and he decided that it was here where he wanted to make his career. He felt also that he had a moral commitment to his partners to return and wanted to fulfil that obligation, as well as to realise his long-standing ambition to become an advocate. Upon his return to Muir Williams Nicholson, he continued to develop the litigation side of the practice until the latter part of the 1970s. At that time, the firm merged with Freehill Hollingdale & Page and once that merger had been successfully completed, the Chief Justice joined the Independent Bar in December 1979. Although he had enjoyed practising in the partnership, he found the independence of the Bar, and being able to devote all his energy to court work, a new challenge. He regards his time at the Bar as a very enjoyable period, particularly because of the opportunities it afforded him to appear before the Privy Council.

He took silk in July 1980. He was President of the Bar Association from 1982 until 1984 as well as Vice-President of the Australian Bar Association in 1984. He regards a number of particularly hard-fought cases from his time as a barrister as among the highlights of his career.

The Chief Justice deliberately avoided specialisation in any particular area; however he was well-known for his media work. He also practised in the areas of income tax, mining, shipping, equity, intellectual property and corporations law. He also did some criminal work. He was admitted in New South Wales in 1979, taking silk there in 1983, and he worked extensively in that State as well as in the Australian Capital Territory, where he was admitted in 1986.

His Honour was appointed Chief Justice of Western Australia two years later. He was 50 years old at the time. Prior to his appointment he had been the inaugural Chairman of the Town Planning Appeal Tribunal from 1979 until 1986 and a member of the Copyright Tribunal from 1978 until 1986.

A sense of duty attracted His Honour to life on the bench. He enjoys the

camaraderie and friendship of his judicial colleagues as well as listening to a good argument in court. He would like to be freer to write judgments, sit on cases and be able to concentrate more fully on performing the core work of being a judge. However, he concedes that these days judges have to play a major role in the administration of the courts of which they are members.

The judge he most admires is the former Chief Justice, Sir Francis Burt AC KCMG. As a 17 year old summer clerk, the young David Malcolm accompanied Sir Francis to court on a number of occasions and was made to feel that his input was appreciated and valued. In later years, he had a number of opportunities to appear as Sir Francis's junior and then later still as counsel in cases over which the former Chief Justice presided. The traits that he particularly admires in Sir Francis are his powerful intellect and clarity of expression, as well as his kindness and generosity. In addition to Sir Francis, Chief Justice Malcolm is also a great admirer of former Chief Justice Owen Dixon and Sir Ninian Stephen.

His Honour has maintained his interest and involvement in Guildford Grammar School over the years, serving on the School Council since 1971 and as Chairman from 1980 until 1983. He was also President of the School Foundation from 1986 until 1993 as well as being involved in both the Anglican Schools Trust and the Anglican Schools Commission over the years. From 1974 until 1982 he was a member of the Western Australian Law Reform Commission and was Chairman for a considerable part of that period. During his time as Chairman, the Commission received wide-ranging references. He describes those years as a very productive period in the history of the Commission and an exciting time to be involved. His Honour has served as Lieutenant-Governor of Western Australia since 1990 and in 1992 was made a Companion of the Order of Australia for his service to law and the community.

The Chief Justice has an extensive list of extra-judicial interests. He has been a member of Council of the Law Society of Western Australia and was Vice-President from 1986 until 1988. He was a member of the Senate of the University of Western Australia from 1988 until 1994 and Chairman of the Advisory Board of the Australian Neuromuscular Research Institute from 1989 until 1995. He has been Chairman of the Advisory Board of the Crime Research Centre at the University of Western Australia since 1990, Chairman of the Western Australian Branch of the Australian Section of the International Commission of Jurists since 1994, a member of the Council of the Society for the Reform of Criminal Law since 1994 and Chairman of the Judicial Section of the Law Association for Asia and the Pacific (LAWASIA) since 1995 and Acting Chairman from 1993 until 1995. In addition, he has been patron and vice-patron of numerous charitable and sporting organisations. In his free time, his Honour enjoys the arts, particularly the ballet, and is a keen windsurfer. He is also a member of the Weld Club.

JUSTICE KENNEDY

The Honourable Justice Geoffrey Alexander Kennedy AO was born on 6 September 1931 in Cottesloe, Western Australia, the son of a Western Australian-born mother and a Victorian-born father. His father was the manager of a shipping and merchandising company and his mother was a secretary in an insurance company until her marriage.

No other member of the judge's family, with the exception of a remote relative who was a solicitor in Ballarat, was involved in the legal profession. His Honour decided as a 12 year old that he wanted to practise law but has no present recollection of his reasons.

After completing his secondary education at Scotch College in Claremont, Justice Kennedy went on to study at the University of Western Australia. He completed his studies in 1953, obtaining a Bachelor of Laws degree (First Class). He also completed a Bachelor of Arts part-time, majoring in economics, with a particular interest in history, and won a Full Blue for hockey.

The judge commenced articles at what was then Robinson Cox & Co in 1954, before leaving to pursue further studies in the following year. As the 1955 Rhodes Scholar for Western Australia, he spent two years at Wadham College in Oxford completing a Bachelor of Civil Law (First Class).

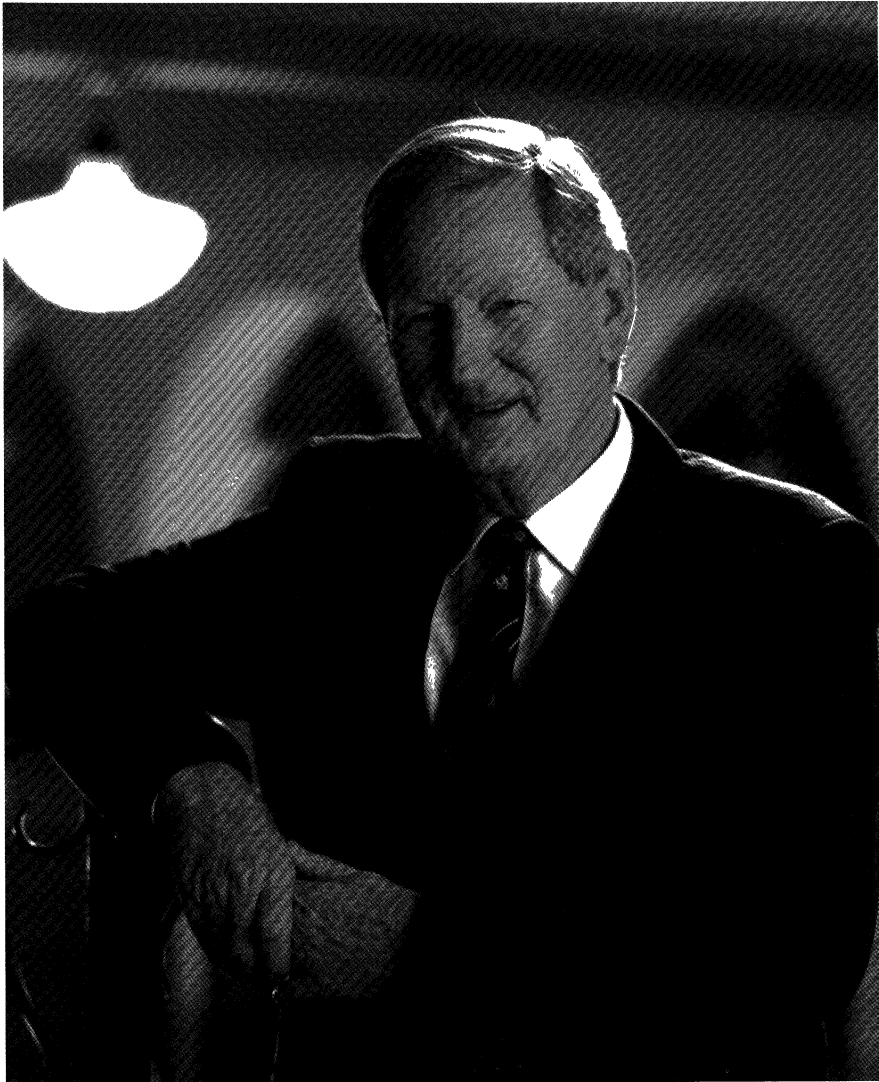
Upon his return from England, he completed articles and was admitted as a barrister and solicitor in December 1957. He became a partner of Robinson Cox & Co in July of the following year and remained in practice with that firm until December 1975. He practised in the commercial litigation section, with a particular emphasis on local government work, taxation and equity.

The judge joined the Independent Bar on 1 January 1976 and became a Queen's Counsel in the following year. Whilst practising as a barrister, he continued to specialise in commercial work, with equity and taxation his major areas of practice.

Justice Kennedy left the Bar in December 1980 and enjoyed a brief stay in England before moving to the Supreme Court in February 1981. He was 49 years old at the time. Prior to that appointment, he had on occasion sat on the Town Planning Appeal Tribunal and undertaken a number of arbitrations. He had a total of 23 years in practice before becoming a judge.

Justice Kennedy served as Chairman of the Royal Commission into the Commercial Activities of Government (the 'WA Inc' Royal Commission) in December 1990, returning to the Supreme Court at the beginning of 1993.

He finds it difficult to say what has been the principal highlight of his career but would probably nominate when he took silk, since he found his time at the Bar to be particularly enjoyable. He also considers his appointment to the Supreme Court a highlight. Rather than being attracted to the life of a judge as such, he



shared the then commonly held view that if a barrister accepted silk, there was a corresponding duty to accept judicial appointment if called upon to do so. He is not sure that this particular convention remains! The judge also felt that, after having been in practice for a considerable period, it was desirable to have a change.

Justice Kennedy enjoys adjudicating cases which are challenging and well-presented. He admits that life on the bench is demanding and unremitting as there is no limit to the amount of work that can go into judgments.

The judge enjoyed his role as a Royal Commissioner, in particular working as part of a strong legal team. He felt the position made an interesting change from his regular duties. In retrospect, however, he feels that there was insufficient opportunity due to constraints to consult publicly and to develop recommendations for reform.

Justice Kennedy is the Chancellor of the University of Western Australia, a position he has held since 1990 and one which absorbs much of his remaining time. He was Pro-Chancellor from 1981 until 1990. He was a member of the Judicial System Advisory Committee of the Constitutional Commission from 1986 to 1988 and Chairman of Trustees of the Western Australian Museum from 1984 to 1991. He was the Chairman of the Legislature Review and Advisors Committee from 1978 to 1981. He served on the board of Princess Margaret Hospital from 1970 to 1988, was Chairman of Scotch College from 1974 to 1983 and Chairman of the National Council of Independent Schools from 1979 to 1981. His Honour was made an Officer of the Order of Australia in 1994 for services to education and the law.

JUSTICE PIDGEON

Justice William Page Pidgeon was born on 20 February 1931 in Midland Junction, Western Australia. Both parents were Western Australian-born. His father was a civil engineer employed by the Midland Railway Company and his mother was a housewife who had formerly been a champion horserider and show jumper. Although neither parent was involved in the legal profession, his father's eldest brother was a solicitor in Bendigo, Victoria.

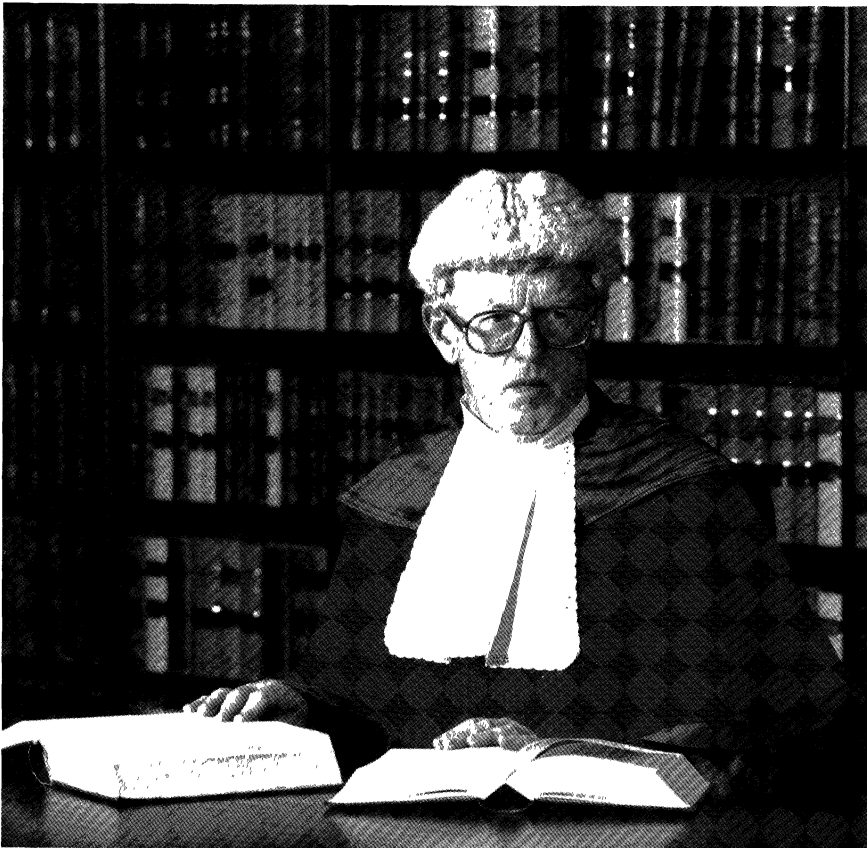
Justice Pidgeon's primary school education was at Woodbridge House in Guildford and he completed his secondary education at Scotch College in Claremont. He commenced his studies at the University of Western Australia in 1948, graduating at the end of 1951 with a Bachelor of Laws.

Following the successful completion of his degree, he was articled with Ken Hatfield of Villeneuve Smith Keall & Hatfield. At the end of the then two year articles period, he went to Bunbury to practise law where he bought into Mr FW Slee's firm to form Slee Anderson & Pidgeon. He enjoyed the independence of country practice and so remained there from 1954 until 1970. Bunbury's status as a circuit town meant that there was always a reasonable amount of Supreme Court work for a legal practitioner. He practised in many areas of law, including conveyancing.

In 1970, due to the rapid growth of Western Australia and in response to the need for another level of court, the District Court was established. Justice Pidgeon was appointed as one of the original judges of the District Court when it commenced operation on 1 April 1970, together with Judges Good, Jones and Heenan. He

acknowledges that the move to the District Court bench was quite a change from a busy practice in a country area and that he was unsure at the time as to whether he wanted that change. However, he felt that ultimately, when called upon to do judicial work, there was a duty to accept. After 12 years as a District Court judge, he was appointed to the Supreme Court on 4 August 1982. He was 51 years old at the time.

Justice Pidgeon finds it very hard to answer what he likes best or least about judicial life although he enjoys seeing points of law well-researched and properly presented. He finds the very sad cases of serious physical injury that come before him on the bench particularly difficult to adjudicate. He also misses some elements of private practice such as the satisfaction in successfully assisting clients who have been wronged and their grateful appreciation of that help; but he does acknowledge the pleasure of the uninterrupted time to work and write which was often hard to find in private practice. He feels that it is too early to judge what the main highlight of his career has been.



Justice Pidgeon admires the judges of the Stuart period of England, which was a turbulent time in England's history in the 17th century, encompassing the Civil War. For Justice Pidgeon, the judges of this era are to be admired for giving the judiciary of today the ability to make decisions without fear of dismissal. The judges of that period laid the foundations of judicial independence and did so fearlessly, despite the constant threat of dismissal. By refusing to bow to the King's wishes to act simply as servants, rather than as independent protectors of the common law, they contributed to the increasing opposition by Parliament to the arbitrary exercise of power by the monarch. This led to the passing of a series of statutes known as the 'Revolution Settlement' in the 1690s which guaranteed that judges would hold office during good behaviour and not at the King's pleasure.

Justice Pidgeon has been Chancellor of the Bunbury Diocese of the Anglican Church since 1978, as well as serving as Acting-Chancellor of the Perth Diocese from time to time. In addition, he was trustee of the Perth Diocese for 10 years from 1972 and, from 1974 to the present day, has been a lay canon on the Chapter of St George's Cathedral. Interestingly, the judge's lawyer uncle from Bendigo was Chancellor of the Bendigo Diocese of the Anglican Church for some time.

As well as his deep involvement with the Anglican church, his Honour is a member of the Weld Club in Perth and the Southwest Club in Bunbury. His recreational interests include chess and model trains. He is a member of the Australian Railway Historical Society, the Hotham Valley Railway Society and the Fleischman Society, which is an English association interested in German, Austrian and Swiss trains. He was patron of the Perth Chess Association from 1972 to 1982.