

# **Understanding the Summary Jurisdiction in NSW**

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## **Statement of Originality**

This is to certify that to the best of my knowledge, the content of this thesis is my own work.  
This thesis has not been submitted for any degree or other purposes.

I certify that the intellectual content of this thesis is the product of my own work and that all the assistance received in preparing this thesis and sources have been acknowledged.

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## **Abstract**

This thesis presents an analysis of the NSW summary criminal jurisdiction (the ‘summary jurisdiction’). The summary jurisdiction is a dynamic criminal justice apparatus where magistrates preside over the determination of liability for certain proscribed behaviours in the lower courts without the intervention of a jury. My close analysis of the summary jurisdiction tells the previously little-known story of its development and offers a basis for critique. Adopting a socio-historical approach, this thesis offers a fresh analysis. At a broad level, change over time in the summary jurisdiction can be seen as following a trajectory of formalisation. I argue that ‘formalisation’ is a useful concept for understanding the historical development of the summary jurisdiction. It has four overlapping and interacting dimensions that assume differing degrees of significance at different times. Those dimensions are: juridification; rationalisation; professionalisation together with what I call ‘lawyerification’; and the separation of law from other spheres of social power. Formalisation has been a product of changing legitimisation demands and attempts to increase the efficiency of the criminal law. Applying formalisation as a lens through which to view the development of the summary jurisdiction reveals how the summary jurisdiction has achieved the criminalisation of behaviours that have been constructed as harmful.

### **Authorship Attribution Statement**

*Chapter 4 of this thesis contains material published in Mitchell, Tanya, 'Criminalisation of Aboriginal People: Development of the Summary Jurisdiction' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 55. This material appears on pages 136–137 of Chapter 4. I was the sole author.*

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## Introduction

### 1. *Introduction*

Criminal law scholarship is in need of an understanding of summary jurisdiction. In excess of 95 per cent of criminal offences are finalised summarily in New South Wales (NSW) — the numbers are similar in other Australian jurisdictions — and criminalisation is happening increasingly via the summary jurisdiction, and yet it is rarely examined. This thesis develops an account of how the summary jurisdiction should be understood and provides a basis for critique.<sup>1</sup> My account proceeds on the premise that in order to critique it is first necessary to understand what is being critiqued. This section of the Introduction sets out the ‘terrain’ I am mapping.<sup>2</sup> It sets the parameters of the thesis based on what I have included in, and excluded from, my analysis.

The summary jurisdiction is vast and there is no single way to define its parameters. On one view it might be said to encompass all crime-related matters dealt with by magistrates in the Local Court including committals, bail for both summary and indictable matters, prosecutions brought by statutory agencies,<sup>3</sup> problem-oriented therapeutic processes,<sup>4</sup> and the separate Children’s Court.<sup>5</sup> Aside from being too much to cover in sufficient depth in one thesis, there is already a sizeable literature on each of these topics (except perhaps summary prosecutions by statutory authorities).<sup>6</sup> This means that such a focus would be of more limited value. Also committals relate to matters that form part of a magistrate’s administrative rather than judicial function,<sup>7</sup> and while criminalising, bail serves purposes other than the determination of criminal liability.

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<sup>1</sup> With respect to law and law reform proposals, this thesis is current as of 6 November 2017.

<sup>2</sup> Nicola Lacey, 'Philosophy, History and Criminal Law Theory' (1998) 1(2) *Buffalo Criminal Law Review* 295, 306.

<sup>3</sup> Such as the Environment Protection Authority ('EPA').

<sup>4</sup> Such as the Magistrates Early Referral into Treatment ('MERIT') for defendants with drug and alcohol problems NSW Government: Justice. Magistrates Early Referral into Treatment (13 March 2017) <<http://www.merit.justice.nsw.gov.au/>>. The *Local Court Act 2007* (NSW) s 3 contains a list of what is included in the definition of 'criminal proceedings'.

<sup>5</sup> Where young people under the age of 18 are prosecuted.

<sup>6</sup> Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11(1) *Journal of Judicial Administration* 8; John Seymour, *Dealing with Young Offenders* (Law Book, 1988).

<sup>7</sup> Indeed the *Acts Interpretation Act 1897* (NSW) excluded committals from the definition of 'summary jurisdiction' because summary jurisdiction was limited to occasions when magistrates were acting in their judicial function,

The aim of this thesis is to map the relatively uncharted terrain of the ‘legal practices’ that create a ‘legal space’ where magistrates preside over the determination of criminal liability of adult defendants in the lower courts without the intervention of a jury.<sup>8</sup> My approach is premised on the understanding that the criminal law is a social practice.<sup>9</sup> On this view legal practices consist of the ‘(more or less) coordinated actions of conscious agents’ within the summary jurisdiction.<sup>10</sup> My working definition is that the summary jurisdiction is a complex criminal justice apparatus comprised of numerous component parts, all of which engage in legal practices within ‘mutually constitutive relationships’.<sup>11</sup> Each component serves different purposes and none can be privileged over the other.

This thesis focuses on the development of the summary jurisdiction in NSW. There are two reasons for circumscribing the thesis in this way. The first is that the socio-historical method adopted in this thesis (set out in Part 3 of this Introduction) is premised on the view that the criminal law cannot be understood in isolation from its social, historical and institutional context.<sup>12</sup> In order to make sense of the legal practices that constitute the summary jurisdiction it is necessary to pay close attention to local context. At the same time, however, it is necessary to widen the socio-historical lens to the national and international because, as Dubber and Farmer have pointed out, ‘[s]ystems of criminal law do not develop in isolation from each other but are embedded in power relations between different states or between states and their colonies ...’.<sup>13</sup> The (British) Imperial context is particularly relevant to NSW.

The second reason for the NSW focus is because this thesis proceeds on the basis that to understand and critique the criminal law it is necessary to pay close attention to how it is

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whereas committals are an administrative function. G C Addison and D G Paterson, *The Law and Practice Relating to Appeals from Magistrates* (Law Book, 1927) 21-2.

<sup>8</sup> In NSW these courts were known as Courts of Petty Sessions until 1982, Local Courts from 1982 to 2007 and the Local Court from 2007.

<sup>9</sup> Lacey, ‘Philosophy, History and Criminal Law Theory’ above n 2, 309. See also Lindsay Farmer, ‘The Obsession with Definition: The Nature of Crime and Critical Legal Theory’ (1996) 5 *Social & Legal Studies* 57, 68.

<sup>10</sup> Lacey, ‘Philosophy, History and Criminal Law Theory’ above n 2.

<sup>11</sup> Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP, 2016) 3.

<sup>12</sup> See eg, Nicola Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory’ (2001) 64(3) *Modern Law Review* 350, 351.

<sup>13</sup> Markus Dirk Dubber and Lindsay Farmer, *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) 5.

institutionalised.<sup>14</sup> Unlike in the United Kingdom where the workings of the lower courts and magistrates have been subjected to detailed historiographical examination,<sup>15</sup> limited historical attention has been paid to the lower courts in Australia.<sup>16</sup> And the Australian Federal system means criminal law varies from state to state. For these reasons, it is important to trace the socio-historical development of the summary jurisdiction of a single jurisdiction in detail.

## 2. *Existing Accounts of the Summary Jurisdiction*

With the notable exception of Lindsay Farmer's scholarship,<sup>17</sup> the summary jurisdiction has rarely been an object of study in the criminal law literature. However, after decades of neglect, more recent criminal law scholarship is beginning to pay attention to the summary jurisdiction. In other disciplines, such as history, sociology, and criminology, aspects of the summary jurisdiction have been either the focus of study,<sup>18</sup> or relevant material has arisen peripherally.<sup>19</sup> Because of the diffuse and often tangential nature of scholarship touching on the summary jurisdiction, categorising existing understandings of the summary jurisdiction by the themes addressed in that scholarship, rather than by methodological approach or disciplinary origin, is a useful means of analysing it.

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<sup>14</sup> This approach is derived from the work of Lindsay Farmer. See eg, Lindsay Farmer, 'Criminal Law as an Institution' in R A Duff et al (eds), *Criminalisation: The Political Morality of the Criminal Law* (Oxford Scholarship Online, 2015) 80; Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (OUP, 2016) 7.

<sup>15</sup> See eg, Norma Landau, *The Justices of the Peace, 1679–1760* (University of California Press, 1984); Norma Landau, 'Summary Conviction and the Development of the Penal Law' (2005) 23(1) *Law and History Review* 173; Bruce Smith, *Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City, 1790–1855* (PhD Thesis, Yale University, 1996); Thomas Sweeney, *The Extension and Practice of Summary Jurisdiction in England c.1790–1860* (PhD Thesis, University of Cambridge, 1985); Peter King, *Crime, Justice and Discretion in England 1740–1820* (Oxford University Press, 2000); Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997); David Barrie and Susan Broomhall, *Police Courts in Nineteenth-Century Scotland, Volume 1* (Routledge, 2014); David Barrie and Susan Broomhall, *Police Courts in Nineteenth-Century Scotland, Volume 2* (Routledge, 2014).

<sup>16</sup> Notable exceptions are Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney University Press, OUP, 1991); Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983); and David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991).

<sup>17</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15.

<sup>18</sup> See eg, Golder, *High and Responsible Office*, above n 16; Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice*, Oxford Socio-Legal Studies (Macmillan Press, 1981).

<sup>19</sup> See eg, Mark Finnane, *Punishment in Australian Society* (Oxford University Press, 1997).

## 2.1 Expansion and Efficiency

The expansion of the summary jurisdiction has been well-recognised. In Australia, legal historians Hilary Golder and Michael Sturma have remarked upon the increasing use of the summary jurisdiction from the mid-nineteenth century in NSW.<sup>20</sup> More recently Brian Opeskin has described the ‘rise of lower courts’ attributing it to a drive to improve access to justice and to accommodate an expanding summary jurisdiction.<sup>21</sup> In the United Kingdom, Jackson, writing in 1937, was one of the first scholars to comment on a reduction in the incidence of the jury trial over the preceding century, attributing it to the expansion of the summary jurisdiction.<sup>22</sup> In 1986 Leon Radzinowicz in the final volume of *A History of English Criminal Law and its Administration*, meticulously traces the expansion of summary jurisdiction in England in the early decades of the nineteenth century setting out the contemporary official justifications given for it and the objections raised against it.<sup>23</sup> He notes that in this period, the summary jurisdiction was expanding because indictable offences were being reclassified as capable of being finalised summarily by magistrates. The justifications for reclassification included reducing the costs of proceedings, but equally important was the belief that the ‘absence of “strict legal proof”’ in the summary jurisdiction would produce more convictions and this ‘greater certainty of prosecution and punishment would ensure greater deterrence.’<sup>24</sup> Recognition of the potential of the summary jurisdiction to regulate harmful behaviours germinated in this period.

In the early-mid nineteenth century in England objections were made to the expansion of the summary jurisdiction. One was the claim that the practice of finalising indictable matters summarily ‘confound[ed] moral distinctions’ between minor ‘mischief’ and ‘truly’ criminal behaviour, and that it eroded the ‘traditional protection of trial by jury’.<sup>25</sup> The first objection suggests that the summary jurisdiction, in the mid-nineteenth century, was understood as dealing only with offences to which no moral obloquy attached. This mid-nineteenth century understanding persists in the twenty-first, but this thesis shows that it is not an accurate reflection

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<sup>20</sup> Golder, *High and Responsible Office*, above n 16; Sturma, above n 16.

<sup>21</sup> Brian Opeskin, ‘State of the Judicature: A Statistical Profile of Australian Courts and Judges’ (2013) 35 *Sydney Law Review* 489, 498–9.

<sup>22</sup> R M Jackson, ‘The Incidence of Jury Trial During the Past Century’ (1937) 1 *Modern Law Review* 132.

<sup>23</sup> Sir Leon Radzinowicz and Roger Hood, *A History of English Criminal Law and its Administration from 1750* (Stevens & Sons, 1986) 618–24.

<sup>24</sup> *Ibid* 619.

<sup>25</sup> *Ibid* 619–20.

of the summary jurisdiction in the current era. My use of the term ‘current era’ derives from my analysis of change over time to the summary jurisdiction and refers to the period from the final quarter of the twentieth century to present.

Another mid-nineteenth century objection to the expansion of the summary jurisdiction in England was that summary disposition is an erosion of the protection of trial by jury.<sup>26</sup> Because of this objection the expansion of the summary jurisdiction is typically constructed as a pernicious trade-off between the rights of the accused and economic rationalism. David Brown et al in the leading criminal law text book in NSW provide a paradigmatic example of this view of the expansion of the summary jurisdiction in the current era: ‘The expansion of summary jurisdiction, carried out in the name of rationalisation, speed and efficiency, is also ... in part, a diminution of access to trial on indictment and hence trial by jury.’<sup>27</sup> Farmer’s study of the development of summary jurisdiction in Scotland offered a more nuanced analysis. Farmer observed that the emergence of summary jurisdiction was grounded in the imperatives of ‘efficiency and economy’, but in the process, the concept of jurisdiction was reconfigured from being organised around moral categories to being defined through procedural rules.<sup>28</sup> Farmer’s work is explored in greater detail in part 2.6 of this Introduction below.

The socio-historical method adopted in this thesis (discussed in Part 3 of this Introduction) discloses that efficiency has been a continuing theme in the development of the summary jurisdiction from the early decades of the nineteenth century. However, efficiency has meant different things at different times, has taken on more importance in some eras than others, has been justified in different ways, and has been impacted upon differently by various social forces. For example, in nineteenth century England efficiency was epitomised by the shedding of formalities and complexity thereby increasing the speed with which cases could be despatched by the court.<sup>29</sup> Efficiency has also meant increasing the number of convictions as a proportion of total charges. In mid-nineteenth century England it was thought that the shedding of formalities would prevent the guilty from escaping punishment on mere technicalities. In early twentieth

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<sup>26</sup> This objection persists in NSW in the current era.

<sup>27</sup> David Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of NSW* (Federation Press, 6<sup>th</sup> ed, 2015) 376. See also, eg, Dat T Bui, ‘The Expansion and Fragmentation of Minor Offense Justice: A Convergence between the Common Law and the Civil Law’ (2016) 19 *New Criminal Law Review* 382.

<sup>28</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15, 74.

<sup>29</sup> *Ibid* ch 3; Lindsay Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45’ (2000) 18(2) *Law and History Review* 397, 410–11.

century NSW it was thought that transferring more offences to the summary jurisdiction would help to reduce the 40 per cent acquittal rate in the Courts of Quarter Sessions.<sup>30</sup> This second definition of efficiency is evident in Herbert Packer's 'crime control model' of criminal justice, which is discussed at the end of this section.

In NSW, while there has been concern about guilty people escaping conviction, particularly since the 1980s, the overarching efficiency-related concern has been how to accommodate the government's increasing use of the criminal law in summary form to regulate behaviours that have been constructed as harmful. This imperative became particularly acute in the post-war period as increasing car ownership led to increasing numbers of driving offences, which placed unprecedented pressure on the summary jurisdiction. Increasing delays in the courts and the recognition of new harms such as drink-driving and domestic violence accelerated the process of 'defining deviance down'<sup>31</sup> by reclassifying indictable offences as summary and removing certain traffic offences from the summary jurisdiction through the introduction of self-enforcing penalty notices. One offence was removed from the court lists (for example, certain traffic infringements) only to be replaced with a different offence that had been enacted as a means of regulating behaviour that had been newly recognised as problematic (for example, domestic violence). In recent decades the language of efficiency has assumed a managerial tone, but the extent to which managerialism has impacted upon the summary jurisdiction has varied in different jurisdictions.<sup>32</sup> In relation to domestic violence, which is the subject of chapter 7, there has been a return to a concern about offenders escaping detection and conviction, but this is called 'effectiveness' rather than efficiency to incorporate the deterrence aspirations of the criminal law.

At this point it is necessary to set out the key features of Packer's two models of criminal process, which he formulated in 1968, because they have been influential in the criminal law literature on the summary jurisdiction. The first is the 'crime control model' of criminal justice. According to this model the 'repression of criminal conduct is by far the most important function

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<sup>30</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 1923, 1709, (Thomas (Tom) Bavin).

<sup>31</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 117.

<sup>32</sup> Compare, eg, Victoria, discussed by Arie Freiberg, 'Managerialism in Australian Criminal Justice: RIP for KPIs' (2005) 31 *Monash University Law Review* 12 with NSW.

to be performed by the criminal process'.<sup>33</sup> For the criminal process to perform this function it must be efficient. Packer says '[b]y "efficiency" we mean the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known.'<sup>34</sup> The concern underlying this definition is that if too many guilty people escape detection, conviction and punishment, the criminal justice system loses its legitimacy and social order is threatened. However, because the number of criminal offences continues to increase as Parliament identifies conduct that is to be governed by the criminal law, a 'premium' is placed on speed, finality and uniformity.<sup>35</sup> This, Packer argues, results in an 'administrative, almost managerial, model'.<sup>36</sup>

Packer's second model of criminal process is the 'due process model'. The purpose of due process, Packer argues, is to protect the accused against the tyranny of the state in the exercise of its coercive and stigmatising criminal law powers. The requirements of due process place obstacles in the way of achieving a conviction. In the due process model due process is placed into a hydraulic relationship with efficiency whereby 'maximal efficiency means maximal tyranny'.<sup>37</sup> However, Packer argues that a 'substantial diminution' in efficiency will be tolerated 'in the interest of preventing official oppression of the individual.'<sup>38</sup> In Packer's model, due process protections both increase the opportunity for accused persons to escape conviction and increase the time taken in reaching convictions, resulting in a reduction in efficiency. These two models, although not always discussed explicitly, have led to the pitting of efficiency against due process in scholarly discussions of the summary jurisdiction.

## ***2.2 Triviality and the Erosion of Due Process***

The summary jurisdiction has received more attention from sociologists and criminologists than it has from criminal law scholars. These empirical analyses provide rich accounts of the legal practices in the lower courts at particular moments in time. The seminal piece is Doreen McBarnet's *Conviction: Law, the State and the Construction of Justice*, which was a qualitative

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<sup>33</sup> Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1969) 158.

<sup>34</sup> Herbert L. Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pennsylvania Law Review* 1, 10.

<sup>35</sup> Packer, *Limits of the Criminal Sanction*, above n 33, 159.

<sup>36</sup> Packer, 'Two Models of the Criminal Process' above n 34, 11.

<sup>37</sup> Ibid 16.

<sup>38</sup> Ibid.

study of 105 cases before the magistrates and district courts in Scotland in the late 1970s.<sup>39</sup> Because of its revelatory nature, and through repetition in text books, this study has become orthodoxy in the criminal law literature in NSW. Embedded in the realist tradition McBarnet draws attention to the distinction between ‘law in the books’ and the law in practice in the summary jurisdiction. McBarnet begins with the legal definition of the summary jurisdiction at the time and then proceeds to make a number of observations about practices in magistrates’ courts. The legal definition of the summary jurisdiction in Scotland at the time was the shedding of ‘certain formalities required by the common law’, namely the indictment, a detailed record of proceedings, notice of the case against the defendant, and a jury.<sup>40</sup>

McBarnet famously describes the criminal process as ‘two tiers of justice’. An ‘ideology of triviality’ pervades the lower courts, and as a consequence, they operate according to a logic that differs from that of the higher courts. Notwithstanding that the legal definition of summary jurisdiction was framed in terms of lack, McBarnet observes that the method and criteria of proof in defended summary hearings are ‘exactly the same’ as those in a jury trial; that is, an adversarial procedure where witnesses are examined and cross-examined.<sup>41</sup> This has implications for the fairness of proceedings. Implicitly adopting Packer’s model of due process, McBarnet’s court observations lead her to the conclusion that proceedings in summary courts depart from the requirements of ‘due process’ and that this is justified by the criminal justice system on two grounds. The first is that because of the ‘ideology of triviality’, due process is thought not to be required for trivial offences. The second justification is that the offences prosecuted in the summary jurisdiction do not involve ‘much law’ and therefore lawyers are not needed. These observations tend to equate a lack of due process with the absence of legal representation for defendants, although McBarnet suggests that even when defence lawyers do appear on behalf of defendants the ideology of triviality results in sub-standard representation.<sup>42</sup> The majority of defendants in her study were unrepresented, and because prosecutors in Scotland at that time were legally qualified, there was an inequality of arms. This inequality was the basis for her conclusion that ‘the practice of criminal justice does not live up to its rhetoric.’<sup>43</sup> McBarnet

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<sup>39</sup> McBarnet, above n 18.

<sup>40</sup> Ibid 138.

<sup>41</sup> Ibid 125.

<sup>42</sup> At this time there was only limited provision of legal aid in magistrates’ courts in Scotland. Ibid, 124-138.

<sup>43</sup> Ibid 155.

attributes the ‘gap’ between the rhetoric and the reality of the criminal law to appellate judges who use the techniques of legal reasoning to ensure that those who are factually guilty do not escape conviction and punishment through legal technicalities.<sup>44</sup> She argues that instead of there being a distinction between crime control and due process as Packer suggests, ‘due process is *for* crime control’.<sup>45</sup> Russell Hogg suggests that McBarnet is in fact arguing that summary proceedings are about crime control and not due process.<sup>46</sup> In other words, Hogg’s interpretation of McBarnet’s thesis is that in the summary jurisdiction due process, such that it is, has been marshalled to the purposes of crime control, and this is not how it should be. The way in which McBarnet’s thesis has been picked up in a leading NSW criminal law text book<sup>47</sup> is perpetuating an understanding that the summary jurisdiction in the current era is in fact the bottom tier of a two-tiered criminal justice system and that it deals with trivial offences. More recent studies in the UK have begun to disrupt the perception of triviality by examining the increasing role of law and legal representation in the lower courts and reform of the lay magistracy.<sup>48</sup>

McBarnet’s thesis was subjected to a robust but little-known critique by a fellow sociologist, Neil Hutton, in 1987.<sup>49</sup> Hutton’s critique is grounded in a discussion of what he considers to be the shortcomings of McBarnet’s sociological methodology, but his main argument is that McBarnet’s analysis is infused with an implicit Marxist ideology; that the law is manipulated in practice to reproduce unequal social power relations. With this as her starting point McBarnet fails to acknowledge that ‘magistrates courts ... have several contradictory objectives’.<sup>50</sup> The law’s purpose, Hutton argues with constructivist undertones, is not to produce outcomes that accord with objective reality, although it might be hoped that it does so. Rather, its purpose is to translate factual guilt into legal guilt, while its procedures are designed to ensure that those who are factually innocent are not convicted. Thus, the utility of pointing out the ‘gap’ between the rhetoric and the reality of the law is lost if it is not asked how that gap is managed

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<sup>44</sup> Ibid 155–6.

<sup>45</sup> Ibid 156 (original emphasis).

<sup>46</sup> Russell Hogg, 'Politics, Prisons and Punishment' (1991) 4 *Journal for Social Justice Studies* 1, 22.

<sup>47</sup> Brown et al, (6<sup>th</sup> ed), above n 27, ch 4.

<sup>48</sup> Lucy Welsh, 'Are Magistrates' Courts Really a 'Law Free Zone'? Participant Observation and Specialist Use of Language' (Paper presented at the British Criminology Conference, Wolverhampton, 2–4 July, 2013); Jane C Donoghue, 'Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales' (2014) 77(6) *Modern Law Review* 928.

<sup>49</sup> Neil Hutton, 'The Sociological Analysis of Courtroom Interaction: A Review Essay' (1987) 20 *Australian & New Zealand Journal of Criminology* 110.

<sup>50</sup> Ibid 119.

and whether the law serves its purpose. A more useful analysis, he suggests, would provide us with an understanding of how power is ‘inscribed in the dynamics of the production and reproduction of structures in social practices.’ Such an understanding of *how* power operates in a particular context enables us ‘to redistribute power to the less powerful’.<sup>51</sup>

Malcolm Feeley conducted a similar observational study to McBarnet’s but of the lower courts in one city in the United States, also in the late 1970s. He concluded that for defendants facing minor charges, being required to go through the time-consuming, frustrating, confusing and tedious court process is punishment in itself, quite apart from any formal penalty that may be imposed. To increase due process in the lower courts, he argues, would *increase* the punishment by lengthening proceedings. For this reason the lower courts are like a ‘complex bargaining and exchange system, in which values, goals, and interests are competing with one another’.<sup>52</sup>

These observational studies have provided a window onto the operation of courts that have remained inaccessible to traditional legal scholarship because of the relative (although not complete) lack of reported case law. Observational studies, by their nature, however, are able to provide only a snapshot, producing a static impression of the summary jurisdiction. This is a reason to suggest that an approach that examines change over time may yield significant insights into the summary jurisdiction.

### ***2.3 Comparisons between the Summary Jurisdiction and the Jury Trial***

Many studies of the summary jurisdiction, such as McBarnet’s, compare it unfavourably with the criminal trial on indictment as though the criminal trial represents the epitome (or at least a superior form) of justice. For example, Ashworth and Zedner have analysed summary trials as one of seven phenomena, including diversion, plea bargaining and preventive orders, that have increased in prevalence in recent decades and which, they argue, pose a challenge to a liberal model of the criminal trial.<sup>53</sup> They conceive of the criminal law as ‘an engine of government’ and so argue that ‘a normative conception of the criminal law cannot be distinguished from a

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<sup>51</sup> Ibid 115.

<sup>52</sup> Malcolm M Feeley, *The Process is the Punishment: Handling Cases on a Lower Criminal Court* (Russell Sage Foundation, first published 1979, 1992 ed) 12.

<sup>53</sup> Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’ (2008) 2(1) *Criminal Law and Philosophy* 21. The others are: fixed penalties, hybrid civil-criminal processes, and strict liability: at 21.

theory of good government'.<sup>54</sup> To make a contribution to this overall aim they assess the impact that the seven phenomena have had on the relationship between the individual and the state. For the purposes of analysis they use three models of the modern state: the regulatory state; the preventive state; and the authoritarian state. They posit that the rise to prominence of notions of human rights has led to the development of cumbersome protections for accused persons and that these seven phenomena have been developed as a means of circumventing 'the more onerous procedural requirements' of the criminal law.<sup>55</sup> They conclude that because the criminal law exposes convicted persons to both stigma and 'significant punishment', the 'liberal model' of the criminal trial ought to be adhered to.<sup>56</sup> Such comparisons have highlighted the potential dangers of the proliferation of means of circumventing protections of accused persons, but they perpetuate an understanding of the summary jurisdiction as the poor cousin of the criminal trial on indictment. By contrast, this thesis tells the story of the formalisation of the summary jurisdiction on its own terms and reveals the relationship between formalisation and criminalisation in the current era.

#### **2.4 Studies of the Magistracy**

Several Australian scholars have examined the historical development of the office of magistrate either as the sole object of study,<sup>57</sup> or as part of a broader study of Australian legal history.<sup>58</sup> Replete with historical context these studies do not undertake doctrinal analyses, nor are they concerned to examine how the summary jurisdiction in the current era has been shaped by historical developments, which is what this thesis provides. There is also a body of sociological scholarship revealing previously hidden aspects of the role of the magistrate in the summary jurisdiction.<sup>59</sup> For more than a decade Kathy Mack and Sharon Roach-Anleu have been

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<sup>54</sup> Ibid 44.

<sup>55</sup> Ibid 48. NSW does not have a Bill or Charter of Rights. This is a significant difference between the UK and NSW contexts in which the summary jurisdiction has developed in the current era.

<sup>56</sup> Ibid 49.

<sup>57</sup> Golder, *High and Responsible Office*, above n 16; Hilary Golder, 'The Making of the Modern Magistracy' (1991) 77(3) *Journal of the Royal Australian Historical Society*; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part I' (2000) 74 *Australian Law Journal* 509; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part II' (2000) 74 *Australian Law Journal* 592; John Kennedy McLaughlin, *The Magistracy in New South Wales, 1788–1850* (LLM Thesis, University of Sydney, 1973); John Kennedy McLaughlin, 'The Magistracy and the Supreme Court of New South Wales 1824–1850: A Sesqui-Centenary Study' (1976) 62(2) *Journal of the Royal Australian Historical Society* 91.

<sup>58</sup> Alex C Castles, *An Australian Legal History* (Law Book, 1982).

<sup>59</sup> See eg, Sharyn Roach Anleu and Kathy Mack, 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 370; Sharyn Roach Anleu and Kathy Mack, 'Magistrates, Magistrates Courts,

conducting empirical research into magistrates, investigating such issues as their career aspirations, job satisfaction and demographic background, as well as the legal practices engaged in by magistrates in court. These studies provide vital insights into the practices of magistrates at particular moments in time, but this thesis adds to the literature an analysis of the law and the operation of the summary jurisdiction as a whole.

## **2.5 Examination of Particular Offences**

The criminal law literature, with only a few notable exceptions,<sup>60</sup> overlooks the impact of jurisdiction on the criminal law. There is a growing body of literature on offences that are finalised summarily — most often as a discussion of *mala prohibita* and the accompanying concern about the erosion of protections of the accused.<sup>61</sup> Material on summary offences also appears as an adjunct to discussions of police powers, or as an analysis of offences at the lower end of the hierarchy of more ‘traditional’ criminal offences, such as common assault as part of a broader examination of offences against the person. Indeed, more recent scholarship has selected certain summary offences, or offences that are capable of being finalised summarily, as its primary focus.<sup>62</sup> However, the significance of the *fact* that these offences are finalised summarily has not been addressed.

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and Social Change' (2007) 29(2) *Law & Policy* 183; Sharyn Roach Anleu and Kathy Mack, 'The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige' (2008) 44(2) *Journal of Sociology* 185; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts*, Palgrave Socio-Legal Studies (Palgrave, 2017).

<sup>60</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15; Lindsay Farmer, 'The Law of the Land: Criminal Jurisdiction 1747–1908' in Peter Rush, Shaun McVeigh and Alison Young (eds), *Criminal Legal Doctrine* (Ashgate, 1997) 63; Lindsay Farmer, 'Territorial Jurisdiction and Criminalisation' (2013) 63(2) *University of Toronto Law Journal* 225; Farmer, *Making the Modern Criminal Law*, above n 14.

<sup>61</sup> See, eg, Ashworth and Zedner, above n 53. Most criminal law texts now contain chapters, or portions of chapters, on offences that are either purely summary or capable of being finalised summarily. See, eg, Brown et al (6<sup>th</sup> ed), above n 27, chs 6, 7 and 11; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) chs 3 and 13.

<sup>62</sup> In the UK see, eg Peter Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *Modern Law Review* 29. Most notable in Australia is the work of Julia Quilter and Luke McNamara. See, eg Julia Quilter and Luke McNamara, 'Time to Define “the Cornerstone of Public Order Legislation”': The Elements of offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)' (2013) 36(2) *University of New South Wales Law Journal* 534; Luke McNamara and Julia Quilter, 'Public Intoxication in NSW: the Contours of Criminalisation' (2015) 37 *Sydney Law Review* 1; See also Jane Sanders and Edward Elliot, 'Affray: What Is It, and What Is It Not?' (2012) 36 *Criminal Law Journal* 368; Alex Steel, 'Criminalisation and Technology: Mobile Phone Use in Vehicles' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 122; Alan Hunt, 'Police and the Regulation of Traffic: Policing as a Civilizing Process?' in Markus Dubber and Mariana Valverde (eds), *The New Police Science: The Police Power in Domestic and International Governance* (Stanford University Press, 2006) 168. In relation to domestic violence, see Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's

In this body of scholarship, summary offences are characterised, predominantly, as either regulatory offences,<sup>63</sup> or low level public order offences. This is perhaps because of the enduring influence of McBarnet's 'ideology of triviality', a focus on the nineteenth century, and an orientation towards England where the summary jurisdiction has not expanded or formalised to the same extent as in NSW. More recently Australian criminal law scholars have begun to draw attention to the broader range of harms that constitute public order offences.<sup>64</sup> This thesis offers an account of the summary jurisdiction that enables the impact of jurisdiction on the criminal law to be analysed.

## **2.6 Jurisdiction, Governance and Criminal Responsibility**

More recently, criminal law scholars writing in the socio-historical tradition have integrated understandings of the summary jurisdiction into analyses of the criminal law. Farmer has provided the most detailed and sustained account of the summary jurisdiction in criminal law scholarship.<sup>65</sup> His study painstakingly documents the emergence and formalisation of a summary jurisdiction in mid-nineteenth century Scotland when formal legal rules and procedures replaced moral categories as the criminal law was moulded into a tool of 'good government' in the modernising nation state.<sup>66</sup> In doing so Farmer showed how the new summary jurisdiction wrought a transformation of the concept of jurisdiction in the criminal law. Rather than providing a longer history of the summary jurisdiction from its inception to the current era as this thesis does, Farmer's focus is on the impact of the transformation of jurisdiction in the mid-nineteenth century on the broader criminal legal 'tradition'—the Scottish equivalent of the common law. He argues that what is 'characteristic of the modern criminal law' is its 'reliance

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Going On?' (2008) 30(3) *Sydney Law Review* 439 and Heather Douglas and Lee C Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence' (2003) 27(1) *Criminal Law Journal* 32. See generally as a practitioners' guide on summary offences in Victoria, Kyle McDonald, *Summary Offences in Victoria* (Thomson Reuters, 2017).

<sup>63</sup> See eg, Anthony Bottoms, 'Neglected Features of Contemporary Penal Systems' in David Garland and Peter Young (eds), *The Power to Punish: Contemporary Penalty and Social Analysis* (Humanities Press, 1983) 186.

<sup>64</sup> Luke McNamara, 'Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 33, 44.

<sup>65</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15.

<sup>66</sup> See also Lindsay Farmer, 'Criminal Wrongs in Historical Perspective' in Antony Duff et al (eds), *The Boundaries of the Criminal Law* (OUP, 2010) 214, 228.

on procedural law<sup>67</sup> for the purposes of the ‘management and production of social and legal order.’<sup>68</sup> In relation to the impact of the summary jurisdiction on the criminal law he concludes:

The modern criminal justice system is a complex administrative system geared towards dealing with large numbers of people in a summary manner and controlling behaviour through small penalties for minor offences. And the crucial period for its formation was the nineteenth century.<sup>69</sup>

He notes that the summary courts have challenged the authority of the tradition to such an extent that they can no longer be regarded as anomalous. On the contrary, it is the ‘survival of the common law’ that is anomalous.<sup>70</sup> On this basis he makes a case for the importance of procedure to criminal law scholarship.<sup>71</sup>

Alan Norrie argues that the proliferation of regulatory summary offences in the nineteenth century enabled harms caused by industrialists to be governed by the criminal law without invoking moral condemnation.<sup>72</sup> This argument implicitly construes summary offences as regulatory offences that do not attract moral obloquy. This thesis shows that such a construction is not accurate in NSW in the current era.

In relation to criminal responsibility in the criminal law more broadly, Nicola Lacey has emphasised the importance of understanding the impact of summary jurisdiction on the development of ‘outcome responsibility’<sup>73</sup> and the changing ‘institutional structures available for the realisation of the legitimation and coordination roles of criminal responsibility’.<sup>74</sup> Building on these analyses, this thesis reveals how formalisation has moulded the summary jurisdiction into a tool for regulating harmful behaviours produced by changing social conditions.

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<sup>67</sup> Farmer, ‘The Obsession with Definition’ above n 9, 65.

<sup>68</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15, 140.

<sup>69</sup> *Ibid* 182–183.

<sup>70</sup> *Ibid* 183.

<sup>71</sup> *Ibid*.

<sup>72</sup> Alan Norrie, *Crime, Reason and History : A Critical Introduction to Criminal Law* (Butterworths, 2nd ed, 2001) ch 5.

<sup>73</sup> See eg, Lacey, *In Search of Criminal Responsibility*, above n 11, 45.

<sup>74</sup> *Ibid* 107.

## 2.7 Judicial Accounts of the Summary Jurisdiction

The Australian High Court has had the opportunity to consider the nature of summary jurisdiction only once in its history in *Munday v Gill* in 1930.<sup>75</sup> In the absence of more recent cases, the conceptualisation of Justice Dixon's — a member of the majority and one who later became known as one of Australia's finest legal minds — has been adopted as the current understanding of summary jurisdiction in the Australian criminal law literature.<sup>76</sup> The decision must therefore be analysed in detail. Chapter 2 discusses the social and political context in which it arose, but here it is examined for what it tells us about the High Court's understanding of the nature of summary jurisdiction in 1930.

*Munday v Gill* arose out of a protracted strike at the Rothbury coal mine in the Hunter Valley in NSW. Nineteen striking workers who were protesting the conservative government's forcible reopening of the mine had informations laid against them under s 545C of the *Crimes Act 1900* (NSW) ('*Crimes Act*') for 'knowingly continuing in an unlawful assembly', which had recently been enacted as a means of regulating strike action. This offence was punishable by six months imprisonment or a maximum fine of £20.<sup>77</sup> It was alleged that the accused were part of a gathering of between six and ten thousand coal miners who 'moved upon the Rothbury coal mine'.<sup>78</sup> The lockout had persisted for some eleven months prior to the date of this incident and had caused considerable political embarrassment for the NSW government.<sup>79</sup> The case came before the High Court by way of an appeal from the grant of a writ of prohibition in the Supreme Court of NSW. The immediate issue was whether the magistrate at first instance had committed a *jurisdictional* error of law. A broader question was to what extent fundamental common law principles apply in the summary jurisdiction, the answer to which depended on how the Court constructed the nature of summary jurisdiction. A subsidiary question was whether the statutory interpretation principles of legality and lenity operated in the summary jurisdiction to protect those common law principles.

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<sup>75</sup> *Munday v Gill* (1930) 44 CLR 38 ('*Munday*').

<sup>76</sup> Brown et al (6<sup>th</sup> ed), above n 27, 272–3.

<sup>77</sup> Two of the eighteen were also charged with carrying arms in an unlawful assembly: *Crimes Act 1900* (NSW) s 545C(2). For a discussion of the background to the case, see Tony Blackshield, 'The Isaacs Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 116 at 124.

<sup>78</sup> *Munday* (1930) 44 CLR 38, 84 (Dixon J).

<sup>79</sup> Blackshield, above n 77, 117.

The debate about a jurisdictional error of law arose in the following manner. At first instance, after hearing the charge against the first defendant, the remaining defendants had consented to the magistrate ‘lumping’ the remaining charges together; or, in other words, hearing them together. All nineteen accused were convicted. The eighteen accused whose charges had been lumped sought statutory prohibition in the NSW Supreme Court to restrain the magistrate from enforcing the convictions on the ground that the magistrate ‘had no jurisdiction to hear together several informations against different defendants even by consent...’.<sup>80</sup> The NSW Supreme Court granted prohibition and the informant (that is, the police officer who had laid the informations, and who was the respondent in the Supreme Court) appealed to the High Court arguing that lumping the cases together did not constitute an error of law that went to jurisdiction. The majority of the High Court agreed, holding that although it was an anomaly, it was not a jurisdictional error and therefore the defendants’ consent had corrected the error.

The majority of the High Court perceived a fundamental distinction between trials on indictment and summary hearings. I will focus on the judgment of Dixon J because it considers the nature of summary jurisdiction in the most depth. Dixon J, perceived a fundamental difference between solemn (indictable) and summary procedure ‘in history, in substance and in present practice.’<sup>81</sup> Citing Blackstone, His Honour described the difference between the two. Solemn procedure is prosecuted in the name of the Crown and requires the intervention of a jury between the Crown and subject to protect the accused from arbitrary state power.<sup>82</sup> Summary prosecutions by contrast, on Dixon J’s construction, are ‘between subject and subject’, the implication being that the fundamental common law protections are of less importance.<sup>83</sup> His Honour did not state so explicitly, but his characterisation of summary proceedings is based on an enduring belief that summary prosecutions are private prosecutions. In doing so he may have been elevating the form of prosecutions, which by historical convention are brought in the name of the informant rather than the Crown, over their substance. Bruce Smith’s research reveals that the police and other public agencies have been conducting prosecutions in the summary

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<sup>80</sup> *Munday* (1930) 44 CLR 38, 42.

<sup>81</sup> *Ibid* 86 (Dixon J).

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*.

jurisdiction in England for centuries.<sup>84</sup> This thesis shows in Chapter 3 that in NSW, police have been bringing summary prosecutions since at least the late nineteenth century.<sup>85</sup> In the overwhelming majority of cases the informant is a police officer, as in *Munday v Gill*. Therefore, for all practical purposes, summary prosecutions have been brought on behalf of the state since at least as early as the late nineteenth century, and they continue to be so brought in the current era.

While Dixon J conceded that accused persons in summary proceedings *are* entitled to the application of the common law protections, on his analysis a failure to apply them does not amount to a want of jurisdiction. Rather, it is an irregularity to which the accused may consent.<sup>86</sup> An ‘ideology of triviality’<sup>87</sup> is discernible in his description of summary proceedings which he compares with proceedings upon indictment:

The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society.<sup>88</sup>

This passage, which is repeated Brown et al,<sup>89</sup> has perpetuated the construction of the summary jurisdiction as ‘trivial’ in NSW. While it pre-dates McBarnet, it corroborates her argument that the ‘ideology of triviality’ is used to justify the abrogation of due process.<sup>90</sup> Dixon J also constructed summary offences as regulatory or minor public order matters. As this thesis shows, that is no longer exclusively the case in NSW. In proceedings upon indictment, His Honour observed (quoting Blackstone’s *Commentaries*) that the accused ‘puts himself upon the Country and he who prosecutes for our Lord the King doth the like’; whereas in summary proceedings ‘he is dealt with by those assigned to keep the peace, who judge both law and fact.’<sup>91</sup> In trials on indictment ‘the jurors are summoned particularly to pass between their Sovereign Lord the King

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<sup>84</sup> Bruce Smith, ‘The Myth of Private Prosecution in England, 1750–1850’ in Markus Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) 151.

<sup>85</sup> Golder, *High and Responsible Office*, above n 16, 98–106.

<sup>86</sup> *Munday* (1930) 44 CLR 38, 89–90 (Dixon J).

<sup>87</sup> McBarnet, above n 18, 143.

<sup>88</sup> *Munday* (1930) 44 CLR 38, 86.

<sup>89</sup> David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5<sup>th</sup> ed, 2011) 142. It is also reproduced in earlier editions.

<sup>90</sup> McBarnet, above n 18, 143.

<sup>91</sup> *Munday* (1930) 44 CLR 38, 86, (Dixon J) quoting William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765, 1765) vol 4, 280.

and the prisoner at the bar.<sup>92</sup> From a pragmatic perspective Dixon J also noted that the tribunal of fact in summary hearings is the magistrate. It is ‘fixed and remains the same whether the cases are dealt with successively or simultaneously.’<sup>93</sup> These fundamental differences, he said, explain why the common law principles protecting accused persons apply to trials on indictment in relation to summary proceedings.<sup>94</sup>

Notwithstanding the fact that Dixon J’s construction of the nature of the summary jurisdiction has been cited in subsequent NSW and Victorian Supreme Court cases,<sup>95</sup> and has been reproduced in text books, it is Isaacs CJ’s understanding of the summary jurisdiction that more accurately reflects the summary jurisdiction in the current era.<sup>96</sup> Isaacs CJ’s dissenting view was based on the salience of due process protections for defendants. For Isaacs CJ, summary criminal proceedings are between the Crown and subject. Therefore the common law principles protecting ‘individual liberty’ apply equally to the summary jurisdiction and the higher courts:

The slightest consideration reminds us that an accused person needs at least as much protection from a sentence of twelve months’ imprisonment with hard labour when inflicted by a Police Magistrate, as when inflicted on a jury’s verdict guided by a Supreme Court Judge.<sup>97</sup>

His Honour referred to the fact that when first commissioned to keep the King’s peace, justices were empowered to ‘hear and determine’ matters, but were to do so in the mode known to the common law.<sup>98</sup> Therefore common law principles remain applicable in the absence of clear statutory provisions to the contrary. It follows, he argued, that although the summary jurisdiction is a product of statute, the common law principles of lenity and legality must apply.<sup>99</sup> Summary proceedings are, on his construction, merely the substitution of one ‘judge’ for a jury of twelve

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<sup>92</sup> *Munday* (1930) 44 CLR 38, 87.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Munday* (1930) 44 CLR 38, 87–88.

<sup>95</sup> *NSW v Williams* [2014] NSWCA 177; *Perkins v County Court of Victoria* (2000) 2 VR 246.

<sup>96</sup> These rules about hearing several indictments together have now been superseded by statutory rules of evidence permitting the practice within certain constraints *Criminal Procedure Act 1986* (NSW) ss 23–24, 29.

<sup>97</sup> *Munday* (1930) 44 CLR 38, 51.

<sup>98</sup> His Honour cites the history of the summary jurisdiction as stated in Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, Law Printers to the King’s most Excellent Majesty, first published 1754, 29<sup>th</sup> ed, 1845) see *Munday* (1930) 44 CLR 38, 52.

<sup>99</sup> *Munday* (1930) 44 CLR 38, 52 (Isaacs CJ) quoting Burn (29<sup>th</sup> ed), above n 98. Citations omitted.

men.<sup>100</sup> All criminal prosecutions are brought by the Crown and the ‘entrusting of jurisdiction in some criminal matters to a single tribunal determining both law and fact ... is procedural only’.<sup>101</sup> Therefore, ‘in the absence of any statutory direction to the contrary’, the ‘inherent principles of the common law safeguarding the liberty and property of the individual’ apply.<sup>102</sup>

While the common law rule prohibiting the lumping of cases had, up to that point, only been applied in cases of trial upon indictment, Isaacs CJ was of the view that the rule also applied in the summary jurisdiction, and when the magistrate at first instance flouted the rule he committed an error of law that went to jurisdiction. The defendants’ consent could not cure the defect because where ‘jurisdiction derived from the King to dispense his royal justice is transgressed ... private submission is incapable of condoning it where personal liberty [is] concerned’.<sup>103</sup> It is the prerogative of the legislature alone to abrogate fundamental common law protections because ‘an individual cannot waive a matter in which the public have an interest.’<sup>104</sup> His Honour took this one step further, citing authority to the effect that ‘a prisoner can consent to nothing.’<sup>105</sup> He might also have added that jurisdiction cannot be conferred upon a court by a party (in this case the defendant) in the absence of a statutory power to do so. In support of his argument that the common law rule prohibiting the lumping of cases applies in the summary jurisdiction, Isaacs CJ referred to s 10 of the *Summary Jurisdiction Act 1848* (UK) (*Justices Act 1902* (NSW) s 57). This section provided that ‘every ... information shall be for one offence only, and not for two or more offences.’<sup>106</sup> Although he conceded that at common law judges have discretion to lump cases, he interpreted s 10 as prohibiting the practice in the summary jurisdiction.<sup>107</sup>

There are reasons other than differing constructions of the summary jurisdiction that help to explain the distinction between Dixon J and Isaacs CJ’s judgments. One is the nature of jurisdictional errors of law. The High Court case of *Kirk v Industrial Court*, decided in 2010,

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<sup>100</sup> *Munday* (1930) 44 CLR 38, 58.

<sup>101</sup> *Munday* (1930) 44 CLR 38, 52.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* 66.

<sup>104</sup> *Ibid* 66–7 quoting Alderson B in *Graham v Ingleby* (1848) 154 ER 277 at 279.

<sup>105</sup> *Munday* (1930) 44 CLR 38, 66 citing *Bertrand’s Case* (1867) L.R 1 P.C at 534.

<sup>106</sup> *Munday* (1930) 44 CLR 38, 62.

<sup>107</sup> *Ibid* 63.

helps to shed light on the decision in *Munday v Gill*. In *Kirk*, citing with approval the work of Professor Geoffrey Sawer written in 1956, the High Court noted that the area of law relating to jurisdictional error is ‘at bottom’ a question of ‘policy, not of logic’.<sup>108</sup> Thus it ‘has not yielded principles that are always easily applied’. The reason for this, Sawer argued, is the tension between the need to keep inferior tribunals within the bounds of their jurisdiction on the one hand, and the desire ‘to give the inferior decision some degree of finality ... for reasons of expediency’, on the other.<sup>109</sup> Given the ‘open textured’ nature of the law relating to jurisdictional error, it is tempting to speculate that Chief Justice Isaacs and Justice Dixon in *Munday v Gill* constructed understandings of the summary jurisdiction that produced the outcome they desired, rather than one that can be seen to reflect an objective reality. It is clear from Dixon J’s emphasis on pragmatic considerations that finality was an important consideration for him. An element of professional rivalry may also have been at play given that the recently appointed Dixon J’s star was rising as Isaacs CJ’s was on the wane.<sup>110</sup> Whatever may have been the reasons for the differing decisions, my analysis of the development of the summary jurisdiction shows that Isaacs CJ’s construction has turned out to be the more accurate understanding of summary jurisdiction in the current era. Therefore, to repeat Dixon J’s construction as though it reflects current reality is misleading. However, rather than declaring one judge’s view correct and the other incorrect, the case is better understood as capturing a moment of transition in the development of the summary jurisdiction from an informal forum with few protections for accused persons to a more formal criminal justice apparatus. In some respects Isaacs CJ was ahead of his time because although the summary jurisdiction had formalised to an extent by 1930, his perception of it did not gain paramountcy until the final quarter of the twentieth century, as this thesis shows.

### **3. Methodological Approach and Sources**

This thesis presents a close analysis of the summary jurisdiction as it developed over time. It employs a socio-historical methodological approach. In order to understand the summary jurisdiction in the current era and to provide a basis for critique, it charts the ‘emergence and

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<sup>108</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (*‘Kirk’*), 568 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) quoting Geoffrey Sawer, ‘Error of Law on the Face of an Administrative Record’ (1956) 3 *University of Western Australia Annual Law Review* 24.

<sup>109</sup> *ibid* 567–8, quoting Sawer.

<sup>110</sup> Blackshield, above n 77, 118–119.

development of legal practices' and how they have been legitimated.<sup>111</sup> Such an approach derives from recognition that the 'network of practices' constituting the criminal law and its institutions has a history and that that history has informed the current form, substance and practice of the law.<sup>112</sup> It is also a means of accounting for the contingency of substantive criminal law.<sup>113</sup> This approach is particularly appropriate because in contrast to the static picture produced by the empirical analyses discussed above, the socio-historical method reveals the dynamic nature of the summary jurisdiction.

The socio-historical method has led me to draw upon particular sources. The NSW summary jurisdiction has developed primarily through statute. Therefore it has been necessary to trace the myriad statutory instruments that have shaped it. The need to decipher the legislative practices and social context behind these instruments has led me to the Hansard reports of parliamentary debates and reports by various government bodies (such as the New South Wales Law Reform Commission ('NSWLRC')). While, for the most part, Local Court cases are unreported, there is nevertheless a substantial body of case law to draw upon. In 2002 the Chief Magistrate began the practice of publishing (but not formally reporting) a handful of cases every year to provide guidance to magistrates on particular issues, such as how to deal with certain issues of proof, or the applicable sentencing practices for certain offence types. These cases are available on the NSW Caselaw website administered by the NSW Department of Justice and are discussed in detail in Chapter 2.<sup>114</sup> There are two further bodies of case law. The first comprises appeals against conviction and sentence to the District Court, the majority of which are unreported. The second is Supreme Court and High Court case law developed through the prerogative writs, the case stated mechanism that was introduced in 1881, and statutory appeals. I draw upon these cases where they illuminate the legal practices of the summary jurisdiction. Treatises written by lawyers to assist practitioners and magistrates have also been valuable. Dating back to 1700 these treatises consolidate the legislation and common law at particular points in time. They have contributed to the development and formalisation of the law.

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<sup>111</sup> Markus Dirk Dubber, 'Historical Analysis of Law' (1998) 16(1) *Law and History Review* 159, 159, 162.

<sup>112</sup> Farmer, 'The Obsession with Definition', above n 9, 68.

<sup>113</sup> Ibid.

<sup>114</sup> NSW Department of Justice, Caselaw <<https://www.caselaw.nsw.gov.au/>>.

The key to the socio-historical method is to analyse the historical development of legal principles and practices in their ‘social, cultural, political, and economic context’.<sup>115</sup> If law is a social practice it follows that divorcing the law from its social context results in only a partial understanding of it. I have derived the social context for my study from parliamentary debates and historical, sociological and criminological studies. For the historical context it has been necessary to rely on sources written by legal historians. Because the summary jurisdiction in NSW, and indeed Australia more broadly, has been subjected to limited historical analysis, the names of some authors, such as Hilary Golder and Alex Castles, appear more frequently than they might in other, more thoroughly-studied jurisdictions. In relation to drink-driving I have consulted contemporary newspaper reports because the public relied upon such reports for an understanding of the law to a far greater degree than for other offences.

#### ***4. A Frame for a Critical Analysis of the Development of the Summary Jurisdiction***

To gain an understanding of this relatively opaque criminal justice apparatus, this thesis constructs a composite picture of the summary jurisdiction by presenting a critical analysis of its component parts. Each component part is equally important and is therefore given equal attention. My analysis reveals that the legal practices of the summary jurisdiction have, broadly speaking, followed a trajectory of formalisation. NSW has had a summary criminal jurisdiction since colonisation, but the way in which it has been conceived of has changed from an amorphous collection of formal and informal powers into a procedurally defined ‘legal space’ with demarcated boundaries. The relationship between formalisation and the increasing use of the criminal law in summary form to regulate harmful behaviours helps to explain how criminalisation is achieved in the current era. This part of the Introduction introduces my formalisation frame. The next part gives an overview of the structure of the thesis.

##### ***Formalisation***

Drawing attention to the trajectory of formalisation in the summary jurisdiction challenges the enduring perception of the summary jurisdiction as a forum of informality. Two descriptions of the summary jurisdiction at points in time one and a half centuries apart illustrate the orthodox perception of the summary jurisdiction. Farmer, in describing the summary practices of Scottish

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<sup>115</sup> Nicola Lacey, ‘“Philosophical Foundations of the Common Law”: Social not Metaphysical’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (OUP, 2000) 17, 19.

courts in the early nineteenth century, says: ‘The informal and summary practice of these courts was thus justified on the basis of expediency. It is clear that there were no definite rules of procedure.’<sup>116</sup> In the late 1970s McBarnet, in her two tiers of justice and ideology of triviality formulations, observed that in the second tier, ‘[a]lmost all criminal law is acted out in the lower courts *without* traditional due process. But of course what happens in the lower courts is not only [considered to be] trivial, it is not really law.’<sup>117</sup> This emphasis on informality, though correct having regard to the context of these studies in place and time, has blunted scholarly awareness of change over time and obscured the similarities (while emphasising the differences) between the summary jurisdiction and the indictable jurisdiction.

I use the concept of formalisation to capture the trajectory of the legal practices of the summary jurisdiction over time. A trajectory of formalisation, albeit implicit rather than explicit, can be discerned in scholarly accounts of the development of the criminal law over time with reference to England and Wales.<sup>118</sup> Arlie Loughnan detects what she calls the ‘formalisation account’ in the criminal law literature according to which the ‘principles and practices’ of the criminal law have followed a trajectory of formalisation.<sup>119</sup> Loughnan’s account applies to the principles of the common law and the practices and procedures of, and surrounding, the criminal trial. Loughnan’s formalisation account identifies a body of literature that explains the development of the criminal law as a process of formalisation whereby disparate and particular legal rules have been replaced by uniform rules of general application. In this process there has been a shift from organising the criminal law around moral categories to organising it through formal, technical legal rules. In addition to formalisation of the criminal law there has been a formalisation of the rules of evidence, and, at an institutional level, the increasing appearance and professionalisation of lawyers and the refinement of the adversarial process.<sup>120</sup> However, Loughnan’s formalisation account contains a qualification. It raises awareness of the fact that this process has not been uniform, inexorable or ‘unilinear’.<sup>121</sup>

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<sup>116</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15, 70.

<sup>117</sup> McBarnet, above n 18, 153 (emphasis in original).

<sup>118</sup> It seems to me that these accounts have been influenced by the framework of modernity in the sociological literature. For a discussion of this literature, see Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (Routledge, 2<sup>nd</sup> ed, 2013) Part III, in particular 228.

<sup>119</sup> Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press, 2012) 40.

<sup>120</sup> *Ibid* 41–2.

<sup>121</sup> *Ibid* 41.

My concept of formalisation in the context of the summary jurisdiction has emerged from my research. It has four overlapping and interacting dimensions that assume differing degrees of significance at different times. Applied as a lens, the value of this concept is the power it has to explain how criminalisation is achieved in the summary jurisdiction in the current era. These dimensions are:

#### ***4.1 Juridification***

I use the concept of juridification as a means of understanding what I have identified as the turn to law via the summary jurisdiction to regulate practices of the actors. For the purposes of analysis I conceptualise juridification in relation to the summary jurisdiction as having an internal and an external aspect. The external aspect is criminalisation, which I analyse under a separate heading below. Internally, juridification can be seen as the turn to law to regulate the practices of magistrates and the justice personnel within the summary jurisdiction. This includes the process of subjecting the practices and the exercise of discretionary power of these actors to legal rules.<sup>122</sup> Good examples of this type of juridification are the development of an increasingly sophisticated system of appeals from the decisions of magistrates and the juridification of sentencing practices, which are examined in Chapter 1. Juridification in this sense has cut across offence categories by the development of legal rules that apply generally to multiple offence categories. It has taken place primarily through legislation, but it also has included common law developments. In the context of drink-driving it incorporates the use of precise technology-derived rules that enable removal of more open-ended evaluative judgements, such as the degree of drunkenness.

On a descriptive level juridification in the summary jurisdiction also includes maturation. I use the term maturation to capture the development of the summary jurisdiction's power to regulate its own processes, which has been accompanied by what the current Chief Magistrate, Judge Graeme Henson has described as an increasing 'self-confidence'.<sup>123</sup> Without wishing to imply that it has been inevitable, maturation of the summary jurisdiction has been discernible

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<sup>122</sup> The characterisation of juridification in this way owes a debt to Weber's analysis of formalisation, an aspect of which is the 'subjection of political power to the forms of legal rationality' in legal modernity: Veitch, Christodoulidis and Farmer, 'Jurisprudence: Themes and Concepts', above n 118, 228.

<sup>123</sup> Graeme Henson, 'Twenty-Five Years of the Local Court of New South Wales' (2010) 22(6) *Judicial Officers' Bulletin* 45, 47.

from the final quarter of the twentieth century onwards, largely as a result of lawyerification (which I discuss below).

#### ***4.2 Rationalisation.***

The formalisation of the legal practices of jurisdiction, appeals and sentencing can be seen as a process of rationalisation, by which I mean that particular rules applying to specific offences have been replaced by rules of general application. One aim of rationalisation has been to achieve a measure of consistency of legal practices amongst magistrates. There have been two key periods of rationalisation: (1) between the mid-nineteenth century and the turn of the twentieth century; and (2) from the final quarter of the twentieth century onwards. Changing legitimisation demands arising from increasing criminalisation as the nature of representative democracy changed and matured account for rationalisation during these two periods.

#### ***4.3 Professionalisation and ‘Lawyerification’.***

The actors in the summary jurisdiction can be usefully divided into two categories: (1) magistrates and ‘justice personnel’— those actors (aside from magistrates) who are there in their official capacity; and (2) those individuals who are affected by the law most directly, namely, victims and defendants. Justice personnel in the summary jurisdiction are the police, police prosecutors, Director of Public Prosecutions lawyers, and defence lawyers. Formalisation in the context of the actors who are there in their official capacity has occurred through two complementary processes: professionalisation and what I call ‘lawyerification’. Professionalisation, in the sense of the development of a professional identity through the monopolisation of specialised knowledge, has been taking place amongst police, police prosecutors,<sup>124</sup> magistrates and lawyers since at least the early nineteenth century. Professionalisation and its impact on the criminal trial has been well-documented in the scholarly literature,<sup>125</sup> but it has not been examined in relation to the summary jurisdiction.

Lawyerification in the sense used here differs from John Langbein’s concept of the ‘lawyerization’ of the criminal trial. Langbein’s account of the lawyerization of the criminal trial

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<sup>124</sup> It seems that the professionalisation of police prosecutors in the current era includes increasing specialisation, as will be seen in Chapter 7 with the trial of the Domestic Violence Intervention Court Model (‘DVICM’). While prosecutors in the DVICM may not be specialists in a strict sense, their regular appearance in the Domestic Violence jurisdiction gives them a degree of on-the-job specialist training.

<sup>125</sup> See, eg Lacey, *In Search of Criminal Responsibility*, above n 11, 117.

in England refers to the infiltration of solicitors, firstly into the work of private and public prosecutions, and then into defence work in the early eighteenth century.<sup>126</sup> Most of the work of these lawyers was, at first, performed pre-trial. The increasing use of lawyers in the prosecution role precipitated the decision by trial judges to allow counsel to appear increasingly for the defendant. This was done as a matter of practice rather than by common law precedent. The reason why there was a delay between lawyers appearing for the prosecution and lawyers being permitted to appear for the defence was because defence solicitors were held in poor regard. However, Langbein argues that this distrust of the ‘unscrupulous’ tactics employed by defence solicitors in the pre-trial preparation of evidence ultimately prompted judges to permit defence counsel to examine and cross-examine witnesses in court, thereby enabling the judge to assess the credibility of the evidence.<sup>127</sup> The increased appearance of defence lawyers was thus a response to increasing prosecution power, concern about false prosecutions, and the construction of false defence evidence. Lawyerization, Langbein argues, was one of the main reasons for the replacement of ‘trial by altercation’ with the adversarial trial.

By contrast, lawyerification of the summary jurisdiction began with magistrates, followed by defence lawyers, and served a different purpose. The use of lawyers as prosecutors in the summary jurisdiction has been marginal. Lawyerification is a much more recent phenomenon than lawyerization. It began in the mid-twentieth century and gained momentum from the final quarter of the twentieth century. Unlike lawyerization, which has been totalising, lawyerification of the summary jurisdiction has been a nuanced development. Despite the complexity of the story of lawyerification, it is clear that the number of lawyers in the summary jurisdiction as a whole has increased significantly and this has contributed to the formalisation of summary procedure.

#### ***4.4 Separation of Law from Other Spheres of Social Power***

The separation of law from other spheres of social power, such as religion and politics, is identified in the socio-historical literature as an aspect of the development of ‘formal rational

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<sup>126</sup> See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005) ch 3, in particular 145–6.

<sup>127</sup> *Ibid*, 145.

law’,<sup>128</sup> and it has been a prominent theme in the summary jurisdiction. It has manifested itself in the achievement of autonomy from the government. However, formalisation in this dimension has been piecemeal and has taken place only in the current era. The magistracy achieved autonomy in the early 1980s and the creation of the ODPP in 1986 gave the prosecution in indictable matters formal autonomy from the government. By contrast, police prosecutors, who are responsible for the prosecution of the vast majority of matters in the summary jurisdiction, have been retained even though they are part of the executive arm of government.

### ***The Relationship between Formalisation and Criminalisation.***

As the summary jurisdiction has formalised there has been a turn to law to regulate behaviours that have been constructed as harmful, what I call, for brevity, ‘constructed harmful behaviours’. I use this expression to emphasise that what is considered to be harmful is socially constructed and to avoid appearing to endorse implicitly such constructions. As will be seen throughout the thesis, and particularly in Chapter 4 in relation to defendants, social perceptions of harmfulness change over time. A timely example is homosexual sex acts between men.<sup>129</sup> This behaviour was criminalised in NSW until 1984. Today the criminalisation of such behaviour is considered to be a breach of human rights. The turn to law to regulate constructed harmful behaviours is the external dimension of juridification that I refer to as ‘criminalisation’. There is a vast literature on criminalisation but the concept is used in a limited way in this thesis.<sup>130</sup> Criminalisation is understood in this thesis as the turn to the criminal law in summary form to regulate constructed harmful behaviours. Criminalisation in the criminal law literature is recognised as encompassing not only the rules that are developed to govern social conduct, but also the enforcement and institutionalisation of those rules,<sup>131</sup> and this thesis confirms that this is so. I argue that

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<sup>128</sup> This has been influenced primarily by the work of Max Weber, see Veitch, Christodoulidis and Farmer, ‘Jurisprudence: Themes and Concepts’, above n 118, 228–9.

<sup>129</sup> It is timely because in November 2017 the Australian people expressed their wish in a national plebiscite that same-sex marriage be legalised. For details on the plebiscite see the Australian Bureau of Statistics: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.

<sup>130</sup> Much of the criminalisation literature is normative. See, eg Douglas Husak, *Overcriminalisation: The Limits of the Criminal Law* (OUP, 2007). This literature is not germane to this thesis because I am not seeking to make normative claims about the appropriate boundaries of the criminal law. Rather I examine *how* criminalisation has been achieved through the summary jurisdiction in order to lay the foundations for exploring the question of *why*.

<sup>131</sup> Nicola Lacey, ‘Legal Constructions of Crime’ in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (OUP, 2002) 264, 282; McNamara, above n 64, 39.

criminalisation in the summary jurisdiction has taken place along two axes: one vertical ('vertical criminalisation'); and one horizontal ('horizontal criminalisation').<sup>132</sup>

Vertical criminalisation comprises the reclassification of indictable offences as capable of being finalised summarily. It might be objected that reclassification is not criminalisation because that behaviour is already criminalised and has merely been transferred from the indictable jurisdiction to the summary jurisdiction. However, this thesis shows that since the mid-eighteenth century reclassification has frequently been motivated by the expectation that rendering an offence triable summarily will increase conviction rates, thus extending the reach of the criminal law. In some instances, such as with the offence of affray discussed in Chapter 5, that expectation has been realised.

It might also be objected that reclassification is in fact *de*-criminalisation rather than criminalisation because the offence is being transferred to a forum that deals with regulatory offences that do not carry the usual moral stigma attaching to criminal convictions. However, the close examination of drink-driving and domestic violence offences presented in Chapters 6 and 7 of this thesis shows that the summary jurisdiction is capable of manufacturing moral condemnation and thus is not a 'moral free' zone.

Horizontal criminalisation comprises the creation of new offences, and, in relation to behaviours that are already criminalised, a shift away from rules of general application towards offences defined with increasing particularity.<sup>133</sup> A good illustration of this shift in the context of the summary jurisdiction is the apprehended domestic violence order and accompanying offence of contravening an apprehended violence order (the 'domestic violence statutory regime') enacted in the 1980s and refined over subsequent decades. While domestic violence has been criminalised since at least the mid-nineteenth century, the domestic violence statutory regime, which sets norms of behaviour via the civil standard of proof and punishes breaches via

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<sup>132</sup> This approach to juridification derives from Jurgen Habermas and explanations of Habermas in Veitch, Christodoulidis and Farmer, above n 118, 256.

<sup>133</sup> A note of clarification is required at this point. Habermas, one of the foremost writers on juridification, saw juridification as having horizontal and vertical dimensions. Horizontal juridification, according to Habermas, is the legal regulation of social behaviour that was previously regulated informally, such as by religion, via law. Vertical juridification is the use of legislation or case law to create 'increasingly detailed normative standards' for behaviour that has already been juridified. See *ibid* 256. To avoid confusion with too many verticals and horizontals, I have included what Habermas would conceive of as vertical juridification in my concept of horizontal criminalisation.

the criminal standard, has enabled the criminal law to be moulded to the particular circumstances of the individual offender and his or her relationship with the person in need of protection, thus enabling the criminal law to define proscribed behaviour with a fine degree of particularity.<sup>134</sup>

### 5. *Overview of the Structure of the Thesis*

This thesis is divided into three parts that correspond with the three component parts of the summary jurisdiction, namely, procedures and practices; actors; and substantive offences. Part I, which contains Chapter 1, presents an analysis of the procedural rules and practices that have developed to instruct the magistrates, and other actors, on how a matter is to proceed through the courts from the moment when a charge is laid to the conclusion of the final appeal. Procedure in this sense is to be distinguished from the substantive offence definitions and whether or not criminal liability is to be imposed upon a particular offender, although they are closely related. Procedures and practices can be sensibly divided into three categories: those relating to jurisdiction; those relating to appeals; and those relating to sentencing. Broadly speaking, the evolution of procedures and practices in NSW, particularly those relating to the boundaries between the summary and indictable jurisdictions, has followed a trajectory of formalisation.

Despite its importance in criminal law scholarship, questions of jurisdiction tend to be ignored, left implicit rather than explicit, or are quarantined from the substantive criminal law as a topic reserved for technical procedural focus.<sup>135</sup> At its simplest, jurisdiction has been defined as the authority to ‘do things with law’.<sup>136</sup> There is now a body of scholarship examining what is termed the ‘metaphysical’ aspects of legal jurisdiction, namely the way in which questions of jurisdiction shed light on power and authority, who may speak for whom, and ‘normative legal ordering’.<sup>137</sup> However, the approach taken to jurisdiction in this thesis is more concrete. It examines the legal practices through which the jurisdictional allocation of offences has been organised. These legal practices have constructed a ‘legal space’ that we know as the summary jurisdiction in NSW.

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<sup>134</sup> Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014), ch 4, 77.

<sup>135</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 15, 118.

<sup>136</sup> Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 4.

<sup>137</sup> *Ibid*; Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007), foreword; Farmer, *Criminal Law, Tradition and Legal Order*, above n 15, 119.

Part II of this thesis contains chapters 2 to 4. It presents an analysis of the development of the roles of the various actors in the summary jurisdiction to reveal the way in which they have shaped the legal practices which constitute the summary jurisdiction. Chapter 2 examines magistrates, Chapter 3 examines the ‘justice personnel’, who are the police, police prosecutors, the ODPP, and defence lawyers; and Chapter 4 examines defendants and victims. Defendants and victims are examined together because they are the actors who are there in a non-official capacity and the law impacts upon them most directly. Broadly speaking, the development of the roles of the legal actors has followed a trajectory of formalisation, but formalisation has been piecemeal and plays itself out in specific ways in relation to each of them. Chapter 4 illustrates the relationship between formalisation and criminalisation by analysing how the demographic mix of defendants in the summary jurisdiction has changed as the government has increasingly deployed the criminal law in summary form to regulate constructed harmful behaviours.

Part III of this thesis comprises chapters 5, 6 and 7 and presents an analysis of substantive offences. These chapters illustrate how criminalisation is achieved, and explore the relationship between formalisation of the summary jurisdiction and criminalisation. The criminal court statistics are a way in to this otherwise opaque dimension of the criminal justice system and are a starting point for making interpretive arguments about the socio-historical material. Chapter 5 examines assault and affray, Chapter 6 examines drink-driving, and Chapter 7 examines the domestic violence offence of contravening an apprehended violence order (‘CAVO’). I have chosen these particular offences for three reasons. The first is that they are representative examples from the three largest offence categories in the summary jurisdiction according to the Australian and New Zealand Standard Offence Classification. Together these three offence categories account for approximately 60 per cent of all offences finalised in the summary jurisdiction at the time of writing.<sup>138</sup> The second reason is that they have been pivotal to the development of the summary jurisdiction in the current era. The third reason is that they provide illustrations of both vertical (assault and affray) and horizontal (drink-driving and contravening a domestic violence order) criminalisation.

My analysis of change over time in the component parts of the summary jurisdiction has led me to identify four chronological periods that are marked by changing social conditions: (1)

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<sup>138</sup> Source: NSW Bureau of Crime Statistics and Research.

from colonisation to the mid-nineteenth century; (2) from the mid-nineteenth century to the end of the nineteenth century; (3) from the end of the nineteenth century to the final quarter of the twentieth century; and (4) from the final quarter of the twentieth century today. Each chapter follows this periodisation except for Chapter 6 — drink-driving, and Chapter 7 — CAVO. The reasons why drink-driving and CAVO differ are set out in the chapters themselves, but broadly speaking it is because different social forces were operating on the development of those areas of law.

## ***6. Outline of Thesis Question and Main Arguments***

The question that this thesis seeks to answer is: ‘How can the historical development of the summary jurisdiction be understood?’ In answering this question this thesis shows how the summary jurisdiction has been set up to regulate constructed harmful behaviours. This thesis argues that formalisation is a useful concept for understanding the historical development of the summary jurisdiction. By analysing each component of the summary jurisdiction through the formalisation lens this thesis exposes aspects of the development of the summary jurisdiction that have been under-analysed in the criminal law scholarship. The utility of the formalisation lens is set out in the individual chapters of this thesis. However, one general argument may be advanced here. Formalisation has facilitated criminalisation in two important respects. Firstly, it has increased the efficiency of the summary jurisdiction. Efficiency in this context is understood as increasing the number of convictions as well as improving the flow of matters through the system. Improvements in efficiency make space for further behaviours to be regulated by the criminal law. Secondly, formalisation legitimates the increasing use of the criminal law’s coercive powers via the summary form in the current era. Whether or not ‘legitimacy’ exists as a social phenomenon is contentious,<sup>139</sup> but that is not the subject of inquiry here. Here legitimisation is understood as the way in which the state’s adjudication of criminal liability and consequent exercise of coercive powers in the imposition of punishment is justified.<sup>140</sup> In arguing that formalisation of the summary jurisdiction plays a legitimating role in the current era this thesis builds upon Nicola Lacey’s argument that the ‘development of ideas of individual responsibility for crime are responses to problems of co-ordination and legitimation faced by criminal law’,

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<sup>139</sup> Alan Hyde, 'The Concept of Legitimation in the Sociology of Law' (1983) (2) *Wisconsin Law Review* 379.

<sup>140</sup> See arguments developed by Nicola Lacey in relation to the role of criminal responsibility in the criminal law, in particular in Lacey, 'In Search of the Responsible Subject' above n 12, 353.

and that these problems change as the social context in which they operate changes.<sup>141</sup> My close analysis of the procedures, practices and substance of the criminal law in the summary jurisdiction shows that change over time can be best understood as a response to changing legitimisation demands. This framework helps to understand why formalisation took place at different times and to varying degrees in the different component parts of the summary jurisdiction. It also helps to understand why formalisation intensified in the final quarter of the twentieth century, particularly since 1995, and not earlier.

This thesis shows *how* criminalisation is achieved and argues that to understand the ‘how’ it is necessary to examine each instance of it closely. The next logical question is *why* criminalisation is used as a means of regulating constructed harmful behaviours. This thesis suggests that to answer this second question it is necessary, again, to examine each instance of criminalisation closely, for as this thesis shows, the reasons why differ from offence to offence.

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<sup>141</sup> Ibid 350.

## **Part I: Procedures and Practices**

## Chapter 1: Procedures and Practices

The procedural rules and practices that instruct the magistrates, and other actors, on how a matter is to proceed through the courts from the moment when a charge is laid to the conclusion of the final appeal are the backbone of the development of the summary jurisdiction. A close examination of the procedures and practices of the summary jurisdiction reveals that change over time has followed a trajectory of formalisation. As noted in the introduction, this phenomenon has been under-analysed in the criminal law literature. Formalisation in the summary jurisdiction has been distinctive from formalisation in the indictable jurisdiction largely because of the summary jurisdiction's distinctive history. This chapter analyses the development of what I have identified as the key procedures and practices, namely, jurisdiction, appeals and sentencing, from colonisation to present. It shows that while the overall trajectory has been one of formalisation, it has, in some areas, been piecemeal, and has not taken place in a smooth and steady progression. There have been long periods of inertia with seismic quantitative, but not necessarily qualitative, shifts taking place in the final quarter of the twentieth century.

This chapter argues that rationalisation and juridification are the most useful dimensions of formalisation in this context. As set out in the Introduction to this thesis, I use the concept of juridification as a means of understanding what I have identified as the turn to law to regulate practices of the magistrates and the justice personnel within the summary jurisdiction. I use the concept of rationalisation as a way of understanding the replacement of particular rules that apply to specific offences with rules of general application. Rationalisation and juridification have been products, in part, of changing legitimisation demands, but they have also taken place to improve the efficiency of the summary jurisdiction. Improved efficiency has facilitated the increasing use of the criminal law in summary form to regulate constructed harmful behaviours. Identification of this relationship between formalisation and criminalisation helps us to understand *how* criminalisation happens. It shows that criminalisation is as much a function of procedures and practices as it is a function of expansion of the substantive criminal law.

Over the course of the second half of the nineteenth century the way in which jurisdiction was conceived of in NSW transformed from being allocated to magistrates on an *ad hoc* offence

by offence basis to being defined primarily in procedural terms.<sup>1</sup> During this period a procedural mechanism for distributing accused persons between the indictable and summary jurisdictions developed. There was a transition from informal and porous jurisdictional boundaries to technical formal legal boundaries—a shift that marks it out as ‘a decisive moment in the modernisation of the law’.<sup>2</sup> This is a similar pattern to that detected by Farmer in the Scottish context. However, while I show that the broad trajectory in NSW was similar, the ‘legal practices’<sup>3</sup> of criminal jurisdiction in NSW were distinct because of the colonial context in which the developments took place. Farmer notes that the transformation and growth of criminal justice in the early nineteenth century has ‘generally been interpreted as part of the movement towards centralisation and formalisation’ and this is ‘said to be characteristic of the modern state’. However, it is the transformation of the operation of jurisdiction, he argues, that is the most significant feature of the rise of the summary jurisdiction.<sup>4</sup> This chapter shows that while in NSW, as in Scotland and England, the formalisation process was underway by the middle decades of the nineteenth century,<sup>5</sup> the period from the final quarter of the twentieth century onwards is the crucial period for understanding the summary jurisdiction in the current era. To make sense of this complex process this chapter traces the reorganisation of the courts and the criminal law through procedural rules and practices from colonisation to the current era.

### ***Procedures and Practices of Jurisdiction***

#### ***From Colonisation to the Mid-Nineteenth Century***

The convict colony of NSW inherited the criminal justice institutions of England but they were modified to meet the ‘exigencies of the situation’.<sup>6</sup> For the first four decades two courts operated in the penal system: the Court of Criminal Jurisdiction for more serious offences (which operated as a military tribunal), and the Bench of Magistrates for less serious offences. The nature of magisterial power and the way in which it was exercised is examined in Chapter 3, but for

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<sup>1</sup> Lindsay Farmer revealed a similar development in the Scottish context in the same period. See Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997), 74.

<sup>2</sup> Ibid 58.

<sup>3</sup> This is a term Farmer employs to denote ‘developments in legislation and practice in the area of jurisdiction’, *ibid.*

<sup>4</sup> Ibid 60.

<sup>5</sup> Farmer identifies the second half of the nineteenth century as the crucial period in Scotland and England, *ibid* 60.

<sup>6</sup> Alex C Castles, *An Australian Legal History* (Law Book, 1982) 33.

present purposes it is important to note that the borders between the jurisdictions were porous and magistrates frequently exceeded their jurisdiction.<sup>7</sup>

In the decades leading up to responsible government in 1856, the Imperial government transplanted to NSW a criminal justice system from England that was premised on territorial (that is, geographic) jurisdiction.<sup>8</sup> But the local legal practices that formed the basis of territorial jurisdiction in England were not present in the NSW colony, which was occupied by Aboriginal peoples with laws and customs that were unfamiliar to the colonising power.<sup>9</sup> In this context magistrates were central to the construction of the link between England's declaration of jurisdiction over NSW and the *actual exercise* of the authority of the English criminal law. This link was forged, in part, through the exercise of summary jurisdiction, at least in relation to convicts and free settlers.<sup>10</sup> From the inception of colonisation until well into the second half of the nineteenth century 'the magistracy was the closest everyday link between the colonial communities and the law.'<sup>11</sup>

In contrast to England, the NSW colony employed an expanded summary jurisdiction as a tool of colonisation to maintain order amongst certain 'problem' groups that were perceived as a potential threat, such as convicts. Power to finalise matters summarily was conferred on magistrates on an *ad hoc* basis by the statute creating the offence. Some statutes contained procedures for magistrates to follow, others were silent. The result was inconsistency and confusion.

One of the earliest uses of the term 'summary jurisdiction' was in 1823 when the Courts of Quarter Sessions were established. These courts were presided over by a bench of magistrates until 1858 when magistrates were replaced with judges and it became a court where criminal

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<sup>7</sup> Ibid, 76–9.

<sup>8</sup> On the link between territorial jurisdiction and the criminal law see; Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (OUP, 2003) 28.

<sup>9</sup> On the use of the summary jurisdiction as a technology of criminalisation and a tool of colonisation, see Tanya Mitchell, 'Criminalisation of Aboriginal People: Development of the Summary Jurisdiction' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 55.

<sup>10</sup> As will be seen, Aboriginal peoples were not governed by the summary jurisdiction in NSW until well into the twentieth century.

<sup>11</sup> Castles, *An Australian Legal History*, above n 6, 373.

matters proceeded on indictment.<sup>12</sup> When Courts of Quarter Sessions opened in 1824 they were vested with ‘power and authority *in a summary way* to take cognizance of *all crimes and misdemeanours not punishable with death*, which have been or shall be committed by any [convicts]...whose sentences shall not have expired or been remitted...’ (emphasis added).<sup>13</sup> Outside of sessions, however, magistrates heard and determined a range of minor civil and criminal matters even though legal authority to do so had been omitted from the First Charter of Justice. This was remedied in 1825 when an Act was passed to create Courts of Petty Sessions and to confer the same power upon a single magistrate over convicts as was exercised by the Courts of Quarter Sessions.<sup>14</sup> Between 1823 and 1850, faced with a shortage of magistrates, the colonial government increasingly conferred the power to hear and determine charges relating to persons other than convicts in a summary way upon one magistrate sitting alone instead of requiring the presence of two or more, as was the case in England. This was a significant dilution of the protection against the arbitrary exercise of power traditionally afforded by using more than one magistrate.

#### ***Mid-Nineteenth Century to the Turn of the Twentieth Century***

In 1856 responsible self-government was established in NSW. Between the mid-nineteenth century and the turn of the twentieth century a procedural mechanism emerged — what I call the ‘reclassification mechanism’ — for the administrative distribution of offenders between the indictable and summary jurisdictions. This mechanism achieved vertical criminalisation. Two pieces of legislation provide bookends for this period. The *Juvenile Offenders Act 1847* (UK), which was adopted in NSW in 1850, marks the beginning of the transition.<sup>15</sup> At the other end is the *Justices Act 1902* (NSW) which consolidated summary criminal procedure. These Acts represent two interrelated strands of legislative change: a reorganisation of the substantive

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<sup>12</sup> *District Courts Act 1858* (NSW). Note that these courts were called Courts of Quarter Sessions until 1973 when the *District Court Act 1973* (NSW) created a court with state-wide jurisdiction and abolished the courts of Quarter Sessions. See *District Court Act 1973* (NSW) ss 166, 167.

<sup>13</sup> *New South Wales Act 1823* (NSW) (4 Geo IV c 96) s xix.

<sup>14</sup> Castles, *An Australian Legal History*, above n 6, 148-9.

<sup>15</sup> *Juvenile Offenders Act 1850* (NSW) (10 & 11 Vict c 82).

criminal law around the emerging procedural notion of jurisdiction; and the regularisation and formalisation of summary procedures through rules of ‘increasingly general application’.<sup>16</sup>

NSW, as a penal colony, employed a vastly expanded summary jurisdiction to control the convict ‘problem’ group. It readily followed developments in England by adopting the summary form of disposition for juveniles charged with minor larcenies and, in 1847, summary jurisdiction was extended to adult free settlers charged with minor larcenies.<sup>17</sup> The motivation for this extension of the use of the criminal law in summary form, both in England and in NSW, was to improve the speed and efficacy of the criminal law, which, it was believed, would make it a more effective tool for maintaining order. The British Parliament had become concerned about the corrupting influence of imprisonment upon young people charged with criminal offences<sup>18</sup> and there were similar concerns in the NSW colony.<sup>19</sup> Permitting minor larcenies committed by juveniles to be finalised summarily by magistrates would, it was argued, permit speedier disposal of charges, increase rates of conviction, and reduce the amount of time offenders spent in prison.<sup>20</sup> Ironically, prior to this expansion, as Thomas Sweeney’s work demonstrates, the majority of juveniles in prison in England had been convicted summarily.<sup>21</sup> Nevertheless the adoption of the *Juvenile Offenders Act 1847* (UK) in NSW coincided with a concern about ‘Sydney’s young vagrants — popularly known as “street Arabs”’.<sup>22</sup> Whether or not it achieved

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<sup>16</sup> Farmer identified a similar move in the Scottish context. See Farmer, *Criminal Law, Tradition and Legal Order*, above n 1, 79.

<sup>17</sup> *Juvenile Offenders Act 1847* (10 & 11 Vict c 82), adopted in Australia by the *Juvenile Offenders Act 1850* (NSW). For a detailed discussion of these developments as they relate to the establishment of the Children’s Court in the early twentieth century see John Seymour, *Dealing with Young Offenders* (Law Book, 1988), especially ch 1. For discussion of the historical context of the English developments see Martin J Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914* (Cambridge University Press, 1990) 279-94. The mechanism was extended to adults in NSW in the *Larceny Summary Jurisdiction Act 1852* (NSW) and three years later the British Parliament passed similar amendments in the *Criminal Justice Act 1855*. By contrast with convicts however, juveniles and adult free settlers retained a choice of jurisdiction.

<sup>18</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 28 April 1847, vol 92 col 33–47. Both the English Parliament and the NSW legislature expressed this concern in the preambles to the Acts which are identical: ‘Whereas in order in certain cases to ensure the more speedy trial of Juvenile Offenders and to avoid the evils of their long imprisonment previously to trial ...’. On the debate over the extension of summary jurisdiction in England see Thomas Sweeney, *The Extension and Practice of Summary Jurisdiction in England c.1790–1860* (PhD Thesis, University of Cambridge, 1985) 125 and following. See also Wiener, above n 17.

<sup>19</sup> Seymour, above n 17, ch 1.

<sup>20</sup> Sweeney, above n 18, 141.

<sup>21</sup> *Ibid* 154.

<sup>22</sup> Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney University Press/OUP, 1991) 76.

its desired purpose, law reformers had recognised the potential of the summary criminal jurisdiction to regulate behaviours that had been constructed as harmful.

NSW was less hostile to the summary form than England, perhaps because of a combination of the extensive use of summary jurisdiction historically and the exigencies of establishing order in the colony.<sup>23</sup> Unlike in England, where such changes were vigorously debated,<sup>24</sup> in NSW the new summary regime for juveniles was adopted without hesitation and extended to adult free settlers a mere two years later in 1852.<sup>25</sup> Breaking the usual pattern of the NSW legislature following English developments, NSW extended summary jurisdiction to adults charged with larceny of goods valued up to 5 shillings three years earlier than England did because it was thought ‘so reasonable that it would hardly be objectionable.’<sup>26</sup>

It is tempting to assume that the summary form was easily introduced in NSW because it was seen as a forum for convicts and criminals who were less deserving of procedural protections. However, there is a paucity of evidence that this was so. In the period between 1788–1823, both settlers and convicts alike were dealt with summarily before the bench of magistrates. Trial by jury was not introduced until 1828.<sup>27</sup> As legal historian Alex Castles explains ‘In theory at least, under the old court system [1788–1823], convicts and freemen were dealt with in the same fashion as far as the administration of the criminal law was concerned.’<sup>28</sup> In 1823 a Supreme Court was established and from that date onwards the NSW courts took on a

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<sup>23</sup> Indeed, there was a period of uncertainty as to whether even free settlers were entitled to a trial by jury in the NSW colony. See Alex C Castles, ‘The Judiciary and Political Questions: The First Australian Experience, 1824–1825’ (1973) 5 *Adelaide Law Review* 294. As Lindsay Farmer points out, reforms to criminal procedure in England during this time were designed to make prosecution and conviction easier and were not motivated by concerns about the autonomy of the accused; see Lindsay Farmer, ‘Criminal Responsibility and the Proof of Guilt’ in Markus Dirk Dubber and Lindsay Farmer, *Modern histories of crime and punishment* (Stanford University Press, 2007) 42, 44. Concerns about due process were not to emerge until the twentieth century; see Antony Duff et al (eds), *The Trial on Trial, Vol. 3: Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007) 50.

<sup>24</sup> See for instance, Mr E B Denison in the UK parliamentary debates on the *Juvenile Offenders Bill*: ‘The principle of the Bill was to give to justices the power of trying boys under sixteen years of age in private; a principle most dangerous to the liberty of the subject; upsetting the great principle of trial by jury, and substituting for it a secret tribunal, where no counsel could be heard on the prisoner’s behalf.’ United Kingdom, *Parliamentary Debates*, House of Commons, 28 April 1847 vol 92, col 33–47.

<sup>25</sup> *Larceny Summary Jurisdiction Act 1852* (NSW), New South Wales, *Parliamentary Debates*, reported in *Sydney Morning Herald*, 25 June 1852.

<sup>26</sup> There was no further debate on the subject.

<sup>27</sup> Alex C Castles, ‘The Judiciary and Political Questions: The First Australian Experience, 1824–1825’ (1973) 5 *Adelaide Law Review* 294.

<sup>28</sup> Alex Castles, *An Introduction to Australian Legal History* (Law Book Co, 1970) 64.

form that more closely resembled the courts in England.<sup>29</sup> It appears to be this background of the penal nature of the colony that provided fertile soil for the expansion of the summary jurisdiction in the mid-nineteenth century, rather than a belief that certain groups deserved less protection from the exercise of state power.

The English and NSW iterations of the *Juvenile Offenders Act* contained the prototype of a procedural mechanism — the reclassification mechanism — for distributing cases between the jurisdictions that has persisted into the current era. The Acts permitted simple larcenies of goods up to a certain value to be finalised summarily unless the offender ‘object[s] to the case being summarily disposed of...’.<sup>30</sup> This procedural reclassification mechanism formed the basis of what is termed elsewhere the ‘administratisation’<sup>31</sup> of the criminal law. It created a category of offences that are triable either summarily or on indictment, namely, those offences that were formerly triable on indictment but which have been reclassified as capable of being finalised summarily by magistrates. Woods refers to these offences as an ‘elective’ or ‘hybrid’ category of offences.<sup>32</sup> After 1995 they became known as ‘table offences’. To avoid confusion I prefer the term ‘triable either way’, which has been adopted in the criminal law literature.<sup>33</sup> This manner of reclassifying indictable offences in order to redistribute them between jurisdictions is a defining feature of the NSW criminal justice system in the current era.<sup>34</sup> In NSW, as in England and Scotland,<sup>35</sup> territory remained important because the jurisdiction of the various Courts is tied to

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<sup>29</sup> Ibid 65.

<sup>30</sup> *Juvenile Offenders Act 1850* (NSW) s 1.

<sup>31</sup> Wiener, *Reconstructing the Criminal*, above n 17, 257.

<sup>32</sup> Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002) 370.

<sup>33</sup> Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’ (2008) 2(1) *Criminal Law and Philosophy* 21, 28.

<sup>34</sup> Woods, above n 32, 370. Gregory Woods attributes the creation of the ‘elective’ or ‘hybrid’ category of offences to the *Criminal Law Amendment Act 1883* (NSW). It appears that the birth of this category can be traced back even further to the *Juvenile Offenders Act 1847*. Indeed Sir Robert Peel’s *Larceny Act 1827* (7 & 8 Geo IV c 29) laid the foundations for this procedural allocation of jurisdiction by abolishing the distinction between grand and petit larceny and creating a class of ‘simple larcenies’ which were triable summarily. Determining which offences were simple larcenies and therefore triable summarily caused a great deal of confusion requiring legislative clarification in NSW in 1891. This is discussed below. For a discussion of this process in England see Leon Radzinowicz and Roger Hood, *A History of English Criminal Law and its Administration from 1750*, vol 5 (Stevens & Sons, 1986), 618–24. See also the discussion of Wiener, above n 17, 259 seq.

<sup>35</sup> The English legislative changes that expanded the summary jurisdiction in the mid-nineteenth century have been traced meticulously: Radzinowicz and Hood, above n 34, 618-24; and Wiener, above n 17, 259 and following. They have been characterised as an extension of the reach of the criminal law. See eg, Wiener at 260-262. Farmer was the first scholar to reveal the significance of the procedural changes in the second half of the nineteenth century because of the way in which jurisdiction was reconceptualised: *Criminal Law, Tradition and Legal Order*, above n 1, 74.

offences committed within certain geographical areas. However, by the end of the nineteenth century in NSW an administrative distribution of offenders was emerging as the predominant means by which authority in the criminal law was organized.

At the same time as jurisdiction was being placed on a more formal footing over the second half of the nineteenth century in NSW, the legislature began to formalise the manner in which summary defended hearings were to be conducted and to mould the disparate procedures spread across numerous statutes into rules of general application. This promoted uniformity of practice amongst magistrates. Formalisation of this 'informal' summary form began in 1848 when the British Parliament passed a series of three Acts known as the Jervis' Acts after their proponent, Sir John Jervis.<sup>36</sup> These Acts were adopted in the NSW colony and the second in the series, dealing with the summary jurisdiction of Justices,<sup>37</sup> became known in NSW as the *Justices Act 1850* (NSW) (the '*Justices Act 1850*').<sup>38</sup> Like the Jervis Acts, the *Justices Act 1850* consolidated some procedural rules but left many untouched and, again, did not strive for consolidation.<sup>39</sup> As Farmer explains, the Jervis Acts mark the beginning of a period in which the procedure in magistrates' courts was formalised to 'facilitate prosecution and conviction'.<sup>40</sup> In NSW they formed a foundation for the increasing formalisation of summary hearing procedure.

A good example of how this was achieved was the stipulation that defended summary hearings were to be conducted by the examination and cross-examination of witnesses as opposed to being conducted 'on the papers'.<sup>41</sup> This provided the foundation for increasing formalisation with the evolution of increasingly complex rules of evidence and the greater involvement of lawyers in summary proceedings in the late twentieth century. Hearing procedure was further clarified in 1853 when Parliament enacted a provision to regulate summary proceedings which provided that 'the examination and cross-examination of witnesses and the

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<sup>36</sup> 11 & 12 Vict c 42, 43, 44.

<sup>37</sup> Known in England as the *Summary Jurisdiction Act 1848* (11&12 Vict c 43).

<sup>38</sup> The Acts were adopted in NSW in 1850. For a detailed discussion of the effect of the Acts see Farmer, *Criminal Law, Tradition and Legal Order*, above n 1, 78; Clive Emsley, *Crime and Society in England 1750–1900* (Longman, 2<sup>nd</sup> ed, 1996) 208–10.

<sup>39</sup> On the effect of the Jervis Acts see Farmer, *Criminal Law, Tradition and Legal Order*, above n 1, 79. Indeed contemporary commentators complained that the Acts were unnecessarily complicated and poorly drafted. For instance, James Fitzjames Stephen said with classic English understatement that though the Acts were 'open to various objections, [they] may by a combination of study and practice be understood': James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, first published 1883) vol 1, 123.

<sup>40</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 1, 79.

<sup>41</sup> *Justices Act 1850* (NSW) s xiv.

right of addressing such Justices upon the case in reply or otherwise be in accordance with that of the Supreme Court upon the trial of an issue of fact *in an action at law*' (emphasis added).<sup>42</sup> The phrase 'in an action at law' served to distinguish summary hearing procedure, which was to be conducted through the oral testimony of witnesses, from actions in equity, which were conducted on the basis of affidavits.<sup>43</sup> By 1848 both the prosecution and defence were permitted to be represented by counsel,<sup>44</sup> but while counsel could examine witnesses, they were precluded from making 'any observation in reply upon the evidence'.<sup>45</sup>

The provisions stipulating the form of summary hearings were consolidated in 1902,<sup>46</sup> but they were not altered and have remained largely the same to this day with two notable subsequent developments. The first was an amendment in 1883 to permit counsel to make 'full answer' to the opposing case;<sup>47</sup> and the second, introduced in 2001, was that summary defended hearings were to be called 'trials'.<sup>48</sup> The latter change is more than a matter of mere nomenclature. It reflects both the reality of the increasing formalisation of summary hearings and the desire of magistrates for greater status within the legal profession, a point which is explored in Chapter 3. Indeed, in a prosecution appeal from the dismissal of charges by a magistrate in 2012, Justice Johnson of the Supreme Court of NSW, explicitly equated trials before magistrates with trials in the higher courts, in particular trials by judge alone. After citing authorities on the nature of the 'role of the Judge in a jury criminal trial', His Honour said 'I consider that they are equally applicable to Magistrates hearing and determining criminal proceedings in the Local

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<sup>42</sup> *Justices Act Amendment Act 1853* (NSW) s 15.

<sup>43</sup> Alfred Goran, *Bignold's Police Offences and Vagrancy Acts* (Law Book Co, 1951) 23 [6]. See also *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 733 where Barton J interpreted the meaning of 'to hear and determine...in a summary way' in a statute granting a right of appeal as not only the absence of a jury, but 'a hearing upon evidence taken orally before the Court, and not merely upon a consideration ... of the depositions already taken.'

<sup>44</sup> See discussion of legal representation and the impact of the *Prisoners Counsel Act 1836*, adopted in NSW in the *Defence on Trials for Felony Act 1840* (NSW), on the summary jurisdiction in chapter 3 below.

<sup>45</sup> *Ibid*, s xiv. See Chapter 3.

<sup>46</sup> With the enactment of the *Justices Act 1902* (NSW) ('*Justices Act 1902*'). The *Justices Act 1902* consolidated summary and indictable procedure in the one Act: *O'Toole v Scott* [1965] AC 939, 947.

<sup>47</sup> *Justices Act 1902* (NSW) s 342.

<sup>48</sup> See *Criminal Procedure Act 1986* (NSW) ch 4 pt 2, the heading of which is 'Trial procedures in the lower courts', which was the title adopted in 2001 when the *Justices Act 1902* (NSW) was repealed and both summary and indictable trial procedures were consolidated in the *Criminal Procedure Act 1986* (NSW). See also Local Court, *Practice Note Crim 1* (at 4 April 2012), Part B – Procedure, note 5 'Summary Criminal Trials'.

Court, whether defended hearings or sentence proceedings following a plea of guilty.’<sup>49</sup> This is an indication of the extent of the formalisation of the summary jurisdiction in the current era.

The next part of this discussion shows how the practices of jurisdiction transformed in NSW from *ad hoc* provisions attached to particular offences into a procedural mechanism of general application governing the allocation of offences between the summary and indictable jurisdictions (the ‘jurisdictional allocation of offences’), which facilitated increasing vertical criminalisation.

The *Criminal Law Amendment Act 1883* (NSW) (‘the 1883 Act’) represents a defining moment in the emergence of the modern criminal law in NSW,<sup>50</sup> and a stepping stone towards the development of a summary jurisdiction defined in formal procedural terms. A marker of its modernity was its categorisation of offences into ‘families’.<sup>51</sup> Most of these families had two divisions: offences punishable on indictment; and offences ‘punishable by justices’.<sup>52</sup> Offences punishable by justices fell into two categories. The first category contained offences that could be finalised summarily *without* the consent of the accused, such as possession of the skin of a stolen animal.<sup>53</sup> Justices were not *required* to finalise these offences, but if they chose to, they could do so without the accused’s consent.<sup>54</sup> The historical material shows that while they *could* finalise these matters, magistrates frequently committed them for trial on indictment. This was a cause of frustration to the legislature which was concerned that the limited resources of the Courts of Quarter Sessions were being wasted on trivial matters. The second category contained offences that could be finalised summarily *with* the consent of the accused.<sup>55</sup> Offences in the first category (*without* consent) were usually less serious than those in the second category and this justified abrogation of the consent requirement. In the 1883 Act this second category (*with* consent) was restricted to simple larcenies (‘or an offence punishable as simple larceny’). This

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<sup>49</sup> *DPP (NSW) v Wililo* (2012) 222 A Crim R 106 [42]–[44], citing *DPP (NSW) v Yeo* (2008) 188 A Crim R 82.

<sup>50</sup> Arlie Loughnan, ‘In Accordance with Modern Notions’: Criminal Responsibility at the Turn of the Twentieth Century’ in Arlie Loughnan and Thomas Crofts (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 157 following Lindsay Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45’ (2000) 18(2) *Law and History Review* 397.

<sup>51</sup> Loughnan, ‘In Accordance with Modern Notions’, above n 50, 163.

<sup>52</sup> See, for instance, the heading in pt II above s 150: ‘Offences under Part II Punishable by Justices.’ At this time there remained two offence categories (out of six) that did not contain any offences punishable by justices: forgery (pt IV) and perjury and subornation (pt VI).

<sup>53</sup> s 157.

<sup>54</sup> See s 428.

<sup>55</sup> *Criminal Law Amendment Act 1883* (NSW) s 150.

category preserved the accused's choice of jurisdiction and was considered to be one of the greatest merits of the Bill because of its potential to increase efficiency and decrease cost.<sup>56</sup>

The 1883 Act captures a moment of transition from conferring summary jurisdiction upon justices on an offence by offence basis to organising jurisdiction by means of a procedural mechanism, and demarcating the boundary between the summary and indictable jurisdictions with reference to a generally applicable maximum penalty. Section 150, discussed above, was an early step in this transition. It was the first provision of general application that reclassified formerly indictable offences as triable summarily. It applied generally to simple larcenies ('or an offence punishable as simple larceny'), and any such offence finalised summarily was punishable by a maximum penalty of 6 months imprisonment (or 3 months for offenders under sixteen years of age).<sup>57</sup> This method of organisation cuts across the 'offence family' method of organising the substantive criminal law by creating a summary legal space with a boundary demarcated by a maximum sentencing jurisdiction. It is a defining feature of the criminal justice system in the current era.

However, while the 1883 Act contained some provisions of general application,<sup>58</sup> it did not completely consolidate and rationalise summary procedure. An example of the lack of rationalisation is the absence of differentiation between the penalties that could be imposed for *without* consent summary offences and those that required consent. For instance, both common assault and aggravated assault could be finalised summarily *without* the consent of the accused. The former carried a maximum penalty of three months' imprisonment or a fine of ten pounds and the latter carried a maximum penalty of six months' imprisonment or a fine of twenty pounds.<sup>59</sup> By contrast, petty larceny — a *with* consent summary offence — carried a maximum penalty of six months' imprisonment (or 3 months for offenders under sixteen years of age).<sup>60</sup> Thus the maximum penalty for aggravated assault (a *without* consent offence) was the same as for petty larceny (a *with* consent summary offence).

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<sup>56</sup> One parliamentarian said there was no need to waste the time and resources of a Judge and jury with cases 'in which the amount of property involved is of infinitesimal value.' NSW, *Parliamentary Debates*, Legislative Assembly, 22 February 1883, 615.

<sup>57</sup> *Criminal Law Amendment Act 1883* (NSW) s 152.

<sup>58</sup> Such as s 152, which provided the maximum penalty for petty larceny and similar offences and ss 440–443 which provided a general right of appeal for offences contained within the Act.

<sup>59</sup> *Criminal Law Amendment Act 1883* (NSW) s 65.

<sup>60</sup> *Ibid* s 152.

A good example of the lack of consolidation is that the 1883 Act gave justices the choice of proceeding ‘in a summary way’ under the *Justices Act 1850* (NSW), the ‘present Act’, or ‘in such other manner as shall be directed by any Act hereafter passed for the like purpose ... as if the same were incorporated in this Act.’<sup>61</sup> Because the 1883 Act was never intended to codify the criminal law,<sup>62</sup> many offences that were capable of being finalised by justices remained in other statutes. This left a residue of confusion. There were also many statutory offences that were silent as to the manner of disposition. Magistrates were required to commit such matters for trial on indictment. The legislature put a halt to this practice through an amendment enacted in 1900 which provided that where an Act did not specifically state how the offence was to be tried, it was to be ‘dealt with by the justices summarily’ unless it was either ‘treason, felony, or misdemeanour.’<sup>63</sup> This amendment was expressly designed to address ‘the frequent complaints that are made in both the district courts and the Supreme Court of the many cases that are sent up for trial that should have been dealt with summarily by the magistrates.’<sup>64</sup> It effected a significant expansion of summary jurisdiction and represents a reorientation of the criminal justice system away from the jury trial and towards summary disposition. Together with the amendments introduced in 1891 and provisions relating to appeals, both of which are discussed below, the 1900 amendments laid the foundation for the subsequent consolidation of procedures relating to justices in the *Justices Act 1902* (NSW).

Two amendments to the *Criminal Law Amendment Act 1883* (NSW) introduced in 1891 are significant in the development of the summary jurisdiction because they consolidated the foundation upon which jurisdiction is conceived of in the current era. In the first of these amendments, Parliament used the reclassification mechanism to reclassify indictable offences other than simple larcenies as triable either way. The *Criminal Law and Evidence Amendment Act 1891* (NSW)<sup>65</sup> detached the reclassification mechanism from simple larceny and re-enacted it as a provision that applied generally to offences that Parliament wished to reclassify. These became *with* consent summary offences. The extension of summary jurisdiction was justified on

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<sup>61</sup> *Ibid* s 428.

<sup>62</sup> Woods, above n 32, 345; Loughnan, 'In Accordance with Modern Notions', above n 50.

<sup>63</sup> New South Wales, *Parliamentary Debates*, 18 Oct 1900, Legislative Council, 4098; *Justices Acts Amendment Act 1900* (NSW) s 4.

<sup>64</sup> New South Wales, *Parliamentary Debates*, 18 Oct 1900, Legislative Council, 4098. Compare the situation in Victoria where magistrates retained the discretion to commit for trial on indictment until 1956: *Hall v Braybrook* (1956) 95 CLR 620.

<sup>65</sup> *Criminal Law and Evidence Amendment Act 1891* (NSW) ss 18-19.

the grounds that a ‘great saving to the country would result’, witnesses would be spared the time and expense of attending two courts, and ‘the prisoner would not be unnecessarily deprived of his liberty in awaiting trial.’<sup>66</sup> After the 1891 amendment, to reclassify indictable offences as triable either way, Parliament simply had to add offences to the list in the section containing the reclassification mechanism.<sup>67</sup> This was the prototype of the ‘Table System’ that was introduced in 1995 and is currently used to organise the jurisdictional allocation of offences.

The second significant amendment introduced in 1891 expanded the summary legal space created by s 150 of the 1883 Act (simple larcenies) that was discussed above. It created a maximum summary sentencing jurisdiction for a cluster of offences by applying the maximum penalty for simple larcenies to several additional offences, namely, ‘attempting to commit suicide[;] ...stealing from the person of another[;] ...’ and all offences finalised summarily by justices pursuant to the reclassification mechanism where the value of the property did not exceed £20.<sup>68</sup> The maximum penalty was 6 months imprisonment (3 months for offenders under 16). It also added an alternative penalty of a fine of £20 (£10 for offenders under 16).<sup>69</sup> These provisions of general application were carried over into the *Crimes Act*,<sup>70</sup> which continues to contain the core of the substantive criminal law in the current era.

### *From the Turn of the Twentieth Century to the Final Quarter of the Twentieth Century*

A century of near inertia in the formalisation of jurisdictional practices followed the 1891 amendments, but the triable either way category of offences was expanded twice: once in 1924 and again in 1974. In 1924, a small number of offences were reclassified as *with* consent summary offences (34 in total)<sup>71</sup> and the maximum summary sentencing jurisdiction for *with* consent offences was increased from six to 12 months imprisonment.<sup>72</sup> By 1974, the *without* consent summary offences (except for common and aggravated assault, which are discussed in

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<sup>66</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 5 August 1891, 606-607.

<sup>67</sup> In the 1891 Act it was ss 18-19.

<sup>68</sup> *Criminal Law and Evidence Amendment Act 1891* (NSW) ss 18–20. This general sentencing jurisdiction was a maximum of 6 months imprisonment (3 months for offenders under 16) but the 1891 Act added, in the alternative, a fine of £20 (£10 for offenders under 16).

<sup>69</sup> *Ibid* s 20.

<sup>70</sup> s 476 contained the *with* consent reclassification mechanism, s 477 contained the list of reclassified offences that could be finalised summarily with the accused’s consent, and s 478 contained the general sentencing jurisdiction.

<sup>71</sup> New South Wales Law Reform Commission (‘NSWLRC’), *Criminal Procedure: First Issues Paper*, General Introduction and Proceedings in Courts of Petty Sessions (1982) 54.

<sup>72</sup> *Crimes (Amendment) Act 1924* (NSW) s 476(g).

Chapter 5) had been consolidated into one provision so that the *Crimes Act* contained two sections for reclassified offences: s 476 for offences that were triable summarily *with* the consent of the accused; and s 501 for offences that were triable summarily *without* the consent of the accused. The High Court considered the effect of s 501 in 1936. The case turned on the distinction between felonies and misdemeanours.<sup>73</sup> The distinction gradually fell into disuse and was abolished in 1999.<sup>74</sup>

The NSW government expanded the *with* consent category again in 1974.<sup>75</sup> The magnitude of the increase in this category of triable either way offences over the course of the twentieth century up to 1974 — which is modest when compared with what happened after 1995 — is clear from the numbers: containing 15 offences in 1900; approximately 49 in 1924; and after the 1974 amendments ‘nearly 70’.<sup>76</sup> Across the same period the maximum sentencing jurisdiction for *with* consent summary offences increased from six months in 1891 to twelve months in 1924, and to two years in 1974,<sup>77</sup> where it has remained (although the maximum period for cumulative sentences was increased from three years in 1999 to five years in 2003).<sup>78</sup> By contrast, the *without* consent category, which was small — containing approximately 17 offences — was expanded only marginally in 1974 by increasing the monetary value of the property that was the subject of the charges. The maximum sentencing jurisdiction for without consent offences remained at twelve months imprisonment.

How was it possible for Parliament to undertake this expansion of the triable either way category of offences and the four-fold increase in summary sentencing jurisdiction? Part of the answer lies in the response of the legal profession to the changing legitimisation demands raised by the expansion. The Criminal Law Committee, which was commissioned to consider the government’s reform proposals in 1973 stated that the ‘consent of the Bar to these recommendations is conditioned on the provision of an adequate legal aid scheme in magistrates’

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<sup>73</sup> The Court held that the allocation of a felony to the summary jurisdiction does not change its character: *Commissioner for Railways v Pitman* (1936) 56 CLR 144.

<sup>74</sup> *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 3, pt 3, which repealed *Crimes Act 1900* (NSW) s 9.

<sup>75</sup> *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 11.

<sup>76</sup> NSWLRC, *Criminal Procedure*, above n 71, 54.

<sup>77</sup> *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 11, which became s 476(7) of the *Crimes Act 1900* (NSW) s 476(7); NSWLRC, *Criminal Procedure*, above n 71, 54.

<sup>78</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58 as amended by the *Crimes Legislation Further Amendment Act 2003* (NSW) sch 2[1].

courts'.<sup>79</sup> The expansion of legal aid that took place from the mid-1970s (but subsequent to the expansion of summary jurisdiction) is discussed in Chapter 3. It is likely that another part of the answer lies in the changing legitimisation demands arising from the transformation of penal practices that took place across the twentieth century. Corporal punishment in the form of whipping (or flogging) had largely fallen into disuse by the 1920s, although it was not removed from the *Crimes Act* until 1974.<sup>80</sup> Similarly, capital punishment ceased in NSW in the mid-twentieth century, although it remained in the *Crimes Act* until 1985.<sup>81</sup> The regulatory fine began to appear in the first half of the twentieth century and expanded massively as a penalty in the inter-war period.<sup>82</sup> Scholars attribute the rise of the fine to the loss of faith in the correctional capacity of short-terms of imprisonment.<sup>83</sup> In the post-war period probation (which was first introduced in 1894)<sup>84</sup> and parole began to professionalise,<sup>85</sup> and the development of non-custodial punishments such as periodic detention and community service orders facilitated the 'non-carceral management of offenders'.<sup>86</sup> In this penal context, by 1974 magistrates had a larger range of non-custodial penalties available to them than in the early decades of the twentieth century, which, together with the extension of legal aid, produced conditions that made an expansion of the summary jurisdiction possible.

### ***From the Final Quarter of the Twentieth Century to Present***

The formalisation of the summary jurisdiction intensified in the final quarter of the twentieth century as a result of a legitimacy crisis in the criminal justice system. This crisis precipitated dramatic changes to legal practices and procedure in a number of the component parts of the summary jurisdiction. There was a structural reorganisation of criminal law institutions, a further

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<sup>79</sup> New South Wales Criminal Law Committee, *Report on Proposed Amendments to the Criminal Law and Procedure*, Report No 54 (1973), 13.

<sup>80</sup> *Crimes and Other Acts (Amendment) Act 1974* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 1974, 1355. On the complex history of the decline of whipping see Mark Finnane, *Punishment in Australian Society* (Oxford University Press, 1997) ch 4.

<sup>81</sup> The last execution in NSW took place in 1940. Capital punishment was formally abolished by the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW).

<sup>82</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge, 2009).

<sup>83</sup> *Ibid*, 42–43; Finnane, above n 80, 163. See also David Garland, *Punishment and Welfare* (Gower, 1985).

<sup>84</sup> *First Offenders Probation Act 1894* (NSW). The suspended sentence was also introduced at the end of the nineteenth century but was not available to magistrates as a penalty.

<sup>85</sup> Jay Harley, *Where Two Ways Meet: Probation and Parole Services in New South Wales* (self-published, 2009).

<sup>86</sup> Finnane, above n 80, 164. On the loss of faith in the criminal justice system to address crime in the 1970s in the United States and the UK see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) esp ch 5.

rationalisation of the jurisdictional allocation of offences, and a reassignment of control over the distribution of offences between the summary and indictable jurisdictions between the prosecution and defence. While the central organising reclassification mechanism remained the same, these developments constituted a significant renovation of the criminal justice system after a century of near-inertia. A small change in emphasis in the allocation of jurisdiction radically altered the balance of power between the actors and further reoriented the criminal justice system away from the jury trial and towards summary disposition. For ‘reasons of administrative efficiency’ the *Local Court Act 2007* (NSW) replaced the 148 separately constituted Local Courts with one Local Court ‘that sits in locations across the state’,<sup>87</sup> as does the Crown Court in UK.

In 1981, under the stewardship of the then recently appointed Chief Magistrate Briese, the magistracy — after a considerable period of resistance to change — unanimously voted to push for independence from the Public Service.<sup>88</sup> (For a more detailed history see Chapter 2). Shortly afterwards Parliament granted the magistracy independence under the *Local Courts Act 1982* (NSW). There then ensued a remarkable sequence of events that precipitated sweeping reforms to the entire criminal justice system. The former Chief Stipendiary Magistrate and Chairman of the magistracy under the Public Service, Murray Farquhar, was convicted of perverting the course of justice and sentenced to four years imprisonment.<sup>89</sup> A short time later Justice Lionel Murphy of the High Court was charged with attempting to pervert the course of justice as was Judge John Foord, a NSW District Court Judge.<sup>90</sup> Both Murphy and Foord were acquitted, but these scandals were followed by repeated revelations over the next two decades of widespread police corruption, first in Queensland, and then in New South Wales.<sup>91</sup> In 1986 the then opposition leader, Nick Greiner, described New South Wales as being on the ‘brink of a

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<sup>87</sup> Local Court of NSW, *Annual Review* (2009) 3 avail

<<http://www.localcourt.justice.nsw.gov.au/Pages/Publications/annualreviews.aspx>>.

<sup>88</sup> Golder, above n 22, 192.

<sup>89</sup> For further discussion see ch 5 of this thesis and *ibid* 200–2.

<sup>90</sup> Both were acquitted: *ibid* 205–6.

<sup>91</sup> In Queensland the *Fitzgerald Inquiry* was held between 1987 and 1989: Qld, Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (1989); and the Royal Commission into the NSW Police Force was held between 1995 and 1997, presided over by Commissioner Justice James Wood: New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997).

constitutional crisis of the first order.<sup>92</sup> Political hyperbole notwithstanding, there was a need to restore public confidence in the criminal justice system.<sup>93</sup>

To this end Parliament enacted the *Judicial Officers Act 1986* (NSW), which granted tenure to magistrates for the first time and provided the same mechanism for their removal from office as judicial officers, namely, an address to both houses of Parliament.<sup>94</sup> This Act also ensured that magistrates enjoyed the same immunities that judicial officers enjoy at common law.<sup>95</sup> In the same year another bundle of reforms created the ODPP giving the prosecution formal independence from the executive. When first enacted, the *Director of Public Prosecutions Act 1986* (NSW) gave the Director tenure for life, subject only to removal by the Governor for ‘incapacity, incompetence or misbehaviour’, or if convicted of a criminal offence punishable by 12 months imprisonment or more.<sup>96</sup> In 2007 life tenure was replaced with a fixed term appointment of ten years.<sup>97</sup> Also, the *Criminal Procedure Act 1986* (NSW) (‘CPA’) was introduced to consolidate summary and indictable procedure and to separate procedural provisions from the substantive criminal law.<sup>98</sup> Placing these developments in a wider context, during the same period the system of civil justice in NSW (as in England) had also reached a state of crisis. Excessive focus on the trial was diagnosed as one of the main causes of delays, which precipitated sweeping reforms, such as the introduction of case management, to improve access to justice in the civil jurisdiction during the ensuing decades.<sup>99</sup>

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<sup>92</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 September 1986, 4140.

<sup>93</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 September 1986, 3874.

<sup>94</sup> Controversially it also established the Judicial Commission of NSW to handle complaints against the judiciary and to provide ongoing training. See Kate Lumley, ‘From Controversy to Credibility: 10 Years of the Judicial Commission of New South Wales’ (Judicial Commission of NSW, 2008) 1 <<https://www.judcom.nsw.gov.au/wp-content/uploads/2014/07/judcom-20years-web.pdf>>

<sup>95</sup> For discussion of the distinctions in the immunities between the various levels of the judiciary, see *Fingleton v The Queen* (2005) 227 CLR 166.

<sup>96</sup> *Director of Public Prosecutions Act 1986* (NSW) sch 1.4(3).

<sup>97</sup> *Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Act 2007* (NSW), which inserted sch 1.2A into the *Director of Public Prosecutions Act 1986* (NSW).

<sup>98</sup> *Director of Public Prosecutions Act 1986* (NSW) was assented to on 23 December 1986 and commenced in stages throughout 1987. The Government introduced a package of ‘far reaching reforms to the administration of justice in this State.’ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1986, 7339. This package contained the *Director of Public Prosecutions Bill*, the *Crown Prosecutors Bill*, the *Criminal Procedure Bill*, the *District Court (Amendment) Bill*, the *Criminal Appeal (Amendment) Bill* and the *Miscellaneous Acts (Public Prosecutions) Amendment Bill*. This package of reforms created the *Criminal Procedure Act 1986* (NSW) and established an independent prosecution service for indictable matters. It is discussed in Chapter 3 of this thesis.

<sup>99</sup> The best-known reports are those by HK Woolf. See, eg HK Woolf, *Access to Justice: Interim Report* (HMSO, 1995) ch 4. For a discussion see Jill Hunter, Camille Cameron and Terese Henning, *Litigation I: Civil Procedure* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2005) [1.8]–[1.14].

Armed with evidence of inefficiency and expense in the criminal justice system, in 1995 the NSW government undertook further significant procedural and institutional reforms. Concern about increasing delays in the criminal justice system had been mounting since the late 1970s. In late 1987 a report of the NSW Law Reform Commission ('NSWLRC') exposed inordinate delays within the criminal justice system.<sup>100</sup> It quoted from a 1975 English report that acknowledged the reality of finite resources and characterised the solution as a choice between due process and timely resolution of charges:

In the last analysis, society has to choose between two conflicting aims. On the one hand is the existing right of the citizen to be tried by a judge and jury... On the other is the right, especially important to anyone defending a serious charge, to be tried as soon as possible. These two requirements have to be met with resources which are finite and cannot be further expanded without limit.<sup>101</sup>

In 1989 the NSW Attorney-General proposed that the summary jurisdiction be expanded 'as a measure to reduce delays in criminal trials'.<sup>102</sup> In 1992 the NSW Bureau of Crime Statistics and Research ('BOCSAR') revealed that a 'surprising' proportion of penalties imposed in the District Court were within the sentencing jurisdiction of magistrates.<sup>103</sup> For example, more than 85 per cent of penalties imposed for assault were within the summary sentencing jurisdiction, which, as discussed above, by that time, had increased to two years imprisonment.<sup>104</sup> This meant that those offences could have remained and been finalised in the Local Court instead of being committed to the District Court. Thus, the economic logic of shifting those offences from the slower and more expensive District Court into the summary jurisdiction was inescapable. In 1995, with a view to making 'considerable savings...to the administration of justice',<sup>105</sup> the government further rationalised the mechanism for reclassifying indictable offences as triable either way by introducing the 'Table System' into the CPA.

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<sup>100</sup> New South Wales Law Reform Commission ('NSWLRC'), *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals for Reform*, Discussion Paper No 14 (1987) vols 1–2.

<sup>101</sup> *Ibid* 52.

<sup>102</sup> Ken Drew, Commander, NSW Police Legal Service citing an unpublished letter from the Attorney-General to the then Premier, the Hon Nick Greiner in, Ken Drew, 'The NSW Police Prosecutor' (Paper presented at Improving Access to Justice: the Future of Paralegal Professionals, Canberra, 19–20 February 1990) 104.

<sup>103</sup> Don Weatherburn and Marie Therese Nguyen da Huong, 'Aspects of Demand for District Court Time' (Contemporary Issues in Crime and Justice, Report No 15, NSW Bureau of Crime Statistics and Research, April 1992) 9. The government cited this report in the parliamentary debates: New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 119.

<sup>104</sup> Weatherburn and Nguyen da Huong, above n 103, 9.

<sup>105</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 118.

As noted in the Introduction, the Table System has been recognised as ‘in part, a diminution of access to trial on indictment and hence trial by jury’,<sup>106</sup> but what has not been remarked upon is how it has facilitated vertical criminalisation and redistributed the power amongst the actors of the summary jurisdiction. Part III of this thesis examines the impact of the Table System on criminalisation in detail; but in order to grasp the significance of the change it is important to examine the 1995 procedural amendments closely. Under the Table System indictable offences punishable by up to ten years imprisonment (sometimes more) are divided into two tables: Table 1 and Table 2.<sup>107</sup> Section 260 of the *CPA* provides that Table 1 offences *must* be finalised summarily *unless* either the *prosecutor or the person charged* elects to have the matter dealt with on indictment.<sup>108</sup> (Table 1 roughly equates to the former *with* consent category of triable either way offences, but with important changes of emphasis.) Section 260 of the *CPA* further provides that Table 2 offences *must* be finalised summarily *unless* the *prosecutor* elects for a trial on indictment.<sup>109</sup> (Table 2 roughly equates to the former *without* consent category of triable either way offences, but again, with important changes of emphasis.) As can be seen, the accused has no choice of jurisdiction for Table 2 offences, and because the legislature expanded this category of offences when the Table System was introduced, it has effectively restricted defendants’ access to trial by jury. Another way to look at Table 2 offences, however, is that if the prosecution wishes to have access to a higher penalty than the two year maximum summary sentencing jurisdiction, the accused must have access to a jury trial. Today there are hundreds of offences in both Tables 1 and 2, which, when compared with the numbers in 1974 set out above, shows the magnitude of the change that the Table System wrought on the summary jurisdiction.

In addition to increasing the number of offences in the summary jurisdiction the Table System effected a significant increase in prosecutorial power, and a marginal ‘in principle’ increase in defence power. Prior to the introduction of Table 2, the prosecution had no direct

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<sup>106</sup> David Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of NSW* (Federation Press, 6<sup>th</sup> ed, 2015) 382.

<sup>107</sup> *Criminal Procedure Act 1986* (NSW) sch 1. There are some exceptions to the ten year limit to accommodate some ‘historical idiosyncrasies’ and offences that the government considered ‘sufficiently serious to warrant the consideration of a higher court’, such as dangerous driving causing death and ‘certain sexual offences’ see *Criminal Procedure Amendment (Indictable Offences) Bill*, discussed in New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 119. The distinction between Table 1 and Table 2 did not map onto the old distinction between felonies and misdemeanours.

<sup>108</sup> *Criminal Procedure Act 1986* (NSW) s 260(1).

<sup>109</sup> *Ibid* s 260(2).

power to choose the jurisdiction in which a *without* consent offence could be finalised—the discretion to commit for trial lay with the magistrate. Table 1 has devolved the power to choose jurisdiction from the magistrate to both the prosecution and defence. In other words, prior to the introduction of Table 1, a magistrate could commit a *with* consent matter for trial even if the accused person consented to summary disposition and the prosecution had no direct power to choose jurisdiction.<sup>110</sup> After the introduction of Table 1 the magistrate no longer had a say in the question of jurisdiction. The rationale for this reconfiguration of power was that the parties, who are in possession of all of the relevant information, are in the best position to decide which jurisdiction is most appropriate.<sup>111</sup> I describe the increase in defence power as ‘in principle’ because in practice defendants rarely exercise the option to elect to have a trial on indictment.<sup>112</sup> This is largely because of the in-built incentives for both parties to resolve the matter in the summary jurisdiction, such as the presumption of summary disposition in s 260 of the *CPA*, the lower maximum penalties in the Local Court, and the sentencing discount for a plea of guilty.<sup>113</sup> However, the election is a useful bargaining chip in the charge negotiation process, a topic to which I return in Chapter 3.

During the twentieth century the requirement of obtaining the defendant’s consent to summary jurisdiction had come to be regarded as a protection of the defendant’s ‘right’ to a jury trial (which was a constitutional right in England, but not in NSW for state offences).<sup>114</sup> For

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<sup>110</sup> The High Court criticised this practice in *Hall v Braybrook* (1956) 95 CLR 620 because it meant that the defendant’s antecedents were disclosed to the magistrate who would be the tribunal of fact if the matter were to proceed summarily.

<sup>111</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 119.

<sup>112</sup> Statistics on which party makes the election are not collected. The best available evidence is this statement from the Chief Magistrate that elections are rarely made in Table 1 offences: See NSW Sentencing Council, ‘An Examination of the Sentencing Powers of the Local Court in NSW’ (NSW Sentencing Council, December 2010), 31.

<sup>113</sup> The discount began as an informal practice, see Kathy Mack and Sharyn Roach Anleu, ‘Balancing Principle and Pragmatism: Guilty Pleas’ (1995) 4 *Journal of Judicial Administration* 232, which then became a common law principle and was enshrined in statute in ss 22 and 21A(3)(k) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). These sections require the court to take a guilty plea into account when determining the appropriate penalty. The size of the discount depends largely on the timing of the plea: the earlier the plea, the larger the discount. This represents the ‘utilitarian’ value of the plea to the administration of justice. The maximum available utilitarian discount is 25%. See *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 and *R v Borkowski* (2009) 195 A Crim R 1. It should be noted that in 2012 Queensland introduced a levy to be charged on sentence—\$100 in the Local Court and \$300 in the higher courts. Such fees illustrate how easily coercion can be introduced to discourage jury trials. For discussion of the levy see Heather Douglas, ‘Queensland’s Offender Levy’ (2013) 24(3) *Current issues in Criminal Justice* 317.

<sup>114</sup> As Lacey notes, the consent requirement to summary jurisdiction legitimised the increase in prosecutorial power that accompanied increased plea bargaining ‘and a more bureaucratized system’: Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP, 2016) 108. In 1900, a right to trial by jury was

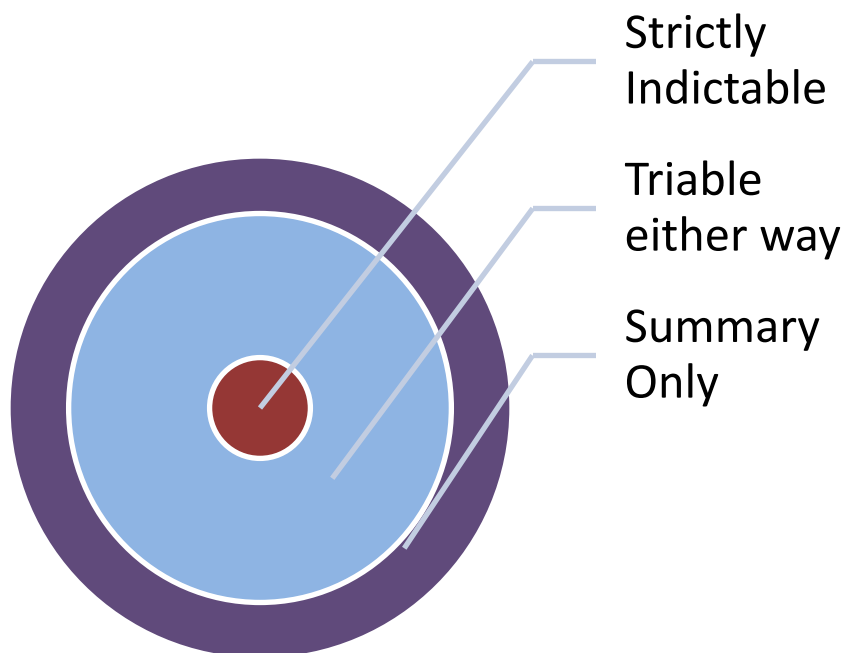
example, in 1974 the NSW government defended its proposed expansion of the category of offences that could be finalised summarily *with* the consent of the accused by emphasising that ‘the interests of the accused, including his right to trial by jury, cannot be said to be prejudiced, because he cannot be dealt with summarily except with his consent.’<sup>115</sup> This perspective on the consent requirement, which was in fact originally designed to increase the efficiency of the criminal justice system in order to facilitate criminalisation, illustrates the rise to prominence of ideas of due process protections for defendants in the second half of the twentieth century. This is why its removal under the Table System in 1995 was seen as further erosion of access to jury trial for defendants. In practice, of course, there are many structural disincentives to electing a jury trial (as mentioned above) suggesting that for the defendant it is not a free choice. It is also possible for Parliament to remove or restrict the defendant’s ability to elect to have a jury trial by reclassifying strictly indictable and Table 1 offences as Table 2 offences, by placing newly enacted offences into Table 2.

To understand how the jurisdictional organisation of criminal offences described above operates in the current era it is useful to think visually. Figure 1 (below) presents a two-dimensional ‘snapshot’ of how jurisdictional arrangements might look at a particular moment in time in the post-1995 era. Where the boundaries between each jurisdiction were previously uncertain, they are now certain; but jurisdiction has become contestable and fungible for triable either way offences. Each category of offence depicted in the diagram is increasing (or decreasing) in size over time as new offences are enacted and/or reclassified, or offences are moved out of the courts, for example via the infringement notice system.

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included in the Australian Constitution, see *Commonwealth of Australia Constitution Act (Imp)* (63 & 64 Vict c 12) s 80, but this applies only to Commonwealth indictable offences and has been held not to prevent the Commonwealth from reclassifying indictable offences as summary: *Kingswell v R* (1985) 159 CLR 264; *Cheng v R* (2000) 203 CLR 248; *Alqudsi v The Queen* (2016) 258 CLR 203.

<sup>115</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 26 March 1974, 1840.



**Figure 1 Snapshot of the Criminal Justice System in the post-1995 era (not drawn to scale)**

How strictly indictable offences are identified for reclassification is opaque. For more than a decade after the introduction of the Table System in 1995, reclassification occurred haphazardly as particular issues relating to the criminal law came before Parliament. In 2010 the NSW Sentencing Council — in a review of the sentencing jurisdiction of the Local Court — recommended that a comprehensive review of the *Crimes Act* be conducted to identify offences that ought to be reclassified from strictly indictable to triable either way.<sup>116</sup> The Department of Justice conducted the review in partnership with the NSW Bureau of Crime Statistics and Research. Offences were identified for reclassification if they were receiving actual penalties in the District Court that were within the sentencing jurisdiction of the Local Court.<sup>117</sup> In August 2016 the government reclassified four further offences as a result of this review.<sup>118</sup> It is not clear whether this process is now complete.

<sup>116</sup> New South Wales Sentencing Council, 'An Examination of the Sentencing Powers', above n 112, 54.

<sup>117</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 August 2016, 1.

<sup>118</sup> It reclassified ss 109(2), 111(20), 112(2) and 113(2) of the *Crimes Act 1900* (NSW) relating to 'breaking and entering into dwelling-houses and other buildings and committing serious indictable offences in circumstances of aggravation': *Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act 2016* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 August 2016, 1.

There is no quantitative evidence on the impact of the table system on the workload of the summary jurisdiction, but the Chief Magistrate reports that the introduction of Table 1 significantly increased the Local Court's workload, which increased overall (that is, not only by virtue of the introduction of Table 1) by approximately 56 per cent between 1995 and 2008.<sup>119</sup> While the total number of table matters finalised summarily is tiny in comparison with the major summary offence categories such as traffic offences and breach of justice orders, because of the increasing complexity and seriousness of table offences, there is anecdotal evidence to suggest that they are consuming more court time.<sup>120</sup>

It is tempting to characterise the introduction of the Table System as achieving the 'massification'<sup>121</sup> of criminalisation because it transferred hundreds of offences to the summary jurisdiction that were previously strictly indictable, and numerous triable either way offences have been created subsequently. David Brown recently began the task of quantifying the number of new offences created in NSW by examining legislation enacted in 2008. In that year alone, Parliament created 302 new offences.<sup>122</sup> For some offences, such as affray (which is examined in Chapter 5), reclassification has facilitated and increased criminalisation by circumventing impediments to securing convictions in the higher courts. However, many offences in Tables 1 and 2 are charged infrequently. For example, in 2002, s 60E was inserted into *Crimes Act* creating an offence of assault, stalking, harassment or intimidation of a student or teacher at a school. Subsection (1) covers such instances where there has been no actual assault. It is punishable by five years' imprisonment and is a Table 2 offence. Between 2003 and 2014 the number of such charges finalised summarily averaged 11 per year. To put this in context, the total number of charges finalised in the Local Court in 2014 was 198,629. This shows that to understand criminalisation (and whether or not 'overcriminalisation' is taking place) it is not enough merely to count substantive offences. It is also necessary to look at change over time to procedures and practices, and to the roles played by the actors and enforcement practices, topics

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<sup>119</sup> In 2010, the Chief Magistrate provided these estimates to the New South Wales Sentencing Council which was asked by the Attorney-General to consider further increasing the sentencing jurisdiction of magistrates for a single offence from two to five years. It declined to make such a recommendation. See New South Wales Sentencing Council, 'An Examination of the Sentencing Powers', above n 112, 30.

<sup>120</sup> Ibid 30.

<sup>121</sup> This term is being used increasingly in the sociological literature. See eg, O'Malley, above n 82, 90; and Margaret Thornton, *Privatising the Public University: The Case of Law* (Taylor and Francis, 2011) 8.

<sup>122</sup> David Brown, 'Physical and Fault Elements: A New South Wales Case Study' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 13, 16.

that I examine in detail in Part II in relation to actors and Part III in relation to substantive offences. Thus, while formalisation of the procedures and practices of jurisdiction intensified in the final quarter of the twentieth century, there was also continuity with earlier periods because it employed tools that had been developed in 1847. The next part of this chapter examines how the development of an organized system of appeals has contributed to the formalisation of the summary jurisdiction.

### *Evolution of the System of Appeals from the NSW Summary Jurisdiction*

At the same time as a more formal understanding of jurisdiction and summary hearing procedure was emerging the system of appeals from decisions of magistrates was being formalised. The impact of the formalisation of appeals on the jury trial has been noted in the criminal law literature,<sup>123</sup> but the development of appeals in the summary jurisdiction was a distinct process and has not been remarked upon. The process was complex because the power of the higher courts to ‘review’ the decisions of magistrates had four overlapping sources. The first was the system of judicial review pursuant to the common law prerogative writs — what I will call ‘common law judicial review’. The second was a statutory system of judicial review that partially replaced the common law prerogative writs — what I will call ‘statutory judicial review’. The third was a statutory mechanism that empowered the parties to request the magistrate to state a case to the Supreme Court on a question of law — what I will call the ‘case-stated mechanism’. Labels become messy in relation to the case-stated mechanism because in the second half of the twentieth century Parliament re-named it a ‘right to appeal on a point of law’, so technically it became a statutory appeal. The fourth source of power was a statutory right of appeal that initially was attached to some (not all) statutory offences but which was replaced over time with a statutory right of appeal that applied generally to all offences within certain specified categories — what I will call ‘statutory appeals’. Overall, for ease of reference, I will call the sum total of these diverse powers a ‘system of appeals’.

My analysis of the development of the system of appeals from the summary jurisdiction suggests that as ‘solemn’ (indictable) procedure became more complex, sophisticated and formalised, so too did summary procedure, with the result that the two jurisdictions have come into closer alignment. This contrasts with Farmer’s observation of Scotland in the second half of

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<sup>123</sup> See eg, Lacey, *In Search of Criminal Responsibility*, above n 114, 112.

the nineteenth century. At that time, when a summary jurisdiction was emerging, as solemn procedure was becoming more solemn, summary procedure was ‘becoming increasingly estranged from the traditional form’.<sup>124</sup> In NSW, as Parliament has turned increasingly to the criminal law in summary form to regulate harmful behaviours, changing legitimisation demands have produced an increasingly formalised system of appeals.

By contrast with the jury trial, which was subjected to appeals only in 1912 (1907 in the UK),<sup>125</sup> decisions by magistrates have been subjected to two parallel systems of oversight (which evolved into four, as set out above), since the fourteenth century, with a brief interlude during the early years of the NSW colony. The reason for greater vigilance with decisions of magistrates is a historical distrust of the summary form:

The execution of the powers confided to justices of the peace in summary convictions is generally watched by the Courts with jealousy, such summary convictions being derogatory to the liberty of the subject; *and all powers given in restraint of liberty must be strictly pursued.* (Original emphasis)<sup>126</sup>

For this reason the system of appeals that developed from the summary jurisdiction is distinct from that in the higher courts. The two mechanisms were: common law judicial review,<sup>127</sup> and statutory appeals. These mechanisms have enabled the superior courts to apply common law principles to the statutory-based summary jurisdiction thereby contributing to its formalisation. As is well-known, rights of appeal do not exist at common law. Prior to the advent of a statutory system of appeals in the twentieth century in the higher courts, jury trials were, as David Bentley has pointed out, ‘wholly deficient’ by today’s standards.<sup>128</sup> While systems of oversight of magistrates have existed for hundreds of years, the system of appeals that emerged from the mid-nineteenth century onwards has wrought a similar, albeit distinct, transformation upon summary trial and sentencing procedure to that undergone in the jury trial.

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<sup>124</sup> Farmer, *Criminal Law, Tradition and Legal Order*, above n 1, 74, 82.

<sup>125</sup> *Criminal Appeal Act 1912* (NSW); *Criminal Appeal Act 1907*.

<sup>126</sup> *Munday v Gill* (1930) 44 CLR 38 (*‘Munday’*) at 52 per Isaacs CJ quoting *Bracy’s Case* (1696) 1 Salk 348; 91 ER 305. Indeed, the summary form was used as an instrument of oppression in the time of Henry VII: William Paley, *The Law and Practice of Summary Convictions on Penal Statutes by Justices of the Peace* (Sweet, Stevens, Maxwell, Butterworth, Richards, 3<sup>rd</sup> ed, 1838), 10.

<sup>127</sup> The common law writs procedure has now been replaced by an equivalent statutory version: see *Supreme Court Act 1970* (NSW) s 69.

<sup>128</sup> David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon Press, 1998) 296.

### *Judicial Review through the Common Law Prerogative Writs*

The use of judicial review of the decisions of magistrates (both common law and statutory) has declined over time as the boundaries between summary and indictable jurisdiction have become more certain. Judicial review of the decisions of magistrates by means of the common law prerogative writs arose out of the void left by the abolition of the Star Chamber and was, according to Wade and Forsyth, the birthplace of modern administrative law.<sup>129</sup> Although the prerogative writs were available at common law, controversially, in the eighteenth century, individual statutes conferring summary jurisdiction upon magistrates frequently removed this option of review.<sup>130</sup> Rosemary Pattenden explains that Parliament did this ‘to prevent interference by the King’s Bench with the work of justices.’<sup>131</sup> She characterises subsequent changes to the law of certiorari in England as a battle between Parliament and the judiciary. To circumvent this ‘ousting’ of certiorari, the courts drew a ‘distinction between errors of law on the [face of] the record and errors of law going to jurisdiction.’<sup>132</sup> In response the British Parliament reduced the scope of certiorari in this context through the *Summary Jurisdiction Act 1848* (UK)<sup>133</sup> by ‘giving the inferior courts extensive powers of amendment, and by reducing the amount of information which had to be included in the record.’<sup>134</sup> Until 1848, inferior courts had been required to record the entirety of the evidence on the face of the record. This enabled superior courts to identify errors easily ‘within the four corners of the record removed on certiorari.’<sup>135</sup> However, the *Summary Jurisdiction Act 1848* (UK)<sup>136</sup> provided, ‘as the sufficient record of all summary convictions, a common form which did not include any statement of the evidence for the conviction.’<sup>137</sup> As the Privy Council said in *R v Nat Bell Liquors Ltd*<sup>138</sup>, thereafter ‘the face of the record “spoke” no longer: it was the inscrutable face of a sphinx’.<sup>139</sup>

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<sup>129</sup> William Wade and Christopher Forsyth, *Administrative Law* (OUP, 11<sup>th</sup> ed, 2014), 10.

<sup>130</sup> Stephen, above n 39, 123.

<sup>131</sup> Rosemary Pattenden, *English Criminal Appeals 1844-1994: Appeals against Conviction and Sentence in England and Wales* (Clarendon Press, 1996), 212.

<sup>132</sup> Ibid 212. See also *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (‘Kirk’), 568.

<sup>133</sup> 11 & 12 Vic, c 43; discussed in *Kirk* (2010) 239 CLR 531, 576.

<sup>134</sup> Pattenden, above n 131, 212. See also *Kirk* (2010) 239 CLR 531, 568.

<sup>135</sup> *Kirk*, above n 132, 568.

<sup>136</sup> 11&12 Vict c 43. Adopted in NSW as the *Justices Act 1850* (NSW).

<sup>137</sup> *Kirk*, (2010) 239 CLR 531, 568.

<sup>138</sup> [1922] 2 AC 128 at 159.

<sup>139</sup> Quoted in *Kirk*, (2010) 239 CLR 531, 568. The nature and extent of certiorari has been considered by the High Court in *Craig v South Australia* (1995) 184 CLR 163; and *Kirk*.

In contrast to England, where the distinction between jurisdictional and non-jurisdictional errors of law was abandoned in 1969,<sup>140</sup> the High Court has maintained the distinction in Australian common law.<sup>141</sup> The cumbersome, time consuming, costly and, perhaps, malleable nature of this distinction and the writ procedure was a significant reason for the introduction of the case-stated mechanism, a topic to which I now turn.<sup>142</sup>

### *The Case-Stated Mechanism*

A case stated mechanism, which permitted either party to request the presiding magistrate to state a case to the Supreme Court on a point of law, was introduced in NSW in 1881.<sup>143</sup> The benefit of this mechanism was that it overcame the complex distinction between jurisdictional and non-jurisdictional errors of law by enabling a party who was ‘dissatisfied’ with a determination of a justice ‘as being erroneous in point of law’ to apply to the justice to state a case to the Supreme Court.<sup>144</sup> The immediate reason for introducing it was the perceived (and actual) poor quality of magistrates at the time. NSW had been slow to adopt the case stated mechanism for justices exercising summary jurisdiction, delaying until 1881 a measure that had been taken decades earlier in England in 1857.<sup>145</sup> Pattenden explains that the British Parliament, which was eager to ‘expand the summary jurisdiction, had come to realise the importance of providing a means of appeal on questions of law’.<sup>146</sup> One way to characterise the case stated mechanism in England is as a product of the tension between the expansion of the summary jurisdiction in a drive to transform the criminal law into a tool for regulating harmful behaviours, on the one hand, and a deep suspicion of the erosion of the common law right to trial by jury on the other.<sup>147</sup> By contrast, in NSW the mechanism was introduced not to protect the rights of

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<sup>140</sup> *Anisminic* [1969] 2 AC 147.

<sup>141</sup> *Kirk*, (2010) 239 CLR 531, 571.

<sup>142</sup> *Crimes (Appeal and Review) Act 2001* (NSW) s 52 (defendants), s 56 (prosecutors).

<sup>143</sup> *Justices Appeal Act 1881* (NSW).

<sup>144</sup> *Justices Appeal Act 1881* (NSW) s 1, which became *Justices Act 1902* (NSW) s101.

<sup>145</sup> *Justices Appeal Act 1881* (NSW). The English Act was the *Summary Jurisdiction Act 1857* (UK), which merely formalised a pre-existing practice. See Pattenden, above n 131, 212. The *Justices Appeal Bill* introduced into the NSW Parliament in 1881 was ‘almost a transcript’ of the *Summary Jurisdiction Act 1857*: New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1881, 1033. For a detailed historical account of the formalisation of the case stated mechanism in England see Phil Handler, ‘The Court for Crown Cases Reserved, 1848–1908’ (2011) 29(01) *Law and History Review* 259.

<sup>146</sup> Pattenden, above n 131, 212.

<sup>147</sup> *Ibid.*

accused persons, but in the interests of the prosecution ‘out of concerns that there was no ability to seek review of a decision of a justice to dismiss proceedings.’<sup>148</sup>

As originally conceptualised, the case stated mechanism could be used by either the defence or the prosecution.<sup>149</sup> It thereby effectively enabled the prosecution to appeal against the summary equivalent of an acquittal, and was predominantly used for that purpose.<sup>150</sup> This was the origin of a mechanism that remains in force, albeit in altered form, exposing accused persons to double jeopardy in the summary jurisdiction,<sup>151</sup> and is a point of distinction between the summary and indictable jurisdictions in the current era. In the higher courts, while the rule against double jeopardy is being eroded,<sup>152</sup> it still applies to prevent appeals against most acquittals.

By the early decades of the twentieth century the case stated mechanism had begun to produce a body of case law for the guidance of magistrates and other legal actors, not only from the NSW Supreme Court, but also from the Supreme Courts of other jurisdictions where similar provisions existed, and the from the High Court. These cases show that as Parliament attempted to circumvent difficulties of proof in the higher courts via summary statutory offences, the appellate courts attempted to ensure that common law protections of the accused permeated summary trial procedure. A good example of this dynamic is the law relating to an offence known as ‘goods in custody’. This statutory possession-based offence was enacted to circumvent the difficulty of proving the elements of larceny and receiving by placing a reverse onus on the defendant of proving lawful possession of suspected stolen goods.<sup>153</sup> The statutory evolution of the offence is a paradigm example of horizontal criminalisation because it shows how Parliament was attempting to render convictions easier to secure. As originally enacted in 1855 the offence read:

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<sup>148</sup> New South Wales Law Reform Commission (‘NSWLRC’), *Criminal Appeals*, Report No 40 (2014) 20.

<sup>149</sup> *Justices Appeal Act 1881* (NSW) s 1.

<sup>150</sup> G C Addison and D G Paterson, *The Law and Practice Relating to Appeals From Magistrates* (Law Book, 1927) 1–2.

<sup>151</sup> *Crimes (Appeal and Review Act) 2001* (NSW) s56 provides an avenue for the prosecution to appeal against a dismissal by a magistrate on a point of law.

<sup>152</sup> See Part 8 of the *Crimes (Appeal and Review) Act 2001* (NSW), ss 99–106.

<sup>153</sup> It was a common practice of the English Parliament in the eighteenth century to enact provisions that reversed the onus of proof. See Bruce P Smith, ‘The Presumption of Guilt and the English Law of Theft, 1750–1850’ (2005) 23(01) *Law and History Review* 133.

Every person...having in his possession or conveying in any manner any thing which may be reasonably suspected of being stolen or unlawfully obtained and who shall not give an account to the satisfaction of such Justice how he came by the same shall be deemed guilty of a misdemeanour...<sup>154</sup>

It was amended in 1908:

to overcome some of the difficulties that would arise if the strict rule of proof were applied to the frequent occasions when persons are strongly suspected of being in possession of stolen property although evidence of ownership to establish guilt is not forthcoming.<sup>155</sup>

The amended section read (relevantly):

Whosoever being charged before a justice with—(a) having anything in his custody; or (b) knowingly having anything in the custody of another person; or (c) knowingly having anything in a house, building, lodging...whether belonging to or occupied by himself or not, or whether such thing is there had, or placed for his own use or the use of another, which thing may be reasonably suspected of being stolen or unlawfully obtained, does not give an account to the satisfaction of such Justice how he came by the same, shall be liable to penalty...<sup>156</sup>

In 1932 the Victorian Supreme Court handed down a decision instructing magistrates to ‘exercise vigilance to prevent the abuse of the [equivalent Victorian] section which was not designed to give summary jurisdiction in cases of larceny: *Meikle v Le Sueur* (1932) VLR 190.’<sup>157</sup> Although not binding in NSW, the decision was included in a NSW treatise for the guidance of practitioners and magistrates.<sup>158</sup> The appellate courts also reminded magistrates that the prosecution must first prove possession and reasonable suspicion before the onus shifts to the defendant.<sup>159</sup> Instructions were also issued to the prosecution:

The prosecution ought not to withhold evidence of a specific offence, or to use the general suspicion contemplated by the section merely for the purpose of depriving a defendant of the presumption of innocence and the right to a trial in the ordinary course.<sup>160</sup>

The offence of goods in custody also created a temptation for police to base their suspicion on the character of the person in possession rather than the nature of the goods themselves or the circumstances of possession. This temptation produced a significant body of appellate case law

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<sup>154</sup> *Police Act 1855* (NSW) s 1.

<sup>155</sup> Alfred Goran and R.P. Vine-Hall, *Bignold's Police Offences and Vagrancy Acts and Certain other Acts* (Law Book, 9<sup>th</sup> ed, 1962) 103 citing *Burnes v Willis* 38 WN 42 which was affirmed on appeal to the High Court.

<sup>156</sup> *Police Act 1901* (NSW) s 27, as amended. See Goran et al, above n 155, 102.

<sup>157</sup> Cited in Goran et al, above n 155, 103.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* 104 citing *Willis v Burnes* (1921) 29 CLR at 514.

<sup>160</sup> *Ibid* 103, citing *Lenthall v Newman* (1932) SASR 126.

stipulating that the suspicion must attach to the *goods* and not to the person.<sup>161</sup> In this way the case-stated mechanism enabled the appellate courts, at least in principle, to ensure the colonisation of the summary jurisdiction by the common law. Goods in custody is still commonly used as an alternative to larceny in the current era producing approximately 3-6,000 convictions per year in the Local Court of NSW.<sup>162</sup>

In 1998, in a move that reinforced the new balance of power between the magistrate and the parties that was effected by the introduction of the Table System in 1995, Parliament changed the case-stated mechanism into a right to appeal to the Supreme Court on a point of law. Prior to this change the parties were required to ask the magistrate to state a case to the Supreme Court. As a result of the 1998 changes the magistrate was removed from the equation. The rights of appeal granted to the defendant under the new provision were greater than those granted to the prosecution, but the prosecution retained the option to appeal to the Supreme Court against a dismissal of charges on a point of law.<sup>163</sup> The defendant was given a right of appeal to the Supreme Court on a question of law against a conviction or sentence and the opportunity to appeal on a question of fact, or mixed fact and law, with leave of the Supreme Court.<sup>164</sup>

While the number of appeals that proceed from the Local Court to the Supreme Court via this mechanism is not high in the current era, they are important because they have been integral to the formalisation of the summary jurisdiction. Between 15 and 25 such appeals are determined each year, the majority of which are appeals by the prosecution against the dismissal of charges.<sup>165</sup> Recent examples are *Director of Public Prosecutions (NSW) v Yeo*<sup>166</sup> and *Director of Public Prosecutions (NSW) v Wililo*.<sup>167</sup> In both cases a single Justice of the Supreme Court of NSW held that the principles of fair trial that apply to trials by judge alone in the higher courts

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<sup>161</sup> Ibid 112–13, citing *Murray v Gunst* (1915) VLR 232 and other cases.

<sup>162</sup> Source: NSW Bureau of Crime Statistics and Research. Goods in custody is also now a penalty notice offence which means the vast majority of such charges are not subjected to the scrutiny of the courts: *Criminal Procedure Regulation 2010* (NSW), s 106; *Criminal Procedure Act 1986* (NSW) s 336–7, sch 3. For a review of the penalty notice system, including their impact on vulnerable people and potential net widening effect, see New South Wales Law Reform Commission ('NSWLRC'), *Penalty Notices*, Report No 132 (2012).

<sup>163</sup> *Justices Act 1902* (NSW) s 104(2).

<sup>164</sup> *Justices Act 1902* (NSW) s 104(1). The defendant could also appeal on the ground that the 'conviction, order or sentence cannot be supported having regard to the evidence.' *Justices Act 1902* (NSW) s 104(1)(c).

<sup>165</sup> It is usual for the appellant to include a claim for prerogative relief in the alternative. See NSWLRC, *Criminal Appeals*, above n 148, 88–9.

<sup>166</sup> (2008) 188 A Crim R 82.

<sup>167</sup> (2012) 222 A Crim R 106.

— such as open justice, natural justice and the requirement upon magistrates to give reasons — apply to criminal proceedings in the Local Court. After reviewing the authorities Johnson J said:

Although these observations were made concerning the role of the Judge in a jury criminal trial, I consider that they are equally applicable to Magistrates hearing and determining criminal proceedings in the Local Court, whether defended or sentence proceedings following a plea of guilty.<sup>168</sup>

### ***Emergence of a General Statutory Right of Appeal***

Writing about England in 1856, Paley considered the development of the statutory ‘right of appeal’ (original emphasis) to be the most significant change in the summary institution since its inception in the reign of Edward III,<sup>169</sup> and this is true in NSW in the current era. Paley traces the earliest appearance of a statutory right of appeal against conviction by a Justice of the Peace to the reign of Charles II (1660–1685).<sup>170</sup> He identifies the *Conventicle Act 1664*<sup>171</sup> as ‘[t]he first instance of an appeal from the sentence of a Justice of the Peace...’<sup>172</sup> From that date increasingly numerous statutes creating summary offences conferred *ad hoc* rights of appeal upon convicted persons, but the applicable procedures and the content of the right varied from statute to statute. In the late nineteenth century those procedures were gradually rationalised until a general statutory right to appeal emerged in 1900, which provided a degree of uniformity for the first time.<sup>173</sup> All of the various avenues of review and appeal were consolidated in 1902, but there was a significant degree of overlap between them.<sup>174</sup>

The general statutory right of appeal is distinct from rights of appeal in the higher courts in two respects. Firstly, appeals to the District Court from the Local Court are heard *de novo*, although they are now conducted on the transcript rather than via a re-hearing. As McHugh J explained in a Supreme Court case in 1987, such an appeal is not ‘an appeal in the sense that lawyers now use that term. It is an election to have the case retried on new materials.’<sup>175</sup>

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<sup>168</sup> Ibid, quoting *Director of Public Prosecutions (NSW) v Yeo and Another*(2008) 188 A Crim R 82 at 95–96.

<sup>169</sup> Paley, above n 126, 12 (the fourteenth century).

<sup>170</sup> Ibid. Discussed by Pattenden, above n 131, 213.

<sup>171</sup> 22 Car 2, c 1.

<sup>172</sup> Paley, above n 126, 13.

<sup>173</sup> The *Criminal Law Amendment Act 1883* (NSW) provided a general right of appeal against convictions under that Act, but many summary offences remained outside of that Act. In 1900 that general right of appeal was expanded to all matters finalised summarily by justices: *Justices Acts Amendment Act 1900* (NSW), see, NSWLRC, *Criminal Appeals*, above n 148, 20.

<sup>174</sup> *Justices Act 1902* (NSW), ss 101–11, ss 112–17, ss118–21, ss122–31, s134. For commentary on the operation of these provisions see Addison and Paterson, above n 150, 101, 194, 200 and William Hattam Wilkinson and Frederick Bushby Wilkinson, *The Australian Magistrate* (Law Book, 7<sup>th</sup> ed, 1903) 714.

<sup>175</sup> *Goldfinch v R* (1987) 30 A Crim R 212, 218, quoted by the NSWLRC, *Criminal Appeals*, above n 148 at 66.

Secondly, because the District Court is an inferior court it has no power to bind the Local Court, so its decisions have no precedent value. For these reasons, it may be argued that the general statutory right of appeal has not produced the degree of formalisation that it might otherwise have done.

During the twentieth century statutory appeals began to shift from the periphery of the criminal process towards the centre, gradually displacing (but not replacing) the more cumbersome prerogative writs and case-stated mechanism. Avenues for appeal from the District and Supreme Courts to the newly established Court of Criminal Appeal were created in 1912 when the NSW legislature enacted a local version of the *Criminal Appeal Act 1907* (UK).<sup>176</sup> Prior to 1911, judges wrote long hand notes of the evidence given in court.<sup>177</sup> Appeals were facilitated by the establishment of a court reporting service in 1911, which recorded evidence in short hand.<sup>178</sup> While technological developments in the latter decades of the twentieth century, such as the introduction of tape recording, have increased the efficiency of court reporting, the cost of, and delay caused by, transcription is an enduring concern.<sup>179</sup> As the twentieth century progressed, appeal options, both in the higher courts and summary courts, were incrementally consolidated and changes were introduced to promote efficiency. An example of this was the abolition in 1998 of prohibition, mandamus and the ‘cumbersome’, ‘unwieldy’, ‘protracted’ and ‘costly’ case stated mechanism and their replacement with ‘a single avenue of appeal to the Supreme Court’ (as discussed above).<sup>180</sup>

Just as appeals transformed the criminal trial (and sentencing proceedings) in the higher courts by fostering ‘formalisation and professionalisation’ and facilitating uniformity,<sup>181</sup> there are indications that a similar transformation has taken place in the summary jurisdiction, intensifying from the final quarter of the twentieth century. From the late 1970s, with the introduction of large-scale government-funded legal aid, defence lawyers began to appear in greater numbers in the summary jurisdiction and legal aid funding became more widely (but not

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<sup>176</sup> *Criminal Appeal Act 1912* (NSW), see NSWLRC, *Criminal Appeals*, above n 148, 18–19.

<sup>177</sup> New South Wales Department of Justice, *History of New South Wales Courts and Tribunals* <<http://www.courts.justice.nsw.gov.au/Pages/cats/history/history.aspx>>

<sup>178</sup> *Ibid.*

<sup>179</sup> NSWLRC, *Criminal Appeals*, above n 148, 73-74, 83.

<sup>180</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7597.

<sup>181</sup> Nicola Lacey, ‘The Rule of Law and the Political Economy of Criminalisation: An Agenda for Research’ (2013) 15(4) *Punishment & Society* 349, 353.

universally) available for appeals, increasing the likelihood of lodgment of appeals and legal representation on appeal.<sup>182</sup> In the same way that counsel conduct the criminal trial in the higher courts with one eye on the possibility of an appeal,<sup>183</sup> there is evidence that the ‘threat’ of an appeal also promotes a more cautious approach in the summary jurisdiction. In 2008 Magistrate Hugh Dillon published an article in *The Judicial Review* suggesting ways in which magistrates might improve the quality of their judgments. Quoting Sir Frank Kitto, a former justice of the High Court of Australia, Dillon hinted, somewhat mischievously, that if one is honest about human nature, judgment writing is, in part, ‘an exercise in precluding a successful appeal.’<sup>184</sup> Dillon’s reflections are corroborated by the remark of a long-serving magistrate made in response to an Australia-wide survey of magistrates conducted in 2008: ‘The nature of the work we do is more complex than in the past. The Supreme Court are also more demanding for correct procedures, adequate reasons etc.’<sup>185</sup> The vast majority of judgments in the Local Court are delivered *ex tempore*, but in the 2000s, the Local Court began to publish (but not report) judgments in selected matters.<sup>186</sup> It is not clear whether there are official criteria for the selection of matters for publication, but they appear to be cases that are significant to the summary jurisdiction. Examples include decisions that clarify the law in relation to prevalent offences, such as offensive language;<sup>187</sup> decisions that promote consistency in sentencing for offences that have recently been added to the summary jurisdiction, such as dangerous driving causing death;<sup>188</sup> cases that have attracted media attention;<sup>189</sup> and more complex cases, such as those where the admissibility of evidence has been challenged.<sup>190</sup> While in a technical sense decisions of magistrates (and of the District Court) do not have precedent value, these published decisions can be seen as a form of ‘de facto’ precedent because they are used as such. This is an example of magistrates regulating their own processes, which, as set out in the Introduction, is a marker of

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<sup>182</sup> The introduction of legal aid is discussed in more detail in chapters 3 and 4.

<sup>183</sup> David Rossman, ‘“Were There No Appeal”: The History of Review in American Criminal Courts’ (1990) 81(3) *Journal of Criminal Law and Criminology* 518, 518.

<sup>184</sup> ‘Judicial Technique: Giving Proper and Sufficient Reasons for Decision’, 107 quoting Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66 *ALJ* 787.

<sup>185</sup> Sharyn Roach Anleu and Kathy Mack, ‘The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige’ (2008) 44(2) *Journal of Sociology* 185, 195-6.

<sup>186</sup> The reasons for decision from 2011 onwards are made publicly available on the NSW case law website, but they are not officially reported: <<https://www.caselaw.nsw.gov.au/about>>.

<sup>187</sup> See, eg *Police v Butler* [2003] NSWLC 2.

<sup>188</sup> See, eg *DPP v Foggo* [2006] NSWLC 39.

<sup>189</sup> See, eg *P v Sharman* [2006] NSWLC 36.

<sup>190</sup> See, eg *Police v Le Platrier* [2010] NSWLC 22.

the summary jurisdiction's increasing maturity. It can also be seen as a form of quasi-juridification. However, the fact that these decisions relate to only a small selection of offences and issues, suggests that there are differing levels of formality in the summary jurisdiction depending on the type of offence that is being dealt with.

### *Appeals against Sentence and the Formalisation of Sentencing Practices*

Despite the changes to the system of appeals discussed above, the formalisation and simplification of the criminal appeal process is far from complete and the NSWLRC has made recommendations for improvement.<sup>191</sup> Inconsistency in sentencing decisions, for instance, has long been a criticism of the summary jurisdiction.<sup>192</sup> It was hoped that appeals against sentence would address this problem, but due to the nature of the sentence appeal mechanism they have not done so. Instead, formalisation of sentencing practices has been achieved by other means.

Appeals by convicted persons against sentences imposed by magistrates were first introduced in NSW in 1891. The *Criminal Law and Evidence Act 1891* (NSW), conferred power upon the Court of Quarter Sessions to 'reduce or vary the sentence'.<sup>193</sup> This power was expanded in 1925<sup>194</sup> and became a right to appeal to the District Court in 1973 when it replaced Courts of Quarter Sessions.<sup>195</sup> The District Court is not provided with the reasons of the magistrate — it decides the matter *de novo*.<sup>196</sup> The reasons for this are historical. One is the lack of legal training of the magistracy.<sup>197</sup> Another is that when appeals against sentence were first introduced, they were heard by a bench of magistrates sitting as Courts of Quarter Sessions before magistrates were replaced by judges in 1858. As magistrates did not have the power to review decisions of other magistrates, the hearings were necessarily *de novo*,<sup>198</sup> and the practice has continued into the current era.

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<sup>191</sup> NSWLRC, *Criminal Appeals*, above n 148. As at the date of submission of this thesis the NSW government was yet to act on those recommendations.

<sup>192</sup> See, eg J Lawrence and R Homel, 'Sentencing in Magistrates' Courts' in Ivan Potas (ed), *Sentencing in Australia* (Australian Institute of Criminology, 1986) cited by Clarence Briese, former Chief Magistrate, in 'Future Directions in Local Courts of NSW' (1987) 10 University of New South Wales Law Journal 127 at 134.

<sup>193</sup> s 26.

<sup>194</sup> When the *Crimes Amendment Act 1924* s 30 inserted s 125(1) into the *Justices Act 1902* (NSW). See NSWLRC, *Criminal Appeals*, above n 148, 20.

<sup>195</sup> See *District Court Act 1973* (NSW), ss 166–7; *Crimes (Appeal and Review) Act 2001* (NSW) s 17.

<sup>196</sup> *Sweeney v Fitzhardinge* (1906) 4 CLR 716.

<sup>197</sup> NSWLRC, *Criminal Appeals*, above n 148, 65, discussed in Chapter 2 of this thesis.

<sup>198</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7595.

The issue of inconsistent sentencing practices rose to prominence during the corruption scandals of the 1980s. To address the flagging legitimacy of the summary jurisdiction, in 1988 the government implemented an election promise to give the prosecution a right to appeal against Local Court sentences for the first time.<sup>199</sup> This right, which enabled the prosecution to appeal to the District Court, was conferred upon the ODPP, rather than police prosecutors, because of the superior legal skills of ODPP lawyers.<sup>200</sup> It was hoped, in particular, that this avenue of appeal would promote consistency in magistrates' sentencing decisions by providing a 'thorough system of Crown appeals' that would establish sentencing guidelines.<sup>201</sup> However, as discussed above, because the District Court is an inferior court with no power to bind the Local Court and its sentencing appeal decisions are not routinely reported, they are not necessarily followed by magistrates. For these reasons appeals against sentence to the District Court are not addressing inconsistency in sentencing practices.<sup>202</sup> Indeed the NSW Sentencing Council in 2004 was of the view that they were a 'barrier' to achieving consistency.<sup>203</sup>

It can be seen from the history of appeals against sentence that they have achieved only a piecemeal formalisation of sentencing practices. As the two reasons for *de novo* appeals set out above no longer pertain it has been argued that appeals by way of re-hearing should be abolished, not only because of concerns about inconsistency, but also because they undermine the status of the magistracy.<sup>204</sup> In its consideration of criminal appeals in NSW in 2014 the New South Wales Law Reform Commission ('NSWLRC') acknowledged the strength of those arguments but declined to recommend replacing the re-hearing with an appeal based on error. To do so, it reasoned, would make magistrates more cautious about their sentencing judgments, which in turn would reduce efficiency. Instead it recommended a reform that attempts to reach a

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<sup>199</sup> The *Justices (Appeals) Amendment Act 1988* (NSW) sch 1(1) inserted s 131AB into the *Justices Act 1902* (NSW): New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 November 1988, 3171. See NSWLRC, *Criminal Appeals*, above n 148, 20.

<sup>200</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 November 1988, 3171-3173.

<sup>201</sup> *Ibid* 3171.

<sup>202</sup> New South Wales Law Reform Commission, above n 148, 63. Although it is an inferior court, it is nevertheless classified as a 'higher court' because of its indictable criminal jurisdiction, and is commonly referred to as such. See eg, the NSW Bureau of Crime Statistics and Research Annual NSW Criminal Court Statistics: [http://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats\\_archived.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats_archived.aspx).

<sup>203</sup> New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* Report No 45 (2004) cited by the New South Wales Law Reform Commission, above n 148, 64.

<sup>204</sup> NSWLRC, *Criminal Appeals*, above n 148, 65.

compromise between all of the competing considerations: that sentencing appeals be decided upon the magistrates' reasons for decision and the material before the Local court.<sup>205</sup>

Sentencing practices have been formalised, not so much by appeals against sentence, but rather by several other reforms introduced from the mid-1980s. The first reform was the establishment of the Judicial Commission of NSW, one of whose primary functions is to disseminate sentencing data and judgments to magistrates (and judges in the higher courts) in an effort to improve consistency. The second reform was that the NSW Court of Criminal Appeal ('CCA') began to issue guideline judgments in 1998.<sup>206</sup> Guideline judgments are a product of the battle between Parliament and the judiciary over sentencing discretion. They provide magistrates and judges with guidelines to promote a higher degree of consistency in sentencing practices whilst preserving sentencing discretion and can be seen as a compromise between statutory mandatory sentencing regimes and unfettered sentencing discretion. On three occasions the Attorney General has requested the CCA to provide a sentencing guideline. Of those, two were issued and one was refused.<sup>207</sup> On five occasions the CCA has issued guidelines of its own motion as permitted by s 37A of the *Crimes (Sentencing Procedure) Act 1999*.<sup>208</sup> Guidelines have been used in NSW to increase the sentences imposed for certain harmful behaviours such as drink-driving, a topic to which I return in Chapter 6. The third reform in 1999, the *Crimes (Sentencing Procedure) Act 1999* (NSW), was introduced to consolidate sentencing procedure and promote more consistent sentencing practices in all courts. Finally, the Local Court practice of publishing a selection of sentencing decisions on the internet has also contributed to the formalisation process and the results of formalisation can be seen in these judgments.<sup>209</sup>

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<sup>205</sup> Ibid 83.

<sup>206</sup> See, eg *Jurisc* (1998) 45 NSWLR 209, Jim Spigelman; 'Sentencing Guideline Judgments' (1999) 11(1) *Current Issues in Criminal Justice* 5.

<sup>207</sup> *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 [High Range PCA]; *Attorney General's Application No 1 of 2002* (2002) 56 NSWLR 146 [Form 1]; *Attorney General's Application No 2 of 2002* (2002) 137 A Crim R 196 [Assault police – refused].

<sup>208</sup> *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383 [Guilty Plea]; *Attorney General's Application (no 1) Under s26 of the Criminal Appeal Act*; *R v Ponfield and others* (1999) 48 NSWLR 327 [Break, Enter and Steal - refused]; *Wong & Leung* (1999) 48 NSWLR 340 [Drug Importation – overruled by the High Court in *Wong v R* (2001) 207 CLR 584]; *R v Henry* (1999) 46 NSWLR 346 [Armed Robbery]; *R v Jurisc* (1998) 45 NSWLR 209 [Dangerous driving causing GBH – reformulated in *R v Whyte* (2002) 55 NSWLR 252. See Sentencing Council: Guideline Judgments < <http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Sentencing/guideline-judgments.aspx>>

<sup>209</sup> See, eg *NSW Police v Pipe* [2015] NSWLC 20.

## *Conclusion*

This chapter argued that the concept of formalisation is a useful lens for understanding the development of procedures and practices in the summary jurisdiction. The two dimensions of formalisation that are most useful in this context are rationalisation and juridification. The key to this process has been the development of the reclassification mechanism. Perhaps the most significant moment in its development was in 1891 when Parliament detached the reclassification mechanism from the particular offence of simple larceny and enacted it as a stand-alone provision of general application to which formerly strictly indictable offences could be added. This provision of general application was used three times in the twentieth century to reclassify strictly indictable offences as triable either way: in 1924, 1974, and then in 1995 with the introduction of the Table System. This can be understood as a process of rationalisation. The sheer size of Tables 1 and 2 with their hundreds of offences, when compared with the modest reclassification attempts in 1891, 1924 and 1974, is an indication of the extent to which rationalisation has facilitated vertical criminalisation.

The reclassification mechanism can also be understood as juridification. Prior to the introduction of the Table System the relatively unregulated discretion to choose to have a trial on indictment resided with the magistrate. Post-Table System that discretion resides with the parties as allocated by s 260 of the *CPA*, and the exercise of that discretion is directed in a way that favours summary disposition. In other words, s 260 directs that the matter is to be finalised summarily *unless* an election to have a trial on indictment is made by the relevant party.

## Part II: Actors

## Chapter 2: Magistrates

As the presiding officers in the summary jurisdiction, magistrates have been key figures in its development. Upon the colonisation of NSW, the summary jurisdiction was a catch-all administrative body and magistrates performed many of the executive, as well as judicial, functions of government at a time when central government was still being constructed and the ability to exercise jurisdiction over the outlying districts was tenuous.<sup>1</sup> At this time magistrates wielded immense power and, due to lack of oversight, they often did so with impunity. Tracking the evolution of the office of the magistrate from colonial times to the present reveals that changes to the magistracy have followed a trajectory of formalisation, particularly in the second half of the twentieth century, and gathered momentum in the final quarter of the twentieth century. These changes have been produced, in part, by changing legitimisation demands. The terms ‘justice of the peace’ or ‘justice’ are used in the earlier periods because these were the terms then used, but the term ‘magistrate’ had largely replaced the term ‘justice’ by the beginning of the twentieth century and it is the preferred term in the current era.

This chapter argues that professionalisation together with lawyerification and the separation of law from politics are the two most helpful dimensions of formalisation in this context. As set out in the Introduction to this thesis, by professionalisation I mean the development of a professional identity through the monopolisation of specialised knowledge. Lawyerification refers to the colonisation of summary jurisdiction by lawyers; and the separation of law from other spheres of social power, such as religion and politics, is identified in the socio-historical literature as an aspect of the development of ‘formal rational law’.<sup>2</sup>

### *From Colonisation to the Mid-Nineteenth Century*

NSW inherited England’s criminal justice institutions, including the office of justice of the peace (later known as magistrates), but modifications were made to meet the ‘exigencies of the situation’.<sup>3</sup> The office of justice of the peace developed out of the office of conservator of the

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<sup>1</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991) 118–119.

<sup>2</sup> This has been inspired primarily by the work of Max Weber. See Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (Routledge, 2<sup>nd</sup> ed, 2013), 228-9.

<sup>3</sup> Alex C Castles, *An Australian Legal History* (Law Book, 1982) 33.

peace which existed in every county in England in ‘ancient times’.<sup>4</sup> Their role was ‘to conserve the King’s peace and to protect the obedient and innocent Subjects from Force and Violence.’<sup>5</sup> The concept of conservation of the peace, also known as ‘the King’s Peace’, developed over centuries and was a foundation of the transition from the pre-modern medieval state, a period characterised by ‘tumultuous revenges and private warfare’, to the modern state.<sup>6</sup> Thus, the king’s peace is not to be dismissed as being concerned with mere trifles such as common assault.<sup>7</sup> Rather, it was a formidable mechanism of state power that had evolved from an ‘occasional privilege’, held by householders and conferred upon certain entrusted individuals for particular purposes, ‘into a common right’ by the thirteenth century.<sup>8</sup> It contributed to the transition from regarding the maintenance of order as a local concern to regarding it as the responsibility of a centralised government.<sup>9</sup>

By 1785, just prior to the colonisation of NSW, the commission of justices of the peace had two dimensions, namely, ‘all the ancient power touching the peace, which the conservators of the peace had at the common law’ and also specific powers conferred by statute.<sup>10</sup> Justices of the peace were appointed by commission of the king and, under the first statute of 1 Ed III, ‘had no other power but only to keep the peace’. Myriad subsequent enactments expanded the commission so that by the time of the colonisation of NSW the jurisdiction of justices of the peace had two bases: a broad discretionary power to keep the peace, and narrow, more circumscribed statutory powers of both an administrative and judicial nature.

In the first two decades of the penal colony of NSW, the functions of justices of the peace were performed by government officers who also held other posts.<sup>11</sup> As Golder notes, because the conditions in the colony were changing so rapidly, and the circumstances differed so radically between different locations, it is misleading to generalise about the early magistracy.

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<sup>4</sup> Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, first published 1754, 15<sup>th</sup> ed, 1785) vol 1, 2. I begin with the 1785 edition of Burn’s because this represents the state of the law at the time Australia was colonised (1788).

<sup>5</sup> *Ibid* vol 1, 2.

<sup>6</sup> Frederick Pollock, ‘The King’s Peace’ (1885) 1 *Law Quarterly Review* 37, 50 and generally.

<sup>7</sup> *Ibid* 50.

<sup>8</sup> *Ibid* 49 and generally.

<sup>9</sup> David Feldman, ‘The King’s Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding over Powers’ (1988) 47(1) *The Cambridge Law Journal* 1015, 107.

<sup>10</sup> Burn (1785), above n 4, 8–9.

<sup>11</sup> Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney University Press/OUP, 1991) 7.

The imperial government had conferred the commission of the peace upon these government officers as one of their many functions in the colony and with such responsibilities they were one of the primary instruments of government. The first appointments made by the governor in NSW were current or retired military officers and civil servants.<sup>12</sup> Described as ‘all-rounders’,<sup>13</sup> justices of the peace combined an enormous array of administrative duties ranging from regulating the price of bread and the sale of liquor<sup>14</sup> with the judicial function of dealing with minor criminal matters such as ‘[p]etty theft, assaults, including indecent assault, cases concerned with breaking and entering private property, gambling, drunkenness and other offences.’<sup>15</sup> Due to lack of oversight and an absence of a precisely defined jurisdiction, magistrates exercised a broad discretion in choosing whether or not to resort to the criminal law.<sup>16</sup> They were required to maintain order and therefore functioned as a quasi-police force until local police forces fashioned in the Peelian style began to be established from 1833.<sup>17</sup> They also performed the role later played by local government before local councils began to be established in 1842.<sup>18</sup> For example, they were responsible for granting licences to butchers and bakers and for setting the price of bread.<sup>19</sup>

None of the magistrates, aside from the Deputy Judge Advocate who doubled as the presiding officer of the Court of Criminal Jurisdiction and the Bench of Magistrates, was legally qualified. All of them held tracts of land, although in contrast to their English counterparts, there was no landholding qualification for the position of magistrate in NSW. The reason for this was pragmatic — there were not enough landed gentry in the colony to fill the available positions. While their magisterial positions were technically ‘honorary’, they were ‘paid in convict labour’.<sup>20</sup> These features of the early magistracy gave rise to a number of actual and perceived conflicts of interest. Their primary function as administrators of the convict workforce came into tension with their position as employers of convict labour. Their position as public servants came

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid 3.

<sup>14</sup> Castles, above n 3, 83.

<sup>15</sup> Ibid 76.

<sup>16</sup> Golder, above n 11, 4.

<sup>17</sup> Castles, above n 3, 70.

<sup>18</sup> Ibid 82; State Archives and Records, Government of NSW < <http://www.records.nsw.gov.au/state-archives/guides-and-finding-aids/archives-in-brief/archives-in-brief-106>> See ‘Administrative History’.

<sup>19</sup> Castles, above n 3, 82.

<sup>20</sup> Golder, above n 11, 13.

into tension with the imperative to make private profit from their own landholdings;<sup>21</sup> and their government posts meant that they performed the judicial aspects of their commission of the peace without actual or perceived independence.<sup>22</sup>

As in England, the position of magistrate carried with it great prestige and power in the colony. In the early decades of the nineteenth century magistrates exceeded their sentencing jurisdiction so frequently that a legislative inquiry was established in 1825 to investigate the extent of the practice.<sup>23</sup> There ensued a power struggle between the Governor, Sir Richard Bourke, and the magistracy that culminated in the enactment of what became known as *Bourke's Summary Jurisdiction Act*, which placed firm limits on the powers of magistrates.<sup>24</sup> Despite this power struggle the historical record reveals that appointees also accepted their commissions out of a sense of public duty.<sup>25</sup> Unlike in England, however, where magistrates derived much of their authority from the deference of the local community, such deference did not exist in the NSW colony.<sup>26</sup> Instead, Golder suggests that the 'conditions of the early colony had bred ... a kind of dependence on magistrates.'<sup>27</sup> This was not only because of the broad range of functions they performed, but also because, in circumstances where no informal dispute resolution mechanisms had yet developed, the peaceful resolution of disputes was crucial to the survival and economic development of the colony.<sup>28</sup> There was also a mutual dependence between the magistrates and the convicts upon whose labour the survival of the colony rested.<sup>29</sup> Because of the small population of the settlements, magistrates quickly developed local knowledge of the character (or reputation) of the people appearing before them — a factor which influenced their decisions.<sup>30</sup>

As the colony developed and expanded, the magistracy provided a means of bringing order to rapidly changing social relations. One of the earliest developments was the creation of a

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<sup>21</sup> Ibid 12.

<sup>22</sup> Ibid 7.

<sup>23</sup> Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002), 170–2.

<sup>24</sup> *Summary Jurisdiction Act 1832* (NSW).

<sup>25</sup> Castles, above n 3, 71.

<sup>26</sup> Golder, above n 11, 4.

<sup>27</sup> Ibid 24.

<sup>28</sup> Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983) 135.

<sup>29</sup> Golder, above n 11, 4.

<sup>30</sup> Ibid 25.

‘stipendiary’ or paid magistracy from 1822, although the title of ‘Stipendiary Magistrate’ did not become official until 1881.<sup>31</sup> A key reason why the NSW colony came to rely upon stipendiary magistrates was the ‘tyranny of distance’ — the vast distances between settlements — which had a ‘fundamental’ impact on the ‘various structures of our law’.<sup>32</sup> Stipendiary magistrates were introduced gradually to supplement honorary magistrates as ‘a series of *ad hoc* responses to specific crises.’<sup>33</sup> There were many different types of paid magistrates. For example, on the frontier, incursions into Aboriginal land by squatters and cattle thieves provoked resistance from Aboriginal people.<sup>34</sup> In response the government created ‘specialist police forces and magistrates to contain frontier conflict.’<sup>35</sup> In the settlements, security and decorum were a priority as the colony attempted to attract free settlers from England. This is reflected in the crime statistics. The offences most frequently charged against free persons were drunkenness (which constituted 59 per cent of arrests in 1842), vagrancy and breaches of licensing laws.<sup>36</sup>

A police magistracy, which was a form of stipendiary magistrate, developed from necessity,<sup>37</sup> and is emblematic of the experimental and fluid nature of the magistracy in early NSW. The role was modelled on the unpopular police magistracy created under the English *Middlesex Justices Act 1792*.<sup>38</sup> Honorary magistrates in England had resisted the creation of a paid magistracy because it threatened their local authority and autonomy. Their tactic was to portray paid magistrates ‘as mere agents of the central government’; a tactic which paid off.<sup>39</sup> As seen below, similar suspicions were to develop in NSW in the early twentieth century, but at its inception, there was no resistance to police magistrates from honorary magistrates in NSW.

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<sup>31</sup> The *Metropolitan Magistrates Act 1881* (NSW) created the title ‘stipendiary magistrate’: *ibid* 97-8.

<sup>32</sup> Annesley Athaide, ‘Alex Castles on the Recognition of Australian Legal History’ (2003) 7 *Australian Journal of Legal History* 127, 147.

<sup>33</sup> Golder, above n 11, 29.

<sup>34</sup> There is an ongoing debate in the Aboriginal and Torres Strait Islander communities about the preferred collective term for their peoples. Many eschew the term ‘Indigenous’. The protocol at the University of Sydney is to use the term ‘Aboriginal and Torres Strait Islander Peoples’. In this thesis, because the focus is NSW, I use the term ‘Aboriginal People(s)’. British missionaries first visited the Torres Strait Islands in 1871 and the islands were annexed to Queensland in 1879: *Mabo v Queensland [No 2]* ‘*Mabo Case*’ (1992) 175 CLR 1 (3 June 1992) 4–5 (Brennan J). For this reason the term ‘Aboriginal Peoples’ seems to be the most historically accurate until at least the end of the nineteenth century.

<sup>35</sup> Golder, above n 11, 29. See also Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001); and Mark Finnane, *Police and Government: Histories of Policing in Australia* (OUP, 1994).

<sup>36</sup> Golder, above n 11, 46.

<sup>37</sup> Castles, above n 3, 211–12.

<sup>38</sup> Golder, above n 11, 39.

<sup>39</sup> *Ibid*.

Indeed, Golder suspects the threat posed by frontier violence meant that more magistrates were welcome:

One realist told the 1839 Select Committee on Police and Gaols that police magistrates were much sought after because their full-time commitment to judicial duties and police organization raised property values in the district!<sup>40</sup>

Appointees to the police magistracy were predominantly serving or retired military personnel whose military salary or pension provided an alternative source of income, which meant they were more willing to accept the low salary offered.<sup>41</sup> Between 1822 and the mid-nineteenth century police forces in NSW remained localised, often administered by the local honorary magistrate, so the appointment of a police magistrate to a particular district provided a means of communication with central government.<sup>42</sup> This arrangement forged close ties not only between police magistrates and the police, but also between police magistrates and the government.<sup>43</sup> After centralisation of the police forces in 1862, police magistrates were no longer responsible for the ‘day-to-day supervision of the constabulary’,<sup>44</sup> but the magistracy has struggled to shed the legacy of that close relationship. So strong was the correlation between magistrates and the police that the term ‘police magistrate’ persisted in common usage long after the term was officially abolished in 1947.<sup>45</sup>

### ***From the Mid-Nineteenth Century to the End of the Nineteenth Century***

Between 1840, when transportation officially ended, and 1856 when responsible government commenced, the machinery of democracy was being constructed and this had a significant impact upon the development of the magistracy. Some honorary magistrates in rural areas lobbied the NSW Legislative Council on behalf of their ‘constituents’ for funding for infrastructure, giving them great power and influence in their local communities.<sup>46</sup> By contrast, police magistrates were perceived in some communities as a threat to self-government because they were thought to enhance the power of the governor.<sup>47</sup> In others, police magistrates were

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<sup>40</sup> Ibid 42.

<sup>41</sup> Ibid 44–5.

<sup>42</sup> Ibid 41.

<sup>43</sup> Castles, above n 3, 212.

<sup>44</sup> Ibid 374.

<sup>45</sup> Golder, above n 11, 168.

<sup>46</sup> Ibid 54–55.

<sup>47</sup> Ibid 54.

preferred because they were more reliable than their honorary brethren (they were all male) who were notorious for not appearing on hearing days and for their poor quality decisions.<sup>48</sup> In the second half of the nineteenth century, honorary magistrates began to be phased out in response to lobbying by local constituents. Nevertheless problems with the perceived and actual poor quality of the magistracy persisted throughout the nineteenth and twentieth centuries. In the 1883 parliamentary debates on the *Criminal Law Amendment Act* members were scathing of them. For example, Mr Tighe said he had:

known magistrates who went to the court with their heads full of the fumes of liquor, and who had no understanding of matters which came before them except what the clerk of the bench thought proper to impart. He had known others feeble in intellect through old age—if, indeed, it was ever otherwise,—and who, when once they got a crotchet into their heads, not all the common-sense, not all the reason, not all the evidence in the world would alter their determination.<sup>49</sup>

This view was not unanimous, but it was predominant.

From the end of transportation in the 1840s, as urbanisation progressed, magistrates became the guardians of good order and morality.<sup>50</sup> During this period, due to a belief in the superiority of British civilisation, and a drive for progress and respectability, historians have detected an increasing concern with propriety, moral standards and order.<sup>51</sup> As the police forces began to centralise, a process that was completed in 1862,<sup>52</sup> there was an increasing reliance upon the machinery of law enforcement to maintain these standards.<sup>53</sup> At the same time, the magistracy began to shed some of its administrative tasks, which were being delegated increasingly to the police.<sup>54</sup>

The decades between 1860 and 1890 were a time of economic prosperity that precipitated an enormous expansion of government.<sup>55</sup> The government was the largest employer in NSW and by the 1890s numerous statutory offences were being enacted as the government expanded into

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<sup>48</sup> Ibid 73; Sturma, above n 28, 119–123.

<sup>49</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 March 1883, 1181 (Mr Tighe).

<sup>50</sup> Golder, above n 11, 77.

<sup>51</sup> Sturma, above n 28, 133; Golder, above n 11, 77–8; Beverley Kingston, *The Oxford History of Australia: Volume 3 1860-1900 Glad, Confident Morning* (OUP, 1988) 60–1.

<sup>52</sup> *Police Regulation Act 1862* (NSW). See Golder, above n 11, 86.

<sup>53</sup> Sturma, above n 28, 133; Golder, above n 11, 101.

<sup>54</sup> Golder, above n 11, 89.

<sup>55</sup> Ibid 79.

previously unregulated areas of life such as ‘public health, education and transport’.<sup>56</sup> During this period the stipendiary magistracy was expanded, and the existence of chamber magistrates — magistrates who gave free advice outside of court — is noted in the historical records from 1889.<sup>57</sup>

In the 1890s, there was an economic downturn and in an attempt to end the culture of political patronage, which had, it was thought, unnecessarily swollen the ranks of the stipendiary magistracy, control over the appointment of magistrates was transferred from the government to the Public Service Board.<sup>58</sup> Under the new system recruitment to the magistracy was to be made more transparent by requiring applicants to pass a ‘qualifying examination’,<sup>59</sup> although legal qualifications were not yet required. However, the replacement of honorary magistrates with stipendiary magistrates exacerbated suspicions about the magistracy’s lack of independence from the government, particularly in relation to industrial disputes.<sup>60</sup> These suspicions intensified after the magistracy was placed within the public service in 1895, a shift that heralded a new era in the development of the magistracy.

### ***From the End of the Nineteenth Century to the Final Quarter of the Twentieth Century***

In 1895, the magistracy was incorporated into the public service, a move that has had an enduring impact on the development and perceptions of the magistracy. In the early decades of the public service, as government officers who wished to make a career out of the magistracy began to replace honorary magistrates, appointment to the magistracy was still based largely on political patronage.<sup>61</sup> The *Public Service Act 1895* (NSW) reformed the public service, and within it, the magistracy, by introducing promotion on merit. This provided career options that had not previously existed for men (at that time careers were for men only) without political connections and was designed to improve efficiency by replacing complacency with ambition.<sup>62</sup> The new pathway into the magistracy was a ‘long apprenticeship’ beginning as a clerk in the

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<sup>56</sup> Ibid 100.

<sup>57</sup> Ibid 98.

<sup>58</sup> Ibid 109.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid 120–1.

<sup>61</sup> Ibid 95.

<sup>62</sup> Ibid 114. The Annual Report of the Public Service Board in 1925 said “‘it is not expected ... female officers will make their employment in the Public Service a career.’” At 147.

Petty Sessions branch of the public service.<sup>63</sup> Salaries were too low to attract members of the private legal profession, but it provided ‘social mobility’ to those who did not have access to a higher education or to the professions.<sup>64</sup> While this solved some problems, it created another. One consequence of the new structure was that the clerks resisted the appointment of others from outside of the public service because it threatened their career prospects. This attitude resulted in what Golder describes as a ‘remarkably homogenous magistracy’ that became a ‘closed shop’, an illustration of which is that several generations within certain families carved out careers along the same pathway from clerk to magistrate.<sup>65</sup> While there was a rising sense of professional identity among the magistrates, they identified more as public servants than as judicial officers.

As the twentieth century progressed the magistracy became increasingly insular, which fueled the perception that magistrates were agents of the government. Clerks of Petty Sessions continued to resist the appointment of recruits from outside of the public service and rejected suggestions that magistrates be required to obtain legal qualifications.<sup>66</sup> In the 1920s, in the lead-up to the Great Depression, industrial unrest broke out in various locations around Australia.<sup>67</sup> It was in 1929, in this context, and amid rising concerns about the spectre of communism, that the NSW magistracy was thrust into a political imbroglio that raised questions about its lack of independence and impartiality. This aspect of the historical development of the summary jurisdiction in NSW reveals its particularity. It also led to the seminal High Court decision on the summary jurisdiction (in fact it is the only High Court case where the nature of summary jurisdiction is given detailed consideration), *Munday v Gill*,<sup>68</sup> and is therefore worthy of detailed discussion.

In 1929, the conservative NSW government introduced a Bill to criminalise the public protest activities of striking workers known as ‘mass picketing’. The introduction of the Bill followed the 1928 waterside workers strike and the 1929 ‘lockout’ of coal miners at the Rothbury coal mine in the Hunter Valley region of NSW, but it was the timber workers’ strike of

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<sup>63</sup> Ibid 114.

<sup>64</sup> Ibid 114, 148.

<sup>65</sup> Ibid 185.

<sup>66</sup> Ibid 168.

<sup>67</sup> See eg, re the 18-months long timber dispute in Tasmania John Dargavel, ‘“Not Easy Work to Starve their Employees”: The Tasmanian Timber Dispute’ (2003) 84 *Labour History* 47.

<sup>68</sup> (1930) 44 CLR 38.

1929 that was the focus of attention in the parliamentary debates.<sup>69</sup> The timber workers' strike was the culmination of a decade-long battle that had been taking place before the Commonwealth Arbitration Court over the number of hours in a working week. The Commonwealth Arbitration Court ultimately raised the award from 44 to 48 hours in 1929. One of the tactics employed by striking timber workers was mass picketing, which, the NSW government said, was designed to 'intimidate' workers lawfully attending work during the strike. Captain Chaffey, Colonial Secretary, when introducing the *Crimes (Intimidation and Molestation) Bill* said:

The experience we have had for months, of the existence in our midst of basher gangs, of intimidation by those gangs, of resort to violence, of interference with people in their homes and with law abiding citizens going to and from their places of employment, has created in the public mind a feeling that the time has arrived when action should be taken to suppress this undoubted evil.<sup>70</sup>

The opposition queried the necessity for, and timing of, the Bill, arguing that the criminal law already contained sufficient offences to deal with the conduct complained of and that the term 'intimidation', which was used in the Bill, was too vague. They were suspicious that the Bill had been introduced to assist the federal conservative government in its re-election bid and in an attempt by the NSW government to reclaim some power over industrial relations from the Commonwealth government.<sup>71</sup> Industrial unrest had become a dangerous political issue for the federal government because the strike action was being taken in response to federal awards. A federal election was scheduled for the end of 1929 and it was in that context that the NSW government introduced the legislation. After vigorous debate the Bill was passed. It inserted several new offences into the *Crimes Act*, including:

545C (1) Whosoever knowingly joins an unlawful assembly or continues in it shall be taken to be a member of that assembly, and shall, on conviction before a police or stipendiary magistrate, be liable to imprisonment for a term not exceeding six months or to a fine not exceeding twenty pounds.

The following April, in 1930, the same NSW government introduced the *Justices (Amendment) Bill 1930 (NSW)* (the '*Justices Amendment Bill*') to permit either party in a

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<sup>69</sup> Miriam Dixon, 'The Timber Strike of 1929' (1963) 10(40) *Historical Studies: Australia and New Zealand* 479, 479.

<sup>70</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1929, 374 (Mr Chaffey).

<sup>71</sup> See eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1929, 376, 378; 379–81.

summary criminal matter to object to an honorary magistrate adjudicating in their case.<sup>72</sup> This Bill was precipitated by an alleged incident in Maitland, rural NSW, where two honorary magistrates had travelled from afar to sit, one of them for the first time, with the local police magistrate on the case of a particular defendant concerning charges arising out of the coal lockout.<sup>73</sup> One of the impugned magistrates was the president of the Maitland Australian Labor Party and the other was the secretary of the Coal Trimmers' Union. The imputation was that these two magistrates intended to influence, improperly, the outcome of the case in favour of the defendant. The Labor opposition rejected the allegations claiming that it was nothing but rumour and innuendo,<sup>74</sup> opposing the bill on the basis that 'the Minister is deliberately giving to any litigant power in effect to choose his tribunal.'<sup>75</sup>

The Bill was ultimately defeated, but both sides of politics had been making use of a pre-existing provision which enabled the government to proclaim 'stipendiary areas', which had the effect of ousting local honorary magistrates.<sup>76</sup> Unionists suspected that this was being done to depose honorary magistrates who were sympathetic to the labour cause — a suspicion that was implicitly, if not explicitly, confirmed by the debates on the *Justices Amendment Bill*.<sup>77</sup> Both the ruling conservatives (a Nationalist–Country Party coalition) party and the opposition Labor party claimed that the impartiality of the magistracy was being undermined. It was in the midst of this bitter ideological battle that the events giving rise to the case of *Munday v Gill*, which is discussed in detail in the Introduction to this thesis, took place.<sup>78</sup> This episode illustrates how close the simmering issue of the lack of independence of the magistracy was to boiling point. It also shows how the demographic mix of defendants in the summary jurisdiction altered as it was deployed to regulate the social upheaval caused by changing industrial and economic circumstances. I return to the demographic mix of defendants in Chapter 4.

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<sup>72</sup> *Justices (Amendment) Bill 1930* (NSW).

<sup>73</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 1930, 4374.

<sup>74</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 1930, 4380.

<sup>75</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 1930, 4378.

<sup>76</sup> Golder, above n 11, 160.

<sup>77</sup> *Ibid*, 161–2.

<sup>78</sup> (1930) 44 CLR 38.

### *Lawyerification*

In 1955, in response to pressures from within the Public Service, the Public Service Board introduced a requirement that magistrates be legally qualified. Thus, one of the most significant developments in the summary jurisdiction, and the feature that distinguishes the NSW magistracy from the lay magistracy in England, occurred not because of external pressures, but rather because of internal politics. The motivations for the introduction of this requirement were manifold. First, the Public Service Board wanted to reduce the attrition rate of staff with legal qualifications that were departing from the public service to take up private practice. Secondly, questions were being raised about the capacity of magistrates without legal qualifications to handle the increasing complexity of summary offences; and finally, the Board was under pressure from legally qualified staff for ‘accelerated promotion’ and higher status within the public service.<sup>79</sup> This pressure challenged the ‘seniority principle’, which stipulated that the next in line would be promoted to the magistracy, and threatened the career prospects of the older clerks who did not have legal qualifications, causing tension within the ranks. The Public Service Board recognised, however, that the seniority principle was hampering efforts to improve the quality of the bench. To address all of these issues, in the late 1940s the Public Service Board put the Petty Sessions branch on notice that from 1 July 1955 all appointees to the magistracy would be required to be legally qualified.<sup>80</sup> This requirement had the effect of breaking the rule of seniority with the result that the average age of new recruits began to decrease. Over the ensuing decades these younger ‘militant’ magistrates, as Golder describes them, began to identify more with the judiciary than the public service.<sup>81</sup> By the 1970s the magistracy’s lack of independence from the government and close ties with the police were being questioned in the media and this brought the simmering issue of independence to boiling point.<sup>82</sup>

By the 1970s, as a response to the convergence of a number of social movements, the homogeneity of the magistracy began to be questioned. Pressure was mounting in multiple social realms. University education became attainable for people from a more diverse range of backgrounds when the federal government began to increase public funding of the tertiary sector after WWII. This was particularly the case when the federal Whitlam government introduced

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<sup>79</sup> Golder, above n 11, 168-9.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* 176.

<sup>82</sup> *Ibid.* 184.

free university education in 1972.<sup>83</sup> Student protest movements with progressive agendas swept across the United States, England and Australia, and large-scale government-funded legal aid was established both federally and in NSW. A progressive Labor government was elected in NSW and against this backdrop it conducted a Review of Government Administration between 1977 and 1982. Professor Wilenski, Commissioner of the review, was critical of the lack of class, gender and race diversity in the public service and its lack of responsiveness to changing social conditions such as ‘the very large influx of migrants after the Second World War’ and ‘the altered status and role of women in the workforce and society’.<sup>84</sup> He observed that:

With its closed career service still largely influenced by seniority and dominated by men recruited in the 1930s, the administration often found it difficult to both absorb new ideas and develop the policy capacity to deal with the new problems of government.<sup>85</sup>

It was, the Commissioner argued, a question of efficiency, which he interpreted broadly: ‘Too often it is assumed that the question of efficiency is concerned only with minimising costs or use of resources.’<sup>86</sup> Instead, he took the view that efficiency is a ‘relationship between the results an agency obtains and the resources it uses’.<sup>87</sup> It requires creativity and imagination to understand and respond to societal problems, which in turn require a broad range of views. In these circumstances the Petty Sessions branch, and the public service more broadly, began to recognise that they needed to (or were forced to) diversify.<sup>88</sup> Within the magistracy this was initially interpreted as a need to recruit women to handle ‘women’s issues’ such as domestic violence and cases involving children, which, as Golder observes, risked relegating female recruits to a lower status women’s issues ‘ghetto’.<sup>89</sup>

Women were first appointed to the magistracy in 1921 in the wake of World War I and the enactment of the *Women’s Legal Status Act 1918* (NSW),<sup>90</sup> but they did not make a notable

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<sup>83</sup> See Kanishka Jayasuriya, ‘Transforming the Public University: Market Citizenship and Higher Education Regulatory Projects’ in Margaret Thornton (ed), *Through a Glass Darkly: The Social Sciences Look at the Neoliberal University* (ANU Press, 2015) 89, 94.

<sup>84</sup> Peter Wilenski, *Review of NSW Government Administration Further Report: Unfinished Agenda* (NSW Government, 1982) 14. See also Peter Wilenski, *Review of NSW Government Administration Directions for Change: Interim Report* (NSW Government, 1977).

<sup>85</sup> Wilenski, *Unfinished Agenda*, above n 84, 14.

<sup>86</sup> *Ibid* 16.

<sup>87</sup> *Ibid*.

<sup>88</sup> Golder, above n 11, 185.

<sup>89</sup> *Ibid* 188–9.

<sup>90</sup> *Ibid* 148.

incursion into the overwhelming masculinity of the magistracy until the 1990s. The reasons for this were both formal and structural. Notwithstanding the *Women's Legal Status Act*, women were not accepted into the formal Petty Sessions magistracy apprenticeship until 1954,<sup>91</sup> and a married woman whose husband was employed by the State was precluded by legislation from pursuing a career in the public service until 1969.<sup>92</sup> In the 1970s, in a new phase of resistance to applicants with legal qualifications from outside the public service, the Public Service Association, the representative body of Petty Sessions clerks, began advising its members to obtain post-graduate qualifications in criminology to make them more competitive.<sup>93</sup> New appointees to the magistracy were also required to do country service and were frequently transferred to new locations. The repercussions of these requirements were twofold: they maintained the closed shop of the magistracy by holding off external recruitment; and they rendered it impossible for married women to attempt to build a career as a magistrate at a time when women were also expected to manage the domestic realm.<sup>94</sup> When the magistracy was removed from the Public Service in 1985, only four magistrates were women.<sup>95</sup>

### ***From the Final Quarter of the Twentieth Century to Present***

The magistracy was finally granted formal structural independence from the government when it was removed from the public service between 1983 and 1985. This was a result, primarily, of the efforts of the then Chief Magistrate, Clarrie Briese, who, it seems likely, was concerned about possible corruption within the magistracy.<sup>96</sup> The issue of independence had remained latent throughout the second half of the twentieth century because the magistracy was considered to have *informal* independence from the government, and due to resistance to change from within the magistracy. In *Ex parte Blume* in 1958 the NSW Supreme Court sought clarification of the position of magistrates from the Attorney-General and this was his response:

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<sup>91</sup> Ibid, 186.

<sup>92</sup> *Public Service Act 1902* (NSW) s 42 stated that '[e]xcept in the Department of Instruction no married woman shall be eligible for appointment to any office in the Public Service if her husband is already in the employment of the State, unless...there are special circumstances...'. This was repealed in 1969 by the *Public Service (Amendment) Act 1969* (NSW) s 2(d).

<sup>93</sup> Golder, above n 11, 188.

<sup>94</sup> Ibid 188.

<sup>95</sup> Local Court of NSW, *Annual Review* (2010) 2 avail

<<http://www.localcourt.justice.nsw.gov.au/Pages/Publications/annualreviews.aspx>> supplies comparative figures for gender diversity.

<sup>96</sup> Golder, above n 11, 199, 205–7. The *Local Courts Act 1982* (NSW) achieved structural independence and came into effect in January 1985.

It is a departmental rule of long standing that the judicial functions of magistrates are not interfered with by the department and that it is not competent for the Minister or any member of the Executive to give any direction affecting his judicial functions to a judicial officer.<sup>97</sup>

The Attorney-General's emphasis on the independence of the magistracy is evidence of acknowledgement of their increasing judicial role and was perhaps crafted to deflect criticism. Recognising that appearances are as important as practice in the operation of the justice system, and that informal rules provide little protection against outside interference, Briese, who was appointed as Chairman of the Magistracy in 1979, was one of the first to begin calling for formal statutory independence.<sup>98</sup> Changes made to the *Public Service Act* in 1979 that placed magistrates under the direct control of ministers instead of the Public Service Board had jeopardised what little independence magistrates had.<sup>99</sup> At the same time a number of committals of high profile defendants brought the issue of magisterial independence to public attention.<sup>100</sup> Briese persuaded the magistracy to vote to be severed from the Public Service—a move they had been resisting — and the *Local Courts Act 1982* (NSW), which achieved that outcome, was passed in 1983, coming into force in January 1985. It did not, however, provide magistrates with the same security of tenure as Supreme and District Court judges who could be removed only by an 'address from both houses of Parliament',<sup>101</sup> an issue to which I return below.

It was in this context of an increasing focus of the lack of independence of the magistracy that the corruption scandals of the 1980s, mentioned in Chapter 1 above, erupted. As the details of the scandals have been set out elsewhere,<sup>102</sup> I will provide only a thumbnail sketch sufficient to generate an understanding of their impact on magistrates as actors in the summary jurisdiction. It was the media — the Australian Broadcasting Corporation (the 'ABC') — that first drew attention in 1983 to corruption in the magistracy and implicated the highest levels of the NSW

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<sup>97</sup> *Ex parte Blume; Re Osborn* [1958] *State Reports of NSW* 334 at 340. For discussion see Sharyn Roach Anleu and Kathy Mack, 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 370, 375–6.

<sup>98</sup> Golder, above n 11, 191–2.

<sup>99</sup> C R Briese, 'Future Directions in Local Courts of New South Wales' (1987) 10 *University of New South Wales Law Journal* 127, 130–1.

<sup>100</sup> Golder, above n 11, 192.

<sup>101</sup> *Constitution Act 1902* (NSW) s 53. This section was amended in 1992 to include magistrates: *Constitution (Amendment) Act 1992* (NSW).

<sup>102</sup> See, eg Golder, above n 11, 200.

government.<sup>103</sup> The allegation was that Murray Farquhar, when he was the Chairman of the magistracy in 1977, had assigned the committal of K E Humphreys to a particular magistrate and ‘warned him that the Premier “wants Kevin Humphreys discharged”’.<sup>104</sup> Humphreys had been charged with the misappropriation of \$50,000 from the Balmain Rugby League Club while he was its Secretary-Manager.<sup>105</sup> A Royal Commission headed by Supreme Court Chief Justice Sir Lawrence Street investigated the allegations against Farquhar and the Premier. The Premier was exonerated but in 1985 Farquhar was charged with attempting to pervert the course of justice.<sup>106</sup> He was convicted and sentenced to four years imprisonment with a non-parole period of 18 months.<sup>107</sup> This episode, together with numerous other allegations of corruption amongst lawyers, judges, police and public officials at the time, eroded confidence in the integrity and competence of the magistracy.<sup>108</sup> Subsequent structural changes were made in an attempt to restore their reputation, and with it, public confidence.

The issue of tenure — a key feature of judicial independence — arose out of a fiasco that ensued when the courts of Petty Sessions were abolished and replaced with Local Courts. Briece had been calling for the establishment of a Judicial Commission to improve the integrity of the magistracy and judiciary since the beginning of his tenure as Chairman of the magistracy in 1979. In 1983, in the context of the revelations of corruption discussed above, Briece raised concerns in a report to the Attorney-General about the fitness for magisterial office of five of the then serving magistrates. After seeking advice from the Law Reform Commission in relation to his powers, the Attorney-General declined to reappoint these magistrates to the new court. In November 1984 the NSW government amended the *Local Courts Act 1982* (NSW) providing that any magistrate who was not reappointed was entitled to a position within the public service on the same salary that they had been paid as a magistrate.<sup>109</sup> This was perhaps intended as compensation for non-reappointment. Four of the five non-reappointed magistrates brought proceedings against the Attorney-General alleging a denial of their legitimate expectation of reappointment and denial of procedural fairness because they had not been made aware of, or

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<sup>103</sup> Ibid, 199-200.

<sup>104</sup> Ibid 200.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> *R v Farquhar* [1985] NSWCCA 63 (29 May 1985).

<sup>108</sup> Golder, above n 11, 200.

<sup>109</sup> *Local Court (Amendment) Act 1984* (NSW) sch 1.

given an opportunity to answer, Briese's allegations.<sup>110</sup> The argument was defeated in the High Court, but the episode divided the justices of the NSW Supreme Court and High Court. The issue in contention was the relationship between the power of the government to ensure that judicial office is held only by the 'best available appointee' and the independence of the judiciary.<sup>111</sup> To restore public trust in the justice system the NSW government created the Judicial Commission of NSW in 1986 and granted the same security of tenure to magistrates as Supreme Court Justices.<sup>112</sup>

Adding to the perceived need for a Judicial Commission were revelations published in a report funded by the Criminology Research Council (the 'Vinson Report') that revealed marked inconsistency in sentences imposed in drug cases before the District Court. These data, they said, hinted at the possibility of deliberate manipulation by certain members of the legal profession and judiciary, but were not conclusive.<sup>113</sup> To ensure that the courts were 'above suspicion' and to improve accountability the Vinson Report recommended the establishment of a body that was responsible for the collection and dissemination of sentencing data, a 'probity council' that would investigate the integrity of court officials, and a Sentencing Council that would be responsible for developing sentencing principles and practices and for educating the public about the sentencing process.<sup>114</sup> The government responded by establishing the Judicial Commission of NSW in 1986. A Sentencing Council was not established until 2003.<sup>115</sup>

### ***Professionalisation***

The push for professionalisation came from both within and beyond the magistracy. Defence lawyers, who were appearing in the summary jurisdiction in increasing numbers subsequent to the introduction of legal aid (which I discuss in Chapter 3) were critical of the quality of magistrates, and, perhaps because of this, magistrates themselves were vying for increased status.

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<sup>110</sup> *McRae v Attorney-General for New South Wales* (1987) 9 NSWLR 268, 285.

<sup>111</sup> See *Attorney General (NSW) v Quin* (1989-1990) 170 CLR 1, 42 (Deane J). See also the majority judgments of Mason CJ, Brennan and Dawson JJ, and the individual judgments of Kirby P, Mahoney and Priestley JJA of the Supreme Court of NSW in *McRae v Attorney-General for New South Wales* (1987) 9 NSWLR 268.

<sup>112</sup> *Judicial Officers Act 1986* (NSW) ss 3, 41. For discussion of similar moves in all Australian jurisdictions see Mack and Anleu, 'Security of Tenure', above n 97.

<sup>113</sup> Tony Vinson, George Cooney, Morag Carroll, Arthur King and Natalie Bolzan, Criminology Research Council, *Accountability and the Legal System: Drug Cases Terminating in the District Court 1980-1982* (1986) 28. For discussion see Golder, above n 11, 207-8.

<sup>114</sup> Vinson et al, above n 113, 28-35.

<sup>115</sup> Department of Justice, Government of NSW, NSW Sentencing Council <<http://www.sentencingcouncil.justice.nsw.gov.au/Pages/About-us/about-us.aspx>>

The structural changes discussed above — provision of the same security of tenure to magistrates as enjoyed by the judiciary and the creation of the Judicial Commission of NSW in 1986 — together with increases in the status of magistrates within the legal profession, fostered professionalisation from the mid-1980s. Writing in 1989, John Bishop, a barrister and author of books on both criminal and civil procedure, provides empirical evidence that the quality of magistrates was still dubious at that time and was having a deleterious impact on the summary jurisdiction. An important example of this was that defence lawyers were being discouraged from pleading guilty and conducting sentencing matters in front of magistrates who were known to be unfair or harsh.<sup>116</sup> Bishop blamed the low status of the magistracy for the low quality of recruits — a vicious cycle — and argued that increased status must be accompanied by improved training.<sup>117</sup> In his view magistrates’ training was irrelevant to the tasks they were required to perform: ‘The magistrate is generally a public servant well trained in the administrative functions of the Local Courts and poorly trained in the usual functions of judicial office.’<sup>118</sup> By providing for the continuing education of magistrates and collating sentencing data from across Australia’s many jurisdictions, over time the Judicial Commission of NSW has enabled the magistracy to keep abreast of changes in the law and to keep sentences within a more consistent range.<sup>119</sup> In 2010, Chief Magistrate, Judge Henson attributed the rapid and extensive professionalisation of the magistracy since 1985 to the ‘hard work’ of the Judicial Commission of NSW.<sup>120</sup>

An incremental increase in the status of the magistracy has accompanied the dramatic changes of the 1980s. Reflecting the ‘predominantly judicial office of the modern magistrate’, in 2004 the form of address of magistrates in court was changed from ‘Your Worship’ to ‘Your Honour’ to bring it into line with the higher courts.<sup>121</sup> In 2005 the ban on magistrates wearing robes was lifted.<sup>122</sup> Magistrates and other members of the judiciary have also been lobbying for a change of title from ‘magistrate’ to ‘judge’ since at least the beginning of Briese’s tenure as

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<sup>116</sup> John B Bishop, *Prosecution without trial* (Butterworths, 1989) 116.

<sup>117</sup> *Ibid* 227.

<sup>118</sup> *Ibid* 229, 231.

<sup>119</sup> Graeme Henson ‘Twenty-Five years of the Local Court of NSW’, (2010) 46 *Judicial Officers Bulletin* 45, 46–47.

<sup>120</sup> *Ibid* 47.

<sup>121</sup> Keith Mason, ‘Impartial, Informed and Independent’ (2005) 7(2) *The Judicial Review* 121, 122.

<sup>122</sup> Local Court of NSW, *Annual Review* (2005) 5, avail

<<http://www.localcourt.justice.nsw.gov.au/Pages/Publications/annualreviews.aspx>>. NSW Bar Association, *Court Attire* <<https://www.nswbar.asn.au/coming-to-the-bar/court-attire>>.

Chairman in 1979.<sup>123</sup> For example, in 2008 Justice Kirby of the High Court, as he then was, argued that changing the title to ‘judge’ would increase the status of the magistracy, which in turn would increase the quality of appointees and further bolster their independence.<sup>124</sup> Magisterial salaries have also increased significantly, a factor that has successfully lured high quality applicants away from lucrative private practices.<sup>125</sup> The appointment of the former Chief Magistrate Price to the Supreme Court<sup>126</sup> and the appointment of several magistrates as District Court Judges are also seen as an indication of the rising quality of the magistracy. The current Chief Magistrate, Judge Henson was appointed as a Judge of the District Court in 2010,<sup>127</sup> although he continues to act as the Chief Magistrate. Magistrates continue to lobby to change their title from ‘magistrate’ to ‘judge’, not only to reflect an increase in status, but also to shed the historical association between magistrates and the police.<sup>128</sup> While the Commonwealth government changed the title of federal court magistrates to ‘judge’ in 2012,<sup>129</sup> the state and territory governments have resisted doing so.

Two further markers of professionalisation are a burgeoning media consciousness and what Judge Henson has described as increased confidence.<sup>130</sup> Since independence in 1985 the magistracy has developed an awareness of the Local Court’s public image, an image which, Henson argues, is often tainted by ‘ill informed’ media reports.<sup>131</sup> The court now responds to inaccurate media reports in two ways. The first is with the assistance of ‘media liaison resources

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<sup>123</sup> See, eg Briese, 'Future Directions in Local Courts of New South Wales' above n 99, 132; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part I' (2000) 74 *Australian Law Journal* 509; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part II' (2000) 74 *Australian Law Journal* 592.

<sup>124</sup> Honourable Michael Kirby, 'The Ongoing Ascent of the Australian Magistracy' (2009) 9(2) *The Judicial Review* 147 162.

<sup>125</sup> From 1 July 2016, the salary of the Chief Magistrate was \$394,230 plus a ‘conveyance allowance’ of \$21,240. The salary of an ordinary magistrate was \$315,380 with a conveyance allowance of \$16,990. By way of comparison, the salary of the Chief Justice of the Supreme Court from 1 July 2016 was \$494, 530 plus \$23,600; that of a Judge of the Supreme Court \$441, 940 plus \$23,600 and of a Judge of the District Court \$395, 810 plus \$21,240: NSW Remuneration Tribunal, Annual Determination of the Judges and Magistrates Group, *Report and Determination under section 13 of the Statutory and Other Offices Remuneration Tribunal Act 1975* (15 July 2016) 14–15.

<sup>126</sup> Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts*, Palgrave Socio-Legal Studies (Palgrave, 2017) (2006) 2.

<sup>127</sup> NSW Government, NSW Attorney General ‘Chief Magistrate Appointed a District Court Judge’ (Media Release, 15 July 2010) <<http://www.nswbar.asn.au/circulars/henson.pdf>>.

<sup>128</sup> Sharyn Roach Anleu and Kathy Mack, 'The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige' (2008) 44(2) *Journal of Sociology* 185, 199.

<sup>129</sup> *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth).

<sup>130</sup> Henson, 'Twenty-five Years of the Local Court of New South Wales' above n 119, 47.

<sup>131</sup> *Ibid* 46.

with the Department of Justice and Attorney General' and the second is through the publication of the reasons of magistrates in selected cases.<sup>132</sup> Linked to this awareness is what Henson describes as 'the court's confidence of its capacity to lead rather than simply react', a confidence that he observes was lacking 'in the early years of its independence'. A consequence of this lack of confidence was that magistrates allowed the parties to control court proceedings. Now, Henson says, '[t]hose days are gone forever'.<sup>133</sup> A manifestation of this new-found confidence is the regular issuing of practice notes to instruct parties on how matters are to proceed before the court.<sup>134</sup> These markers of professionalisation are examples of the system self-regulating, which is another indicator of its maturity.

### *Diversity*

Increasing gender diversity and the appointment of magistrates from a broad range of backgrounds has been a 'deliberate strategic goal' in the summary jurisdiction since the removal of the magistracy from the public service.<sup>135</sup> Judge Henson attributes the dramatic improvement in gender diversity in particular, and other dimensions of diversity more broadly, to the introduction of transparency into recruitment processes and the 'deliberate appointment' of magistrates with a 'multiplicity of experiences'.<sup>136</sup> This is confirmed in the scholarly literature.<sup>137</sup> Data from an Australia-wide survey conducted in 2007 show that diversification along the gender dimension has been more successful in the magistracy than in the higher court judiciary.<sup>138</sup> While female appointments to the higher court judiciary remained at approximately one in four for the fifteen years prior to 2007, appointments of women to the magistracy have increased to approximately fifty per cent Australia-wide over the same period.<sup>139</sup>

There is also evidence to suggest that magistrates are increasingly being drawn from a more diverse range of social class backgrounds. One source of diversity is mothers in paid work.

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<sup>132</sup> Ibid 46.

<sup>133</sup> Ibid 47.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Kathy Mack and Sharyn Roach Anleu, 'Entering the Australian Judiciary: Gender and Court Hierarchy' (2012) 34(3) *Law & Policy* 313.

<sup>138</sup> Ibid 327–8.

<sup>139</sup> Ibid 327; in 2015 there were 75 male magistrates and 56 female magistrates out of a total of 123 full time and 8 part-time magistrates: Local Court of NSW, *Annual Review* (2015) 7–9, avail <<http://www.localcourt.justice.nsw.gov.au/Pages/Publications/annualreviews.aspx>>.

Female magistrates ‘have more experience of mothers in paid work, compared with their male colleagues.’<sup>140</sup> However, when comparing the magistracy with the judiciary from a class perspective, the male magistracy appears to be more socially diverse from a class perspective than the male judiciary. The 2007 data reveal that ‘a higher proportion (nearly two-thirds) of male judges report mothers rarely or never in paid work compared with male magistrates (just less than one-half).’<sup>141</sup> Judge Henson reports that magistrates are increasingly being selected from a variety of backgrounds, including private practice as solicitors or barristers, the State and Commonwealth Director of Public Prosecutions, Legal Aid, the Law Society and academia.<sup>142</sup> Anecdotally, Magistrate Dillon reports that the appointment of ‘practising lawyers with experience in dealing with briefs of evidence and the rules of evidence’ has led to ‘an immeasurable but significant cultural change in the Local Courts’.<sup>143</sup> This is a reference to a change in the perception of magistrates as always accepting the prosecution evidence to a general, but not universal, perception that they are ‘fair and competent’.<sup>144</sup> Data on the other axes of diversity such as ethnicity and sexual orientation are not available in Australia,<sup>145</sup> but Dillon notes the summary jurisdiction has done less well in these dimensions.<sup>146</sup>

Changes in appointment practices over the last three decades also hint at an increase in ‘viewpoint’ diversity — that is, the expansion of judicial perspectives — a dimension of diversity that is not easily measured. Scholars warn that ‘inclusive diversity ... may not automatically increase “viewpoint” diversity’,<sup>147</sup> but Magistrate Dillon notes that after the magistracy was removed from the public service and outside appointments were made, many former Legal Aid and defence lawyers were appointed to the bench.<sup>148</sup> This broke the ‘perceived nexus between police and the magistracy’.<sup>149</sup> This is a significant reorientation of the summary jurisdiction because historically magistrates have been seen as government partisans existing

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<sup>140</sup> Ibid 322.

<sup>141</sup> Ibid.

<sup>142</sup> Henson, above n 119, 47. Mack and Roach Anleu’s data corroborates this claim. See Mack and Anleu, ‘Entering the Australian Judiciary’, above n 137, 327–8.

<sup>143</sup> Hugh Dillon, ‘Law and Social Change – A Magistrate’s Perspective’ (2005) 7(3) *Judicial Review* 345, 350.

<sup>144</sup> Ibid 350-1.

<sup>145</sup> Mack and Anleu, ‘Entering the Australian Judiciary’, above n 137, 320.

<sup>146</sup> Dillon, above n 143, 352.

<sup>147</sup> Mack and Anleu, ‘Entering the Australian Judiciary’, above n 137, 338.

<sup>148</sup> Dillon, above n 143, 350.

<sup>149</sup> Ibid.

merely to ‘rubber stamp police actions’.<sup>150</sup> This is interesting not only for what it reveals about the reality of the summary jurisdiction, but also for what it reveals about the perception of the summary jurisdiction that prominent magistrates wish to convey. The discourse discloses a concern to depict the summary jurisdiction as a mature criminal justice apparatus that operates according to principles of fairness and is to be taken seriously. This concern is a product of professionalisation and lawyerification.

Why is a diverse magistracy considered to be so important in the current era? My analysis suggests that in NSW the rise to prominence of notions of fair trial and due process in the post-war era, which have increasingly permeated the summary jurisdiction due to the increased involvement of lawyers, together with the social movements (discussed in this and other chapters) championing human rights and feminist perspectives, have produced conditions in which an unrepresentative magistracy will no longer be tolerated. In addition to concerns about equal opportunity and objectivity, there are reasons to think that a diverse magistracy is a way of ensuring the democratic legitimacy of the summary jurisdiction.<sup>151</sup> Mack and Anleu summarise history of the various reasons given in the scholarly literature for the need for gender diversity in the judiciary more broadly.<sup>152</sup> In the 1990s the reasons were based on the perceived need for a broader range of perspectives and life experiences, which, it was thought, may produce ‘greater empathy or compassion’. In the 2000s arguments were based on promoting equal opportunity for women in the workforce. It has also been argued that diversity is crucial for maintaining ‘public confidence and trust’ in the legal system and the judiciary’s ‘claims of neutrality and impartiality’.<sup>153</sup> But these reasons do not address the magistracy specifically. In England, the persistence of lay justices is seen to supply the summary courts with democratic legitimacy and to provide protection against ‘professional power’.<sup>154</sup> Concerns about the concentration of professional power have not been raised in NSW, most likely because of the legacy of the historical concern about the poor quality of the magistracy. In a similar way to the

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<sup>150</sup> See, eg Golder, above n 11, 196.

<sup>151</sup> I say ‘in principle’ because historically juries have not necessarily been representative of the defendant’s community, or the broader community.

<sup>152</sup> Mack and Anleu, ‘Entering the Australian Judiciary’, above n 137, 319.

<sup>153</sup> Ibid.

<sup>154</sup> Jane C Donoghue, ‘Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales’ (2014) 77(6) *Modern Law Review* 928, 933.

diversity supplied by a jury in the higher courts, diversity in the magistracy can be seen as an attempt to bolster the democratic legitimacy of an expanding summary jurisdiction.

### *Conclusion*

My analysis of magistrates as actors in the summary jurisdiction in this chapter indicated that the formalisation lens is a useful means of understanding change over time in this context. The two most useful dimensions of formalisation here are professionalisation together with lawyerification, and the separation of law from politics, which has taken the form of autonomy from the government. While there have always been magistrates who were also lawyers, lawyerification began in the mid-twentieth century. It was precipitated by the internal politics of the Petty Sessions branch of the Public Service. However, it intensified in the early 1980s in response to the legitimisation demands raised by the conviction of the former Chairman of the magistracy, Murray Farquhar, for perverting the course of justice and the ensuing ‘constitutional crisis’. The legitimisation demands raised by this crisis also led to the structural separation of the summary jurisdiction from the government, thus addressing at last the issue of lack of independence that had been simmering since colonisation. This can be understood as a separation of law from politics. On a descriptive level my analysis also showed the increasing maturity of the summary jurisdiction and diversity of the magistracy. In the current era the official pursuit of diversity amongst the magistracy can be seen as providing the summary jurisdiction with a source of democratic legitimacy.

### Chapter 3: Justice Personnel

Alongside magistrates, the justice personnel are the other actors in the summary jurisdiction who are there in their official capacity. They are the police, police prosecutors, ODPP lawyers, and defence lawyers. It is useful to group these actors together because they all engage in enforcement practices. The police investigate or detect the suspected commission of offences and lay charges; police prosecutors and ODPP lawyers prosecute the offences; and defence lawyers represent the interests of the accused in the prosecution process, including by retrospectively challenging the legality and/or propriety of police enforcement practices in relevant cases. My examination of change over time in the practices of these actors reveals that it has followed a trajectory of formalisation. However, this trajectory of formalisation plays itself out in specific ways in relation to each of them.

This chapter argues that professionalisation together with lawyerification, and the separation of law from other spheres of social power are the two most prominent dimensions of formalisation here. As set out in the Introduction to this thesis, by professionalisation I mean the development of a professional identity through the monopolization of specialised knowledge. Lawyerification refers to the colonisation of summary jurisdiction by lawyers, and the separation of law from other spheres of social power, such as religion and politics, is identified in the socio-historical literature as an aspect of the development of ‘formal rational law’.<sup>1</sup> In this context, as with magistrates, it manifests itself as autonomy from the government.

#### *Police*

Police as actors have impacted upon the development of the summary jurisdiction in two main ways. The first is through charging practices, and the second is through their role as prosecutors. This part of the chapter examines each of these in turn. The final part of the chapter examines plea negotiation where these two sets of practices and the practices of defence lawyers intersect.

There has been enormous change in the nature of policing over time in NSW, and yet the story of police as actors in the summary jurisdiction is one of relative continuity. There is

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<sup>1</sup> This has been influenced primarily by the work of Max Weber, see Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (Routledge, 2<sup>nd</sup> ed, 2013), 228–9.

another story about changing police practices that is both bigger, and smaller, than the summary jurisdiction. A dominant theme of that other story is formalisation through professionalisation and juridification. However, while this chapter necessarily gestures towards that story, my more circumscribed aim is to examine those instances where police as actors have impacted upon the development of the summary jurisdiction. This more specific focus reveals that the formalisation of police practices in the summary jurisdiction has been piecemeal. This chapter argues that the two dimensions of formalisation that are most useful for understanding the development of the police as actors in the summary jurisdiction are juridification and professionalisation.

### *From Colonisation to the Mid-Nineteenth Century*

The colonists brought with them from England the office of the local constable, but because of the absence of pre-existing local communities, and the need to rely on convicts to act as constables, it was of limited success in the NSW colony.<sup>2</sup> During the early decades a magistrate's jurisdiction was most often invoked by a complaint made on oath by the victim to the magistrate. Accusations could also be made by a witness or a police officer and depending on the seriousness of the offence, the magistrate would then issue either a warrant of arrest or a summons.<sup>3</sup> During the penal era, from 1788 to at least the 1830s, magistrates largely 'controlled the prosecution process'.<sup>4</sup> The historical record shows that magistrates sometimes used prosecutions to achieve certain personal ends, such as removing people from 'a desirable tract of land',<sup>5</sup> which illustrates the power of magistrates during this period.

In the 1830s discrete police forces began to be established for different purposes. They were given a wide variety of administrative functions in addition to law enforcement and the maintenance of public order. While, as Finnane's research shows, the initial dispossession of Aboriginal people in NSW was accomplished without the aid of police, the police forces that were established from the 1830s onwards 'added to the colonial state an apparatus of great power

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<sup>2</sup> Mark Finnane, *Police and Government: Histories of Policing in Australia* (OUP, 1994), 11.

<sup>3</sup> See Francis McArthur, 'The Justices' Assistant' [1846] Australian Colonial Law Monographs 6-9; John Plunkett, *The Australian Magistrate or A Guide to the Duties of a Justice of the Peace for the Colony of New South Wales* (Anne Howe, 1835) iv.

<sup>4</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991) 137.

<sup>5</sup> *Ibid.*

and flexibility in completing the process.’<sup>6</sup> The violence of the dispossession process, which has been analysed in detail elsewhere, has shaped the relationship between the police and Aboriginal people to this day.<sup>7</sup> Policing in the Australian colonies was based on the identification of particular groups who posed a threat to social order, such as convicts and Aboriginal people.<sup>8</sup> From the beginning, police in NSW were a governing tool of the state that played a central role in state formation.<sup>9</sup>

### *From the Mid-Nineteenth Century to the Turn of the Twentieth Century*

From the mid-nineteenth century to the turn of the twentieth century, as the summary jurisdiction began to formalise, police forces in NSW began to be consolidated and centralised. After early experiments with placing magistrates in control of police, police were placed under the control of the executive government through police commissioners.<sup>10</sup> The year 1862 is cited as the precise date from when centralisation took effect.<sup>11</sup> Historians attribute the move towards centralisation to social forces such as the unrest unleashed by the influx of settlers during the gold rushes in the mid-nineteenth century and the erosion of public respect for the police because of their inability to control bushranging.<sup>12</sup> For these reasons, although the emergence of a centralised police force in NSW coincided with a similar move in England and Ireland, the process in NSW was distinctive.<sup>13</sup>

During the middle decades of the nineteenth century as transportation of convicts was abolished, the maintenance of a social order based on contemporary ideas of respectability was considered to be essential to the prosperity of the developing colony. This became the ‘central mandate’ of the newly centralised police forces.<sup>14</sup> The importance of this aspect of the policing

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<sup>6</sup> Finnane, *Policing and Government*, above n 2, 111.

<sup>7</sup> See, eg Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001) ch 3.

<sup>8</sup> Finnane, *Policing and Government*, above n 2, 75.

<sup>9</sup> *Ibid* 9, 14.

<sup>10</sup> *Ibid* 15; Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney University Press, OUP, 1991) 67.

<sup>11</sup> Finnane, *Policing and Government*, above n 2, 20.

<sup>12</sup> *Ibid* 29. Bushrangers were often former convicts who lived in the Australian wilderness and committed robberies on people passing through on horses or coaches. They sometimes robbed banks or stole horses. Ned Kelly was one of the most notorious bushrangers.

<sup>13</sup> Finnane, *Policing and Government*, above n 2, 29.

<sup>14</sup> David Dixon, 'Issues in the Legal Regulation of Policing' in David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999) 36, 37.

role is reflected in the incentives offered to police officers to lay charges for certain offences. Sturma reports that for an unspecified period prior to 1850 ‘constables received a portion of the fines for convictions’ for offences such as indecent exposure and ‘obscene language’.<sup>15</sup> Late in the nineteenth century the police began to develop a monopoly over ‘crime fighting’,<sup>16</sup> which is understood in this context as the detection, prosecution and conviction of offenders.<sup>17</sup>

In the summary jurisdiction the maintenance of social order and the crime fighting functions have been less clearly demarcated than in the higher courts. Since the earliest days of police forces, the police have used charges such as offensive language and offensive behaviour as a means of maintaining social order and these offences have therefore remained staples of the summary jurisdiction. This is one reason why police enforcement practices have a significant impact on the summary jurisdiction’s offence profile.<sup>18</sup> The maintenance of social order function has also contributed to the over-policing of certain groups in the community, in particular young people and Aboriginal and Torres Strait Islander People who tend to spend more time in public spaces than other community groups.<sup>19</sup>

It is difficult to determine with precision the statistical profile of the summary jurisdiction during the mid-late nineteenth century because it pre-dates the appearance of coherent and uniform statistical record-keeping. Despite this, historians have developed an ‘impressionistic’ account from extant records. Golder’s research shows that public drunkenness and ‘drink-related offences’ dominated the summary jurisdiction at the time.<sup>20</sup> In 1884, offences against the person constituted approximately 5 per cent of offences, offences against property approximately 10 per cent, and ‘offences against good order’, which included offences such as drunkenness, offensive language and vagrancy, comprised approximately 80 per cent of total offences.<sup>21</sup> While the offence profile of the summary jurisdiction changed during the twentieth century as new

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<sup>15</sup> Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983), 128.

<sup>16</sup> Dixon, ‘Issues in the Legal Regulation of Policing’, above n 14, 37; Finnane, *Policing and Government*, above n 2, 76.

<sup>17</sup> David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon, 1997) 78.

<sup>18</sup> Cf Julia Quilter and Luke McNamara, ‘Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)’ (2013) 36 *UNSW Law Journal* 534.

<sup>19</sup> Cunneen, above n 7, ch 4.

<sup>20</sup> Golder, above n 10, 101-102.

<sup>21</sup> Calculations based on statistics in Satyanshu Mukherjee et al, *Source Book of Australian Criminal and Social Statistics 1804–1988* (Australian Institute of Criminology, 1989).

offences were created, it remained dominated by ‘offences against good order’ and ‘petty offences’ — which included drink-driving and other parking and traffic offences, drug offences and breaches of regulatory Acts (such as the *Public Health Act*) — until the final quarter of the twentieth century.<sup>22</sup>

### *From the Turn of the Twentieth Century to the Final Quarter of the Twentieth Century*

In broad terms, the story of Australian policing in the twentieth century is one of professionalisation, as in other parts of the common law world, as the state came to assume exclusive responsibility for dispute resolution in the criminal context.<sup>23</sup> The main ingredient of professionalisation, the monopolisation of knowledge,<sup>24</sup> dates from the mid-late nineteenth century in NSW.<sup>25</sup> There were two prongs to this monopoly in NSW: the development of the specialised skill of crime investigation, which had already begun by the mid-nineteenth century;<sup>26</sup> and technological developments designed to assist with the identification of offenders, such as fingerprinting. These technological developments took place between 1880 and WWII,<sup>27</sup> and an emerging ‘science’ of crime detection had its genesis during this period.<sup>28</sup> Developments such as these led to the police establishing a monopoly over the field of criminal law enforcement.

A driver of professionalisation in NSW was the development of specialised training.<sup>29</sup> For the bulk of the twentieth century the emphasis was on physical training and learning on the job. Police recruits were rarely exposed to educational influences from outside the police force and this resulted in a significant degree of insularity.<sup>30</sup> One consequence of this insularity was the development of ‘a culture of corruption’, which was the main impetus behind the juridification of police enforcement practices in the late twentieth century and early twenty-first

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<sup>22</sup> For the nineteenth century statistics see Golder, above n 10; for the twentieth century see Satyanshu Mukherjee, *Crime Trends in Twentieth Century Australia* (Allen & Unwin, 1981) 44.

<sup>23</sup> Dixon, *Law in Policing*, above n 17, 52.

<sup>24</sup> Samuel Walker, *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington Books, 1977) ix—x. The other two are ‘professional autonomy, and the service ideal’.

<sup>25</sup> Dixon, ‘Issues in the Legal Regulation of Policing’, above n 14, 37; Finnane, *Policing and Government*, above n 2, 76.

<sup>26</sup> Finnane, *Policing and Government*, above n 2, 76.

<sup>27</sup> *Ibid* 75.

<sup>28</sup> *Ibid* ch 4.

<sup>29</sup> *Ibid* 141–147.

<sup>30</sup> *Ibid* 147; New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 2.

century.<sup>31</sup> In the 1980s, radical changes precipitated by the Lusher Commission, which is discussed in the next section, were made to recruitment and training practices within the police force. Amongst the changes were measures to increase diversity in the police force, the introduction of promotion on merit, and training in cross-cultural awareness.<sup>32</sup>

The degree to which legal regulation influences police practices is contentious.<sup>33</sup> Legal regulation may occur through the common law or legislation and can best be understood through the lens of juridification. Reasons for the uncertainty surrounding the degree to which legal regulation influences police practices include the limited scope for enforcing legal regulations and because policing in NSW, as in England and other countries with similar police forces, is predominantly done by consent.<sup>34</sup> This means that the police conduct activities with the consent of the suspect that they otherwise have no power to do. A good example is requesting identity. Police have no power to request a person's identity unless certain circumstances pertain. One is that police 'suspect on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place where the alleged indictable offence occurred, whether before, when, or soon after it occurred.'<sup>35</sup> However, if these circumstances are absent, a person's consent to disclosing their identity operates as the source of power. The NSW Police Force resisted legal regulation for the bulk of the twentieth century, influenced in part by the police push for autonomy in the United States.<sup>36</sup> For this reason, while there were common law restrictions on the exercise of police power, legal regulation had a limited impact on police practices in NSW for much of the period.<sup>37</sup> Indeed the police were, in practice if not in principle, largely unregulated until the 1980s. This is evident in the Australian Law Reform Commission's scathing critique in 1975 of the state of uncertainty surrounding the rights of suspects in criminal investigations.<sup>38</sup> For example, the common law position on detention for the purposes of questioning remained unclear until the High Court

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<sup>31</sup> Finnane, *Policing and Government*, above n 2, 184.

<sup>32</sup> Janet Chan, *Changing Police Culture: Policing in a Multicultural Society*, 129-136.

<sup>33</sup> For a discussion of the relationship between the law and police practices see Dixon *Law in Policing*, above n 17.

<sup>34</sup> *Ibid* 75.

<sup>35</sup> Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 11(1).

<sup>36</sup> Dixon, 'Issues in the Legal Regulation of Policing', above n 14, 37.

<sup>37</sup> *Ibid*.

<sup>38</sup> Australian Law Reform Commission ('ALRC'), *Criminal Investigation*, Report No 2 (1975) 44.

confirmed in 1986 that it was prohibited.<sup>39</sup> However, even subsequent to that decision, police in NSW continued to detain suspects for the purpose of questioning because in a system dominated by guilty pleas the practice was rarely challenged in court.<sup>40</sup> Underpinned by a measure of success that was based on numbers of convictions, police enforcement practices coalesced into a culture of impunity and securing convictions at all costs.<sup>41</sup> This culture led, in turn, to an emphasis on obtaining confessions, and, perhaps inevitably, their fabrication.<sup>42</sup> Due in part to deficient leadership throughout the 1960s, and perceptions of police ineffectiveness, the public reputation of the NSW police by the late 1970s was poor.<sup>43</sup>

### *From the Final Quarter of the Twentieth Century to Present*

In 1976 the newly elected left-leaning Wran Labor government set about rejuvenating the public service and public institutions, as discussed in chapters 1 and 2. In relation to policing, it established the *Lusher Commission to Inquire into NSW Police Administration* (the ‘Lusher Commission’) in 1979. The Commission was asked, in particular, to investigate ‘the structure of the relationship between the Police Force and the Executive Government’.<sup>44</sup> One of the key problems the Lusher Commission identified was insularity. To overcome insularity the Lusher Commission recommended departing from the structure whereby sole oversight of the police was vested in the police commissioner and replacing it with a board, members of which would be drawn from both inside and outside of the force.<sup>45</sup> The report, which was handed down in 1981, was a precursor to the dramatic overhaul of the institutions of the criminal justice system that took place throughout the 1980s and into the 1990s.

In addition to these structural changes, in the 1980s, the work of the NSW police force underwent a ‘paradigm shift’ that had a significant impact on the summary jurisdiction. The shift

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<sup>39</sup> *Williams v The Queen* (1986) 66 ALR 385. Cf England where the practice was sanctioned by the common law in the 1960s, affirmed by the House of Lords in 1984 and enshrined in statute in the same year (*Police and Criminal Evidence Act* 1984 (UK)). See Dixon, ‘Issues in the Legal Regulation of Policing’, above n 14, 40.

<sup>40</sup> Dixon, *Law in Policing*, above n 14, 195. For discussion of the practice see Peter Sallmann and John Willis, *Criminal Justice in Australia* (OUP, 1984) 22.

<sup>41</sup> Finnane, *Policing and Government*, above n 2, 84–92.

<sup>42</sup> *Ibid* 87–92; Dixon, *Law in Policing*, above n 17, ch 5.

<sup>43</sup> Mark Finnane, ‘From Police Force to Police Service? Aspects of the Recent History of the New South Wales Police’ in David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999) 6, 14.

<sup>44</sup> New South Wales, Commission to Inquire into New South Wales Police Administration, *Report* (1981) Terms of Reference (‘Lusher Commission’).

<sup>45</sup> Finnane, ‘From Police Force to Police Service?’, above n 43, 25.

was from reactive law enforcement and peacekeeping to ‘community policing’.<sup>46</sup> ‘Community policing’ in this context is understood as the engagement of members of the community in the crime detection and enforcement processes. This paradigm shift took place against a background of the collapse of penal welfarism and a crisis of confidence in the criminal justice system in liberal democracies.<sup>47</sup> While the balance of opinion among historians and policing scholars is that the community policing paradigm shift was little more than rhetoric and was quickly displaced by law and order imperatives,<sup>48</sup> as an ethos it provided fertile ground for the intensification of the focus on risk-prevention in policing that took place in the 1980s. There is a large body of scholarship on risk-prevention as a governance strategy, but here I use the term in the narrower sense of policing as a means of preventing the risks posed to the community by harmful behaviours that are regulated by the criminal law. A good example of this style of policing is the offence of drink-driving, which Pat O’Malley describes as the paradigm risk-prevention offence.<sup>49</sup> O’Malley argues that in the context of a broader societal shift towards risk-prevention in fields such as the ‘medical sciences’ that was precipitated by ‘an explosion of scientific knowledge of risk’ and fostered by the insurance industry, there was a shift in policing practices from the mid-1980s away from law enforcement and towards ‘preventing crime and managing behaviour using predictive techniques’.<sup>50</sup> The state’s assumption of responsibility for risk prevention through its police ‘service’ (as it was called for a brief period)<sup>51</sup> has been one of the drivers of the enormous expansion of the summary jurisdiction. I explore these themes further in Chapter 6 on drink-driving and Chapter 7 on domestic violence.

In addition to this external focus, the reorientation of policing towards risk-prevention had an internal dimension. Internally, in the wake of the Royal Commission into the NSW Police

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<sup>46</sup> Dixon, ‘Issues in the Legal Regulation of Policing’, above n 14, 38; Finnane, ‘From Police Force to Police Service?’, above n 43, 24, 33.

<sup>47</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 53.

<sup>48</sup> Finnane, ‘From Police Force to Police Service?’, above n 43, 35; Janet Chan and David Dixon, ‘The Politics of Police Reform’ (2007) 7(4) *Criminology and Criminal Justice*, 443, 463.

<sup>49</sup> Pat O’Malley, ‘The Politics of Mass Preventive Justice’ in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP, 2013) 273, 273.

<sup>50</sup> Pat O’Malley, *Crime and Risk* (SAGE, 2010) 1, 7.

<sup>51</sup> One of the features of community policing was that the ‘NSW Police Force’ was to be re-named a police ‘service’ to reflect the new reality of the policing role. The name reverted to the ‘NSW Police Force’ in 2006 amid ‘panics about public lawlessness’: Finnane, ‘From Police Force to Police Service?’, above n 43, 24; Dixon, *Law in Policing*, above n 17, 214. Chan and Dixon suggest that the story of policing in NSW is ‘encapsulated in the shifting name of the police department’: see Chan and Dixon, above n 48, 462–464.

Force (the ‘Wood Royal Commission’), which was established in the 1990s to investigate police corruption, the NSW Police ‘Service’ adopted a ‘new accountability’ which accompanied the infiltration of managerialism into the public sector in the late 1990s.<sup>52</sup> New accountability represented a shift away from ‘traditional accountability’ based on the ‘rule of law’ or ‘public-interest standards’ towards accountability based on ‘managerial’ standards, which ‘promotes risk-management rather than rule enforcement’.<sup>53</sup>

By the turn of the twenty-first century, policing was moving into an era of ‘policing by law’ whereby police powers are not only set out in statutory provisions, but those provisions also provide detailed guidance on how those powers are to be exercised.<sup>54</sup> The Wood Royal Commission was the catalyst for the shift to policing by law.<sup>55</sup> One of the most important findings of the Wood Royal Commission was the problem of ‘process corruption’. Process corruption occurs when police distort criminal justice processes in order to secure convictions. Examples include ‘verballing’ — which is the practice of concocting unsigned records of interview or confessions, assaulting accused persons in order to elicit a confession, committing perjury, and fabricating or tampering with evidence.<sup>56</sup> The Wood Royal Commission recommended that this form of corruption be addressed by consolidating and elucidating police powers and reducing the ‘possibility of abuse of powers through ignorance’, among other measures such as changing the culture of the policed force.<sup>57</sup> This ought to be done, it stated, in a way that would ‘strike a balance between the need for effective law enforcement and the protection of individual rights’.<sup>58</sup> The Commission’s view was that these measures would repair the tainted reputation of the police force.

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<sup>52</sup> Janet Chan, ‘Governing Police Practice: Limits of the New Accountability’ (1999) 50(2) *British journal of Sociology* 251, 251.

<sup>53</sup> *Ibid.*, 254.

<sup>54</sup> Gareth Griffith, ‘Police Powers in NSW; Background to the Law Enforcement (Powers and Responsibilities) Bill 2001’ (Briefing Paper No 11/2001, NSW Parliamentary Library Research Service, 2001) Executive Summary.

<sup>55</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). On ‘process corruption’ see New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 2, 395; and David Brown, ‘The Royal Commission into the NSW Police Service: Process Corruption and the Limits of Judicial Flexibility’, (1998) 9(3) *Current Issues in Criminal Justice* 228.

<sup>56</sup> Brown, ‘The Royal Commission into the NSW Police Service’. above n 55, 229–30.

<sup>57</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 2, 395-6.

<sup>58</sup> *Ibid.*

In 2001, in response to the Wood Royal Commission recommendations, the NSW government introduced the *Law Enforcement (Powers and Responsibilities) Bill* into Parliament. After a three year incubation period the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (*LEPRA*) came into operation in 2005.<sup>59</sup> NSW was not the only common law jurisdiction to consolidate police powers. The *Police and Criminal Evidence Act 1984* (*PACE*) in England was ‘influential’ in the decision to consolidate police powers in NSW.<sup>60</sup> The *Police Powers and Responsibilities Act 2000* (QLD) was also a ‘landmark’ consolidation that took place at a similar time to the enactment of *LEPRA*.<sup>61</sup> Unlike *PACE*, *LEPRA* has received scant attention in the academic literature. One of the few people to comment on the legislation was Andrew Haesler, who was a Public Defender at the time, and is now a District Court Judge. He pointed out that *LEPRA* was not a mere consolidation; it created additional police powers in response to lobbying by the NSW Police.<sup>62</sup> Further powers have been added subsequent to *LEPRA*’s enactment in response to atypical incidents, such as the Cronulla ‘race riots’ in 2005 when anti-Muslim sentiment erupted into violence in the Sydney suburb of Cronulla.<sup>63</sup> The dominant legal discourse in relation to police powers in the current era is critical of the way in which legal regulation has led to the augmentation of police powers. This transition to the statutory elucidation of police powers may be understood as juridification.

Despite the juridification of police enforcement practices more broadly, the juridification of police enforcement practices in the summary jurisdiction has been less extensive. There are two reasons for this. The first is that many summary offences are excluded from the statutory provisions. A good example of such exclusion is the legal regulation of conducting interviews with suspects. To address the problem of verballing, the electronic recording of interviews with suspects was introduced administratively from 1991,<sup>64</sup> and was enshrined in statute in 1997.<sup>65</sup>

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<sup>59</sup> Griffith, ‘Police Powers in NSW’, above n 54, 49.

<sup>60</sup> Ibid, Executive Summary.

<sup>61</sup> Ibid.

<sup>62</sup> Andrew Haesler, ‘Police Powers 2006’, The Public Defenders (2 March 2006)

<[http://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/Papers%20by%20Public%20Defenders/public\\_defenders\\_police\\_powers\\_2006.aspx](http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_police_powers_2006.aspx)>.

<sup>63</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 6A. See Chris Cunneen, ‘Law, Policing and public Order: The Aftermath of Cronulla’ in G Noble (ed), *The Cronulla Riots, Multiculturalism and National Belonging* (Institute of Criminology Press, 2009) 220.

<sup>64</sup> David Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of NSW* (Federation Press, 6<sup>th</sup> ed, 2015) 463.

However, the legislative requirement to electronically record interviews with suspects applies only to Table 1 and strictly indictable offences. It does not apply to Table 2 or summary only offences. The second reason for the piecemeal juridification of police enforcement practices in the summary jurisdiction is that in practice, because of the prevalence of guilty pleas, breaches of regulations are often not scrutinised.<sup>66</sup> As guilty pleas are a feature of the entire criminal justice system in the current era, lack of scrutiny is not unique to the summary jurisdiction.

### ***Prosecutions in the Summary Jurisdiction***

Police prosecutors conduct the overwhelming majority of prosecutions in the summary jurisdiction. They are intriguing because they represent a combination of the prosecutorial and investigative functions in the one actor. Their continued existence — an example of continuity over time — is a key feature that distinguishes the summary jurisdiction from the indictable jurisdiction.

### ***The History of Police Prosecutors***

The practice of police prosecutions, whereby senior police officers appear in court to present prosecutions on behalf of police officer informants, began informally in the second half of the nineteenth century. By the time Commissioner William John Mackay created the NSW Police Prosecution Service in 1941 the practice was ‘long-established’.<sup>67</sup> In 1965 a Prosecuting Branch was established as a separate department within the Police Force.<sup>68</sup> In the same year, the Privy Council approved the informal practice of police officers conducting prosecutions in the summary jurisdiction.<sup>69</sup> The Court held that permitting police prosecutors to appear on behalf of informants was merely another dimension of magistrates’ discretion to allow any person, whether counsel or not, to appear on behalf of an accused person in the summary jurisdiction. It was, they held, an ‘element or consequence of the inherent right of a judge or magistrate to

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<sup>65</sup> *Crimes Amendment (Detention after Arrest) Act 1997* (NSW) which inserted s 281 into the *Criminal Procedure Act 1986* (NSW).

<sup>66</sup> Due to the prevalence of guilty pleas throughout the court hierarchy, this is not unique to the summary jurisdiction.

<sup>67</sup> *O’Toole v Scott* [1965] 1 A.C. 939, 950. Lusher Commission, above n 44, 238. Peter Sweeny, ‘The Role of the Police Prosecutor in the Magistrates Court System’ in Ivan Potas (ed), *Prosecutorial Discretion*, Conference Proceedings, 7–9 November 1984 (Australian Institute of Criminology) 135.

<sup>68</sup> Mr Justice Lusher noted that the prosecution branch routinely provided legal advice to police officers on prosecutions, which he considered ‘interesting’ given that prosecutors were not legally trained. Lusher Commission, above n 44, 242.

<sup>69</sup> *O’Toole* [1965] 1 A.C. 939.

regulate the proceedings in his court.<sup>70</sup> The Privy Council also made the pragmatic observation that it is necessary in the administration of justice to permit accused persons *or complainants*, who may not be able to afford counsel, to be represented by a non-lawyer.<sup>71</sup> In NSW, because prosecutors are not required to be legally qualified, they appear before the Local Court with the leave of the magistrate.<sup>72</sup>

Police prosecutors are drawn from the ranks of police officers, establishing a strong link between the prosecutorial and investigative functions and thoroughly marinating future prosecutors in police culture.<sup>73</sup> In addition to several years of experience as a police officer, recruits are provided with some (limited) training by other police officers in the prosecution service, but receive no formal legal training from outside the service.<sup>74</sup> Until 2008 law graduates were prohibited from applying to become a police prosecutor until they had done three years of police work.<sup>75</sup> The Prosecution Service has struggled to retain recruits because prosecutors who had obtained legal qualifications often moved into the more lucrative field of private practice upon graduation.<sup>76</sup> In the late 1970s and early 1980s the Prosecuting Branch was failing to attract recruits, in part because it provided no financial incentive: police prosecutors had to forego the ‘financial benefits which accrue to them from working shift work’.<sup>77</sup> The resistance of the NSW Prosecution Branch to legal qualifications echoes that of the Petty Sessions Branch when magistrates were part of the public service, as seen in Chapter 2 on magistrates. Over the last decade the Prosecution Branch appears to have been attempting to make prosecutions a more desirable career option for police officers and law graduates. In 2008 the NSW Police Force introduced an ‘Accelerated Prosecutors Recruitment Program’ pursuant to which law graduates can be ‘fast-tracked’ into police prosecutions.<sup>78</sup> Chris Corns argues that this will improve the

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<sup>70</sup> Ibid 959.

<sup>71</sup> Ibid 954 (emphasis added).

<sup>72</sup> Sweeny, above n 67, 136.

<sup>73</sup> Lusher Commission, above n 44, 241.

<sup>74</sup> John Bishop, *Prosecution without trial* (Butterworths, 1989) 51; Lusher Commission, above n 44, 241–2. This appears still to be the case but information on training is not readily available.

<sup>75</sup> Chris Corns, *Public Prosecutions in Australia* (Thomson Reuters, 2014) 232.

<sup>76</sup> Lusher Commission, above n 44, 256.

<sup>77</sup> Ibid 241.

<sup>78</sup> Corns, above n 75, 232.

quality of police prosecutors and is a further step towards the ‘professionalisation of police prosecutions in Australia’.<sup>79</sup>

Competing claims to a monopoly on relevant expertise underpin the debate about police prosecutors’ lack of formal legal training. Criticism has come largely from members of the legal profession who are acquainted with the justifications for the legal profession’s monopoly on the provision of legal services.<sup>80</sup> An early public criticism of police prosecutors in NSW came from Mr Justice Lusher in the Lusher Commission, discussed above, which coincided with the increased appearance of defence lawyers in the summary jurisdiction and the removal of the magistracy from the public service. Justice Lusher raised a number of concerns, including whether the activities of prosecutors constitute the provision of legal advice by unqualified persons in contravention of the *Legal Practitioners’ Act 1898* (NSW), a regime that the courts have emphasised is for the protection of the public.<sup>81</sup> In response, prosecutors claimed to have specialised expertise that is particular to prosecutions in the summary jurisdiction. For instance, in 1984, Peter Sweeny, Superintendent in Charge of the Prosecuting Branch of the NSW Police wrote:

...the training experience and constant working in the field, and the requirement to read related legal material, provides skill and capacity in the law which is not only adequate and sufficient for the purpose concerned, but is also expert... The prosecutors, as police personnel, have a great understanding of police work and are perhaps more aware of the requirements necessary for the presentation of prosecutions in the magistrates court system.<sup>82</sup>

The general pattern of increasing formalisation of the summary jurisdiction revealed in this thesis raises questions about the continued existence of police prosecutors. As long ago as 1989, John Bishop expressed concern that with the expansion and increasing complexity of summary matters the continued use of legally untrained prosecutors was inappropriate.<sup>83</sup> At that time he noted the move towards improving the quality of magistrates and, because of the formalisation of the provision of legal aid, more defendants were being legally represented, dynamics that are explored in Chapter 2 on magistrates and Chapter 4 on defendants. In the context of what Bishop described as the ‘maturation’ of the summary jurisdiction, the presence

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<sup>79</sup> Ibid 233.

<sup>80</sup> Lusher Commission, above n 44; Bishop, above n 74; Corns, above n 75.

<sup>81</sup> Lusher Commission, above n 44, 251, 253–4. These issues are now governed by the *Legal Profession Uniform Law Application Act 2014* (NSW).

<sup>82</sup> Lusher Commission, above n 44, 238. Sweeny, above n 67, 244.

<sup>83</sup> Bishop, above n 74, 63.

of unqualified prosecutors was perpetuating a lack of sophistication,<sup>84</sup> a problem that persists in the current era.

How can the continued police control of summary prosecutions in NSW be accounted for? It appears to be a product of the political power of police unions and associations protecting the careers of their members, as well as the resource implications of requiring prosecutors to obtain legal qualifications, rather than evidence that police prosecutors are the best available option for the administration of justice. There is limited available evidence of the effectiveness of the office of police prosecutor. A pilot study conducted in 1996 hints that transferring prosecutions to legally qualified solicitors would save resources. During the pilot, responsibility for summary prosecutions was transferred to ODPP solicitors for three months at two local courts in NSW. The tentative finding was that efficiency (defined as reduced time taken to finalise matters and increased numbers of guilty pleas) was greatly improved because of, among other factors, the ability of ODPP solicitors to identify more readily the weak cases. This was particularly the case in assault matters where the victim did not wish to pursue charges.<sup>85</sup> However, because of the haste with which the pilot was initiated and its consequent poor design, the pilot's statistical data is unreliable.<sup>86</sup>

### ***The Impact of the Establishment of the Office of the Director of Public Prosecutions (the 'ODPP')***

Since 1840 criminal prosecutions in the higher courts in NSW have been conducted in the name of the Attorney-General.<sup>87</sup> In 1840, as one of a cluster of measures designed to improve the administration of justice, the colonial legislature enacted a provision stating that all prosecutions before the Supreme Court, and the Courts of General and Quarter sessions were to be 'prosecuted by information in the name of the Attorney-General or other officer appointed for such purpose by the Governor.'<sup>88</sup> In accordance with that provision a practice developed

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<sup>84</sup> Ibid 71.

<sup>85</sup> Tony Krone, *Fairness and Efficiency in Summary Prosecutions: The Independent Prosecutor's Dilemma in a 'Law and Order' Environment* (PhD Thesis, University of New South Wales, 2002) <<http://www.austlii.edu.au/au/journals/UNSWLawTD/2002/1.pdf>>, 93.

<sup>86</sup> Ibid 92. Changes to enforcement practices introduced in relation to domestic violence since 1996 (analysed in Chapter 7) have rendered the findings of this study obsolete.

<sup>87</sup> The current provision is *Criminal Procedure Act 1986* (NSW) s 8. For a discussion of the central role of the Attorney-General to criminal prosecutions in Australia see Corns, above n 75.

<sup>88</sup> *Administration of Justice Act 1840* (NSW) s 10.

whereby the Attorney-General would appoint a barrister to conduct prosecutions.<sup>89</sup> These barristers were called Crown Prosecutors and were briefed by the Crown Solicitor, known as the ‘Clerk of the Peace’, who was also employed by the Attorney-General.<sup>90</sup> Crown Prosecutors were therefore not independent of the Attorney-General. This position endured until the ODPP was established in 1986.

In NSW, the establishment of an ODPP that is independent of the Attorney-General was a response to the ‘constitutional crisis’ (discussed in the preceding chapters) that befell the NSW criminal justice system in the 1980s.<sup>91</sup> The crisis in NSW occurred at a time when similar institutions were being created in the UK and other jurisdictions around Australia.<sup>92</sup> In the UK, an independent Crown Prosecutors’ Service was established in 1986 in response to a recommendation of the Royal Commission on Criminal Procedure.<sup>93</sup> A key imperative was to improve the efficiency of public prosecutions by ‘reduc[ing] the number of weak cases currently prosecuted.’<sup>94</sup> Corns argues that, in Australia, the reasons for the creation of independent prosecution services differed in each jurisdiction,<sup>95</sup> but close examination of each context reveals that the underlying rationale was the prevention of corruption. For instance, in Victoria, concerted lobbying by then shadow Attorney-General John Cain led to the establishment of an ODPP in that state. Cain’s primary aim was to insulate the prosecution process from political influence. He was concerned that powerful actors such as business people, trade unions and the police might stymie prosecutions that had ensued from the exposure of illegal conduct in various inquiries in the 1970s.<sup>96</sup> At a federal level a number of Royal Commissions into organised crime recommended the establishment of an independent Commonwealth prosecution service as a key anti-corruption measure.<sup>97</sup> The ODPP in NSW was created as one plank of a raft of measures designed to restore public confidence in the criminal justice system following the prosecution of

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<sup>89</sup> Lusher Commission, above n 44, 243.

<sup>90</sup> *Ibid.*

<sup>91</sup> As noted above, an important dimension of the Director’s independence was life tenure. This was abolished in 2007. See Chapter 1, nn 93 and 94.

<sup>92</sup> Corns, above n 75, ch 2.

<sup>93</sup> Andrew Sanders, ‘An Independent Crown Prosecution Service?’ (1986) *Criminal Law Review* 16, 16.

<sup>94</sup> *Ibid.*

<sup>95</sup> Corns, above n 75, 80.

<sup>96</sup> *Ibid.* 76.

<sup>97</sup> Such as the Costigan Royal Commission: Victoria, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Report* (1982). See *ibid.* 78–79.

a magistrate, a District Court judge and a justice of the High Court for perverting the course of justice.

The establishment of the ODPP contributed to the lawyerification of the summary jurisdiction. It will be recalled from Chapter 1 that a Table System was introduced in 1995, pursuant to which both the prosecution and defence may elect to proceed by way of a trial on indictment in Table 1 triable either way matters, and the prosecution only may elect to proceed by way of trial on indictment in Table 2 triable either way matters. Since the introduction of the Table System the division of labour between police prosecutors and the ODPP has operated as follows. Police prosecutors have carriage of all summary offences except ‘prescribed’ summary offences or unless the person ‘responsible for carriage of the matter has consented in writing’ to the ODPP taking carriage.<sup>98</sup> For the last several years the ODPP has taken carriage of approximately 500 summary matters per year,<sup>99</sup> a tiny proportion of the total (approximately).<sup>100</sup> For Table 1 and 2 matters, if the police prosecutor, in discussion with investigating officers, believes the matter is serious enough to consider electing for a trial on indictment, the file is referred to the ODPP. If the ODPP chooses to elect, they take carriage of it. If the ODPP chooses not to elect, the brief is returned to the police prosecutor and the matter proceeds summarily,<sup>101</sup> unless it is sufficiently complex for the ODPP to retain carriage. In the financial year 2013/14, 2,980 matters were referred to the ODPP by the police for advice in relation to an election.<sup>102</sup> The ODPP also provides advice to the police on ‘sufficiency of evidence or appropriateness of charges’,<sup>103</sup> but advice is sought in only 3 per cent of cases.<sup>104</sup>

In the context of the recently established ODPP, when the Table System was introduced it impacted upon the summary jurisdiction in several important respects. It resulted in an

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<sup>98</sup> *Director of Public Prosecutions Act 1986* (NSW) s 9(2).

<sup>99</sup> Office of the Director of Public Prosecutions (‘ODPP’), *Annual Report 2014–15*, (2015) 48 (‘*Annual Report 2014–15*’). Eg, in 2014–15 they received 533 summary matters and completed 467.

<sup>100</sup> In 2014 the total number of charges in the Local Court was 255,387: Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2014*, 3. From 2015 onwards the *Criminal Court Statistics* reports record the number of defendants rather than the number of charges finalised so these reports are not directly comparable with the pre-2015 ones.

<sup>101</sup> Corns, above n 75, 232.

<sup>102</sup> *Annual Report 2013–14*, 18. In 2012-13 it was 3,028: Office of the Director of Public Prosecutions, *Annual Report 2013-14*, (2013).

<sup>103</sup> New South Wales Law Reform Commission (NSWLRC), *Encouraging Appropriate Early Guilty Pleas*, Report No 141 (2014) 62, 45.

<sup>104</sup> *Ibid* 87.

enormous accretion of power to the prosecution; it consolidated the judicial nature of magisterial power by shedding administrative functions; it formalised prosecution practices for triable either way matters; it bolstered the fair trial protections for the accused by preserving the common law principle of fair trial that the tribunal of fact should not be aware of prior offending; and it reoriented the criminal justice system towards summary disposition. It achieved this reorientation by creating a powerful incentive for the defendant to plead guilty in triable either way offences<sup>105</sup> thereby facilitating the increased use of the criminal law in summary form. Prior to the 1995 changes, defendants who wished to plead guilty did not know in which jurisdiction they would be sentenced until after they had entered their plea and the magistrate had heard the prosecution case and read their antecedents.<sup>106</sup> Uncertainty about the maximum penalty they faced before deciding on a plea was an incentive to put the prosecution to proof.<sup>107</sup> The 1995 changes made it possible for defendants (usually via their legal representative) to plead guilty in exchange for the prosecutor agreeing that no election would be made. Thus in addition to formalising the jurisdictional allocation of offences, the 1995 changes to criminal procedure further formalised prosecution practices and facilitated criminalisation by creating a double incentive: (1) to finalise matters summarily; and (2) for the defendant to plead guilty to avoid the higher sentencing jurisdiction of the District Court.

The creation of the ODPP also invites speculation about whether it has contributed to the formalisation of prosecution practices in the summary jurisdiction through the institutionalisation of fair trial values. In 1987 when the ODPP commenced operation in the context of the loss of public confidence in the criminal justice system, it began to publish Prosecution Guidelines that were designed to improve the transparency of prosecution practices.<sup>108</sup> As Nicholas Cowdery, Director of Public Prosecutions from 1994 to 2004, has said: '[the guidelines] serve to guide prosecutors and to inform the community about actions taken in its name.'<sup>109</sup> They also provide

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<sup>105</sup> Ibid 131.

<sup>106</sup> The High Court recognised this could undermine the principle of fair trial that the tribunal of fact ought not be made aware of the accused's antecedents, but it upheld the legislature's right to control the discretion of magistrates as it saw fit: *Hall v Braybrook* (1956) 95 CLR 620.

<sup>107</sup> Bishop, above n 74, 116.

<sup>108</sup> The current Guidelines are available at website of the Office of the Director of Public Prosecutions, NSW, *Prosecution Guidelines* (rev 2007) <<http://www.odpp.nsw.gov.au/prosecution-guidelines>>.

<sup>109</sup> Nicholas Cowdery, *Introduction to the 2007 Guidelines*, 1 June 2007:

<<http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>> at 1.

defence representatives with a negotiating tool and, in some instances, grounds for appeal.<sup>110</sup> However, it is difficult to gauge the extent to which this institutionalisation of fair trial values has impacted upon the summary jurisdiction for the following reasons: there is no empirical evidence on the subject; the ODPP becomes involved in only a tiny proportion of the overall caseload of the summary jurisdiction (as has been seen in this chapter); and the practices of the NSW Prosecution Branch are so opaque that it is not possible to determine whether it is official policy that police prosecutors apply the ODPP Prosecution Guidelines. Nor is it possible to determine the proportion of police prosecutors that has legal qualifications.

My history of prosecutions in the summary jurisdiction shows that while formalisation has taken place through professionalisation of police prosecutors, and the lawyerification of, and autonomy from the government in, prosecutions conducted by the ODPP, because of the continued existence of police prosecutors it has been piecemeal. The continued existence of police prosecutors is an instance of continuity with the earliest days of the colony since when there has been little separation of the prosecution and investigation roles.

### *Defence Lawyers*

In the current era defence lawyers have come to play a greater role in the development of the summary jurisdiction than at any other point in its history. It is challenging to pinpoint the date when lawyers first began to appear in the summary jurisdiction in NSW prior to the 1970s and the frequency with which they did so. During the early decades of the penal colony there were but a few lawyers in the colony, all of whom were ex-convicts,<sup>111</sup> and the majority of defendants appeared unrepresented before the bench of magistrates. A legal profession, as opposed to a handful of legal practitioners, began to emerge in the period between 1824, when the Supreme Court of NSW opened, and 1856 with the commencement of responsible government.<sup>112</sup> Few defence lawyers appeared in the summary jurisdiction during that period,<sup>113</sup> and there were even fewer in remote districts.<sup>114</sup>

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<sup>110</sup> *Wood v The Queen* (2012) 84 NSWLR 581.

<sup>111</sup> Neal, above n 4, 82.

<sup>112</sup> J M Bennett, E.J Minchin and Anthony Fisher, *A History of Solicitors in NSW* (Legal Books, 1984) ch 3.

<sup>113</sup> Sturma, who examines the period from 1831 to 1861: Sturma, above n 15, 119–120.

<sup>114</sup> Golder, above n 10, 75.

In NSW, the legal profession retained the division between barristers and solicitors, an ‘accident of English social history’,<sup>115</sup> but it was not enforced in the summary jurisdiction. In 1840 the NSW legislature enacted the *Defence on Trials for Felony Act 1840* (NSW), which adopted the *Prisoners Counsel Act 1836* (UK). This Act permitted barristers to represent defendants in both summary and indictable matters.<sup>116</sup> The Act did not apply to solicitors but that was remedied in 1849 when the legislature enacted a provision stating that attorneys (the label given to solicitors at that time) ‘shall be allowed to practise and act as Counsel and be heard in all matters before the said Courts of Quarter Sessions in the same manner as Barristers are in the [Supreme Court]’.<sup>117</sup> For this reason, although the division of the profession has been jealously guarded in NSW,<sup>118</sup> solicitors have been entitled to appear as counsel in the summary jurisdiction since 1849.

Until the latter decades of the nineteenth century, criminal defence lawyers struggled to gain professional legitimacy.<sup>119</sup> This is reflected in the restrictions placed on counsel by both the *Defence on Trials for Felony Act 1840* (NSW) and its counterpart in the UK. Counsel were permitted to examine and cross-examine witnesses, but not to make a closing statement because of a concern that they would distort the truth with persuasive advocacy.<sup>120</sup> By 1883, lawyers in NSW had achieved a monopoly over the criminal trial in the sense of ousting non-lawyer agent competitors, as evidenced in the parliamentary debates on the *Criminal Law Amendment Act 1883* (NSW),<sup>121</sup> but the division of the profession and lack of qualified solicitors in country areas were causing difficulties. As one Member of Parliament said, in Sydney lawyers were ‘as plentiful as blackberries...but up the country...it was exceedingly difficult to get any one to plead the cause of unfortunate people accused before the courts.’<sup>122</sup> To remedy this problem some Members urged Parliament to adopt an amendment permitting ‘agents’ to appear on behalf

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<sup>115</sup> J R S Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (Law Book, 1979) 5.

<sup>116</sup> *Defence on Trials for Felony Act 1840* (NSW) (4 Vic No.27) ss 1, 2.

<sup>117</sup> *An Act for the Removal of Defects in the Administration of Criminal Justice 1849* (NSW).

<sup>118</sup> Forbes, ‘The Divided Legal Profession in Australia: History, Rationalisation and Rationale’, above n 115, vi. NSW contrasts with other jurisdictions, such as South Australia, where the legal profession is fused.

<sup>119</sup> Alana Piper and Mark Finnane, ‘Defending the Accused: The Impact of Legal Representation on Criminal Trial Outcomes in Victoria, Australia 1861-1961’ (2017) 38(1) *Journal of Legal History* 27, 30.

<sup>120</sup> *Defence on Trials for Felony Act 1840* (NSW) s 2.

<sup>121</sup> See, eg New South Wales, *Parliamentary Debates*, Legislative Council, 31 January 1883, 176 (Mr Stewart).

<sup>122</sup> *Ibid* 174 (Mr Cox).

of accused persons.<sup>123</sup> Others, such as Sir Alfred Stephen, himself a lawyer, were horrified at the deterioration in the quality of representation that would accompany such an ‘innovation’.<sup>124</sup> Stephen’s view is an indication of a growing professional consciousness that was concerned to maintain a monopoly for the sake of the profession over who could appear before the court despite the shortage of lawyers.

While lawyers were successful in developing a monopoly over acting on behalf of the defence in the higher courts (except, of course, for unrepresented accused), as seen above in relation to the history of prosecutions, they were not successful in developing a monopoly in relation to prosecutions in the summary jurisdiction. It was not until almost a century later, in 1965, that the Privy Council resolved the debate about non-lawyers appearing in the summary jurisdiction in *O’Toole v Scott*.<sup>125</sup> Legally unqualified police prosecutors continued to appear on behalf of informants, but it did not become common practice for unrepresented defendants to be assisted by a legally unqualified agent.

It is no exaggeration to claim that the introduction of legal aid in the late 1970s transformed the summary jurisdiction. The NSW government had begun to make limited provision for the public funding of criminal trials for impecunious defendants in the early twentieth century. For most of the century the provision of legal aid for ‘poor prisoners’ was governed by the *Poor Prisoners Defence Act 1907* (NSW) which gave judges and magistrates power to cause the Attorney-General to make arrangements for the prisoner’s defence. This form of legal aid was extremely limited. Its limitations are evident in the three criteria for an award of aid. First, the person must have been ‘committed for trial for an indictable offence’. This left the person unrepresented during committal proceedings and for offences finalised summarily. Second, the person had to be ‘without adequate means to provide defence for himself’; and third, the judge or magistrate had to be satisfied that the provision of legal aid was ‘desirable in the interests of justice’. In 1969 the government expanded the scheme somewhat by creating the office of the Public Defender to represent persons charged with indictable offences, persons who had been committed for sentence, or persons who wished to appeal against a conviction for an indictable offence. Neither of these schemes applied to summary offences or triable either way

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid (Mr Stephen).

<sup>125</sup> [1965] 1 A.C. 939.

offences that were finalised summarily.<sup>126</sup> Indeed, in 1974, a member of Parliament, in the course of parliamentary debates on the clauses of the Crimes and Other Acts Amendment Bill that were to expand the summary jurisdiction, remarked:

It should not be forgotten that criminal legal aid in New South Wales is pitifully inadequate. ...it is an acknowledged fact that legal aid is virtually non-existent in courts of petty sessions, which deal with most criminal offences...<sup>127</sup>

These parliamentary debates reveal two things: the extent to which notions of fair trial had permeated the democratic process by the 1970s; and how changing legitimisation demands created by vertical criminalisation were creating circumstances in which the relative lack of defence lawyers in the summary jurisdiction would no longer be tolerated. Sir John Fuller noted in his second reading speech:

‘The Bar Council and the Council for Civil Liberties were of opinion that there should be no extension of the powers of a magistrate unless the accused is represented by counsel, and that the proposals [to expand s476]<sup>128</sup> should not be put into effect until a comprehensive scheme of legal aid in courts of petty sessions is in operation.’<sup>129</sup>

The government indicated that it intended to expand the legal aid scheme but, in the interests of ‘good administration’, the proposal to expand the summary jurisdiction should not be delayed until that had been done. Fuller, on behalf of the government, presented the view that the interests of the accused were protected by the fact that the summary disposition of offences required the accused’s consent and there was a right of appeal by way of rehearing to the District court.<sup>130</sup> While these arguments are evidence of the legitimating role played by the consent requirement and the availability of appeals, they overlooked the reality that without legal advice an accused person was unlikely to know whether it was in their best interests to consent to summary jurisdiction and whether or not to appeal. What is more, an appeal was an additional expense for which legal aid was not routinely available.

In addition to changing legitimisation demands raised by vertical criminalisation, the changing nature of the legal profession contributed to the increasing appearance of defence

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<sup>126</sup> Ross Cranston and David Adams, ‘Legal Aid in Australia’ (1972) 46 *Australian Law Journal* 508, 516. It should be noted that despite these Acts defendants frequently went unrepresented in the higher courts: at 516.

<sup>127</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 1974, 1378 (Mr Walker).

<sup>128</sup> This section contained a list of offences that could be finalised summarily with the consent of the accused. See Chapter 1 of this thesis.

<sup>129</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 26 March 1974, 1839 (Mr Fuller).

<sup>130</sup> *Ibid* 1840.

lawyers in the summary jurisdiction. At that time in the early 1970s, the idea that state-funded legal assistance was an integral part of the welfare state had not yet taken root in NSW.<sup>131</sup> This is despite the fact that there was a movement in England and the United States in that direction.<sup>132</sup> For instance, the Widgery Committee in England had recommended that legal aid be provided in magistrates courts in certain situations, such as where defendants faced a loss of employment or liberty, or where ‘language difficulties or mental incapacity’ threatened their comprehension of proceedings,<sup>133</sup> but the legal profession in NSW was initially resistant to the provision of legal aid. A prominent concern was that it would erode the income of private practitioners.<sup>134</sup> Writing in 1972, Ross Cranston and David Adams, who were legal practitioners, speculated that the inertia on this issue may ‘stem from an ignorance of the plight of the poor’, the ‘belief amongst lawyers that the problem is social rather than a legal one’, or a complacent belief that the legal aid system was adequate.<sup>135</sup> Legal aid was also highly political with left-leaning Labor governments preferring government-funded services and conservative Liberal governments preferring profession-based schemes.<sup>136</sup>

The attitude of the legal profession towards legal aid changed with the ‘welfare rights’ movement that arose during this time of relative social prosperity.<sup>137</sup> As discussed in Chapter 2 on magistrates, after WWII, the conservative (Liberal) Prime Minister Menzies began to increase the public funding of universities as a means of promoting ‘stability and integration among the middle classes’, and in 1972, the newly elected socially progressive (Labor) Prime Minister Whitlam introduced free university education as a means of promoting social equality.<sup>138</sup> Government funding brought tertiary education within the reach of people from the lower social

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<sup>131</sup> Cranston and Adams, above n 126, 519.

<sup>132</sup> On the history of the international movement see Erhard Blankenburg, ‘The Lawyers’ Lobby and the Welfare State: The Political Economy of Legal Aid’ in Francis Regan et al (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (OUP, 1999) 113.

<sup>133</sup> Cranston and Adams, above n 126, 516.

<sup>134</sup> John Chesterman, *Poverty and Social Change: The Story of the Fitzroy Legal Service* (Melbourne University Press, 1996) 1.

<sup>135</sup> Cranston and Adams, above n 126, 508.

<sup>136</sup> *Ibid.*

<sup>137</sup> Tamara Goriely, ‘Making the Welfare State Work: Changing Conceptions of Legal Remedies Within the British Welfare State’ in Francis Regan et al (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (OUP, 1999) 89, 100.

<sup>138</sup> Kanishka Jayasuriya, ‘Transforming the Public University: Market Citizenship and Higher Education Regulatory Projects’ in Margaret Thornton (ed), *Through a Glass Darkly: the Social Sciences Look at the Neoliberal University* (ANU Press, 2015) 89, 94. See also Margaret Thornton, *Privatising the Public University: The Case of Law* (Taylor and Francis, 2011) 2 on the shifts in the university sector in the twentieth century.

orders for the first time thereby increasing the diversity of the student population. By the 1960s the university model of legal education was displacing the apprenticeship model,<sup>139</sup> as ‘new left movements’ swept across campuses in the late 1960s and early 1970s in the midst of anti-Vietnam war protests and anti-apartheid sentiment.<sup>140</sup> Influenced in part by these movements, and the criticism that high legal fees were preventing poor people from accessing justice, the legal profession was being challenged to be ‘more actively involved in the quest for social change.’<sup>141</sup>

At the same time, improvements in data-gathering methods provided access to new information that revealed previously un-examined social problems. In the early 1970s, reliable data on the extent of poverty in Australia became available for the first time,<sup>142</sup> and in 1972 a report by the BOCSAR drew attention to the disadvantage faced by unrepresented defendants in the courts of Petty Sessions.<sup>143</sup> Further reports by BOCSAR revealed the particular disadvantage of Aboriginal defendants, especially those living in rural towns with high Aboriginal populations.<sup>144</sup>

All of these factors provided the impetus to establish community legal centres for the provision of free legal advice and to agitate for an expansion of state-funded legal aid. The Redfern Aboriginal Legal Service was the first community legal service in Australia. It was established in 1971 with the assistance of a federal grant as a response to decades of discrimination against Aboriginal people by police.<sup>145</sup> Federally, the left-leaning Whitlam Labor government, elected after more than two decades of conservative rule, established the Australian Legal Aid Office in 1973;<sup>146</sup> and, in NSW, the left-leaning Wran Labor government, similarly elected in 1976 after a long period of conservative rule, followed suit by creating the Legal

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<sup>139</sup> On the expansion of university education for lawyers from the 1960s, see Forbes, above n 115, 208.

<sup>140</sup> Chesterman, above n 134, 2; Goriely, above n 137, 100.

<sup>141</sup> Chesterman, above n 134, 1–2.

<sup>142</sup> Cranston and Adams, above n 126, 517.

<sup>143</sup> See NSW Bureau of Crime Statistics and Research, ‘Legal Representation and Outcome’ (NSW BOCSAR, 1972).

<sup>144</sup> See, eg, NSW Bureau of Crime Statistics and Research, Department of Attorney General and of Justice, ‘Aboriginal People and the NSW Criminal Justice System: A Review of Existing Information’, BOCSAR Statistical Bulletin No 3 (BOCSAR, NSW Department of Attorney General and of Justice, 1979).

<sup>145</sup> Chesterman, above n 134, 3.

<sup>146</sup> Satyanshu Mukherjee and Adam Graycar, *Crime and Justice in Australia* (Hawkins Press, 2<sup>nd</sup> ed, 1997) 70–71. For a detailed discussion on the federal changes to legal aid see Chesterman, above n 134, ch 3.

Services Commission of NSW (later re-named the Legal Aid Commission) in 1979.<sup>147</sup> The Whitlam federal government reforms have been credited with bringing legal aid into the mainstream.<sup>148</sup>

Legal Aid was first introduced into the NSW courts of Petty Sessions in 1974 through the Public Solicitor's office and was expanded in 1976.<sup>149</sup> The recently established BOCSAR had only introduced a 'comprehensive system of data collection' into the summary jurisdiction in 1972.<sup>150</sup> No firm figures exist prior to that date on the extent of legal representation in the summary jurisdiction, but it is generally agreed that the 'overwhelming majority' of defendants were unrepresented.<sup>151</sup> The numbers of legally represented defendants increased rapidly in the second half of the 1970s to more than 50 per cent by 1978.<sup>152</sup> In the current era approximately sixty percent of defendants are legally represented,<sup>153</sup> but of those who are not, many will still have received some form of legal advice. An innovation of large-scale government funded legal aid has been the provision of duty lawyers at the Local Court and, more recently, advice in other forms, such as over the telephone.<sup>154</sup> At times, when Legal Aid funding has been cut, these alternative forms of advice have replaced in-court representation to a degree.<sup>155</sup>

This history reveals the story of the lawyerification of the summary jurisdiction through the increased appearance of defence lawyers in the final quarter of the twentieth century. Defence lawyers have contributed to the formalisation and legitimation of the summary jurisdiction by insisting upon the application of rules of evidence and the principles of fair trial. Several examples may be cited to illustrate this point. In the last two decades it has not been uncommon for defence counsel in the summary jurisdiction to challenge the admissibility of

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<sup>147</sup> *Legal Services Commission Act 1979* (NSW), which was re-named the *Legal Aid Commission Act 1979* (NSW).

<sup>148</sup> Chesterman, above n 134, 93, although he adds '[o]ne can cynically suggest that this was because the funds poured into the [Australian Legal Aid Office] suddenly made poor clients attractive to private lawyers.'

<sup>149</sup> NSW Bureau of Crime Statistics and Research, NSW Department of Attorney General and of Justice, *Court Statistics 1976*, Statistical Report 8, Series 2 (BOCSAR, NSW Department of Attorney General and of Justice, 1978) 7; Peter Cashman, 'Representation in Criminal Cases' in John Basten et al (eds), *Criminal Injustice System* (Australian Legal Workers Group, 1982) 195, 197.

<sup>150</sup> T Vinson and R Homel, 'Legal Representation and Outcome' (1973) 47 *Australian Law Journal* 132, 132.

<sup>151</sup> Cashman, 'Representation in Criminal Cases', above n 149, 195. Bishop, above n 74, 62.

<sup>152</sup> Cashman, above n 149, 197.

<sup>153</sup> In 1997, it was 56 per cent: NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics December 1997*. In 2016 it was 60 per cent. Source: NSW Bureau of Crime Statistics and Research.

<sup>154</sup> Legal Aid NSW, *Annual Report 2016-2017*, 29.

<sup>155</sup> Jeff Giddings, 'Rhyme and Reason: Legal Aid in Australia' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017) 43, 54.

evidence under s 138 of the *Evidence Act 1995* (NSW) on the basis that it has been obtained unlawfully or improperly, or to challenge the existence of an element of the offence, such as whether or not a police officer was acting in execution of duty.<sup>156</sup> Offensive language charges are frequently defended,<sup>157</sup> and in 2013 the Aboriginal Legal Service successfully sought a writ of prohibition in the Supreme Court against a magistrate who had refused to recuse himself on grounds of apprehended bias.<sup>158</sup> On the current state of historical knowledge it is impossible to determine with precision the extent to which such challenges were made prior to the advent of legal aid in the summary jurisdiction, but given the increase in the appearance of defence counsel it is reasonable to conclude that they are far more prevalent in the current era than previously. For these reasons the increasing appearance of defence lawyers in the summary jurisdiction since the 1970s has had an impact beyond individual defendants. In addition to insisting upon the application of the rules of evidence and lodging appeals, they also participate in law reform debates thereby providing an important source of its legitimacy. For this reason, any government reduction in legal aid funding erodes the legitimacy of the summary jurisdiction.

While the broad impact of defence lawyers has been one of increasing formalisation, it has not been unilinear. There are several factors perpetuating informality in the summary jurisdiction. One is the high proportion of defendants that is unrepresented. Another is poor quality representation (although it must be recognised that this is not true of all defence lawyers appearing in that jurisdiction). In 1989, for example, Bishop, while acknowledging the lack of empirical evidence and relying instead on ‘impressions’, concluded that there was a ‘wide variety in the quality’ of defence lawyers in the summary jurisdiction — some excellent, some poor, especially among less experienced practitioners.<sup>159</sup> In 2005, Magistrate Hugh Dillon also noted the variable quality of practitioners appearing in the Local Courts:

[Local Courts] are ...the forum in which young lawyers begin to learn their trades and the level beyond which the mediocre rarely progress. In my experience, despite many honourable exceptions to the rule, the general standard of advocacy in magistrates’ courts is not high.<sup>160</sup>

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<sup>156</sup> See, eg *Police v Brett Lee Nye* [2003] NSWLC 9; *R v McClean* [2008] NSWLC 11.

<sup>157</sup> See, eg *DPP v Carr* [2002] NSWSC 194; *Police v Paton* [2009] NSWLC 34.

<sup>158</sup> *Gaudie v Local Court of NSW and Anor* [2013] NSWSC 1425.

<sup>159</sup> Bishop, above n 74, 134.

<sup>160</sup> Hugh Dillon, ‘Law and Social Change – A Magistrate’s Perspective’ (2005) 7(3) *Judicial Review* 345.

Dillon goes on to state that '[w]ithout for a moment excusing poor decision-making by magistrates ... one of the principal causes of bad decisions by magistrates is the inadequacy of the advocacy of the lawyers who presented the cases ...'<sup>161</sup> In 2010 the Chief Magistrate, Judge Graeme Henson, referred obliquely to the continuing poor quality of advocacy:

the development of a compendium of civil and criminal judgments accessible through [various websites] is beginning to generate a level of understanding within the practice of law that the Local Court is entitled to no lesser standard of advocacy than that displayed in higher jurisdictions.<sup>162</sup>

Anecdotal evidence suggests that poor quality legal representation remains a problem in the current era and thus echoes of McBarnet's argument that ideology of triviality results in sub-standard representation continue to reverberate. Dillon hints at one reason for this in the passage quoted above: the summary jurisdiction is treated as less important because the stakes for defendants are seen to be lower and it is therefore a place where junior lawyers can learn their craft.

Another reason for poor quality representation is the high case load for Legal Aid and Aboriginal Legal Service Lawyers. A 'health survey' conducted internally at Legal Aid in 2011 revealed that enormous caseloads, among other factors, were causing 'high levels of stress' within the organisation.<sup>163</sup> Caseloads at Legal Aid NSW remain high.<sup>164</sup> Similarly, the 'high volume legal practice' is cited as a reason for the 'declining retention rates' of solicitors at the NSW Aboriginal Legal Service.<sup>165</sup>

The vagaries of Legal Aid funding impact upon caseloads and quality. Most often the cause of fluctuations is political,<sup>166</sup> but the courts have also played a role. In 1992 the case of *Dietrich v The Queen*<sup>167</sup> required Australia's apex court to determine whether the right to a fair

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<sup>161</sup> Ibid.

<sup>162</sup> Graeme Henson, 'Twenty-Five Years of the Local Court of NSW', *Judicial Officers Bulletin* (2010) 46.

<sup>163</sup> Geesche Jacobsen, 'Legal Aid Lawyers Buckle Under Work Stress', *Sydney Morning Herald*, 6 September 2011.

<sup>164</sup> Eg, in the financial year 2016-2017 the criminal law practice of Legal Aid NSW provided 166,114 duty services: Legal Aid NSW, *Annual Report 2016-2017* at 29. 'Duty lawyers advise and/or represent disadvantaged people appearing before the Local and Children's Courts on criminal charges.' They also give advice in other jurisdictions such as family law: at 17.

<sup>165</sup> Aboriginal Legal Service, *Annual Report 2016-2017*, 12.

<sup>166</sup> See eg, Jeff Giddings, above n 155, 51.

<sup>167</sup> (1992) 177 CLR 292.

trial—more accurately expressed as the right not to be tried unfairly<sup>168</sup>—included the right to be legally represented at public expense. The majority held that it does not, but courts:

‘possess an undoubted power to stay criminal proceedings which will result in an unfair trial... [This power] necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a *serious* offence.’<sup>169</sup>

The High Court did not define ‘serious offence’, nor did it state definitively the content of the right to a fair trial. While being a source of uncertainty, this lack of definition has the advantage of allowing what is considered to be ‘serious’ to change over time. As Deane J said, ‘the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances.’<sup>170</sup> Whether or not a particular offence is considered to be serious at a particular moment in time can be seen as a dimension of changing social standards and circumstances. By not linking the definition of a ‘serious offence’ to the offence’s classification as indictable or summary, the High Court has left it open to argue that certain summary offences are ‘serious’ enough to qualify for the *Dietrich* fair trial protection. As this thesis shows, summary offences have been increasing in seriousness according to a number of measures, including severity of penalty, and the degree of moral condemnation they attract, particularly since the final quarter of the twentieth century. The *Dietrich* decision had profound implications for legal aid funding. Merits tests that allowed funding for trials to be refused on the basis that conviction was likely had to be revised and funding re-deployed.<sup>171</sup>

There is evidence that legal aid bodies interpret ‘serious offence’ to be one that carries a risk of imprisonment. In *Dietrich*, in obiter, Deane J stated there was ‘much to be said’ for excluding some categories of criminal offences from the *Dietrich* fair trial protection, such as ‘proceedings before a magistrate or judge, without a jury’ where there was ‘no real threat of deprivation of personal liberty’.<sup>172</sup> To the best of my knowledge this approach has not been explored in subsequent reported Australian case law. However, Legal Aid NSW restricts legal

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<sup>168</sup> Ibid 299 per Mason CJ and McHugh J.

<sup>169</sup> Ibid 297–8, Mason CJ, McHugh J (emphasis added).

<sup>170</sup> Ibid 328, per Deane J.

<sup>171</sup> Jeff Giddings, above n 155, 52-53.

<sup>172</sup> Ibid 336 per Deane J citing *Argersinger v Hamlin* (1972), 407 U.S. at 37–38, 40.

representation in the Local Court to matters where ‘there is a real possibility of a term of imprisonment being imposed’, where there are ‘exceptional circumstances’, or, in proceedings commenced by the police or Centrelink (Australia’s welfare agency) where ‘the offence carries a term of imprisonment as an available penalty’.<sup>173</sup>

It can be seen from this analysis that a variety of factors impact upon the quality of legal representation in the summary jurisdiction. Given the increasing complexity of matters coming before the Local Courts, poor quality legal representation threatens to undermine one of the main foundations upon which the legitimation of the summary jurisdiction in the current era rests.

### ***Plea Negotiation in the NSW Summary Jurisdiction***

An important example of how change (and continuity) over time in the practices of the actors in the summary jurisdiction has both facilitated and hindered the increasing use of the criminal law in summary form to regulate harmful behaviours is the practice of plea negotiation. Plea negotiation holds particular significance in the current era because in the Summary jurisdiction, as in the criminal justice system more broadly, the vast majority of matters proceed by way of a guilty plea. Approximately 90 per cent of defendants are found guilty in one of the following ways: following a guilty plea (approximately 60 per cent); following a defended hearing (approximately 15 per cent), or being convicted *ex parte* (approximately 15 per cent).<sup>174</sup> The conviction rate differs between offences. For example, drink-driving has a 99 per cent conviction rate, a subject to which I return in Chapter 6, whereas the offence category ‘non-assaultive sexual offences against a child’ has a conviction rate of just 5.3 per cent.<sup>175</sup> Plea negotiation has further augmented the power of the prosecution, which has also facilitated the enormous increase in the use of the criminal law in summary form to regulate harmful behaviours in the current era. As Mack and Anleu note ‘[w]hen criminal charges are resolved by discussion, the prosecutor is

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<sup>173</sup> Legal Aid NSW, *Policy Online*, 4.3 Local Court Criminal Law Matters < [https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available?SQ\\_DESIGN\\_NAME=print-chapter](https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available?SQ_DESIGN_NAME=print-chapter)>.

<sup>174</sup> In 2013 and 2014 the figure was 89.2%: NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics December 2014* (NSW Department of Justice, 2015) 3, avail <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx)>

<sup>175</sup> NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (NSW Department of Justice, 2015) <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx)>

the central and most powerful figure.<sup>176</sup> Plea negotiation arose out of informal practices developed by the legal actors as a means of managing the increasing workload in a system that had reached crisis point and can be understood as an instance of the system regulating itself.

Before proceeding with the discussion, a definitional note is required. Plea negotiation is known by a number of different terms including ‘plea bargaining’, ‘charge bargaining’, ‘charge negotiation’ and ‘negotiated justice’. Although the term ‘plea bargaining’ has currency in NSW in the current era, there are moves both in Australia and internationally to shift away from terms that connote ‘bartered justice’.<sup>177</sup> Mack and Anleu’s research for the Australian Institute of Judicial Administration (analysed in detail below) purported to dispel the myth that the aim of the practice was to reach an outcome based on bargaining rather than merit. Instead, they argue, the aims are similar to those of the criminal justice system as a whole:

For the most part, plea discussions in Australia are an informal, semi-adversarial/semi-co-operative process which attempts, in a situation of uncertainty, to identify the provable facts and the charge which most appropriately reflects the facts, to the satisfaction of both prosecution and defence, whereupon an agreement is reached that a plea of guilty will be entered to that appropriate charge, and that charges which are not appropriate will be withdrawn.<sup>178</sup>

For similar reasons Nicholas Cowdery QC, the former Director of Public Prosecutions in NSW, prefers the term ‘negotiated justice’.<sup>179</sup> He also notes that the term ‘plea bargaining’ is misleading because ‘the only plea ever in contemplation is one of guilty. It is invariably the *charge* that is under negotiation.’<sup>180</sup> I use the term ‘plea negotiation’ because a plea of not guilty is always a possible, if infrequent, outcome, and is the source of the defendant’s power in the negotiation process.

The combined effect of police charging practices and the fact that much criminal conduct can potentially fall into more than one category of offence gives rise to the possibility of plea negotiation. Charging practices and plea negotiation have a profound impact on the course and outcome of criminal proceedings and yet they receive little attention in the criminal law literature in Australia. In relation to plea negotiation, this is largely due to its opacity and the dearth of

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<sup>176</sup> Kathy Mack and Sharyn Roach Anleu, ‘Pleading Guilty: Issues and Practices’ (Australian Institute of Judicial Administration, 1995) <<http://www.aija.org.au/online/Pub%20no42.pdf>>, 75.

<sup>177</sup> Nicholas Cowdery, ‘Negotiating Justice with Integrity in NSW’ in Jill Hunter et al (eds), *The Integrity of Criminal Process: From Theory into Practice* (Hart, 2016) 117, 120.

<sup>178</sup> Mack and Anleu, ‘Pleading Guilty’, above n 176, 236.

<sup>179</sup> Cowdery, ‘Negotiating Justice with Integrity in NSW’, above n 177, 121.

<sup>180</sup> *Ibid* 120.

empirical data.<sup>181</sup> Asher Flynn and Arie Freiberg are working to address this in their research project *Negotiated Guilty Pleas: An Empirical Analysis*.<sup>182</sup> In 1984 the Superintendent in Charge of the Prosecuting Branch of the NSW Police Force wrote that ‘police in the field exercise wider prosecutorial discretion than judges, magistrates, the Director of Public Prosecutions or any other official involved in the criminal justice system.’<sup>183</sup> This is because police decide whether to charge or not, and which charges to lay, and there is limited oversight of the exercise of this discretion. It must be noted that while this remains true, as seen above in relation to the history of prosecutions, there was a shift in the power balance in favour of prosecutors after the introduction of the Table System in 1995.

Perhaps the most significant aspect of charging practices for the summary jurisdiction is ‘over-charging’. Mike McConville suggests that police deliberately inflate charges as a means of obtaining leverage in plea negotiations.<sup>184</sup> However, Mack and Anleu have noted that the ‘term ‘overcharging’ implies that there is a single reality for which there exists one truly correct charge’.<sup>185</sup> This is not the case. Mack and Anleu suggest that more often over-charging is a product of the exigencies of the circumstances in which police are required to lay charges. For example, time limits imposed on police in relation to detention of a suspect after arrest mean that charges are often laid at a time when the evidence is still evolving and police are not in a position to know which charges will be appropriate.<sup>186</sup> The truth is likely to lie between these two extremes. As seen above, although police may seek the ODPP’s advice on charging decisions in relation to indictable charges (including triable either way charges), they are not required to, and rarely, do so.<sup>187</sup> In summary matters police have exclusive control over which charges are laid. All of these factors conspire to create conditions in which plea negotiation has become desirable,

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<sup>181</sup> Asher Flynn, ‘Plea-negotiations, Prosecutors and Discretion: An Argument for Legal Reform’ (2015) 49(4) (2016) *Australian & New Zealand Journal of Criminology* 564, 565–6.

<sup>182</sup> Asher Flynn, *Negotiated Guilty Pleas: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan) (forthcoming).

<sup>183</sup> Sweeny, above n 67, 150.

<sup>184</sup> Mike McConville, *The Case for the Prosecution* (Routledge, 1993) ch 9.

<sup>185</sup> Mack and Anleu, ‘Pleading Guilty’, above n 176, 76.

<sup>186</sup> On over-charging see Mack and Anleu, ‘Pleading Guilty’, above n 176, 76 and NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, above n 103, 62. The time limit for detention after arrest has recently been increased from four to six hours and may be extended in certain circumstances: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115.

<sup>187</sup> NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, above n 103, 58. The police tend to seek advice only in matters involving ‘complex legal or factual issues’: at 59. Note that the NSWLRC has recommended that police be required to consult with the ODPP in all matters where indictable charges are being considered.

not only for the prosecution and the courts, but also for the defendant for whom the ‘process is [often] the punishment’.<sup>188</sup> The NSWLRC has recently commended the practice of plea negotiation arguing that the challenge is how to ensure that ‘appropriate’ guilty pleas are achieved without coercion.<sup>189</sup>

Plea negotiation grew out of a clandestine practice in relation to indictable matters in the higher courts and is now not only sanctioned by legislation and common law, but is expressly encouraged. It is difficult to trace the origins of plea negotiation in Australia because of the secrecy surrounding the practice. In 1980 the Australian Law Reform Commission said:

There is no point in continuing to pretend that plea bargaining does not exist in Australia. Though the evidence is incomplete, it is sufficient to establish that the practice is well entrenched and enduring. Any agreements made between the prosecution and defence should not remain secret ‘deals’ struck between them.<sup>190</sup>

In the early 1990s, in response to growing concerns amongst the judiciary around Australia about the injustice caused by increasing delay in the criminal justice system, the Standing Committee of Attorneys-General requested the Australian Institute of Judicial Administration to commission research on ‘plea negotiation’.<sup>191</sup> Mack and Anleu conducted the research (the ‘AIJA project’) from the mid-1990s and after its initial report in 1995 they continued to expand on it into the 2000s. The AIJA project is the only examination of plea negotiation that has been undertaken in Australia. It revealed that while, by 1995, ‘plea discussions between prosecution and defence legal representatives [were] widespread and regarded by everyone interviewed as normal and appropriate’,<sup>192</sup> they were marked by ‘secrecy’ and this was preventing the ‘development of a professional standard that such discussions should occur as early as possible.’<sup>193</sup> For example, lawyers and judges who participated in the research recalled that until the ‘early eighties’ there was a practice of conducting plea discussions in judges’ chambers.<sup>194</sup> This practice, which raised numerous ethical issues, had ceased by 1995,

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<sup>188</sup> Malcolm M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, first published 1979, 1992 ed).

<sup>189</sup> NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, above n 103.

<sup>190</sup> Australian Law Reform Commission (‘ALRC’), *Sentencing Federal Offenders*, Report No 15 (1980) 83.

<sup>191</sup> Kathy Mack and Sharyn Roach Anleu, ‘Balancing Principle and Pragmatism: Guilty Pleas’ (1995) 4 *Journal of Judicial Administration* 232, 232. Sharyn Roach Anleu and Kathy Mack, ‘Intersections Between In-Court Procedures and the Production of Guilty Pleas’ (2009) 42(1) *Australian & New Zealand Journal of Criminology* 1, 1.

<sup>192</sup> Mack and Anleu ‘Balancing Principle and Pragmatism’, above n 191, 233.

<sup>193</sup> Mack and Anleu, ‘Pleading Guilty’, above n 176, 92.

<sup>194</sup> *Ibid* 60.

but secret plea negotiations continued.<sup>195</sup> Mack and Anleu's research reveals that by 2009 magistrates were actively participating in the production of guilty pleas through their behaviour on the bench, such as granting opportune adjournments to allow parties to engage in discussions.<sup>196</sup>

Other practices engaged in by the legal actors also impact upon plea negotiation and these have also been formalised over time. The best example is the inconsistent application of a sentencing discount for a guilty plea. The discount on sentence for a guilty plea developed out of the informal practice of defence lawyers of submitting that the guilty plea should be a mitigating factor on sentence.<sup>197</sup> The AIJA project found that while a key factor motivating defendants to plead guilty was the strength of the prosecution case, a secondary factor was the knowledge that a guilty plea would be rewarded by a discount on penalty.<sup>198</sup> By 1995 the discount for a plea of guilty was 'widely accepted in law and practice in Australia', but the degree to which sentencing judges allowed the plea to mitigate the sentence varied markedly.<sup>199</sup> This variation was undermining attempts to achieve consistency in sentencing, an issue that is seen to threaten the legitimacy of the criminal process.<sup>200</sup> To address this problem the discount on sentence was formalised. In 1990 a statutory discount for a plea of guilty was inserted into the *Crimes Act* and was transferred to the *Crimes (Sentencing procedure) Act 1999* (NSW) when sentencing law was consolidated in 1999.<sup>201</sup> In the current era, when a discount is awarded for the utilitarian value of the plea (that is, the saving of time and expense to the criminal justice system), it is to be between 10 and 25 per cent of the otherwise appropriate sentence.<sup>202</sup> The courts have also issued a number of guidelines on how to apply the discount.<sup>203</sup>

The plea negotiation procedure in the summary jurisdiction differs according to whether it is conducted by a police prosecutor or an ODPP solicitor. In matters that are finalised

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<sup>195</sup> Ibid 21.

<sup>196</sup> Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy' (2010) 35(1) *Law & Social Inquiry* 137.

<sup>197</sup> Mack and Anleu, 'Pleading Guilty', above n 176.

<sup>198</sup> Ibid 18. Other motivations include remorse.

<sup>199</sup> Mack and Anleu, 'Pleading Guilty', above n 176, 161.

<sup>200</sup> For a discussion of the issues see *R v Jurisic* (1998) 45 NSWLR 209 (Spiegelman CJ).

<sup>201</sup> s 439 was inserted in to the *Crimes Act 1900* (NSW) by the *Crimes Legislation (Amendment) Act 1990* (NSW).

<sup>202</sup> *R v Thomson* (2000) 49 NSWLR 383.

<sup>203</sup> In NSW see *R v Thomson* (2000) 49 NSWLR 383; *R v Borkowski* (2009) 195 A Crim R. For a recent discussion of the operation of the discount in NSW see NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, above n 103, ch 9.

summarily, a cumbersome and time-consuming practice of plea negotiation has developed as a direct result of the police prosecutor's lack of independence from the police force. Following the Lusher Commission in 1981, which was critical of the office of police prosecutor, the NSW Prosecuting Branch was at pains to restore its credibility. To this end, in 1984, for example, Superintendent Sweeny, the then head of the NSW Prosecution Branch, stated that 'it is essential that the prosecution system should not only operate impartially, but be seen to do so if it is to command public confidence.'<sup>204</sup> For this reason, he explained, police prosecutors:

may only withdraw charges in the following circumstances:

- Where an offender has been charged with an offence that cannot be substantiated, but another offence is disclosed, the prosecutor can charge the offender with the other offence and withdraw the original charge when the second charge has been finalised;
- Where the charge is a 'back-up' charge and the major charge has been finalised the prosecution may offer no evidence in the minor charge; and
- Where the Commissioner [of Police] has advised the prosecution that he has favourably considered representations for the withdrawal of the charge.

Motivations for withdrawal other than those mentioned could only be considered as sinister, and could leave the prosecution open to accusations of partiality and corruption.<sup>205</sup>

The process of plea negotiation in the Local Court therefore requires the defendant or, more usually, the defendant's legal representative, to make 'representations' to the Commissioner of Police for the withdrawal and/or substitution of charges who then consults with the informant (usually the Officer in Charge ('OIC')) before making a decision. This is an example of an instance where an unrepresented defendant is at an extreme disadvantage because they are not in a position to know of the possibility or process of plea negotiation.

In relation to triable either way matters, until the introduction of the Table System in 1995, there was, in principle, no plea negotiation in the summary jurisdiction.<sup>206</sup> The reason for this was that any substitution or withdrawal of charges had to be done with the leave of the magistrate. Police prosecutors therefore had no power to 'deliver' on any bargain made with the defence because they could not bind the magistrate.<sup>207</sup> In practice, prosecutors did withdraw and substitute charges and the request for the leave of the magistrate became a mere formality. Nevertheless, the institutional structure of the summary jurisdiction, explained in the next

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<sup>204</sup> Sweeny, above n 67, 143.

<sup>205</sup> Ibid 144.

<sup>206</sup> Bishop, above n 74, 48.

<sup>207</sup> Ibid, 49.

section, did not encourage the practice.<sup>208</sup> Thus, while the practice of plea negotiation subsisted in the summary jurisdiction, it was not sanctioned by law, nor was it facilitated by institutional conditions.

By 1996, after the introduction of the Table System, the Commissioner's Instructions contained a detailed procedure for the withdrawal of criminal charges. The withdrawal could be done with or without the substitution of alternative charges. The procedure required the OIC to 'submit a comprehensive report together with all relevant statements, documents, exhibits, photographs, etc.' to the 'region commander' or, in the case of summons traffic matters, to the 'district commander'.<sup>209</sup> In deciding whether to withdraw charges the commander was instructed to follow the ODPP Prosecutorial Guidelines.<sup>210</sup> It is not difficult to see why an OIC might be tempted to avoid such a time-consuming process and take their chances on the defendant entering a guilty plea. Where representations by the defence for the withdrawal or substitution of charges have been unsuccessful the matter may be set down for a defended hearing (now called a 'trial') if the defendant does not plead guilty. In that situation the assigned police prosecutor will receive the file on the day of the hearing allowing time for little, if any, preparation.<sup>211</sup> The effect of this is that summary trials are likely to be poorly run by the prosecution, which impacts upon the attainment of convictions and the formality of the proceedings.

By contrast, in the small proportion of matters in the summary jurisdiction where the ODPP has carriage, the defendant's legal representative negotiates directly with the ODPP solicitor. While the ODPP solicitor is required to consult with the complainant and the OIC, the overarching guiding principle is the 'public interest'.<sup>212</sup> Because of the ODPP's independence from the executive, there is less likelihood of the police having improper influence over the decision. In NSW since the introduction of the Table System in 1995, it has been possible for the process of plea negotiation to include an agreement by the ODPP to keep triable either way charges in the summary jurisdiction in exchange for a plea of guilty. Plea negotiation may also

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<sup>208</sup> Ibid.

<sup>209</sup> New South Wales Police Service, *Commissioner's Instructions*, Instruction 92-21, (1 April 1996). The Commissioner of Police no longer issues instructions in this form but the procedure remains similar.

<sup>210</sup> Ibid.

<sup>211</sup> New South Wales Law Reform Commission ('NSWLRC'), *Procedure from Charge to Trial*, Discussion Paper 14/1 (1987) vol 1, 42.

<sup>212</sup> Office of the Director of Public Prosecutions NSW ('ODPP'), *Prosecution Guidelines* 20 ('ODPP Guidelines').

include a negotiation of the facts that will go before the court for sentence.<sup>213</sup> This aspect of plea negotiation is controversial because of the risk that it may distort or downplay the victim's experience. Avoiding such distortion was one of the reasons for introducing the ODPP Prosecution Guidelines in the late 1980s and case law has developed on the issue.<sup>214</sup> Unlike in the United States, plea negotiation in NSW does not include an agreement on sentence that is capable of binding the sentencing judge or magistrate.<sup>215</sup> It was a previous practice of prosecutors to agree to give an informal indication on sentence to the bench, but the High Court has now disapproved of this practice.<sup>216</sup>

A further practice that distinguishes plea negotiation in summary only matters from triable either way matters is the relative lack of pre-trial disclosure by the prosecution. It has been recognised since 1995 that early prosecution disclosure is crucial to successful plea negotiations.<sup>217</sup> In relation to summary only matters, until 2001 — although the defendant was to be informed of the nature and content of the charge(s) against him or her<sup>218</sup> — there was no formal obligation on the prosecution to disclose the brief of evidence to the defence.<sup>219</sup> When the issue of prosecution disclosure was being considered by the NSWLRC in 1982, concerns were raised that requiring the police to prepare a brief of evidence in every case would impose 'a great burden' upon prosecuting authorities.<sup>220</sup> However, commentators pointed out that a lack of disclosure was impeding the attainment of appropriate early guilty pleas.<sup>221</sup> In 1997, s 66B was inserted into the *Justices Act 1902* (NSW), which required the prosecution to serve a brief of evidence on the defence 'at least 14 days before the hearing of the evidence for the

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<sup>213</sup> Mack and Anleu, 'Balancing Principle and Pragmatism', above n 191, 233; NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, above n 103, 262.

<sup>214</sup> *ODPP Guidelines 20*, *R v Di Simoni* (1981) 147 CLR 383.

<sup>215</sup> *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 253 CLR 58.

<sup>216</sup> *Ibid*; Cowdery, above n 177, 120. In NSW, a sentence indication scheme was introduced in 1993 to reduce the backlog of criminal cases before the courts. The scheme was designed to encourage guilty pleas by giving offenders certainty about the sentence they would receive. It was repealed in 1996 because of concerns that it may be coercive. See , Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, Attorney General's Department, 1995) <<http://www.bocsar.nsw.gov.au/Documents/110.pdf>>. For discussion see Mack and Anleu, 'Pleading Guilty', above n 176, 66-73.

<sup>217</sup> See e.g. Mack and Anleu, 'Pleading Guilty', above n 176, 111–112.

<sup>218</sup> *Justices Act 1902* (NSW) ss 145A, 27(c), 62(c), 78(1).

<sup>219</sup> New South Wales Law Reform Commission (NSWLRC), *Criminal Procedure: First Issues Paper*, General Introduction and Proceedings in Courts of Petty Sessions (1982) 9.

<sup>220</sup> *Ibid*.

<sup>221</sup> Bishop, above n 74, 131; Mack and Anleu, 'Pleading Guilty', above n 176, 87–88.

prosecution'.<sup>222</sup> This provision has the flavour of a compromise that attempts to balance the need of the police service to conserve resources with the desire to increase the use of the criminal law in summary form by encouraging guilty pleas; however, the effect of s 66B, and its modern equivalent, is that the prosecution evidence will not be disclosed to the defence unless the matter is set down for a summary trial. Such restrictions on disclosure act as a disincentive to obtaining all of the relevant evidence because setting the matter down for trial potentially erodes the discount on penalty for an early guilty plea.

In relation to pre-trial disclosure in indictable matters, practices adopted recently in the Local Court demonstrate not only its maturity, but also the impact of the practices of the actors on the increasing use of the criminal law in summary form in the current era. It has long been a principle of fair trial that the prosecution must disclose the case against the defendant in indictable matters, but in 1989, Bishop noted that the practice of disclosure of the prosecution case while the matter was still in the Local Court was 'very weak'.<sup>223</sup> The position had changed little by 1995.<sup>224</sup> In 2001 a disclosure regime was inserted into the *Criminal Procedure Act 1986* (NSW) following the recommendations of a 'working party' established under the auspices of the Criminal Law Review Division of the Attorney General's Department.<sup>225</sup> In its second reading speech the government described the state of the law regarding pre-trial disclosure at that time as:

presently subject to ad hoc procedure and practice that diminishes consistency and certainty in case management. The present situation is regulated by a combination of common law rules, legislation, prosecution guidelines, Bar Association and Law Society Rules and Supreme Court practice directions. This bill improves upon and formalises these requirements.<sup>226</sup>

The statutory disclosure regime was based on a 'case management model', which had been borrowed from changes made in the civil litigation system, requiring 'hands-on' intervention by

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<sup>222</sup> The amending Act was the *Justices Amendment (Briefs of Evidence) Act 1997* (NSW). *Justices Act s 66B Criminal Procedure Act 1983* (NSW) s 183(3) when the *Justices Act* was repealed in 2001 and its provisions transferred to the *Criminal Procedure Act 1986* (NSW): *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW).

<sup>223</sup> Bishop, above n 74, 131.

<sup>224</sup> Mack and Anleu, 'Pleading Guilty', above n 176, 87–88.

<sup>225</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 August 2000, 8288 (Mr Debus). Pt 3 div 3 titled 'Case Management provisions and other provisions to reduce delays in proceedings' was inserted into the *Criminal Procedure Act 1996* (NSW) by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW).

<sup>226</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 August 2000, 8288 (Bob Debus).

the trial court.<sup>227</sup> Controversially it also imposed circumscribed disclosure requirements upon the defence, but it was initially restricted to cases that met certain criteria, such as where the District or Supreme Court was satisfied that it would be a ‘complex criminal trial’.<sup>228</sup> In 2013 mandatory defence disclosure was extended to all indictable matters.<sup>229</sup> However, because indictable matters commence and are managed in the Local Court until the finalisation of committal proceedings, a need arose to ensure that the prosecution was making adequate disclosure prior to committal. For this reason the Local Court developed a practice of making an order for service of the brief of evidence in both strictly indictable and triable either way matters. In 2012 the Local Court issued a practice note to guide practitioners on the disclosure requirements. The objects of the practice note included: to ensure that ‘summary criminal trials are heard within the Local Court’s published time standards’; and to ensure that the ‘legislative purpose in s 260 CPA [that is, the presumption of summary disposition] in respect of Table matters is applied.’<sup>230</sup> The practice note created a timetable for indictable matters requiring service of the brief upon the defence within four weeks with a further two weeks for the defence to reply.<sup>231</sup> The timetable is strict, allowing adjournments only where the Court is ‘satisfied that departure from the timetable is in the interests of justice.’<sup>232</sup> It is not possible to quantify the impact of the practice on the rate of guilty pleas on the currently available data, but the NSWLRC is of the view that improving early disclosure increases the rate of early guilty pleas. This is evident, the NSWLRC argues, from the large proportion of indictable matters that is ‘withdrawn or resolved in the Local Court.’<sup>233</sup> In 2012/13, ‘41% of indictable matters did not proceed to the District or Supreme Court mostly because they were dropped by the prosecution or the charge was downgraded and resolved in the Local Court.’<sup>234</sup> Of these, 52 per cent were ‘sentenced in the Local Court, 25% were withdrawn by the ODPP, 5% were returned to police to

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<sup>227</sup> Ibid.

<sup>228</sup> *Criminal Procedure Act 1986* (NSW) s 47C.

<sup>229</sup> *Criminal Procedure Act 1986* (NSW) s 141 as amended by the *Criminal Procedure Amendment (Mandatory Defence Disclosure) Act 2013* (NSW).

<sup>230</sup> Local Court Practice Note Crim 1, *Case Management of Criminal Proceedings in the Local Court*, 24 April 2012; cl 5.2 (‘*Local Court Practice Note Crim 1*’).

<sup>231</sup> *Local Court Practice Note Crim 1*, above n 230, 5.4.

<sup>232</sup> Ibid 5.6(a).

<sup>233</sup> NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, above n 103, xvii.

<sup>234</sup> Ibid xvii–xviii.

prosecute, and 3% were dismissed by the court.<sup>235</sup> The process of enshrining disclosure requirements in statute and practice notes can be understood as juridification.

### *Conclusion*

In this chapter I examined change over time to the roles of the justice personnel in the summary jurisdiction through the lens of formalisation. This approach was useful because it revealed the particularity of the development of each of these roles. It showed that formalisation has been piecemeal for each of them and has been a response to changing legitimisation demands as well as the result of a desire to improve efficiency.

The most striking example of the particularity and piecemeal nature of formalisation in this group of actors is the persistence of police prosecutors. My discussion of police prosecutors showed that since the establishment of the NSW Prosecution Service in 1941, police prosecutors have developed a sense of professional identity, and a belief in the possession of specialised knowledge. Some police prosecutors are legally qualified, but the prosecutions branch of the NSW police force has resisted lawyerification. It has also resisted separation from the executive branch of government. The impact of the piecemeal nature of formalisation was seen in the practice of plea negotiation, particularly when plea negotiations conducted by police prosecutors are compared with those conducted by the ODPP. Because of their lack of autonomy from the government, the process for plea negotiations is cumbersome and time consuming. However, since 1995, when the choice to elect to have a trial on indictment was removed from the magistrate and given to the parties as per s 260 of the *CPA*, plea negotiation, which began as a clandestine, informal practice, has been sanctioned and the practices upon which it is based, such as pre-trial disclosure, have formalised to a degree. Thus, while piecemeal, formalisation has facilitated the increasing use of the criminal law in summary form to regulate constructed harmful behaviours. The increased appearance of defence lawyers, which can be understood as a response to the legitimisation demands raised by the escalating use of the summary form in the current era, can also be seen as having facilitated the increasing use of the criminal law in summary form. .

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<sup>235</sup> Ibid 59–60.

## Chapter 4: Defendants and Victims

Throughout its history the summary jurisdiction has been deployed to regulate a diverse range of constructed harmful behaviours. This chapter shows how the use of the summary jurisdiction for that purpose has impacted upon who appear as defendants in relation to, and who are the victims of, offences finalised summarily. This chapter argues that the deployment of the criminal law in summary form to solve social problems has resulted in the construction of ‘problem’ social groups. This has been as much a product of police enforcement practices and procedural mechanisms as it has been a product of the substantive law. The summary jurisdiction’s increasing maturity (a consequence of formalisation) has also created a new problem social group. By the last-mentioned point I mean that as the summary jurisdiction has matured it increasingly regulates its own processes by, for example, punishing breaches of court orders, such as the imposition of an Apprehended Domestic Violence Order (‘ADVO’). This self-regulation has created a new cohort of defendants, which is analysed in Chapter 7. As social circumstances have changed, not only have new behaviours been criminalised via the summary jurisdiction, but some have been ‘decriminalised’ as regulation has been assigned to alternative governmental or social structures.

At the outset of the discussion it is important to note the distinctive changes over time to the summary jurisdiction’s regulation of Aboriginal people. Aboriginal people were largely absent from the summary jurisdiction until the 1930s. Mechanisms of criminal justice were not used in relation to Aboriginal people in NSW until after dispossession had taken place circa the 1840s.<sup>1</sup> Indeed, in NSW, the summary jurisdiction was not considered to be a useful tool for the regulation of behaviours of Aboriginal people that had been constructed as harmful until the mid-twentieth century. Between the mid-nineteenth century and the middle decades of the twentieth century Aboriginal people were largely segregated and their lives were controlled by civil regulatory systems established pursuant to ‘protection’ policies, which kept them out of the summary jurisdiction. While these protection systems were criminalising in their own way,<sup>2</sup> they

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<sup>1</sup> Mark Finnane, *Police and Government: Histories of Policing in Australia* (OUP, 1994) 111.

<sup>2</sup> *Ibid* 118.

are the reason why Aboriginal people do not feature in the story of the development of the summary jurisdiction until protection began to be dismantled in the 1930s.<sup>3</sup>

Victims are also largely missing from the story of the development of the summary jurisdiction until the final decades of the twentieth century. This is because, until then, the overwhelming majority of offences coming before magistrates were ‘victimless crimes’, such as public order offences and traffic offences. Such crimes are victimless in the sense that they produce ‘harmful’ outcomes rather than victims as traditionally understood. However, two features of the current era have led to the increasing involvement of victims in the summary jurisdiction. The first feature is the government’s increasing use of the criminal law in summary form since the 1980s in an attempt to protect certain groups in the community from harmful behaviours. Lobbying by certain interest groups has driven this process, in part. The second feature is the intense reclassification of strictly indictable offences as triable either way since the introduction of the Table System in 1995.

### ***From Colonisation to the Mid-Nineteenth Century.***

During the period from colonisation to the mid-nineteenth century the summary jurisdiction was used primarily as a means of regulating the convict ‘problem’ group and maintaining order in the penal colony. Most of the defendants in the summary jurisdiction were male convicts charged with various disciplinary offences such as ‘neglect of work’ and ‘absenteeism’.<sup>4</sup> The malleability of offences such as ‘insubordination’ or ‘insolence’, which carried a range of penalties including the lash, the treadmill and ‘bad reports on ticket-of-leave applications’ gave magistrates broad discretion.<sup>5</sup> Few free persons deliberately chose to settle in the NSW colony prior to 1820 with the result that the vast majority of the population was comprised of convicts, emancipists (that is, convicts whose terms of punishment had expired and were therefore free) or

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<sup>3</sup> This was not the case in all Australian colonies. In Western Australia, for example, which was colonised later in 1829, the Summary Jurisdiction was used in the dispossession process. See Paul Hasluck, *Black Australians* (Melbourne University Press, 2<sup>nd</sup> ed, 1970). Between 1936 and 1954 a summary court was established to try Aboriginal people for homicide. See Kate Auty, *Black Glass* (Fremantle Arts Centre Press, 2005).

<sup>4</sup> Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney University Press, OUP, 1991) 8–10; Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983) 118.

<sup>5</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991) 123, 133–4.

their children; they represented 87 per cent of the population in 1828.<sup>6</sup> However, while rare, free persons did appear as defendants in the summary jurisdiction. One of the most frequently charged offences was drunkenness, an offence that dominated the summary jurisdiction until the middle decades of the twentieth century.

The gender mix of the summary jurisdiction was male-dominated during this period, as it has been throughout its history, but this was not exclusively the case. In 1788 women comprised the majority of defendants charged with drunkenness.<sup>7</sup> Historians have argued that this statistic is more likely to reflect the fact that drunkenness was more acceptable in men than in women at that time — a double standard — than the relative prevalence of the offence amongst the sexes. Drunkenness in women was considered to be ‘distasteful’, as evidenced by the prosecution of Catherine Evans in 1799 who was described as appearing before the bench of magistrates in a state of ‘beastly Intoxication’.<sup>8</sup>

In a context where commodities were scarce, charges of petty larceny were common. The case of Richard Cartwright is illuminating because it shows how defended hearings were conducted in the earliest days of the colony, at least for free settlers. In 1788, Richard Cartwright, a free settler, was charged with suspicion of stealing five pairs of new shoes. The shoes had been discovered in Cartwright’s possession during a search of the tent in which he was living. Unusually Cartwright called three witnesses in his defence (ordinarily the defendant was the only person to speak on his or her own behalf). The shoes were presented before the Magistrate and three witnesses were called who then gave evidence about them. The first witness swore that he had given the prisoner one of the pairs of shoes as security for a small loan. A second witness swore that he had swapped one of the pairs of shoes with the prisoner for a pair of his own which had been too small for him. The final witness swore that he had voyaged to NSW with the prisoner and had ‘frequently observed him airing several pairs of new shoes on deck.’<sup>9</sup> The charge against Mr Cartwright was dismissed.

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<sup>6</sup> Neal, above n 5, 15.

<sup>7</sup> Golder, above n 4, 22.

<sup>8</sup> Golder, above n 4, 22-23.

<sup>9</sup> Bench of Magistrates Proceedings, Reel 654, 30 April 1788, 17.

### *From the Mid-Nineteenth Century to the Turn of the Twentieth Century.*

During this period from the mid-nineteenth century to the turn of the century when the colony was becoming more prosperous, increasing numbers of free settlers were arriving from England, and the police forces were centralising. In this context there were two main social imperatives that impacted upon the use of the criminal law in summary form: ensuring the colony's prosperity; and, maintaining moral standards in the community. In relation to the former, the 'phenomenal growth of pastoral industry'<sup>10</sup> in mid-nineteenth century NSW increased the incidence of cattle theft, which had become a widespread practice.<sup>11</sup> This behaviour was constructed as harmful and the summary jurisdiction was deployed to regulate it. This offence category brought defendants from a variety of backgrounds before the summary jurisdiction. 'Duffing', for example, which 'involved the theft of branded stock for immediate slaughter or with a view to altering' or 'cutting out' the brand, was 'especially prevalent among the convict population and emancipists.'<sup>12</sup> But herd owners, who were wealthier and socially 'respectable', also participated in cattle theft by placing their brand on the 'unbranded cattle of other squatters' that were accidentally 'rounded up' in the muster process.<sup>13</sup> Some stockmen used their employment as an opportunity to steal cattle and set up their own herd. This is how squatting — the practice of taking unlawful possession of a tract of land and establishing a grazing or agricultural business — spread. Once a squatter had gathered a herd he (they were usually, if not exclusively, men) would move to previously un-settled areas to avoid detection and squat.<sup>14</sup> Cattle theft was a capital offence triable only on indictment. However, perhaps for that reason, and because juries and judges were sympathetic to offenders, convictions were rare.<sup>15</sup> In an attempt to rectify this impediment to the criminalisation of cattle theft, in 1850 the NSW legislature passed the *Cattle Protection Act*, which created a summary offence of being reasonably suspected of being in possession of the carcass(es) of stolen cattle.<sup>16</sup> Based on an Irish provision, the offence placed the burden of proving lawful possession on a defendant who had been found in possession of the carcass of cattle that was reasonably suspected of being

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<sup>10</sup> Golder, above n 4, 51.

<sup>11</sup> John Perkins and Jack Thompson, 'Cattle Theft, Primitive Capital Accumulation and Pastoral Expansion in Early New South Wales, 1800–1850' (1998) 29(111) *Australian Historical Studies* 289, 298.

<sup>12</sup> *Ibid* 292, 296.

<sup>13</sup> *Ibid* 297–8.

<sup>14</sup> *Ibid* 297.

<sup>15</sup> *Ibid* 299.

<sup>16</sup> *Cattle Protection Act 1850* (NSW) s 1.

stolen. Since the eighteenth century the British Parliament had been enacting such reverse-onus summary possession-based property offences that circumvented impediments to securing convictions at trial.<sup>17</sup> The *Cattle Protection Act's* long title, 'An Act for the better prevention of Cattle Stealing and the Sale of Stolen Cattle', suggests that it was passed for the same reason.

In relation to the second imperative — of maintaining moral standards in the community — its impact on the summary jurisdiction is illustrated by the prevalence of prosecutions for offensive language offences by both police informants and private informants, and a change in attitude towards prostitution. In the decades following the cessation of transportation, colonial society in NSW was characterised by a 'preoccupation' with 'social status'.<sup>18</sup> The composition of the colony's population began to change rapidly after 1820 such that by 1841 the proportion of convicts, emancipists and their children had decreased to 63 per cent.<sup>19</sup> In the 1840s, the majority of defendants were still convicts, but the number of convict defendants gradually declined as the century progressed. With the numbers of convicts decreasing, police turned their attention away from convict management and towards the maintenance of order in the broader community.<sup>20</sup> Together, these social factors produced a concern with behaviour exhibiting 'immorality', such as 'drunkenness, sly-grog selling, gambling, prize-fighting' and 'desecration of the Sabbath', particularly during the gold rushes.<sup>21</sup> In 1841, drunkenness constituted 61 per cent of cases heard by magistrates, a proportion that dropped to 37 per cent in 1850/51,<sup>22</sup> but rose again to be the most frequently charged offence by the end of the century.<sup>23</sup> The second largest category of offences, 'disobedience, abusive language and disorderly conduct', was a comparatively small fraction of cases comprising 8.8 per cent of cases in 1941, and 6.7 per cent

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<sup>17</sup> Bruce P Smith, 'The Presumption of Guilt and the English Law of Theft, 1750–1850' (2005) 23(01) *Law and History Review* 133; Bruce Smith, *Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City, 1790–1855* (PhD Thesis, Yale University, 1996). Bentham made no secret of the fact that such offences were designed to close loopholes in the criminal law. See Thomas Sweeney, *The Extension and Practice of Summary Jurisdiction in England c1790–1860* (PhD Thesis, University of Cambridge, 1985) 104–105. Jerome Hall meticulously traces the development of these offences that were designed to protect new forms of property created by the Industrial Revolution. See Jerome Hall, *Theft, Law and Society* (Bobbs-Merrill, first published 1935, 2<sup>nd</sup> ed 1952). For an historical analysis of the rise of possession-based property offences see Markus Dirk Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2001) 91(4) *Journal of Criminal Law and Criminology* 829.

<sup>18</sup> Sturma, above n 4, 136.

<sup>19</sup> Neal, above n 5.

<sup>20</sup> Sturma, above n 4, 133–4.

<sup>21</sup> *Ibid* 127.

<sup>22</sup> *Ibid* 125.

<sup>23</sup> Golder, above n 4, 101–2.

in 1850–51.<sup>24</sup> ‘Making water in the street’, usually accompanying drunkenness, was the most usual form of indecent exposure.<sup>25</sup> However, there were more serious but atypical cases, such as that of Andrew Gannon who followed Anne Barker ‘through the tap room of a public house with his pants down, while making lewd suggestions.’ Mr Gannon was sentenced to imprisonment with hard labour.<sup>26</sup> Through offences such as drunkenness and offensive language, the summary jurisdiction was deployed to perform a civilizing role in the burgeoning colony.

Obscene language charges, although only a fraction of total cases, were prevalent in the middle decades of the century nevertheless, and a large proportion of them (for example, approximately half of those prosecuted at Paramatta between 1852 and 1854) were brought by ‘civilians’.<sup>27</sup> These cases frequently arose between persons of equivalent social status, often neighbours or people conducting transactions, as illustrated by the case of Michael Dagherty. Mr Dagherty was mending an umbrella for Mr Wright and his wife. When Mr Wright queried the length of time it was taking, ‘Dagherty told him to bugger himself, slapped his [Dagherty’s] bottom a dozen times, and told him to kiss it. When Wright’s wife interjected ... he retorted that “she might go and fuck herself.”’<sup>28</sup> Trivial cases such as this caused historian Michael Sturma to characterise a large proportion of the prosecutions being brought in the summary jurisdiction as arising from ‘fits of pique’.<sup>29</sup> In the context in which prosecutions were brought privately, the gender balance of defendants was relatively even, and cases were brought by, and against, people from all social classes.<sup>30</sup> This discussion illustrates the dispute resolution role that the summary jurisdiction played in a society lacking the informal processes that develop organically over time. This can be seen as a further dimension of its civilizing function.

By the end of the nineteenth century there was rising concern about repeat offenders, who had become another ‘problem’ group in the summary jurisdiction. Public drunkenness was the most frequently charged offence, followed by ‘riotous or indecent behaviour, vagrancy’ and ‘obscene, threatening or abusive language’.<sup>31</sup> However, it was estimated that there were ‘3000

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<sup>24</sup> Sturma, above n 4, 125.

<sup>25</sup> Ibid 129.

<sup>26</sup> Ibid 128–9.

<sup>27</sup> Ibid 129–131.

<sup>28</sup> Ibid 131.

<sup>29</sup> Ibid 127.

<sup>30</sup> Sturma, above n 4, 132.

<sup>31</sup> Golder, above n 4, 102.

“habitual drunkards” in Sydney alone’, and repeated arrests ‘were more common among female than male drinkers’, even though the overall ‘female proportion of arrests fell in the second half of the century from 25 per cent in 1861 to 16 per cent in 1894’.<sup>32</sup> The majority of women were being arrested for behaviour relating to prostitution. Beyond Sydney, repeat offending was also a concern in settlements with sparse populations that were outside of major towns, such as Wilcania.<sup>33</sup>

Concealed behind the statistics for offences against good order is the story of prostitution, which has been played out in the summary jurisdiction. From 1788 until the end of the second half of the nineteenth century there was a high tolerance of prostitution in NSW for various reasons, not least of which was the ‘high ratio of men to women’ in the population.<sup>34</sup> By the late nineteenth century official attitudes towards prostitution had changed to such an extent that 83 per cent of offences laid against women were prostitution-related offences.<sup>35</sup> The attitudinal change had begun as transportation ended in the 1840s and the numbers of free settlers began to increase, bringing with them the influence of Victorian morals and contributing to the concerns about respectability in the developing colony (discussed above). During this period prostitution came to be seen as a ‘social problem’, not only in NSW but also in other parts of the western world.<sup>36</sup> Prostitution was not illegal but police could, and increasingly did, charge women engaging in prostitution with offences such as ‘drunkenness’, ‘being drunk and disorderly’, ‘vagrancy’, ‘being an idle or disorderly person’, ‘loitering on footways/public thoroughfares’, [and] ‘offensive/indecent behaviour/language’.<sup>37</sup> However, again, a small number of repeat offenders accounted for the majority of the arrests. For example, in 1859, ‘fifty-one Sydney women were arrested at least ten times.’<sup>38</sup>

Prostitution was hierarchical with high class brothels at the top, the ‘common prostitute’ or ‘street walker’ at the bottom and several other levels in between, and it was those women at the lowest levels of the prostitution hierarchy who were charged and appeared before the

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<sup>32</sup> Ibid 103–4.

<sup>33</sup> Ibid 103.

<sup>34</sup> Raelene Frances, *Selling Sex: A Hidden History of Prostitution* (UNSW Press, 2007) 24.

<sup>35</sup> Judith Allen, *Sex & Secrets: Crimes Involving Australian Women since 1880* (OUP, 1990) 21–22.

<sup>36</sup> Frances, above n 34, 44; Barbara Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia Since 1945* (Cambridge University Press, 1997) 18.

<sup>37</sup> Allen, above n 35, 21.

<sup>38</sup> Golder, above n 4, 103–4.

summary jurisdiction.<sup>39</sup> As Raelene Frances explains ‘[t]he status of a sex worker was ... defined by the race and class of her clients as well as by her age, appearance and habits.’ While high class brothel owners could be charged with ‘keeping a disorderly house’ (an indictable offence punishable by two years’ imprisonment until 1908) it was rare for police to do so.<sup>40</sup> The ages of women engaging in prostitution typically ranged from 16 to 30, but those who were arrested were towards the older end of the range — working class women of ‘all racial and ethnic groups’ who tended to drink heavily and were likely to have a venereal disease.<sup>41</sup> Their street walking and other ‘nuisance’ behaviour brought them to the attention of the police.<sup>42</sup> There was also a racial dimension with police targeting female Aboriginal and Chinese prostitutes, and those who worked in ‘Chinese and other “lower class” brothels’.<sup>43</sup> Thus, by the turn of the twentieth century the demography of defendants in the summary jurisdiction was dominated by people from the lower strata of society who were charged, often repeatedly, with low level offences.

There is evidence that Aboriginal people were being prosecuted and tried before magistrates, at least within the frontiers of settlement, during this period,<sup>44</sup> but it is difficult to trace the extent to which it was being done. Prison records in NSW rarely designated Aboriginality,<sup>45</sup> and comprehensive historical examination of proceedings before magistrates (an enormous and painstaking task) has yet to be undertaken.<sup>46</sup> The impediments to rendering Aboriginal people subjects of the criminal law in the higher courts were manifold and have been discussed extensively in the historical literature.<sup>47</sup> One of the most confounding and enduring of

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<sup>39</sup> Frances, above n 34, 130-1.

<sup>40</sup> Ibid 134.

<sup>41</sup> Allen, above n 35, 248; Frances, above n 34, 130–1. Most women engaging in prostitution were aged between sixteen and thirty. Older women engaged in sex work but clients preferred younger women. See Frances at 126.

<sup>42</sup> Frances, above n 34, 153.

<sup>43</sup> Ibid 140; Allen, above n 35, 25.

<sup>44</sup> R H W Reece, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s* (Sydney University Press, 1974) 10.

<sup>45</sup> Mark Finnane, *Punishment in Australian Society* (Oxford University Press, 1997) 39.

<sup>46</sup> Four legal historians have examined selected records relating to magistrates court proceedings in the nineteenth century. In New South Wales, Michael Sturma investigated a selection of courts between the 1830s to the 1860s (see Sturma, above n 4, ch 6); and Hillary Golder investigated court returns and police summons statistics in the later decades of the nineteenth century (see Golder, above n 4, 100). Both noted the insufficiency of the primary records and were only able give impressionistic accounts of proceedings. Neither mentions Aboriginal people. Alan Pope had more success with the primary sources in South Australia. See Alan Pope, *One Law for All? Aboriginal People and Criminal Law in Early South Australia* (Aboriginal Studies Press, 2011). See also, in relation to Western Australia, Ann Hunter, *A Different Kind of 'Subject': Colonial Law in Aboriginal-European Relations in Nineteenth Century Western Australia 1829–61* (Australian Scholarly Publishing, 2012) ch 6.

<sup>47</sup> See, eg Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012).

those has been described as ‘Aboriginal difference’,<sup>48</sup> which is a reference to ‘Aboriginal difference in customs, norms, and perspectives’ from those of the ‘ascendant settler populations’.<sup>49</sup>

Perhaps the best-known legal impediment was the prohibition on the admission of the testimony of Aboriginal witnesses. Part of a broader story about Christianity and imperialism,<sup>50</sup> the prohibition excluded from court the evidence of ‘... *Athiests, Persons Infamous, and Persons interested* ...’<sup>51</sup>. I have found only one reference in the historical material to the prosecution of Aboriginal people in the summary jurisdiction during this period in NSW.<sup>52</sup> Commentary in Wilkinson’s treatise for Australian Magistrates suggests that Aboriginal people were neither prosecuted nor called as witnesses:

[a]thiests, or persons who profess no religion, and have no belief in a future state of rewards and punishments, can never be admitted to give evidence. It is to be lamented that Aboriginal natives of New South Wales are at the present time incompetent to give evidence, on this ground [sic].<sup>53</sup>

### ***From the Turn of the Twentieth Century to the Final Quarter of the Twentieth Century***

From the early twentieth century the summary jurisdiction was used increasingly to solve social problems. During the period from the turn of the twentieth century to the final quarter of the twentieth century the demographic mix of defendants began to change as the criminal law in summary form was deployed to regulate constructed harmful behaviours engaged in by particular social groups. The increasing use of the summary jurisdiction for this purpose is best illustrated by the regulation of: drivers of motor cars; striking workers; people (usually women) working as prostitutes; ‘fallen women’; and men engaging in homosexual sex acts. From the 1930s, as the protection systems began to be dismantled, Aboriginal people began to appear more frequently before the summary jurisdiction. Despite the increasing use of the criminal law in summary form, across the entire period from 1900 to 1976, the overwhelming majority of defendants were

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<sup>48</sup> See for instance Mark Finnane, ‘The Limits of Jurisdiction: Law, Governance, and Indigenous Peoples in Colonised Australia’ in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010) 150; Douglas and Finnane, above n 47; Pope, above n 46.

<sup>49</sup> Finnane, ‘The Limits of Jurisdiction’, above n 48, 150.

<sup>50</sup> Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press, 2010) 14. Until 1744 this prohibition also excluded the evidence of infidels. On the excision of the prohibition against infidels giving evidence see *Omychund v Barker* (1744) 1 Atk. 21; 26 ER 15.

<sup>51</sup> William Hattam Wilkinson, *The Australian Magistrate* (George Robertson, 1835) 118–119.

<sup>52</sup> Reece, above n 44, 10. Magistrates’ lack of legal training at this time raises concerns about the extent to which they applied the rules of evidence in proceedings.

<sup>53</sup> Wilkinson (1835), above n 51, 118–119.

appearing in relation to low level offences. A study of the statistics for all magistrates' courts in Australia between 1900 and 1976 shows that 'petty offences' and 'offences against good order', which carried sentences of a fine or a short period of imprisonment, accounted for approximately 85 per cent of total offences.<sup>54</sup> The petty offences category comprised offences such as drink-driving, 'parking and allied offences', 'other traffic offences', drug offences and breaches of regulatory Acts such as the *Public Health Act*.<sup>55</sup> Offences against good order comprised offences such as 'drunkenness, drunk and disorderly, indecent, riotous or offensive behaviour' and vagrancy.<sup>56</sup> The remaining 15 per cent comprised approximately equal portions of low level offences against the person and larceny.<sup>57</sup>

The first example that illustrates how the criminal law in summary form has been used to regulate constructed harmful behaviours is driving motor cars. Of all the social changes that have impacted upon the demography of the defendants in the summary jurisdiction, the invention of the motor car has been one of the most dramatic, and its effects can be seen along three demographic axes of class, gender and indigeneity. From the early 1900s until the rise of the middle class in the prosperous 1920s motor cars were owned 'principally by wealthy men'.<sup>58</sup> At that time cars were seen as a public nuisance so those men tended to be of a rebellious nature, 'did not fit into the standard mould of conservative policy-maker and were thus excluded from the corridors of power'.<sup>59</sup> This social group began to appear before magistrates in the early twentieth century as the summary jurisdiction was deployed to regulate the potentially harmful behaviour of driving. In the first year of operation of the *Traffic Act 1909* (NSW), 57 convictions were recorded for offences such as speeding, negligent driving and 'excessive smoke'.<sup>60</sup> Middle class car ownership increased rapidly in the 1920s, bringing 'large numbers of respectable property owners' before the summary jurisdiction for the first time,<sup>61</sup> a trend that continued throughout the Great Depression.<sup>62</sup> By the 1950s, car ownership, albeit of the second-hand

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<sup>54</sup> Satyanshu Mukherjee, *Crime Trends in Twentieth Century Australia* (Allen & Unwin, 1981) 44.

<sup>55</sup> *Ibid* 17.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid* 45.

<sup>58</sup> Shane Birney, *A Nation on Wheels: Australia and the Motor Car* (Dreamweaver Books, 1984) 44.

<sup>59</sup> *Ibid*.

<sup>60</sup> Keith Winser, 'The Story of Australian Motoring: The Complete History of Motoring, from the First Horseless Carriages to Our Cars of Today' (1955) *Fortnightly Motor Manual* 100.

<sup>61</sup> Golder, above n 4, 139.

<sup>62</sup> *Ibid* 161.

variety, had become possible for '[t]hose considered to be working class'.<sup>63</sup> With the introduction of a penalty notice system in 1961 the numbers of 'white collar offenders' appearing in magistrates courts began to subside,<sup>64</sup> but traffic offences nevertheless continued to produce defendants from a cross-section of social classes.

A recent study by BOCSAR provides some insight into the impact of traffic offences on the demography of the summary jurisdiction in the current era. The study showed that while the offence of 'drive while disqualified or licence suspended' ('DWD') brings defendants from the full spectrum of social backgrounds before the summary jurisdiction, 'relatively disadvantaged' offenders are overrepresented in this offence category.<sup>65</sup> So too are Indigenous offenders who are a disproportionately disadvantaged social group.<sup>66</sup> While the class profile of traffic offences is complex, the gender profile is clear: it has remained a male-dominated offence category despite broader changes regarding the role of women in society. In 1914, women comprised 0.5 per cent of traffic offenders. By 1934 this had risen to approximately 3 per cent where it remained until the 1970s.<sup>67</sup> In the current era women comprise approximately 20 per cent of traffic offenders.<sup>68</sup> I revisit the topic of traffic offences in Chapter 6 for the insight it provides into the impact of the formalisation of enforcement practices on the development of the law of drink-driving.

The second example that illustrates how the criminal law in summary form was used to regulate constructed harmful behaviours is certain behaviours engaged in by women. For much of the twentieth century certain behaviours engaged in by women were treated as special social problems that were appropriate for regulation by the summary jurisdiction. This part of the

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<sup>63</sup> Birney, 'A Nation on Wheels', above n 58, 223.

<sup>64</sup> On the introduction of the penalty notice system see Richard Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, Canberra 1995) 32. On the impact this had on 'white collar offenders' see Golder, above n 4, 161.

<sup>65</sup> Paul Nelson, New South Wales Bureau of Crime Statistics and Research, *Driving While Disqualified*, Bureau Brief, Issue Paper No 103 (March 2015) 5. This was a particular problem in the Northern Territory under 'the Intervention'. See Thalia Anthony and Harry Blagg, Report to the Criminology Research Advisory Council, 'Addressing the "Crime Problem" of the Northern Territory Intervention: Alternate Paths to Regulating Minor Driving Offences in Remote Indigenous Communities' (June 2012).

<sup>66</sup> Indigenous people account for 11.3 per cent of DWD offenders: Anthony and Blagg, above n 65, 5. They are overrepresented to a greater degree in other offence categories, such as Contravene Apprehended Violence Order, which is discussed below.

<sup>67</sup> The following calculations are based on statistics from Satyanshu Mukherjee et al, *Source Book of Australian Criminal & Social Statistics 1804–1988* (Australian Institute of Criminology, 1989) 285: in 1914 women constitute 0.5 per cent; in 1934 women constitute 3 per cent; in 1954 women constitute 3.5 per cent; in 1971 women constitute 3.4 per cent.

<sup>68</sup> In 2014 men comprised 80 per cent of regulatory traffic offenders (17,676 out of a total of 22,050). Source: New South Wales Bureau of Crime Statistics and Research.

chapter examines two targeted behaviours: prostitution and first offenders. These behaviours were constructed as problematic primarily through police law enforcement practices and procedural mechanisms rather than the substantive law.

Prostitution was formally criminalised in 1908 with the creation of a number of specific prostitution-related offences, but the number of women being charged with offences in relation to prostitution in the summary jurisdiction fell dramatically during the ensuing decade.<sup>69</sup> This decrease seems counter-intuitive because whereas previously the police were restricted to charges such as offensive language and behaviour, and offences under the Vagrancy legislation, the *Police Offences (Amendment) Act 1908* (NSW) (*Police Offences (Amendment) Act*) gave them a greater range of offences with which to respond to prostitution. These offences included ‘being a common prostitute, [who] solicits or importunes for immoral purposes, any person who is in any public street, thoroughfare, or place’.<sup>70</sup> The *Police Offences (Amendment) Act* also empowered a magistrate who convicted a ‘female’ of this newly created offence to commit the offender to a ‘reformatory’ created for the purposes of the Act.<sup>71</sup> This latter provision, which was designed as an attempt to rescue ‘fallen women’, was added to the Bill as an afterthought during the parliamentary debates when members realised that the criminalisation of both brothels and soliciting in public would ‘leave these poor unfortunate women without any place at all’.<sup>72</sup>

Enacted in the same parliamentary session, the *Prisoners’ Detention Act 1908* (NSW) (*Prisoners’ Detention Act*) empowered magistrates to order that a ‘prisoner’ (that is, someone who was serving a term of imprisonment) who was found to be infected with a ‘contagious disease’ be detained in a ‘locked hospital’ for an indefinite period that may extend beyond the expiration of their term of imprisonment until determined to be ‘free from a contagious disease’ by the medical officer in charge of the hospital.<sup>73</sup> ‘Contagious disease’ was defined as ‘venereal disease, including gonorrhoea’.<sup>74</sup> The Act had been ‘carefully drafted’ to preserve ‘equality of treatment between the sexes,’<sup>75</sup> but the parliamentary debates show that it was directed at women

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<sup>69</sup> Allen, above n 35, 75.

<sup>70</sup> *Police Offences (Amendment) Act 1908* (NSW) which inserted s 4(i) into the *Vagrancy Act 1902* (NSW).

<sup>71</sup> *Vagrancy Act 1902* (NSW) s 4(1), as amended by *Police Offences (Amendment) Act 1908* (NSW) s 5(3).

<sup>72</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 November 1908, 2217 (Mr Levy).

<sup>73</sup> *Prisoners Detention Act 1908* (NSW) ss 4, 5. The Act provided for an appeal to the Court of Quarter Sessions: s 4(1).

<sup>74</sup> *Ibid* s 2.

<sup>75</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 11 November 1908, 2348 (H Gullett).

working as prostitutes.<sup>76</sup> These legal changes constructed a ‘prostitute’ problem social group that had not previously existed and drove prostitution ‘indoors’, forcing it to become a professionalised and ‘less visible’ occupation.<sup>77</sup> Judith Allen speculates that this may explain why the number of prosecutions of women for offences relating to prostitution fell dramatically after 1908.<sup>78</sup> Historians and criminologists give varying accounts of the impact of the 1908 laws.<sup>79</sup> It is clear that the overall number of women appearing before the summary jurisdiction charged with offences in relation to prostitution decreased,<sup>80</sup> but enforcement practices that targeted the ‘visible and distasteful’ elements of the commercial sex trade perpetuated the ‘class bias’ in the demographic mix of women who appeared as defendants.<sup>81</sup>

From 1908 until ‘decriminalisation’ in 1979, the numbers of women appearing in the summary jurisdiction charged with offences in relation to prostitution fluctuated wildly with changing government policy concerns and policing practices.<sup>82</sup> For example, between 1940 and 1971 the most commonly charged offence in relation to prostitution was offensive language and/or behaviour. The number of such charges laid during this period ranged from 15,391 in 1964 to 515 in 1970,<sup>83</sup> with peaks and troughs in between. As in earlier periods it was a subgroup of female sex workers who carried the bulk of prosecutions. Because brothel owners were rarely charged, and many sex workers were receiving protection from prosecution, charges were being laid against the same ‘most troublesome women’ multiple times.<sup>84</sup> Occasionally police conducted blitzes of brothels and street prostitution, often around election time, which inflated the number of arrests and expanded the group of women appearing before the court.<sup>85</sup>

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<sup>76</sup> The Bill had originally been named the Contagious Diseases Bill and was drafted to apply to women only but ‘the government was bombarded with protest from women’s organisations’, so it was ‘carefully’ redrafted. See Allen, above n 35, 74–5.

<sup>77</sup> Ibid 93, 96.

<sup>78</sup> Ibid 75.

<sup>79</sup> Compare eg, Frances, above n 34, 222 with Roberta Perkins, *Working Girls: Prostitutes, Their Life and Social Control* (Australian Institute of Criminology, 1991) <<http://www.aic.gov.au/publications/previous%20series/lcj/1-20/working.html>> 127 Table 2.7.

<sup>80</sup> Perkins, above n 79. These figures are based on police charge and summons data rather than court data, so they include charges that may have been withdrawn prior to an appearance in court.

<sup>81</sup> Allen, above n 35, 88.

<sup>82</sup> Ibid 191.

<sup>83</sup> Ibid 191–2.

<sup>84</sup> Ibid 192; Perkins, above n 79, ch 2, table 2.0.

<sup>85</sup> Frances, above n 34, 258.

The second ‘special social problem’ relating to women that the government regulated via the summary jurisdiction was female first offenders. In 1919 the NSW government enacted the *First Offenders (Women) Act 1919* (NSW) whereby magistrates were to give female first offenders the option of having their case heard *in camera* and to prohibit publication of the details. In the parliamentary debates the government claims to have been motivated by a need to assist ‘the unfortunate women of our community who commit crimes’ to avoid the stigmatisation of imprisonment.<sup>86</sup> As one member noted, unlike men, ‘[n]o woman ever recovers from the taint of sentence to imprisonment.’<sup>87</sup>

This legislative innovation can be readily interpreted as a shift towards marshalling the summary jurisdiction to address the social problem of ‘fallen’ women. This is evidenced by the comments of Member of Parliament, Mr Perry who noted that many charitable and religious organisations were working ‘in the reforming of young girls who are inclined to fall.’<sup>88</sup> The Act was introduced in the midst of first wave feminism — in the same year the NSW Parliament enacted the *Women’s Legal Status Act 1918* (NSW), which provided that ‘women shall not by reason of sex be deemed to be under any disqualification to hold certain positions or to practise certain professions’.<sup>89</sup> Despite the fact that the government had sought advice from the ‘women’s organisation committee’,<sup>90</sup> there is a paternalistic tone running through the debates, perhaps reflecting religious interests and the absence of female parliamentarians and parliamentary counsel. Mr Hall, for example, equated women with children,<sup>91</sup> and Mr Mutch, said that in the intimidating surroundings of a court room:

a woman becomes absolutely helpless, if not positively terrified. ... Those who have seen women as mere witnesses in the box will realise how difficult it is for a woman to comport herself with the assurance necessary to do justice to her case.

Words such as ‘helpless’, ‘unfortunate’ and ‘poor girls’ are used repeatedly to describe these women. The Bill’s moralistic intentions are revealed in the government’s plan to place these first offenders ‘in association with some good-hearted co-religionists who would endeavour to put

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<sup>86</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 December 1918, 3516 (Mr Hall).

<sup>87</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 December 1918, 3727 (Mr Mutch).

<sup>88</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 December 1918, 3518 (Mr Perry).

<sup>89</sup> Preamble to the *Women’s Legal Status Act 1918* (NSW).

<sup>90</sup> A process that had taken 12 years: New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 December 1918, 3523 (Mr Storey).

<sup>91</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 December 1918, 3731, (Mr Hall).

them on their feet again'.<sup>92</sup> The opposition pointed out that the Bill did not provide for such a regime, but did seek 'to have trials heard in secret', with some members evoking images of the Star Chamber.<sup>93</sup> Arguments urging the protection of the principle of open justice were, however, defeated.

In addition to further attempts to use the criminal law to solve social problems, a shift towards leniency in punishment is discernible in this, and other, legislative changes made throughout the first half of the twentieth century. A perception that imprisonment does not assist with reform had led to the enactment in 1894 of the *First Offenders Probation Act 1894* (NSW), and was one of the motivations behind conferring power upon magistrates in 1908 to commit women convicted of soliciting to a reformatory, as discussed above. At the time that the *First Offenders (Women) Act* was drafted it was common for first offenders in the summary jurisdiction to be sentenced to a period of imprisonment; something that would rarely happen in the current era. In providing for private hearings the government hoped that magistrates would no longer send female first offenders to gaol.<sup>94</sup>

The stereotype of the female shoplifter was used to construct another 'problem' group that the summary jurisdiction was deployed to regulate. It is an important example because it shows how in attempting to regulate one harmful social behaviour by altering the summary process for female first offenders, the government created another social problem. In 1929 the government amended the *First Offenders (Women) Act 1919* (NSW) to exclude shoplifting from the secret hearing procedure (but not the non-publication order) because it was believed that the Act had encouraged criminal gangs to employ women with no prior convictions to shoplift for them.<sup>95</sup> Shoplifting was considered to be a predominantly female offence in this era. By 1929 the department store had revolutionised the way in which goods were displayed and sold, no longer

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<sup>92</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 December 1918, 3516 (Mr Hall).

<sup>93</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 December 1918, 3519–20 (Mr Johnston).

<sup>94</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 December 1918, 3733 (Mr Hall). The 1929 amending Act also introduced s 556A to the *Crimes Act 1900* (NSW), now the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 10, which enabled magistrates, upon conviction of an offender of otherwise good character for a 'trivial' offence, to dismiss the charge.

<sup>95</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 February 1929, 3202 (Mr Ness). *Crimes (Amendment) Act 1929* (NSW) s 22.

placing them behind counters.<sup>96</sup> In the debates on the 1929 amendments women were depicted as weak-willed and unable to resist temptation. Mr Baddley, MP, for example, said:

it is generally accepted that women are more subject to temptation than men, and are more impulsive. ... In the big retail merchants' shops goods are lying strewn all about and some girls cannot resist the temptation to pick them up.<sup>97</sup>

There are no statistics to indicate the numbers of women who availed themselves of the 'secret hearing' procedure, but the *First Offenders (Women) Act* (NSW) remained in force until 1976. It was repealed in the wake of second wave feminism on the basis that it identified women who were repeat offenders and was therefore unacceptably discriminatory. It was discriminatory because, when a woman appeared in court the magistrate was required to ask her whether she would be availing herself of the *First Offenders (Women) Act's* closed court procedure. An answer of 'no' revealed to the magistrate that she had a prior record of offending, thus breaching the common law principle of fair trial that the tribunal of fact ought not to be made aware of prior convictions.<sup>98</sup> Also, by 1976 the institutional conditions of the summary jurisdiction had changed rendering the *First Offenders (Women) Act* redundant. Sentencing practices had altered to such an extent that it was rare for a first offender to be sentenced to imprisonment. These two examples relating to women show the flexibility of the summary jurisdiction and the way its procedures and demographic mix changed as social attitudes towards both women and offending changed.

The third example that illustrates how the criminal law in summary form was used to regulate constructed harmful behaviours is men engaging in homosexual sex acts. This behaviour, which had long been constructed as harmful, was regulated by the summary jurisdiction for the bulk of the twentieth century. It is difficult to determine with precision when summary offences were first used in relation to this behaviour, but in 1953, the NSW Supreme Court in *Ex parte Langley* ('*Langley*') stated that 'it has been a practice of long standing' for police to charge men engaging in, or inciting other men to engage in, 'an unnatural sex offence' with the summary offence of living on earnings of prostitution under s 4(2)(o) of the *Vagrancy Act 1902* (NSW).<sup>99</sup> In *Langley*, the Supreme Court was concerned that police were using the

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<sup>96</sup> Rachel Shteir, *The Steal: A Cultural History of Shoplifting*, (Penguin Press).

<sup>97</sup> New South Wales, Parliamentary Debates, Legislative Assembly, 26 February 1929, 3199–3200, (Mr Baddeley).

<sup>98</sup> *First Offenders (Women) Repeal Act 1976* (NSW).

<sup>99</sup> *Ex parte Langley; Re Humphries* (1953) 53 SR(NSW) 325.

*Vagrancy Act* offence, which carried a maximum penalty of six months imprisonment, instead of the far more serious ‘abominable crime of buggery or bestiality’ under s 79 of the *Crimes Act*, which was punishable by 14 years imprisonment. While the Court does not explore the reasons why police may have been doing so, two possible explanations arise from the analysis of offences such as cattle stealing in this thesis. The first is that the elements of the more serious offence of ‘buggery’, which were defined by common law, would have been difficult to prove unless the offenders were caught in the act; and the second is that the police, who were making the charging decision, may have thought the penalty for the more serious offence was too harsh. In reaching its decision (or perhaps in order to achieve the desired result) the NSW Supreme Court confirmed the long-held understanding that only women could be prostitutes. Males engaging in such behaviour with other males, the court held, did not fall within the definition of the *Vagrancy Act* offence because the meaning of ‘prostitute’ for the purposes of that Act was ‘a woman who indiscriminately consorts with men for hire’.<sup>100</sup> Therefore they could not be charged with the *Vagrancy Act* offence, but should, instead, be charged with buggery.

In response to *Langley* in 1955 the NSW government added two triable either way offences, ss 81A and 81B, to the *Crimes Act*. Section 81A made it an offence for a ‘male person in public or private’ to procure, attempt to procure or commit ‘any act of indecency with another male person’.<sup>101</sup> The prescribed maximum penalty was two years imprisonment. Section 81B made it an offence for a ‘male person, in any public place’ to solicit another male to commit an act of indecency under s81A or an ‘abominable’ act under s 79 of the *Crimes Act* and was punishable by up to 12 months imprisonment. However, both sections were placed in the reclassification section, s 477 of the *Crimes Act*, which made them triable summarily with the consent of the accused. In this way the new provisions preserved summary jurisdiction over homosexual behaviour while conveying moral condemnation by categorising the new offences as capable of being finalised on indictment. The theme of using the triable either way categorisation of offences to convey moral condemnation is explored in more detail in chapters 6 and 7.

It has not been possible to determine how many men appeared as defendants in the summary jurisdiction charged with such offences, or their social background, because the

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<sup>100</sup> Ibid 327 citing *Wharton’s Law Lexicon*.

<sup>101</sup> *Crimes Act 1900* (NSW), ss 81A and 81B respectively.

statistics are camouflaged within the offence category labelled ‘offences against good order’, but it is likely that changing police enforcement practices impacted on the number of arrests. Homosexual sex acts between consenting male adults were not formally decriminalised in NSW until 1984.<sup>102</sup>

The fourth and final example that illustrates how the criminal law in summary form has been used to regulate constructed harmful behaviours is behaviours engaged in by Aboriginal people. From the 1930s Aboriginal people began to appear in the summary jurisdiction in greater numbers for minor offences as the ‘protection’ systems were slowly dismantled,<sup>103</sup> and by the 1950s incarceration rates were increasing.<sup>104</sup> Reasons for incarceration differed between rural and urban areas but a predominant cause during the second half of the twentieth century was low-level offending and drunkenness.<sup>105</sup> As seen in Chapter 3 in relation to police, and above in this chapter in relation to prostitution, police enforcement practices have a significant impact on the numbers of defendants who appear in the summary jurisdiction in relation to such offences.<sup>106</sup> Notwithstanding the predominance of low-level offending, Aboriginal people were increasingly being arrested for more serious intra-racial violence, including, in some communities, violence against Aboriginal women and children.<sup>107</sup> The reasons for the high levels of violence in some Aboriginal communities are complex and are still being unraveled, but they include the ongoing impact of colonisation.<sup>108</sup> Without wishing to detract from the importance of the impact of the colonial legacy on the relationship between Aboriginal people and the Criminal Justice System, the task in the context of this thesis is to understand how the summary jurisdiction has replaced alternative structures that regulated the behaviours of Aboriginal people. The best way to do this is through an examination of the NSW government’s response to domestic violence in the final quarter of the twentieth century, a topic to which I will return in the final part of this chapter.

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<sup>102</sup> *Crimes (Amendment) Act 1984* (NSW).

<sup>103</sup> Finnane, *Police and Government*, above n 1, 119.

<sup>104</sup> *Ibid* 123.

<sup>105</sup> *Ibid* 124.

<sup>106</sup> On this issue in relation to Aboriginal people see, eg Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, ch 7 (‘*Royal Commission into Deaths in Custody*’); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

<sup>107</sup> Finnane, *Police and Government*, above n 1, 124. On this phenomenon in the state of Queensland see Mark Finnane and Jonathan Richards, ‘Aboriginal Violence and State Response: Histories, Policies and Legacies in Queensland 1860–1940’ (2010) 43(2) *Australian and New Zealand Journal of Criminology* 238.

<sup>108</sup> See eg, *Royal Commission into Deaths in Custody*, above n 106.

### *From the Final Quarter of the Twentieth Century to Present*

Four significant changes to the way in which the summary jurisdiction is used to regulate harmful behaviours are crucial for understanding the summary jurisdiction in the current era. The first is the introduction of the Table System in 1995. In Chapter 1 it was seen how the formalisation of jurisdictional boundaries and the rationalisation of the jurisdictional allocation of offences created a new way of organising the substantive criminal law that cuts across the ‘offence family’ method of organisation. Examining the summary jurisdiction through this lens shows that these developments have produced a new cohort of defendants in this final period. Because unprecedented numbers of offences have been reclassified as triable either way since the introduction of the Table System, the number of defendants charged with more serious offences whose charges are being finalised summarily has increased. The second significant change is the increasing use of the criminal law in summary form as a means of protecting particular members of the community from harmful behaviours. Accompanying the maturity of the summary jurisdiction, this change has produced a second new cohort of defendants charged with the category of offences that I call ‘breach of justice orders’. The best example of this phenomenon is the offence of contravention of an apprehended violence order (‘CAVO’) and it is analysed in Chapter 7. The third significant change has been the ‘decriminalisation’ of prostitution which has led to the near disappearance of a social group—women working as prostitutes—that has populated the summary jurisdiction since the late nineteenth century. This change shows that regulation of particular behaviours by the summary jurisdiction is not inevitable. The fourth significant change has been the rise to prominence of the victim which has seen the victim move from the periphery to take up a central role in the development of the summary jurisdiction in the current era.

### *Defendants Charged with Increasingly Serious Offences since the Introduction of the Table System in 1995*

Due to the intensification of the reclassification of strictly indictable offences as triable either way from 1995, significantly more defendants charged with formerly strictly indictable offences (in addition to newly created triable either way offences) are being dealt with in the Local Court than in previous eras. As shown in Chapter 1, there were three major overhauls of the criminal law during the twentieth century. The first was in 1924, the second was in 1974, and the third

was in 1995. The reclassification process began modestly in 1924. This was followed by a fifty year gap before another tranche of reclassifications in 1974, which included Assault Occasioning Actual Bodily Harm and common assault. These offences comprise one of the top three largest offence categories in the summary jurisdiction in the current era. But the 1924 and 1974 overhauls were a mere trickle in comparison with the tsunami of reclassifications that was precipitated by the introduction of tables 1 and 2 in 1995, each of which contains hundreds of offences.<sup>109</sup> As discussed in relation to plea bargaining in Chapter 3, the combined result of the Table System and the presumption of summary disposition created by s 260 of the *Criminal Procedure Act 1986* (NSW) has been that 41 per cent of triable either way offences are now either withdrawn or finalised in the Local Court.<sup>110</sup> Numerically these offences comprise only a small fraction of total offences in the summary jurisdiction, but they represent a significant proportion of total triable either way offences. Triable either way offences can also be more complex, particularly if defended.<sup>111</sup> Two key examples examined in Chapter 6 (below) are affray and using a weapon to commit an offence. The intensification of the reclassification of strictly indictable offences as triable either way from 1995 has also contributed to increasing involvement of victims in the summary jurisdiction in the current era, a topic which I explore below in this chapter.

### ***Aboriginal Defendants***

In the 1970s, as the vestiges of the civil regulatory system of protection disappeared, Aboriginal people were increasingly appearing as defendants in the summary jurisdiction.<sup>112</sup> In that decade, evidence began to emerge of the disproportionate enforcement and punishment of minor offences against Aboriginal people. Reports by BOCSAR and others revealed that there were higher rates of arrest for drunkenness in ‘country towns with a relatively high Aboriginal population’.<sup>113</sup> While these statistics may, in part, have been explained by the well-known fact that some

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<sup>109</sup> *Criminal Procedure Act 1986* (NSW) sch 1.

<sup>110</sup> New South Wales Law Reform Commission (NSWLRC), *Encouraging Appropriate Early Guilty Pleas*, Report No 141 (2014) 62 xvii–xviii.

<sup>111</sup> New South Wales Sentencing Council, ‘An Examination of the Sentencing Powers of the Local Court in New South Wales’ (New South Wales Sentencing Council, December 2010 ) 30 [para 3.6].

<sup>112</sup> Finnane, *Police and Government*, above n 1, 122-130.

<sup>113</sup> Golder, above n 4, 197.

Aboriginal people spend more time in public spaces than non-Aboriginal people,<sup>114</sup> this does not explain it fully. Nor does it explain why the sentences imposed by magistrates for drunkenness in those towns were also disproportionately severe.<sup>115</sup> The reasons are complex, but they include the legacy of the police role in the enforcement of the protection policies, in particular the removal of Aboriginal children.<sup>116</sup> At the risk of oversimplification, this history, and ongoing discriminatory police practices, has caused tension between Aboriginal people and the police.<sup>117</sup> One consequence of this tension that is relevant to the summary jurisdiction is what has become known as the ‘trifecta’, where a charge of offensive language escalates into additional charges of resist arrest and assault police.<sup>118</sup> In addition to problematic police enforcement practices the BOCSAR reports raised a concern that magistrates were imposing sentences in a discriminatory manner.

At around this time in the late 1960s/early 1970s it was also revealed that in Redfern, the heart of the Aboriginal community in Sydney, the offence of drunkenness was being used against Aboriginal people as a *de facto* curfew. In a report commissioned by the National Inquiry into Racist Violence, Justice Wooten described the curfew in operation: ‘any Aboriginal who was on the streets of Redfern at a quarter past ten was simply put into the paddy wagon and taken to the station and charged with drunkenness.’<sup>119</sup> This discriminatory treatment of Aboriginal people was the reason for the establishment of the Aboriginal Legal Service in 1971, a subject which is explored in Chapter 3. In 1991 the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) revealed that during the 1980s Aboriginal people had been coming into police custody at a disproportionate rate for being intoxicated, for alcohol-related offences, and for other minor matters such as offensive language.<sup>120</sup> While Aboriginal people continue to come before the summary jurisdiction in disproportionate numbers for low level offending despite

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<sup>114</sup> Cunneen, *Conflict, Politics and Crime*, above n 106; *Royal Commission into Deaths in Custody*, above n 106, vol 2, ch 13.

<sup>115</sup> Golder, above n 4, 197.

<sup>116</sup> See Human Rights and Equal Opportunity Commission, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (1997).

<sup>117</sup> Finnane, *Police and Government*, above n 1, ch 6.

<sup>118</sup> Mark Dennis, ‘Is This the Death of the Trifecta?’ (2002) 40(3) *Law Society Journal* 66; *DPP v Carr* (2002) 127 A Crim R 151.

<sup>119</sup> Chris Cunneen, Human Rights and Equal Opportunity Commission, *Aboriginal-Police Relations in Redfern: With Special Reference to the ‘Police Raid’ of 8 February 1990* (1990) 1.

<sup>120</sup> *Royal Commission into Deaths in Custody*, above n 106, vol 1, ch 7.1. On the ‘decriminalisation’ of intoxication see Luke McNamara and Julia Quilter, ‘Public Intoxication in NSW: The Contours of Criminalisation’ (2015) 37 *Sydney Law Review* 1.

changes to legal practices recommended by the RCIADIC,<sup>121</sup> in the current era more serious offences are also contributing to their over-incarceration. A prominent example of this is the introduction of the ‘beach of justice order’ offence of CAVO in the 1980s. This offence enlisted the summary jurisdiction in the quest to govern the newly recognised harmful behaviour of non-fatal domestic violence. Chapter 7 analyses the rise of this offence in detail and its impact on Aboriginal defendants.

### ***The ‘Decriminalisation’ of Prostitution***

At the same time as indictable offences were being reclassified as triable either way from 1974, several numerically large minor public conduct offences have been ‘decriminalised’ in the current era. As discussed in Chapter 2, this was a product of the magistracy’s quest for increased status under Farquhar’s leadership,<sup>122</sup> together with a shift from a punitive to a welfare approach to social issues such as drunkenness and drug use.<sup>123</sup> I use quotation marks around ‘decriminalised’ because while the substantive offences were abolished, the behaviour was criminalised in other ways. One important example is the offence of public drunkenness, which had constituted a large proportion of the case load of the summary jurisdiction since colonisation. It was abolished by the *Intoxicated Persons Act 1979* (NSW), thus removing a large cohort of defendants, but remained criminalised through alternative mechanisms such as police detention of intoxicated persons for up to eight hours if they were, for example, ‘behaving in a disorderly manner’.<sup>124</sup>

Similarly in 1979, following the sexual revolution of the 1960s and 1970s and sustained lobbying by feminist groups and civil libertarians, the socially progressive left-leaning NSW government ‘decriminalised’ prostitution by repealing the *Summary Offences Act 1970* (NSW), which contained, among other prostitution-related offences, soliciting for prostitution.<sup>125</sup> However, in place of the repealed *Summary Offences Act* the government had enacted the

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<sup>121</sup> Eg, the NSW parliament removed the penalty of imprisonment for offensive language in response to the *Royal Commission into Deaths in Custody* in 1993 to discourage police from exercising the power to arrest for that offence: *Summary Offences (Amendment) Act 1993* (NSW); and imprisonment is supposed to be a punishment of last resort: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.

<sup>122</sup> Golder, above n 4, 196.

<sup>123</sup> Ibid. See also McNamara and Quilter, above n 120.

<sup>124</sup> McNamara and Quilter, above n 120, 12 quoting the *Intoxicated Persons Act 1979* (NSW).

<sup>125</sup> Sullivan, above n 36, 180. At that time soliciting for prostitution was contained in s 28 of the *Summary Offences Act 1970* (NSW).

*Offences in Public Places Act 1970* (NSW), which police used as a substitute for the repealed prostitution offences. The result is reflected in the statistics. Between 1976 and 1979, 1,663 women were arrested for ‘offensive behaviour’ in relation to prostitution. Between 1979 and 1981, following decriminalisation, 10,480 women were arrested for ‘causing serious alarm or affront’ under the *Offences in Public Places Act 1970* (NSW) in relation to prostitution.<sup>126</sup> Thus decriminalisation had occurred in name only. Notwithstanding the enactment of the *Offences in Public Places Act 1970* (NSW) a small number of women engaging in visible prostitution-related behaviour continued to be brought repeatedly before the summary jurisdiction. Soliciting was re-criminalised in 1988 with the re-enactment of the *Summary Offences Act 1988* (NSW) when a conservative government took office after a decade of Labor rule.

After more than two centuries of prosecuting only prostitutes for behaviour relating to prostitution, an offence of solicitation of a prostitute by a *client* was inserted into the *Summary Offences Act* in 1989<sup>127</sup> and the first prosecution of a male client in the history of NSW was brought in the same year. It was such an event that it was reported in the *Sydney Morning Herald*.<sup>128</sup> Between the year 2000 and 2013 there was a spate of prosecutions of clients under s 19A(1) of the *Summary Offences Act 1988* (NSW) but the numbers peaked at 161 in 2001 and have since dwindled to none.<sup>129</sup> A likely explanation for the failure to prosecute clients is police enforcement practices, which is another illustration of the impact of these practices on the number and demographic mix of defendants offence profile in the summary jurisdiction.

In the current era prostitution offences have all but disappeared from the summary jurisdiction as regulation has been assigned to alternative government structures. It must be noted, however, that it is not possible to tell on the current data the extent to which prostitution-related behaviour is camouflaged by the public order offence statistics. The numbers of the most frequently-charged prostitution offence—soliciting within view from a dwelling, school etc<sup>130</sup>—have declined from 307 finalised charges in 1994 to just one in 2016.<sup>131</sup> The reason for the decline was the shift in the mid-1990s from regulating prostitution via the criminal law to

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<sup>126</sup> Perkins, above n 79, ch 2.

<sup>127</sup> *Summary Offences Act 1988* (NSW) s 19A was inserted by the *Crimes and Courts Legislation Amendment Act 1999* (NSW).

<sup>128</sup> Perkins, above n 79, 152, table 2.13.

<sup>129</sup> Source: New South Wales Bureau of Crime Statistics and Research.

<sup>130</sup> *Summary Offences Act 1988* (NSW) s 19(1).

<sup>131</sup> Source: New South Wales Bureau of Crime Statistics and Research.

regulating it via local council planning and development administrative mechanisms. The shift was precipitated by two events: the exposure in the Wood Royal Commission of ‘a clear nexus between police corruption and the operation of brothels’;<sup>132</sup> and the Supreme Court decision *Sibuse v Shaw*<sup>133</sup> in which it was held that ‘a brothel is a disorderly house [within the meaning of the *Disorderly Houses Act 1943* (NSW)] regardless of whether it is disorderly in the usual meaning of the word’. This decision increased the potential number of convictions of brothel owners.<sup>134</sup> Changes to the law in 1995 enabled brothels to obtain a planning certificate from their local council and this regime remains in force in the current era.<sup>135</sup> Once in possession of a certificate, a brothel may only be closed by a declaration of the Land and Environment Court, which is a branch of the Supreme Court, upon application by the relevant local council. Local councils may apply for a declaration if they have received complaints from local residents. In making its decision, the Land and Environment Court is directed to consider a list of factors, including whether the brothel is causing ‘a disturbance in the neighbourhood’.<sup>136</sup> Frances reported in 2007 that illegal prostitution persists because some councils refuse to grant permits.<sup>137</sup>

### ***The Rise to Prominence of the Victim***

In the current era victims have moved from the sidelines to take up a key position in the criminal justice process.<sup>138</sup> This has impacted on the summary jurisdiction in two main respects. Firstly, decisions made by victims now have the potential to influence the course of criminal prosecutions through the process of plea negotiation. Secondly, through the political power of lobby groups that have arisen in the final quarter of the twentieth century, victims exert enormous influence over law reform. This part of the chapter charts the rise to prominence of the victim in NSW and examines how it has shaped the summary jurisdiction in the current era.

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<sup>132</sup> Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 1, 13 [1.39–1.40].

<sup>133</sup> (1988) 13 NSWLR 98.

<sup>134</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 1995, 1187 (Mr Whelan). The *Disorderly Houses Act* was renamed the *Restricted Premises Act 1943* (NSW) in 2002 by the *Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002* (NSW), sch 1[2].

<sup>135</sup> Frances, above n 34, 277; *Environmental Planning and Assessment Act 1979* (NSW) s 149.

<sup>136</sup> *Disorderly Houses Act 1943* (NSW) s 17 as amended by the *Disorderly Houses Amendment Act 1995* (NSW).

<sup>137</sup> Frances, above n 34, 289.

<sup>138</sup> See David Garland, *The Culture of Control* (OUP, 2001) 159 where Garland traces this development and the reasons for it in the UK and the USA.

Scholars have traced the roots of the focus on victims in criminal justice to a branch of criminology called ‘victimology’, which began to develop in the post-war period.<sup>139</sup> Victimology was initially used as a means of shedding new light on the traditional interests of criminology, namely crime and the criminal.<sup>140</sup> Alongside this new ‘science’, an interest in victimisation developed as a method of attempting to quantify the ‘dark figure’ of crime.<sup>141</sup> From the late 1960s victims became an area of study ‘in their own right’, but it was the lobbying of victims groups that raised awareness of the dissatisfaction of victims with the criminal justice system.<sup>142</sup> Initial efforts by victims groups focused on persuading the state to provide economic and psychological assistance to victims of crime. However, as victimisation surveys began to reveal the level of alienation felt by victims from the criminal justice process, those efforts were expanded to the ‘reintegration’ of victims into the criminal justice process.<sup>143</sup> Tyrone Kirchengast characterises attempts to address these feelings of alienation as a backlash against the displacement of the victim from the criminal process by the state.<sup>144</sup> Peter Ramsay attributes such developments to the ‘decay of liberal norms into a political culture characterised by permanent emergency’.<sup>145</sup> In addition, the increased significance of victims in the criminal process in the last three decades has been driven by human rights discourses precipitated by the adoption of the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985.<sup>146</sup>

In NSW the first Victims Compensation Scheme was created in 1987,<sup>147</sup> and the focus on compensation changed to rights when a Charter of Victims’ Rights was created in 1989. In 1996, acting on an election promise, the NSW Government gave the Charter statutory force by enacting the *Victims Rights Act 1996* (NSW), which, the Government explained, placed a

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<sup>139</sup> On the victim in criminal justice see Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006) especially 165 on victimology.

<sup>140</sup> Edna Erez, ‘The Impact of Victimology on Criminal Justice Policy’ (1989) 3 *Criminal Justice Policy Review* 236, 236–7.

<sup>141</sup> *Ibid* 237.

<sup>142</sup> *Ibid*.

<sup>143</sup> Australian Institute of Criminology, *Victim Impact Statements, Trends and Issues in Crime and Criminal Justice* No 33 (1991), 2 < <http://www.aic.gov.au/publications/current%20series/tandi/21-40/tandi33.html> > .

<sup>144</sup> Kirchengast, above n 139, 165.

<sup>145</sup> Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP, 2012) 25–26.

<sup>146</sup> GA Res 40/34, 96<sup>th</sup> plenary meeting, (29 November 1985). See also Australian Institute of Criminology, *Victim Impact Statements*, above n 143, 2.

<sup>147</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2013, 20068 (Mr Hazzard).

‘statutory obligation on agencies to ensure that a victim is treated with courtesy and compassion and respect for their rights and dignity.’<sup>148</sup> However, in keeping with the abiding suspicion of human rights in NSW, the Act fell short of creating enforceable legal rights by limiting the action that could be taken for a breach of the charter to ‘disciplinary proceedings against an official or a complaint to the Victims Bureau’.<sup>149</sup> The increasing power of the victims’ lobby is evidenced by the establishment in the Act of a Victims of Crime Bureau in 1996 to provide services to victims, and, in the same year, a Victims Advisory Board, which was to ‘provide advice to government on matters relating to support services for crime victims and victims compensation.’<sup>150</sup>

Changes made to the victims support regime in 2013 show that government attention to victims has now become a necessary feature of the political landscape in the current era. In 2013 the *Victims Rights Act 1996* (NSW) was repealed and replaced with the *Victims Rights and Support Act 2013* (NSW), which rationalised the provision of compensation to make the system more efficient, and created the office of the Commissioner of Victims Rights. The office of Commissioner was a policy commitment set out in the Premier, Barry O’Farrell’s conservative government’s 10-year plan to improve ‘community confidence in the justice system’.<sup>151</sup> It was part of a broader plan to ‘rebuild our state and make NSW number one.’<sup>152</sup> The increased political power of victims, together with women’s and feminist lobby groups, has had a significant impact on the summary jurisdiction via law reform. Chapter 7 of this thesis, which examines the use of the summary jurisdiction as a means of regulating non-fatal domestic violence, shows how demands from victims and feminist groups have dictated not only the content of the substantive law relating to domestic violence in the summary jurisdiction, but also changes to the practices of actors, including the police, prosecutors and magistrates.

In addition to the political power of lobby groups, victims now have the potential to influence the course of criminal prosecutions through the process of plea negotiation. By virtue of the statutory obligation on government agencies to have regard to the Charter of Victims

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<sup>148</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 May 1996, 973 (Mr Shaw).

<sup>149</sup> *Victims Rights Act 1996* (NSW) s 8(2).

<sup>150</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 May 1996, 973 (Mr Shaw).

<sup>151</sup> *Ibid.*

<sup>152</sup> New South Wales Government, *A Plan to Make NSW Number One* (2011)

<[https://www.ipc.nsw.gov.au/sites/default/files/file\\_manager/NSW2021\\_WEBVERSION.pdf](https://www.ipc.nsw.gov.au/sites/default/files/file_manager/NSW2021_WEBVERSION.pdf)> 36.

Rights, victims must be consulted and kept informed of the progress of their case through the criminal justice process. The Charter of Victims Rights was appended to the ODPP Prosecution Guidelines in the late 1980s.<sup>153</sup> Even though their views are not determinative, the process of requiring the victim to be consulted gives them more power to influence the outcome of criminal proceedings than previously.<sup>154</sup>

### ***Conclusion***

This Chapter showed how certain behaviours have been constructed as harmful, and how the summary jurisdiction has criminalised them. This process has resulted in the construction of ‘problem’ social groups. The behaviours have been so diverse that it is not possible to depict them as sharing the same features. The Chapter also showed that the process of regulation via the summary jurisdiction has resulted in the construction of ‘problem’ social groups. Thus the demographic mix of defendants in the summary jurisdiction has changed over time. Between colonisation and the final quarter of the twentieth century, the demographic mix of defendants in the summary jurisdiction was dominated by offenders from the lower strata of society who had been charged, often repeatedly, with low level offences such as public drunkenness. In the final quarter of the twentieth century, however, there was a shift in the nature of defendants appearing before the summary jurisdiction as increasingly serious offences were reclassified as triable either way. At the same time victims began to play a greater role in the conduct of the criminal process. Four changes account for this shift. The first is the maturation of the summary jurisdiction. The second is its formalisation, which has made the intensification of the reclassification of strictly indictable offences since 1995 possible. The third is the ‘decriminalisation’ of certain ‘staple’ offences of the summary jurisdiction, such as public drunkenness; and the fourth is the rise to prominence of victims in the criminal justice process in

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<sup>153</sup> The guidelines and appendices are available at website of the Office of the Director of Public Prosecutions, *Prosecution Guidelines* <<http://www.odpp.nsw.gov.au/prosecution-guidelines>>.

<sup>154</sup> These requirements are set out in the ODPP Prosecution Guidelines, eg, guideline 20 in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions* (2007) <<http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>> 37.

the current era. Notwithstanding this seismic shift, there remains an element of continuity: in the current era a large number of defendants — more than 60 per cent — are repeat offenders.<sup>155</sup>

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<sup>155</sup> New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2014*, 6. The data in this report relate to offenders with no prior proven offences in the previous 10 years. In both 2013 and 2014 it was 37 per cent.

## **Part III – Substantive Offences**

## Chapter 5: Assault and Affray

This thesis now turns to examine substantive offences. Assault and affray are pivotal offences of the summary jurisdiction because they show how formalisation has made increasing vertical and horizontal criminalisation possible. Vertical and horizontal criminalisation have pushed forward the summary jurisdiction's development. I use the term 'assault' as a shorthand term to refer to common assault, battery, and more aggravated forms of assault, such as assault occasioning actual bodily harm, distinguishing between them where necessary. Common assault is the third largest offence category in the summary jurisdiction behind drink-driving and offences against justice procedures, resulting in almost 20 per cent of total convictions in 2016.<sup>1</sup> After lying dormant for two centuries, affray is enjoying a renaissance. Its prevalence has increased dramatically from 0.03 per cent in 1994 to 0.92 per cent in 2016.<sup>2</sup> This is 30-fold increase and although it is still a relatively small number of cases (2,166 out of a total of 234,879), this represents a change over time in the government's response to interpersonal violence.

Unlike drink-driving (Chapter 6) and CAVO (Chapter 7), which grew up in the summary jurisdiction, both assault and affray have been reclassified as triable either way, but at different times and for different reasons. Assault has been at the epicentre of rationalisation of the jurisdictional allocation of offences and has therefore played a significant role in the development of the summary jurisdiction. Assault and affray are examined side by side in this chapter because in the summary jurisdiction today they are closely aligned. One manifestation of this alignment is the use of the offence of affray as an alternative, or 'back-up', to a charge of assault. In other words, there is evidence that the police sometimes use a charge of affray to secure a conviction where they would otherwise not be able to secure one for assault (for example, where the victim refuses to give evidence). Such use of alternative charges to secure convictions is an under-analysed dimension of criminalisation.

This chapter argues that the most useful dimensions of formalisation for understanding assault and affray in the summary jurisdiction are rationalisation and juridification. My analysis suggests that change over time in these offences has been produced by changing social attitudes towards interpersonal violence. Three moments in time illustrate this dynamic in relation to the

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<sup>1</sup> Source: NSW Bureau of Crime Statistics and Research.

<sup>2</sup> Source: NSW Bureau of Crime Statistics and Research.

law of assault: the adoption of the *Offences against the Person Act 1828* (UK); the creation of offences of aggravated assault on women and children in 1854; and the evolution of the offence of stalking from the final decade of the twentieth century to present.

My analysis also shows that formalisation made possible the reclassification of more serious offences in the assault hierarchy, and the common law offence of affray. The triable either way category of offences has given jurisdiction a fungible quality that enables Parliament to use the jurisdictional classification of offences for political purposes. Thus the jurisdictional allocation of offences is used normatively. As discussed in Chapter 4 in relation to homosexual sex acts between men, the fungibility of jurisdiction enables Parliament to attach a high degree of moral blameworthiness to constructed harmful behaviour through the maximum penalty available on indictment, while preserving the availability of the summary form. This facilitates criminalisation. In the context of assault-like offences, this dynamic is best illustrated by the offence of ‘use weapon to resist arrest’.

### ***From Colonisation to the Mid-Nineteenth Century***

By the time NSW was colonised in 1788 the law of assault was beginning to formalise. The distinction between the civil and criminal jurisdictions was hardening,<sup>3</sup> and assault had come to lie in the criminal jurisdiction.<sup>4</sup> Affray, by contrast, appears always to have been an offence against the peace, which placed it in the criminal jurisdiction, rather than being a matter for private suit.<sup>5</sup> It was the construction of assault around protection of the king’s peace that gave it its criminal character.<sup>6</sup> This characterisation of assault as an offence against the peace is

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<sup>3</sup> Peter King, ‘Punishing Assault: The Transformation of Attitudes in the English Courts’ (1996) 27(1) *Journal of Interdisciplinary History* 43, 52.

<sup>4</sup> Prior to that time an assault could render a wrong-doer liable for damages in a civil action ‘and also to an indictment at the suit of the king’: Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, first published 1754, 15<sup>th</sup> ed, 1785) vol 1, 112.

<sup>5</sup> *Ibid* 113, citing Hawkins, 1 Haw 135.

<sup>6</sup> Hawkins considered the sureties of the peace and good behaviour to deal with *threats* to the peace whereas assault and battery were one of the ‘several kinds of actual disturbances of the peace’. An assault was a disturbance of the peace ‘committed by one or two persons’; an affray was a disturbance that required ‘a great number’: (William Hawkins (and Thomas Leach (ed)), *A Treatise on the Pleas of the Crown; or, A System of the Principal Matters Relating to the Subject, Digested under Proper Heads* (Lynch, 1788, 6<sup>th</sup> ed) vol 1, 263). On the movement of the criminal law away from organisation around the King’s peace in the eighteenth century, see Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (OUP, 2016) 67.

reinforced in the commission of the peace where assaults and batteries are described as ‘properly and directly against the peace’.<sup>7</sup>

In the 1785 edition of Burn’s Justice of the Peace, the law of assault was described in this way:

Assault...is an attempt or offer, with force and violence, to do corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one’s fist at him; or by any other such like act, done in an angry, threatening manner.<sup>8</sup>

A brief statement of principle is followed by specific illustrations. Similarly battery was defined as:

when any injury whatsoever, be it never so small (sic), is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like.<sup>9</sup>

Affray was described as ‘a publick [sic] offence to the terror of the king’s subjects; so called (according to Lord Coke) because it affrighteth and maketh men afraid.’<sup>10</sup> Words alone did not constitute an affray, but they empowered a constable to take the person who had spoken them ‘before a justice in order to find sureties [of the peace].’<sup>11</sup> There could be an affray without violence, such as ‘where a man arms himself with dangerous and unlawful weapons, in such a manner as will naturally cause a terror to the people’; but the wearing of arms without circumstances of terror was not an affray.<sup>12</sup> A person’s status was a key aspect of determining liability for affray, for ‘persons of quality are in no danger of offending against this statute.’<sup>13</sup>

### ***From the Mid-Nineteenth Century to the Turn of the Twentieth Century***

Towards the middle decades of the nineteenth century in NSW there was a social shift away from tolerance of interpersonal violence. A similar shift took place in England towards the end of the eighteenth century and has been identified as part of a longer-term ‘civilising’ process dating

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<sup>7</sup> Burn (1754, 1785 ed), above n 4, vol 3, 16.

<sup>8</sup> Ibid vol 1, 111.

<sup>9</sup> Ibid 112.

<sup>10</sup> Ibid 16.

<sup>11</sup> Ibid 17.

<sup>12</sup> Ibid 18.

<sup>13</sup> Ibid.

from the sixteenth<sup>th</sup> century.<sup>14</sup> In early nineteenth century England, in the context of the Victorian concern with respectability, the criminal law began to contribute to the shaping of social attitudes towards violence by reducing capital and corporal punishment. At the same time the reach of the criminal law was extended through the increased use of the summary form,<sup>15</sup> the creation of a hierarchy of offences with commensurate penalties, and the development of alternative forms of punishment, such as the penitentiary.<sup>16</sup> Farmer has argued that the criminal law played a central role in the ‘invention’ of violence, a core component of which was a ‘developing normative understanding of the inviolability of the person.’<sup>17</sup> A similar normative development is discernible in NSW. It is explained in part by the fact that Victorian-era morals had made their way to the Antipodes;<sup>18</sup> but the concern about respectability was also a product of the local context — the interrelated desires to shed the colony’s convict past (the ‘convict taint’) as transportation was abolished, to attract more free settlers to the colony, and to increase the colony’s prosperity.<sup>19</sup>

In these changing social conditions, prosecutions for assault began to increase, and this precipitated the formalisation of the law of assault. The structure and content of the current law of assault in NSW, which includes both indictable offences and those that are triable either way, is based on ‘a hierarchy of offences against the person’ that was developed between 1803 and 1861 in England.<sup>20</sup> While this process began in 1803, my analysis indicates that the enactment of *Lord Landsdowne’s Act* in 1828 (which applied in NSW)<sup>21</sup> was a significant moment in the

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<sup>14</sup> Farmer, *Making the Modern Criminal Law*, above n 6, 235 citing Martin J Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (Cambridge University Press, 2006) 12.

<sup>15</sup> Farmer, *Making the Modern Criminal Law*, above n 6, 239.

<sup>16</sup> Martin J Wiener, *Reconstructing the criminal: Culture, Law, and Policy in England, 1830-1914* (Cambridge University Press, 1990) 11–12.

<sup>17</sup> Farmer, *Making the Modern Criminal Law*, above n 6, 235.

<sup>18</sup> Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983) 7.

<sup>19</sup> *Ibid* 7–8.

<sup>20</sup> Phil Handler, ‘The Law of Felonious Assault in England, 1803–61’ (2007) 28(2) *Journal of Legal History* 183. Handler shows that as the legislature attempted to rationalise the law of assault between 1803 and 1861, trial practices undermined these efforts at statements of general principle, at 183. When NSW criminal law was consolidated in 1883, the law of assault was based on the English *Offences against the Person Act 1861*: Arlie Loughnan, ‘“In Accordance with Modern Notions”: Criminal Responsibility at the Turn of the Twentieth Century’ in Arlie Loughnan and Thomas Crofts (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 163.

<sup>21</sup> *Australian Courts Act 1828* (9 Geo. IV, c. 83), s 24 which provided that all ‘laws and statutes in force in England at the time of the passing of the Act were to be applied in the colonial courts’ except those laws that were inconsistent with any law already in operation: Alex Castles, *An Australian Legal History* (Law Book, 1982) 397.

formalisation and modernisation of the law of assault. *Lord Lansdowne's Act*,<sup>22</sup> the official title of which was the *Offences against the Person Act 1828* (UK), was one of a series of reforms introduced between 1825 and 1828 to simplify and consolidate criminal law and procedure. John Plunkett, a lawyer practising in NSW, authored the first edition of *The Australian Magistrate*, which was published in 1835. He interpreted the reason for passing *Lord Lansdowne's Act* as being merely to reduce cost and improve efficiency.<sup>23</sup> Peter King regards the Act as of little moment as it 'was directly [sic] mainly at the magistrates in Petty Sessions and did little more than formalise existing practice by empowering two justices "to hear and determine" assault cases and impose fines of up to £5'.<sup>24</sup> (If the offender defaulted on paying the fine, magistrates could imprison the offender for a maximum of 2 months.)<sup>25</sup> However, these interpretations underplay the fact that placing the power of magistrates to deal with common assault on a statutory footing is an instance of juridification because it represents an attempt by Parliament to assert the authority of statute and to stamp out informal practices by placing limits on discretionary power.

Prior to the enactment of *Lord Lansdowne's Act*, magistrates in England disposed of assault matters informally, committing, it was estimated, 'scarcely a fiftieth part of the assault cases that come before magistrates in their private houses' for trial in the higher courts.<sup>26</sup> Two factors combined to encourage such informality: penalties for assault dealt with on indictment were still harsh at this time, so disposing of matters informally circumvented those penalties; and magistrates had no power to impose penalties for assault in the summary jurisdiction.<sup>27</sup> The most common outcomes before magistrates were settlement of the dispute or binding the offender over to keep the peace.<sup>28</sup> There is a suggestion that the only matters sent before a jury

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<sup>22</sup> So-called after Lord Lansdowne who introduced the Act into the House of Lords.

<sup>23</sup> John Plunkett, *The Australian Magistrate or A Guide to the Duties of a Justice of the Peace for the Colony of New South Wales* (Anne Howe, 1835) 26–7 where he says the Lansdowne Act was passed 'in consequence of the increased number of assaults and the expenses of prosecuting them...'

<sup>24</sup> King, 'Punishing Assault', above n 3, 61.

<sup>25</sup> *Lord Lansdowne's Act* s 27.

<sup>26</sup> 'Substance of an Act for Consolidating and Amending the Statutes in England Relative to Offences against the Person, Now under Consideration of Parliament' (1828) 1(1) *Law Magazine and Review: A Quarterly Review of Jurisprudence* 129, 139.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* 140.

were those where the magistrate or ‘an influential neighbour’ sought to make an example of the offender.<sup>29</sup>

By giving magistrates the power to impose penalties for assault, it was intended that these informal practices be abolished. The extension of summary jurisdiction was also designed to remove ‘trivial’ matters from the Courts of Quarter Sessions,<sup>30</sup> and provide access to justice to people of limited means.<sup>31</sup> The combination of a centralising police force that was gradually assuming responsibility for prosecution, and an emerging ‘humanitarian sensibility’ among the middle classes, led to an increase in prosecutions for assault. *Lord Lansdowne’s Act*, which formalised the power of magistrates to impose punishments for assault, enabled an ‘increasing number of assaults [to] be tried summarily’.<sup>32</sup>

Due to a lack of records, and the multiple factors impacting on recorded crime rates, it is difficult to gauge the impact of *Lord Lansdowne’s Act* in NSW but there are reasons to think that the number of assaults finalised summarily (formally rather than informally) increased. As seen in chapter 2, during this period in NSW it was common for magistrates to dispose of matters informally and they frequently exceeded their sentencing jurisdiction.<sup>33</sup> The magistrates’ treatises published before and after the enactment of *Lord Lansdowne’s Act* provide some indication that prosecutions for assault in the summary jurisdiction were increasing. The 1825 edition of Burn’s *Justice of the Peace* (‘Burn’), an English publication, was the only treatise written specifically for magistrates that was available in the NSW colony between 1825 and 1835 when Plunkett authored *The Australian Magistrate*. The section in Burn on assault and battery is brief. It sets out the definitions of assault and battery followed by one and a half pages of examples of when assault and/or battery will be justified.<sup>34</sup> The first edition of *The Australian Magistrate* was based on Burn but was supplemented by relevant cases from the Australian colonies. It replicated Burn’s definition of assault and then set out the provisions of *Lord Lansdowne’s Act*. No examples were provided. By the third edition of *The Australian*

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<sup>29</sup> Ibid 140.

<sup>30</sup> Ibid 139.

<sup>31</sup> Lisa Surridge, ‘On the Offences against the Person Act, 1828’ *BRANCH: Britain, Representation and Nineteenth-Century History* <[http://www.branchcollective.org/?ps\\_articles=lisa-surridge-on-the-offences-against-the-person-act-1828](http://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offences-against-the-person-act-1828)> citing an anonymous letter by a magistrate.

<sup>32</sup> Farmer, *Making the Modern Criminal Law*, above n 6, 238.

<sup>33</sup> Above Chapter 2, nn 23, 24.

<sup>34</sup> Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, first published 1754, 24<sup>th</sup> ed, 1825) vol 1, 226–229.

*Magistrate*, published in 1847, the section on assaults and batteries had been greatly expanded, including an extended discussion of the requirement of proportionality in justified assaults and summaries of cases that provided examples of particular factual scenarios.<sup>35</sup> By 1881, the discussion of examples was divided into cases falling within the summary jurisdiction,<sup>36</sup> and those that were dealt with on indictment.<sup>37</sup> This expanding treatment of assault in the treatises over this period is evidence of the increasing numerical profile of assault offences in the summary jurisdiction at this time—both those that were finalised summarily, and those that magistrates committed for trial.

By contrast with the increasing examination of assault in the treatises, the material on affray was shrinking. The 1835 edition of *The Australian Magistrate*, reproduced the definition of affray from Burn over one and a half pages. By 1866, the entry on affray had diminished to just five lines stating that it was a misdemeanour at common law and was defined as ‘[t]wo or more fighting in some public place, to the terror of the people’.<sup>38</sup> The only options available to magistrates in relation to a charge of affray were to commit the accused for trial for assault or affray, or bind them over to keep the peace.<sup>39</sup> This limited treatment of affray suggests the offence was seldom charged, and if charged, seldom committed for trial during this period. Given the dearth of records it is not possible to determine whether, and if so, how frequently, magistrates dealt with affray informally or bound accused persons over to keep the peace.

Alongside vertical criminalisation, horizontal criminalisation in the mid-nineteenth century was also contributing to the formalisation of responses to interpersonal violence. This is best illustrated by the adoption in NSW in 1854 of the English *Aggravated Assaults on Women and Children Act* enacted by the British Parliament in 1853.<sup>40</sup> In response to concerns about violence against women and children, the British Parliament expanded the jurisdiction of magistrates to deal with family violence in 1853. They did so by adding an offence of aggravated

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<sup>35</sup> Edwin Suttor, *Plunkett's Australian Magistrate* (WA Coleman, 1847) 32–33.

<sup>36</sup> William Hattam Wilkinson, *The Australian Magistrate* (George Robertson, 1881) 39.

<sup>37</sup> *Ibid* 41.

<sup>38</sup> William Hattam Wilkinson, *Plunkett's Australian Magistrate* (JJ Moore, 1866) 5.

<sup>39</sup> *Ibid* 5.

<sup>40</sup> *Aggravated Assaults Act 1853*, 16 Vict c 30.

assault with a higher maximum penalty than common assault to the summary jurisdiction.<sup>41</sup> The *Aggravated Assaults on Women and Children Act 1854 (NSW)* ('*Aggravated Assaults Act NSW*') instructed magistrates to make use of the provision when of the opinion that the assault was of such a nature that the punishment prescribed in the *Lansdowne Act* (£5 and in default, a maximum of 2 months imprisonment) was insufficient.<sup>42</sup> The *Aggravated Assaults Act NSW* augmented the sentencing powers of magistrates in two ways: it empowered magistrates to impose a maximum sentence of six months with or without hard labour for aggravated assaults (or a fine of up to £20); and magistrates could choose between imprisonment and a fine in the first instance. The following year, in 1855, the NSW Parliament expanded the power to choose between imprisonment and a fine to 'all cases of summary convictions for assault'.<sup>43</sup> In this way, recognition of a category of harm being suffered by a particular class of victims, namely women and children, led to horizontal criminalisation and pushed forward the development of the summary jurisdiction.<sup>44</sup>

Prosecution practices under the new aggravated assault provision differed from those for common assault because they were designed to improve access to justice for victims of domestic violence. They were designed to overcome one of the main disincentives to having recourse to the criminal law, which was, the fear of reprisals from the perpetrator for initiating charges. For common assault the aggrieved person was required to bring the complaint,<sup>45</sup> and justices were not empowered to convict and impose a penalty where the complainant asked the court merely to bind the offender over to keep the peace.<sup>46</sup> By contrast, a prosecution for aggravated assault could be brought 'either upon the complaint of the party aggrieved or otherwise'.<sup>47</sup> This provision is important because it enabled women who were victims of domestic assaults to distance themselves from responsibility for the decision to initiate charges. I return to this theme

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<sup>41</sup> *An Act for the Better Prevention and Punishment of Aggravated Assaults upon Women and Children and to Amend the law Respecting Recognisances to Keep the Peace or for Good Behaviour 1854 (NSW)* is passed [18 Vic. No.9] ('*Aggravated Assaults on Women and Children Act 1854 (NSW)*').

<sup>42</sup> Indecent acts without physical violence also fell within the aggravated assault provision indicating that the aggravated assault provision was being interpreted broadly: Wilkinson, *Plunkett's Australian Magistrate* (1881), above n 36, 41 citing *Ex parte Jones*, 1 Knox, 263.

<sup>43</sup> *Police Act 1855 (NSW)* s 22.

<sup>44</sup> On recognition of women as a class of victims in England see Farmer, *Making the Modern Criminal Law*, above n 6, 244, 249–251.

<sup>45</sup> William Hattam Wilkinson, *Plunkett's Australian Magistrate* (JJ Moore, 1860) 24 citing *Lord Lansdowne's Act 1828*, 9 Geo IV, c 31, s 27.

<sup>46</sup> *Ibid* 24 citing *R v Deny*, 20 L.J.M.C, 189.

<sup>47</sup> *Ibid* 25, citing *Aggravated Assaults Act NSW 1854 (NSW)*, s 1.

of changes to prosecution practices that have facilitated the criminalisation of domestic violence in Chapter 7.

The law of assault was consolidated in 1883 but not rationalised, leaving the jurisdictional allocation of assault offences in a state of confusion, a situation that persisted for more than a century. As explained in Chapter 1, the *Criminal Law Amendment Act 1883* (NSW) ('the 1883 Act') divided offences into 'families', such as 'offences against the person', 'larceny and similar offences' etc. At the end of the part of the 1883 Act on each offence family was a section that listed the offences that were 'punishable by justices'. The 1883 Act closely followed the classification system and content of the *Offences against the Person Act 1861* (UK) in relation to assault offences.<sup>48</sup> The 1883 Act prescribed the punishment for common assault finalised summarily (imprisonment for a maximum term of three months or a maximum fine of £10, or up to six months imprisonment or a maximum fine of £20 for an aggravated assault upon women, or boys under 14) but left its definition to the common law.<sup>49</sup> In doing so, it preserved the pre-existing jurisdiction of magistrates over common assault and aggravated assaults,<sup>50</sup> and the requirement that magistrates commit such assaults for trial where they found them to have been 'accompanied by an attempt to commit felony or ... *from any other circumstance* ... [it is] a fit subject for prosecution by indictment'.<sup>51</sup> This provision gave magistrates a broad discretion to commit matters for trial.

### ***From the Turn of the Twentieth Century to the Final Quarter of the Twentieth Century***

The jurisdictional allocation of assault and the maximum penalties that could be imposed summarily did not change between 1883 and the final quarter of the twentieth century. In light of the fact that the reclassification mechanism emerged in 1891, and that Parliament had been expanding summary jurisdiction in relation to assault since 1828, how can this century of inertia be explained? A development of the summary jurisdiction that took place in 1924 provides a clue to this puzzle. In the post-World War I period, as part of the first of three major overhauls of the criminal law undertaken in NSW in the twentieth century,<sup>52</sup> the NSW government partially

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<sup>48</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 17 April 1883, 1533 (Sir Alfred Stephen).

<sup>49</sup> *Criminal Law Amendment Act 1883* (NSW) s 65.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* s 66 (emphasis added).

<sup>52</sup> As discussed in Ch 1 of this thesis the second was in 1974 and the third was from the mid-1980s to the mid-1990s.

rationalised the jurisdictional allocation of offences. The changes were minor but significant because it was the first time that the reclassification mechanism was used to increase the number of offences that could be finalised summarily *with* the consent of the accused by adding them to a reclassification provision in the *Crimes Act*. This reform is an instance of vertical criminalisation, so why was assault not included?

In the early 1920s the NSW government was faced with high unemployment, a deteriorating economic situation, and rising recorded crime rates. There was much speculation in the parliamentary debates on the 1924 changes to the *Crimes Act* about the causes of the increase in recorded crime, such as the after-effects of the war, unemployment, and a more efficient and effective police force.<sup>53</sup> While the causes were debatable, it was clear that both the magistrates courts and the Courts of Quarter Sessions were processing a higher number of cases than ever before in the twentieth century, and the numbers had been increasing steadily for more than a decade. For example, committals by magistrates to the court of quarter sessions had doubled since 1918,<sup>54</sup> and the number of trials being run in the Courts of Quarter Sessions had doubled since 1913.<sup>55</sup> There had been similar increases in the number of matters finalised summarily.<sup>56</sup> Faced with increasing delays in the Courts of Quarter Sessions the government framed the debate around two possible solutions: either incur the expense of employing more judges in the Courts of Quarter Sessions in straitened economic times; or permit more cases to be finalised summarily.

At this time, there was no rational basis for the jurisdictional allocation of offences. One of several examples given in the parliamentary debates on the 1924 amendments illustrates the irrationality: if a ‘man’ had stolen a dog he could — without his consent — be tried by a magistrate, but a man who had stolen a cat could *not* — without his consent — be tried by a magistrate.<sup>57</sup> The government proposed to rid the criminal law of several such anomalies. Premier Bannon said repeatedly, ‘[w]e are rectifying anomalies of that kind [i.e., the cat and dog

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<sup>53</sup> See eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 1923, 1704-1708 (Mr Bavin).

<sup>54</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 1923, 1707 (Mr Bavin).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* 1706.

<sup>57</sup> *Ibid* 1711.

scenario set out above] and that is all we are doing.’<sup>58</sup> Nevertheless, much concern was expressed in the parliamentary debates that increasing the number of offences that could be finalised summarily *without* the consent of the accused would erode the foundational democratic institution of trial by jury.

The power of the legitimisation function served by the jury trial at this time is evident in the government’s awareness that the need for a more rational criminal law was not sufficient to justify changes that effectively restricted access to trial by jury. It therefore listed several further justifications. It pointed out that a ‘very large number’ of those matters committed for trial were matters of ‘trifling’ dishonesty,<sup>59</sup> the implication being that they did not require the attention of the Courts of Quarter Sessions. It also noted that approximately 50 per cent of matters that were committed for trial resolved by way of a plea of guilty.<sup>60</sup> Of those matters that went to trial, approximately 40 per cent resulted in an acquittal.<sup>61</sup> Based on these justifications the government reclassified several strictly indictable offences by creating a provision that contained all of the offences in the *Crimes Act* that were to be dealt with summarily *without* the consent of the accused (s 501).<sup>62</sup>

This is the first time this provision (which I call the ‘*without* consent’ provision or jurisdiction) makes an appearance as a provision of general application, rather than one attached to individual offences, in the criminal law of NSW. A general sentencing jurisdiction of 12 months imprisonment or a fine of £50 pounds was attached to the provision. These developments are best understood as rationalisation, but there were restrictions. The without consent jurisdiction could only be exercised by two stipendiary or police magistrates; it could not be exercised by honorary magistrates, nor could it be exercised by magistrates sitting alone.

The list of offences that could be finalised summarily *with* the consent of the accused was, by this time, in s 476 of the *Crimes Act* (which I call the *with* consent provision or jurisdiction). No further offences were added to the with consent jurisdiction in 1924. Assault

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid 1710.

<sup>60</sup> Ibid 1712.

<sup>61</sup> Ibid 1709.

<sup>62</sup> The government repealed s 501 as it existed in the 1900 version of the *Crimes Act 1900* (NSW) (i.e., unlawfully using another person’s cattle) and replaced it with a section of general application that reclassified strictly indictable offences as capable of being finalised summarily *without* the consent of the accused.

was not included in the rationalisation process and therefore was not included in either section despite the fact that in some circumstances, as explained above, it could be finalised summarily.

The concern expressed about preservation of access to trial by jury in the parliamentary debates on the 1924 changes to the *Crimes Act* accounts for the minimal expansion of the summary jurisdiction in the 1924 overhaul of the criminal law. There were compelling economic reasons for moving offences from the expensive Courts of Quarter Sessions to the cheaper magistrates' courts and yet parliament reclassified very few offences and excluded assault from the rationalisation process. This hints at the possibility that there is more to the expansion of the summary jurisdiction than a trade-off between the rights of the accused and economic rationalism. It was not until the final quarter of the twentieth century that due process concerns were satisfied in other ways as described elsewhere in this thesis. This explains why consent was required for common assault to be tried summarily until 1988, and why the use of the criminal law in summary form exploded in the final quarter of the twentieth century and not earlier.

### ***From the Final Quarter of the Twentieth Century to Present***

During the final quarter of the twentieth century the jurisdictional allocation of common assault was rationalised incrementally. It was done in three stages in 1974, 1988 and 1995. In 1974 Parliament reclassified several strictly indictable offences as capable of being finalised summarily by adding them to the *with* consent provision of the *Crimes Act* (which was still s 476).<sup>63</sup> As explained above, s 501 (the *without* consent provision) had been inserted in 1924, but several reclassified offences still existed outside of these two general provisions, including common and aggravated assault. The 1974 amendments reclassified, among other offences, the strictly indictable offences of assault occasioning actual bodily harm,<sup>64</sup> assault with intent to commit felony on certain officers,<sup>65</sup> and 'common assault prosecuted on indictment', by adding them to the *with* consent provision.<sup>66</sup> Attached to the list of offences was a provision of general application prescribing a maximum sentencing jurisdiction of 2 years imprisonment if tried

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<sup>63</sup> *Crimes Act 1900* (NSW) s 476(6) lists those offences.

<sup>64</sup> *Crimes Act 1900* (NSW) s 59.

<sup>65</sup> s 58. The maximum penalty for this offence was increased from 2 to 5 years: New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 2602 (Mr Dowd).

<sup>66</sup> *Crimes Act 1900* (NSW) s 61. This rendered the offence label confusing given that it could now be finalised summarily.

summarily (unless the term fixed by law was shorter), or a \$2,000 fine.<sup>67</sup> The *without* consent summary sentencing jurisdiction, on conviction before two justices, remained imprisonment for 12 months, as it had been prior to the 1974 changes, but the fine was increased to \$1,000.<sup>68</sup> This rearrangement of jurisdiction left duplicate summary common assault provisions: s 61 of the *Crimes Act*, confusingly titled ‘common assault prosecuted on indictment’, which could be finalised summarily *with* the consent of the accused and was punishable by a maximum of 2 years imprisonment;<sup>69</sup> and ‘common assault’,<sup>70</sup> which was a *without* consent summary offence (but was not included in the without consent provision), punishable by a maximum of six months imprisonment or a \$500 fine or both. The 1974 amendments therefore left a residue of inconsistency.

By the late 1980s the conditions that made the increasing use of the criminal law in summary form possible were taking hold. As seen in Part II of this thesis, the summary jurisdiction was experiencing lawyerification. Courts of Petty Sessions had been abolished and replaced with Local Courts. The magistracy had gained independence from the Public Service, it was becoming increasingly professionalised, and increasing numbers of magistrates were gaining legal qualifications. The introduction of large-scale government-funded legal aid in the mid-to-late-1970s had increased the number of defence lawyers appearing in the Local Courts, and the ODPP, which had been created in 1986, was taking carriage of a number of triable either way matters. In this context, in 1987 the NSWLRC tabled a report on crippling delays within the criminal justice system.<sup>71</sup> The fact that the government of the day made it an election promise in the upcoming 1988 election to reduce delays and increase the efficiency of the criminal justice system reflects the high social profile of this issue.<sup>72</sup> Members of Parliament were also concerned about an increase in the reported crime rates for offences against the person in the

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<sup>67</sup> s 476(7)(a), (b).

<sup>68</sup> s 501(1). These offences were a ‘grab bag’ of old minor larcenies and larceny-like offences that were no longer a problem in contemporary society, such as stealing cattle (a serious offence in colonial times), stealing dogs, stealing metal, glass, wood etc fixed to houses or land, etc; offences that had been created because of the difficulty of proving the elements of larceny.

<sup>69</sup> *Crimes Act 1900* (NSW) s 476(6)(d). In 2002 the Supreme Court of NSW confirmed that it is not the 2-year punishment that renders it a summary offence, rather, it is Parliament’s classification of it as such: *R v Fisher* (2002) 54 NSWLR 467.

<sup>70</sup> s 493.

<sup>71</sup> New South Wales Law Reform Commission (‘NSWLRC’), *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals for Reform*, Discussion Paper No 14 (1987) vol 1-2.

<sup>72</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 1988, 3467 (EP Pickering).

period 1987-8,<sup>73</sup> and there had been a spate of riots in Redfern, Bathurst, as well as Bourke and other parts of western NSW.<sup>74</sup> In response to this constellation of circumstances the government proposed the rationalisation of the jurisdictional allocation of assault, the abolition of the strictly indictable common law offences of riot, rout and affray, and the creation of statutory offences of riot and affray that were to be placed in the *with* consent summary jurisdiction.

The 1988 amendments can be readily interpreted as evidence that formalisation had created conditions that enabled Parliament to undertake further vertical criminalisation. Parliament repealed ss 493 (common assault) and 494 (aggravated assaults) and reclassified ss 58 (assault with intent to commit felony on certain officers), 59 (assault occasioning actual bodily harm) and 61 (common assault prosecuted in indictment) from *with consent* summary jurisdiction to *without consent* summary jurisdiction.<sup>75</sup> It placed those offences into a new s 495 titled ‘Indictable offences punishable summarily without consent of accused: assaults’. Not only could these offences be finalised summarily without the consent of the accused, but they no longer required the attention of two magistrates; they could be finalised by ‘a Magistrate sitting alone’.<sup>76</sup> For reasons that are unclear, the amendments retained the summary sentencing distinction between ss 58 and 59 on the one hand (2 years or a \$5,000 fine or both)<sup>77</sup> and s 61 (common assault prosecuted in indictment) on the other (12 months or a fine of \$1,000 or both), preserving a pre-existing irrationality.<sup>78</sup> The overall effect of these amendments was to remove the accused’s ability to request a jury trial for these offences — the discretion to commit for trial resided solely with the magistrate.<sup>79</sup>

### ***The Formalisation of Affray***

The conditions discussed above that were amenable to vertical and horizontal criminalisation in relation to assault also enabled Parliament to undertake the vertical criminalisation of riot and

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<sup>73</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 1988, 3499 (Mr Newman).

<sup>74</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 1988, 3503 (Mr Dowd).

<sup>75</sup> *Crimes (Amendment) Act 1988* (NSW). Assented to 6 December 1988. Section 56 (assault on clergy) was also reclassified in this manner.

<sup>76</sup> The Magistrates chapter traces this move from two magistrates to one: *Crimes Act 1900* (NSW) s 495(1).

<sup>77</sup> *Crimes Act 1900* (NSW) s 495(3). Note that the penalty for s 58, assault with intent to commit felony on certain officers, prosecuted on indictment was increased from 2 years to 5 years because the government believed the reform was ‘much needed’: *Crimes (Amendment) Act 1988* (NSW) sch 4; New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 2602, (Mr Dowd).

<sup>78</sup> *Crimes Act 1900* (NSW) s 495(2).

<sup>79</sup> As discussed in Chapter 1, this discretion was removed from magistrates in 1995 and transferred to the parties.

affray. While it is necessary to consider riot because of the lack of affray cases prior to 1988, and the similarity of the issues surrounding each offence, the focus of this chapter is on affray because of its relationship with assault. Vertical criminalisation in this context comprised two steps. The first was to abolish the common law offences of ‘riot, rout and affray’<sup>80</sup> and replace them with statutory offences of riot and affray in ss93A-D of the *Crimes Act* (rout was abolished).<sup>81</sup> These provisions were based on law reform reports from the UK, in particular the ‘Law Commission Report on Criminal Law: Offences Relating to Public Order’, and the United Kingdom *Public Order Act 1986*.<sup>82</sup> Until 1988 the common law offences of riot and affray had been strictly indictable in NSW, so the second step in the vertical criminalisation process was to add the new statutory offences to s 476(6)(d) of the *Crimes Act*, which placed them in the *with consent* summary jurisdiction.<sup>83</sup> They were classified as public order offences by inserting them into Part 3A of the *Crimes Act*: ‘Offences Relating to Public Order’, rather than Part 3, ‘Offences against the Person’.

It was the difficulty of securing a conviction against people charged with riot, rout and affray that prompted the government to replace the common law offences with statutory offences and to reclassify them.<sup>84</sup> This difficulty is illustrated by the fact that the offences were ‘not often charged’.<sup>85</sup> Indeed, the first known conviction for the ‘indictable common law offence of riotous assembly’ was recorded in 1987 even though the offence had existed in NSW since colonisation.<sup>86</sup> A case in point and catalyst for the changes to the law was when 95 persons were charged with riot in relation to the Easter Bathurst Australian Grand Prix motor cycle races in 1985. Conflict between police and motor cycle race attendees, who were part of a ‘motorcycle

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<sup>80</sup> *Crimes (Amendment) Act 1988* (NSW) sch 1. The common law offence of rout was not replaced.

<sup>81</sup> The *Crimes (Amendment) Act 1988*, sch 1(2) inserted ss 93B and 93C into the *Crimes Act 1900* (NSW). On the riots as a catalyst see, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 Nov 1988, 3388 (Ms Nori).

<sup>82</sup> For a discussion of the background to these amendments see *Colosimo v Director of Public Prosecutions* (2005) 64 NSWLR 645, 648; Jane Sanders and Elliot Edward, ‘Affray: What Is It, and what Is It Not?’ (2012) 36 *Criminal Law Journal* 368. For an exploration of the causes of the Bathurst riots precipitating the enactment of the provision see Chris Cunneen and Rob Lynch, ‘The Social-Historical Roots of Conflict in Riots at the Bathurst Bike Races’ (1988) 24(1) *Journal of Sociology* 5; and Chris Cunneen, *Human Rights and Equal Opportunity Commission, Aboriginal-Police Relations in Redfern: With Special Reference to the ‘Police Raid’ of 8 February 1990* (1990).

<sup>83</sup> In 1995, both offences were placed in Table 1 of the *Criminal Procedure Act 1986* (NSW), ‘indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise’.

<sup>84</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 2600 (Mr Dowd). Following the UK’s lead, the government abolished the offence of rout.

<sup>85</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 2600 (Mr Dowd).

<sup>86</sup> Cunneen and Lynch, above n 82, 25.

subculture’, at the bi-annual Bathurst motorcycle races had been occurring since the 1960s.<sup>87</sup> The clashes have deep historical roots in the distrust of the police in some segments of the working classes and resistance to state efforts to control working class leisure activities.<sup>88</sup> Prior to the 1988 amendments to the law of riot and affray, these ‘public order disturbances’ had been dealt with under ‘various summary public order offences’ punishable by a fine only.<sup>89</sup> However, in the 1980s the clashes ‘escalated to riot proportions’ and the NSW government responded punitively.<sup>90</sup>

In the parliamentary debates the government noted that ‘[c]onsiderable difficulties have arisen in the prosecution’ of the 95 accused mentioned above.<sup>91</sup> The government blamed the low charging and conviction rates on the uncertainty of the elements of the common law offences and their ‘onerous’ procedural and substantive requirements.<sup>92</sup> The government hoped that replacing the common law offences with statutory ones would make the law more certain and encourage the police to charge the offences more frequently.<sup>93</sup> The government also argued that the maximum penalty of life imprisonment was discouraging guilty pleas and was motivating defendants to put the state to the expense of a trial.<sup>94</sup> The 1987 case of *Anderson v Attorney-General (NSW)*, which arose out of the riots at Bathurst in 1985, exemplifies these obstacles to conviction. Justice McHugh, JA of the NSW Supreme Court noted that ‘[d]espite the antiquity of the offence, the precise elements of the offence of riot are not settled.’<sup>95</sup> The court held that for the accused to be guilty of riotous assembly the prosecution had to prove, beyond reasonable doubt, that all of them had been ‘present together’ and that ‘each of them had the intent to help each other’.<sup>96</sup> The court conceded that these elements placed ‘formidable, but not impossible, difficulties in the way of the Crown in the present case.’<sup>97</sup>

By the late 1970s, the definition of affray at common law in England was:

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid 5.

<sup>89</sup> Ibid 25–6.

<sup>90</sup> Ibid 5.

<sup>91</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 2600 (Mr Dowd).

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> *Anderson v Attorney-General for NSW* (1987) 10 NSWLR 198, per McHugh JA at 209.

<sup>96</sup> Ibid at 211.

<sup>97</sup> Ibid.

- (1) unlawful fighting or unlawful violence used by one or more persons against another or others; or an unlawful display of force by one or more public persons without actual violence;
- (2) in a public place or, if on private premises, in the presence of at least one innocent person who was terrified; and
- (3) in such a manner that a bystander of reasonably firm character might reasonably be expected to be terrified.<sup>98</sup>

Due to the dearth of NSW cases the common law definition in NSW at this time was uncertain. The statutory definition of the NSW offence of affray enacted in 1988 was:

- 93C(1) A person who uses or threatens unlawful violence towards another and whose conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety is guilty of affray and liable to penal servitude for 5 years.
- (2) If 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).
  - (3) For the purposes of this section, a threat cannot be made by the use of words alone.
  - (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
  - (5) Affray may be committed in private as well as in public.

The mental element was set out in s 99D(2):

A person is guilty of affray only if the person intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence.

The new statutory offences of riot and affray were placed in s 476 of the *Crimes Act*, the *with consent* provision. They were designed to complement a new summary offence of violent disorder that had been enacted in the same year.<sup>99</sup> The government described all of these new offences as a package of reforms that constituted a complete revision of the ‘law relating to public order’.<sup>100</sup> In 2005 the government increased the 5 years’ imprisonment maximum penalty for the new statutory offence of affray to ten years following another large-scale riot, the Cronulla race riot, which was sparked by anti-Muslim sentiments.<sup>101</sup> This increase in penalty exposes the political dimension of the jurisdictional allocation of offences. The fungibility of jurisdiction enables the government to increase the degree of moral condemnation attaching to a

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<sup>98</sup> Sanders and Edward, above n 82, 369 citing J C Smith, *Criminal Law by JC Smith and Brian Hogan* (Butterworths, 4<sup>th</sup> ed, 1978).

<sup>99</sup> *Summary Offences Act 1988* (NSW), s 28.

<sup>100</sup> New South Wales Parliament, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 2601 (Mr Dowd).

<sup>101</sup> *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) sch 2[3].

particular impugned behaviour whilst preserving the availability of summary jurisdiction. I explore this issue in more detail in the final part of this chapter below.

The number of affray charges finalised in the summary jurisdiction has increased exponentially, not since 1988 as might be expected, but rather, since the mid-1990s, and particularly since the late 1990s. Meanwhile, the numbers finalised on indictment have remained relatively low. Between 1993 and 2007 the number of affray matters finalised in the District Court increased only marginally, from 20 to 47,<sup>102</sup> while the number finalised summarily increased from 57 in 1994 to 2,166 in 2016.<sup>103</sup> How can this increase in summary finalisations be accounted for? Why did it take place from the mid-1990s and not from 1988? A fulsome answer requires empirical investigation, but the increase can be readily interpreted as a product, in part, of changes to police and prosecution practices resulting from the transfer of the power to choose the jurisdictional allocation of triable either way matters from the magistrate to the parties in 1995, a topic to which I now turn.

As explained in Chapter 1, the Table System was introduced in 1995. It removed the discretion to elect to have a trial on indictment from the magistrate and gave it, instead, to the parties.<sup>104</sup> The rationale for this transfer was twofold. First, the parties are in possession of the knowledge relating to the case, so it makes sense for them to be making the decision about the appropriate jurisdiction.<sup>105</sup> Second, it removed the problem of the magistrate, who is the tribunal of fact, being made aware of the accused's criminal history before deciding whether to proceed summarily. This transfer of power had a profound impact on charging and prosecution practices. Jane Sanders and Edward Elliot observe that the police frequently lay an affray charge as an alternative to an assault charge. This means that if the assault charge cannot be proven because, for example, the victim refuses to attend court to give evidence; the prosecution may nevertheless secure a conviction for affray.<sup>106</sup> Alternatively, defence lawyers may negotiate a plea of guilty to assault, which carries a lower maximum penalty than affray, in exchange for withdrawal of the affray charge; or the defence may negotiate a plea of guilty to affray on the

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<sup>102</sup> New South Wales Sentencing Council, 'An Examination of the Sentencing Powers of the Local Court in New South Wales' (New South Wales Sentencing Council, December 2010 ) 27.

<sup>103</sup> Source: NSW Bureau of Crime Statistics and Research.

<sup>104</sup> For Table 1 offences both the prosecution and defence have an election; for Table 2 offences only the prosecution has an election.

<sup>105</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995 118-9 (Mr Shaw).

<sup>106</sup> Sanders and Elliot, above n 82, 381.

understanding that the prosecution will not elect to have a trial on indictment. Securing a plea of guilty to affray in the summary jurisdiction limits the maximum penalty to two years' imprisonment. Prior to 1995 such negotiations were more difficult, if not impossible, because the magistrate made the decision about jurisdiction, and prior to the reclassification of affray as triable either way in 1988, affray could not be used as an alternative (or 'back-up') to summary assault charges at all.

There is anecdotal evidence that at trial the element of affray that the conduct be 'such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety' is assumed rather than proven, rendering convictions easier to secure.<sup>107</sup> Sanders and Elliot speculate that this is because of s93C(4), which states that '[n]o person of reasonable firmness need actually be, or be likely to be, present at the scene'. This may account for some of the increase in the number of convictions for affray, but the majority of offences are finalised by way of a guilty plea (the average is 60 per cent in the Local Court and 75 per cent in the District Court).<sup>108</sup> It is likely that the charge of affray, and the choice of jurisdiction in which it is to be finalised, have been used increasingly as bargaining chips in plea negotiations since the introduction of the table system in 1995. For these reasons criminalisation via the offence of affray has a horizontal dimension — a deliberate broadening of the offence definition — as well as a vertical dimension.

### *Use Weapon to Resist Arrest and Stalking*

The offence of 'use weapon to resist arrest' (s 33B of the *Crimes Act*) is a useful case study of the summary jurisdiction, not because it is prolific—the numbers finalised each year are low—but because it illustrates how vertical criminalisation operates in the post-1995 era and reveals an otherwise hidden political dimension to the jurisdictional allocation of offences.<sup>109</sup> Enacted as a strictly indictable offence punishable by ten years imprisonment in 1974 as part of the second major overhaul of the criminal law in the twentieth century, s 33B was reclassified as a Table 1 offence in 2002, which means it is to be finalised summarily unless either the prosecution or the

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<sup>107</sup> Ibid 378–81.

<sup>108</sup> NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (2017) [http://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats\\_archived.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats_archived.aspx).

<sup>109</sup> *Crimes Act 1900* (NSW) s 33B.

accused elect to have a trial on indictment.<sup>110</sup> Since then the numbers finalised in the Local Court have increased from 76 in 2002 to 318 in 2016.<sup>111</sup> The reason the government cited for creating the offence was ‘[t]he recurrence of the “siege” situation [which] has pointed up the lack of any serious penalty for the random use of weapons to the danger of people generally, rather than of any particular person.’<sup>112</sup> It was designed to address problems of proof with s 33 of the *Crimes Act*, which contained the element ‘shoots at ... any person’.<sup>113</sup> Proving that ‘any specific person’ was ‘the intended target for the weapon’ was difficult and was a barrier to securing convictions.<sup>114</sup> In 1989 the maximum penalty for s 33B was increased from 10 to 12 years imprisonment.

Two aspects of the reclassification of the s 33B offence as triable either way reveal the hidden political dimension of the jurisdictional allocation of offences. The first relates to the politics of penalties. In 2001, just one year prior to the reclassification of s 33B, the government had created an aggravated ‘in company’ form of the offence with a harsher penalty of 15 years imprisonment. This was one of a number of amendments made to the criminal law to address ‘gang’ violence.<sup>115</sup> The Opposition had objected to the increased penalty quoting statistics which showed that prison sentences for the non-aggravated form of the offence were imposed in a minority of cases only and the maximum sentence had rarely been used.<sup>116</sup> There was no evidence, they said, that increased penalties were necessary. In response the government argued that the increase was designed to send a ‘clear message’ to the courts to impose more severe penalties.<sup>117</sup> Only 12 months later the non-aggravated form of the offence was reclassified as triable either way,<sup>118</sup> thereby limiting the maximum penalty to two years imprisonment if finalised summarily. The aggravated form, s 33B(2), remains, for the time being, strictly indictable. It is not possible to access records of the parliamentary drafting process, but the

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<sup>110</sup> Inserted into Table 1 by *Firearms Amendment (Public Safety) Act 2002* (NSW) sch3.1[2].

<sup>111</sup> Source: NSW Bureau of Crime Statistics and Research.

<sup>112</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 26 March 1974, 1831 (Mr Fuller).

<sup>113</sup> Section 33 read: ‘Whosoever maliciously by any means wounds or inflicts grievous bodily harm upon any person, or maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person, with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or any other person, shall be liable to penal servitude for life.’

<sup>114</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 26 March 1974, 1831 (Mr Fuller).

<sup>115</sup> *Crimes Act 1900* (NSW) s 33B(2) inserted by *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001* (NSW).

<sup>116</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 October 2001, 17938 (Mr Hartcher).

<sup>117</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 October 2001, 17519 (Mr Debus).

<sup>118</sup> Required to be finalised summarily unless the accused or the prosecution elects otherwise.

reason for the reclassification of the non-aggravated form of the offence is likely to have been the fact that the penalties being imposed in the District Court were within the sentencing jurisdiction of the Local Court.<sup>119</sup> The reclassification of this offence shows how the fungibility of jurisdiction enables Parliament to express ‘populist outrage’ and moral condemnation through high maximum penalties while preserving access to the summary jurisdiction, which facilitates criminalisation.<sup>120</sup> The second revealing aspect of the reclassification of this offence is that it was not discussed in the parliamentary debates. Similarly, newly drafted offences appear to be given a jurisdictional classification in the drafting process, which is often not debated.<sup>121</sup> This suggests that while jurisdictional allocation is sometimes contested in the parliamentary process, it is often dealt with administratively in the drafting of the bill in a process that escapes public scrutiny.

In a process that I conceptualise as horizontal criminalisation, several statutory offences have been introduced since 1988 to address newly recognised harms to the person. In his historical analysis of offences against the person in England, Farmer detects a shift from concerns about preserving the king’s peace to protection of the body of the person and, more recently, to protection of individual autonomy.<sup>122</sup> NSW has followed a similar trajectory via the creation of offences such as stalking,<sup>123</sup> which recognises mental harm, and ‘using a carriage service to menace, harass or cause offence’,<sup>124</sup> which expands personal autonomy to the virtual realm. In the final part of this chapter I examine the offence of stalking.

A statutory offence of stalking was created in 1993 and has been one of the fastest growing offence categories in the Local Court over the last decade and a half. The number of

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<sup>119</sup> This was why common assault was reclassified. See Chapter 2 above.

<sup>120</sup> On the enactment of ‘populist outrage’ see Julia Quilter, ‘Criminalisation of Alcohol-Fuelled Violence: One Punch Laws’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 82. On governments retreating into ‘an expressive mode’, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 110.

<sup>121</sup> Eg, new offences allocated to Table 1 include: intentionally causing a bushfire, *Crimes Act 1900* (NSW) s 203E, which prescribed a maximum penalty of 14 years, enacted by *Crimes Amendment (Bushfires) Act 2002* (NSW); and unauthorised computer access and function (‘hacking’) offences, *Crimes Act 1900* (NSW) ss 308C (where punishable by 10 years), 308D, 308E, 308F or 308G, enacted by *Crimes Amendment (Computer Offences) Act 2001* No 20.

<sup>122</sup> Farmer, *Making the Modern Criminal Law*, above n 6, ch 8.

<sup>123</sup> *Crimes Act 1900* (NSW) s 562AB, introduced in 1993. It has since been moved into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13. On the history of stalking see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) 602. See also Celia Wells, ‘Stalking: The Criminal Law Response’ (1997) *Criminal Law Review* 463.

<sup>124</sup> This is a Commonwealth offence: *Criminal Code Act 1995* (Cth) s 474.17.

stalking matters finalised in the summary jurisdiction has increased from 712 (0.39 per cent of a total of 179 276) in 2001 to 10, 489 (4.46 per cent of a total of 234 879) in 2016.<sup>125</sup> A BOCSAR Report in 2013 found that intimidation related to domestic violence, which is encompassed in the offence of stalking among other offences, is ‘driving the overall increase in intimidation observed in NSW over recent years.’<sup>126</sup> Stalking has also been the biggest cause of increases in the NSW prison population in recent years.<sup>127</sup> In 1999 Parliament made two amendments to the offence to expand it and address difficulties of proof. The first amendment was to include mental harm, and the second was to redefine the element of ‘intention to cause fear of personal injury’ as ‘knows that the conduct is likely to cause fear in the other person’.<sup>128</sup> The fact that convictions for stalking in the Local Court did not begin until 2001 despite the fact that it commenced operation in 1993 is evidence of the difficulty of proving the requisite mental element of the provision as it was originally drafted.

The jurisdictional trajectory of stalking shows how the jurisdictional allocation of offences can serve political purposes. The original penalty for stalking was 2 years imprisonment or a fine of 50 penalty units or both, which placed the offence in the summary only category.<sup>129</sup> In 1994, the maximum penalty was increased to 5 years imprisonment.<sup>130</sup> In the parliamentary debates the government said that reclassifying the offence as triable either way and increasing the penalty would ‘reflect the seriousness with which this type of behaviour is viewed and will provide an effective deterrent.’<sup>131</sup> In 1995, the offence was placed in Table 2 when the Table System was enacted,<sup>132</sup> which means that it must be finalised summarily unless the prosecution elects a trial on indictment.<sup>133</sup> There are two possible explanations for the upward trajectory of stalking; one practical and one normative. The practical explanation is that it represents

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<sup>125</sup> Source: NSW Bureau of Crime Statistics and Research.

<sup>126</sup> Emma Birdsey, NSW Bureau of Crime Statistics and Research, *Temporal Trends and Characteristics of intimidation*, Issues Paper No 83 (2013) 1. BOCSAR acknowledges that it is not possible to say whether the increase in intimidation is due to more instances of the behaviour in the community or a greater willingness by victims to report the behaviour to police.

<sup>127</sup> Don Weatherburn et al, NSW Bureau of Crime Statistics and Research, *Why is the NSW Prison Population Still Growing? Another Look at Prison Trends Between 2011 and 2015*, Issue Paper No 113 (2016) 5.

<sup>128</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(3). New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 1999, 3482 (Mr Whelan).

<sup>129</sup> *Criminal Procedure Act 1986* (NSW) s 6(c).

<sup>130</sup> *Crimes (Threats and Stalking) Amendment 1994* (NSW), sch 1.

<sup>131</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 1994, 5090, (Mr Hannaford).

<sup>132</sup> *Criminal Procedure Amendment (Indictable Offences) Act 1995* (NSW).

<sup>133</sup> *Criminal Procedure Act 1986* (NSW) s 260.

recognition by Parliament that stalking offences can involve complex issues of fact and evidence law that require the attention of the higher courts. The normative explanation is that although, even in its modern administrative guise, the summary jurisdiction is capable of conveying moral condemnation, as is seen in chapters 6 and 7, there are limits to its moral-condemnatory capacity. The factor that frequently persuades the prosecution to elect to have a trial on indictment is when the maximum sentencing jurisdiction of the summary jurisdiction (2 years imprisonment) does not reflect the seriousness of the offence.<sup>134</sup> The fungibility of jurisdiction enables Parliament to attach the moral condemnatory capacity of the higher courts to offences that are, in practice, finalised summarily, performing a normative or symbolic function that can be used for political purposes.

### ***Conclusion***

This chapter argued that formalisation is a useful concept for understanding the development of the offences of assault and affray. Rationalisation and juridification are the two most prominent dimensions here. This chapter depicted how rationalisation and juridification have facilitated both vertical and horizontal criminalisation, particularly since the final quarter of the twentieth century. Common assault is a paradigm example of this process. It was seen how *Lord Lansdowne's Act* placed the power of magistrates to finalise common assault on a statutory footing, a move that can be interpreted as juridification. It was also seen how, in a series of legislative changes that took place in 1974, 1988, and 1995, the jurisdictional allocation of assault finally settled into the category of triable either way offences, a process that can be interpreted as rationalisation. Changing social attitudes towards interpersonal violence supplied the catalyst for change, but rationalisation of the jurisdictional allocation of assault was not achieved before the late 1980s because the conditions that made it possible were just beginning to take hold by that time. Those conditions included the autonomy of the magistracy from the government and lawyerification. In the final quarter of the twentieth century the formalisation of the summary jurisdiction began to be seen as performing a legitimation function that was capable of being substituted for that formerly performed by the criminal trial for reclassified offences. However, formalisation of the law of assault has not resulted in the complete separation of law

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<sup>134</sup> Guideline 20 in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions* (2007) <<http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>> 37.

from politics; far from it. The politicization of the criminal law is well-known, but my analysis of the offence of ‘use weapon to resist arrest’ revealed a hidden political dimension of the jurisdictional allocation of offences that has escaped analysis.

## Chapter 6: Drink-Driving

Drink-driving is an illuminating case study in the summary jurisdiction because it shows how the dynamic interaction between changing social conditions and practices of procedure and proof pushed forward the development of the summary jurisdiction from a forum that deals primarily with ‘drunks’ and ‘fine defaulters’<sup>1</sup> to one that deals with offences that are considered to be ‘truly’ criminal. This notion of what is ‘truly’ criminal is a reference to the ‘moral distinctions’ that have traditionally been drawn between minor ‘mischief’ and ‘truly’ criminal behaviour, which, as mentioned in the Introduction, was one of the objections to the expansion of summary jurisdiction in the mid-nineteenth century.<sup>2</sup> Drink-driving offences constitute approximately 20 per cent of offences finalised every year in the NSW Local Court,<sup>3</sup> and yet while they have been the subject of intense scrutiny from sociologists and behavioural scientists, they have received little attention in Australian criminal law scholarship.<sup>4</sup> The offence of drink-driving provides a different perspective on the summary jurisdiction because, unlike assault and affray, it ‘grew up’ in the summary jurisdiction; it is younger, having arisen at the beginning of the twentieth century; and it has always been a summary only offence.

The law relating to drink-driving was the government’s response to a major new threat resulting from the development of the motor car. Parliament had options other than the criminal law with which to respond to this major new threat, such as regulation via the insurance industry or civil remedies, but it chose the criminal law in part because of its capacity to convey moral condemnation. Just as new technology created the threat, new technology has been the key to responses to the threat. The development of technologies of breath analysis, and the growth of bodies of expert scientific and social knowledge in relation to alcohol consumption have precipitated significant changes in criminal process.

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<sup>1</sup> Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney University Press, OUP, 1991) 133.

<sup>2</sup> Leon Radzinowicz and Roger Hood, *A History of English Criminal Law and its Administration from 1750* (Stevens & Sons, 1986) 619–620.

<sup>3</sup> Source: New South Wales Bureau of Crime Statistics and Research yearly court statistics <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats\\_archived.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats_archived.aspx)> (2014) 21.

<sup>4</sup> A notable exception is Julia Quilter et al, ‘Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of Intoxication in Australian Legislation’ (2016) 39 *UNSW Law Journal* 913.

This chapter argues that the most useful dimension of formalisation for understanding drink-driving is juridification. Juridification in this context incorporates the use of precise technology-derived rules that enable removal of more open-ended evaluative judgements, such as the degree of drunkenness, and the use of the appellate process to curb the sentencing discretion of magistrates. This chapter shows how the behaviour of drink-driving has been criminalised. It can be seen as an example of horizontal criminalisation. Here criminalisation means the turn to law (legislation) via the summary jurisdiction to respond to a major new threat of harm resulting from the technological development of the motor car. It includes not only changes to the substantive law, but also changes to enforcement practices. Attempts to make the criminal law more effective characterise the development of the substantive law and practices of procedure and proof in relation to drink-driving.

In contrast to the preceding chapters, in analysing change over time in this context, different chronological periods emerge from my research: from the early twentieth century to the 1960s; from the 1960s to the early 1980s; and from the early 1980s to present. The time periods in this chapter are different because change in the context of drink-driving has been the product of technological advances and the development of bodies of scientific and social knowledge.

At this point, some clarification of the terms used throughout this chapter is required. ‘Drink-driving’ is an umbrella term that is used to refer to all offences that criminalise driving with alcohol in the body. Since at least 1968 it has also encompassed occupying the driver’s seat of a motor vehicle and attempting ‘to put the vehicle in motion’.<sup>5</sup> ‘Driving under the influence’ (‘DUI’) was the first drink-driving offence in NSW. It was introduced in 1915 and remains in force today. Since then two further offences have been introduced: ‘Drunk or under the influence and incapable’ was introduced into the *Crimes Act* in 1929,<sup>6</sup> but was repealed in 1951. Driving with the prescribed concentration of alcohol in the blood (‘PCA’) was introduced in 1968 and is the offence upon which our current drink-driving offence regime is based. It exists alongside DUI.

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<sup>5</sup> See *Sheldrake v DPP* [2005] 1 AC 264. At the time of writing this offence was contained in the *Road Transport Act 2013* (NSW) s 110.

<sup>6</sup> s 526A.

### *From the Early Twentieth Century to the 1960s*

The first motor car was imported into New South Wales in 1900.<sup>7</sup> This new technology, which revolutionised transportation as the twentieth century progressed, was initially met with ambivalence. There was division in the community between motoring enthusiasts and those who were dubious about the new technology. Complaints by some members of Parliament about the nuisance of the noise and smell caused by cars were indicative of the ‘atmosphere of hostility’ in the broader community towards motor vehicles.<sup>8</sup> Other members of Parliament were anxious not to stifle the fledgling motoring industry with excessive regulation, as had happened in England.<sup>9</sup> These diverse imperatives presented a new challenge to the NSW government.<sup>10</sup>

It quickly became clear that motor cars were more than a mere nuisance; they also created a new threat of injury and death. In response to this new threat the NSW government, following moves in England and elsewhere, began to legislate to regulate the use of motor vehicles. Between 1900 and 1909 the regulation of motor vehicles was left to the Sydney City Council,<sup>11</sup> but in 1909 the NSW Parliament passed the first statute to regulate motor vehicles bringing NSW into line with ‘all countries where motor vehicles are now in the habit of being used.’<sup>12</sup> Using the English *Motor Car Act 1903* (UK) as a model, the enactment of the *Motor Traffic Act 1909* (NSW) (the ‘MTA’), was motivated by concerns with increasing numbers of motor accidents.<sup>13</sup> There was much discussion of drivers not stopping after an accident,<sup>14</sup> which led to the inclusion of the offence of failing to stop in the case of an accident.<sup>15</sup> A second purpose of the 1909 Act was to establish a registration scheme for motor cars. Motorists, who at this time were from the privileged classes, were feeling persecuted by over-zealous prosecutors, so they

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<sup>7</sup> Keith Winser, 'The Story of Australian Motoring: The Complete History of Motoring, from the First Horseless Carriages to Our Cars of Today' (1955) *Fortnightly Motor Manual* 88.

<sup>8</sup> Eg, New South Wales, *Parliamentary Debates*, Legislative Council, 5 Dec 1907, 1648–1649. For discussion see *ibid* 7.

<sup>9</sup> Eg, Mr Earp said that prejudice against motorists ‘was exhibited in England at the start of the Industry, and the result had been to drive the industry to the Continent, where manufacturers had obtained such a lead that it would take England a long time to overtake her competitors in that industry.’ New South Wales, *Parliamentary Debates*, Legislative Council, 10 December 1907, 1793–4 (Mr Earp). On early regulation see Roy Light, *Criminalising the Drink-Driver* (Dartmouth Publishing 1994) 12.

<sup>10</sup> And indeed to governments around the developed world. See, eg Light, above n 9, 12–13.

<sup>11</sup> Winser, 'The Story of Australian Motoring' above n 7, 99.

<sup>12</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 4 December 1907, 1551 (Mr Hughes).

<sup>13</sup> Indeed it was requested by the City Council and the Inspector-General of Police: *ibid*.

<sup>14</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1909, 1012.

<sup>15</sup> *Motor Traffic Act 1909* (NSW) s 8.

formed various ‘motorists’ protection societies’, one of which was the Royal Automobile Club of Australia, established in 1903.<sup>16</sup> These clubs became a strong lobbying force for legislative change. The MTA was parliament’s attempt to balance these diverse imperatives by regulating ‘motor traffic’ while avoiding creating a ‘vindictive measure for the suppression of motorists.’<sup>17</sup>

Early in the twentieth century it was recognised that the combination of drinking alcohol and driving a motor vehicle presented a particular threat of injury and death. In 1906 in England, where there had been a far greater number of cars for a longer period than in NSW, a Royal Commission on Motor Cars had recommended the creation of ‘a special penalty for being drunk when in charge of a car’, among other matters relating to road safety.<sup>18</sup> Despite this recommendation, a drink-driving offence relating specifically to ‘mechanically propelled’ vehicles was not enacted in England until 1925,<sup>19</sup> perhaps for fear of its potentially stifling effect on the motor car industry. By contrast, the NSW Parliament enacted a drink-driving offence in 1915. It was in these terms: ‘Any person who drives a motor vehicle while he is under the influence of intoxicating liquor shall be guilty of an offence under the Act’. This was the original DUI offence.<sup>20</sup> A provision in almost identical terms remains in our road traffic legislation today.<sup>21</sup> The penalty in 1915 was a maximum fine of £20 and the legislation gave courts the discretion to impose an additional penalty of licence suspension and/or disqualification ‘for such time as the court thinks fit’.<sup>22</sup> There was minimal discussion of the 1915 provision in the parliamentary debates. What little was said indicates that it was enacted to address the absence of an offence of driving ‘while under the influence of intoxicating liquor.’<sup>23</sup> By this time there was

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<sup>16</sup> Winsler, ‘The Story of Australian Motoring’ above n 7, 88; Shane Birney, *A Nation on Wheels: Australia and the Motor Car* (Dreamweaver Books, 1984) 42.

<sup>17</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 11 Dec, 1907, 1853 (Mr Winchcombe).

<sup>18</sup> Light, above n 9, 15.

<sup>19</sup> In England the first drink-driving offence was enacted in the Criminal Justice Act 1925 (UK), although there had been, since 1806, an offence of being “incapable of driving” by reason of “intoxication”. See *ibid* 2. ‘Drunken drivers’ had also been prosecuted under the *Licensing Act 1872* (35 & 36 Vict c 94). At 16. The *Criminal Justice Act 1925* (UK) s 40(1) read: ‘Any person who is drunk while in charge on any highway or other public place of any mechanically propelled vehicle shall, on summary conviction, be liable in respect of each offence to imprisonment for a period not exceeding four months or to a fine not exceeding fifty pounds [or both].’ At 16.

<sup>20</sup> *Motor Traffic Act 1909* (NSW) s 5(2), inserted by the *Motor Traffic (Amendment) Act 1915* (NSW).

<sup>21</sup> *Road Transport Act 2013* (NSW) s112.

<sup>22</sup> *Motor Traffic Act 1909* (NSW) s10(1).

<sup>23</sup> Mr Flowers who introduced the Bill into Parliament went on to say ‘It has been held that drunkenness cannot be adduced as an offence before a magistrate. It is not taken into account.’ New South Wales, *Parliamentary Debates*, Legislative Council, 11 Feb, 1915, 2427 (Mr Flowers).

growing recognition in England of a link between drink-driving and road accidents,<sup>24</sup> but the extent to which this knowledge was influential in Australia is unclear.

Traffic offences such as drink-driving had a profound impact upon the summary jurisdiction. By the immediate post-WWI period, breaches of traffic regulations constituted a substantial percentage of the matters heard by magistrates. The statistics reveal that 44 per cent of summary convictions were for offences against good order, and 41 per cent were for 'other offences', comprising breaches of local government (4425) and traffic (3798) regulations. These new offences had begun to 'change the traditional image of the magistrate's court', which had been seen as merely dealing with 'drunks' and 'fine defaulters'.<sup>25</sup> Contemporary statisticians did not consider traffic offences to be 'truly criminal',<sup>26</sup> and it has been argued that underlying this view of traffic offences in general, and drink-driving in particular, was the belief that 'to label such offences' as '*really* crimes' 'would be to criminalise the behaviour of the very people who make and enforce the laws.'<sup>27</sup> The view that traffic offences were not truly criminal was reinforced by the creation of a separate traffic court in Sydney in the 1920s.<sup>28</sup> By 1973 traffic courts had been established in the large regional centres of Gosford and Newcastle,<sup>29</sup> although beyond these highly populated centres traffic matters were dealt with in the ordinary courts of Petty Sessions. Magistrates presiding over traffic courts were on a lower Public Service grade than stipendiary magistrates sitting in the regular courts of Petty Sessions,<sup>30</sup> which further reinforced the non-criminal perception of traffic offences.

The remainder of the period from the late 1920s to the 1960s is characterised by several difficulties with rendering drink-driving amenable to regulation by the criminal law. These difficulties can be divided into two categories: practical and normative. There were three main practical problems: difficulties with the interpretation of the elements of drink-driving offences; difficulties with proof of drunkenness leading to confusion amongst the driving public about the level of intoxication that would result in a criminal conviction; and perceived leniency in

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<sup>24</sup> Light, above n 9, 14.

<sup>25</sup> Golder, above n 1, 133.

<sup>26</sup> Ibid 133.

<sup>27</sup> Ross Homel, 'Sentencing in Magistrates' Courts: Some Lessons from a Study of Drinking Drivers' in Mark Findlay, Sandra Egger and Jeff Sutton (eds), *Issues in Criminal Justice Administration* (Allen & Unwin, 1983) 109, 115.

<sup>28</sup> Golder, above n 1, 139 and 161.

<sup>29</sup> Ibid 179.

<sup>30</sup> Ibid 174.

sentencing. Underlying these practical difficulties was the normative debate about whether drink-driving was truly criminal. The following analysis suggests that there is a relationship between proof of drunkenness and the degree of wrongfulness attaching to the offence of drink-driving. The degree of difficulty of proving drunkenness goes to the degree of wrongfulness because it is relevant to knowledge that one is drunk.

### *Difficulties of Interpretation and Proof*

The practical criminalisation difficulties are illustrated by the introduction of a new drink-driving offence into the *Crimes Act* in 1929. It will be recalled from the discussion above that until 1929 the only drink-driving offence relating to motor vehicles was DUI under the MTA. Against a backdrop of an escalating road toll and alarm at the danger presented by ‘drunken men’ driving ‘these machines’ sometimes at ‘an excessive speed, and without regard to the safety of other people’,<sup>31</sup> the NSW government introduced an offence of being ‘drunk or under the influence and incapable’ into the *Crimes Act*. It read:

Any person who, while driving on any highway or other public place any mechanically-propelled vehicle, is drunk or being under the influence of intoxicating liquor is incapable of properly controlling such vehicle, shall, on conviction before two justices, be liable to imprisonment for a term not exceeding six months, or to pay a fine not exceeding fifty pounds, or to both such imprisonment and fine.<sup>32</sup>

Insertion of the new offence into the *Crimes Act* instead of the MTA may be interpreted as an indication that Parliament intended to mark it out as a criminal offence. The penalty was significantly harsher than for the offence of DUI. Because the MTA was designed primarily to regulate motor vehicles, placing the offence in the MTA would have given it the characterisation of a mere traffic violation. By inserting it into the *Crimes Act* Parliament (whether intentionally or not) had begun the process of attaching a degree of moral blameworthiness to the offence of drink-driving.

It was difficult to secure convictions for the new *Crimes Act* offence because its elements raised significant difficulties of both interpretation and proof. For instance, what did ‘drunk’ mean? How was it to be proven? Similarly, what does it mean to ‘be under the influence of intoxicating liquor’ or ‘incapable of properly controlling’ a vehicle? How were these elements to

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<sup>31</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 3 October 1928, 531 (Mr Boyce).

<sup>32</sup> *Crimes Act 1900* (NSW) s 526B(1) inserted by the *Crimes (Amendment) Act 1929* (NSW) s 12.

be proven? In drafting the new offence the NSW Parliament was mindful of the English provision, incorporated into the *Criminal Justice Act* in 1925, which made it an offence to be ‘drunk while in charge on any highway or other public place of any mechanically propelled vehicle...’, but the meaning of drunkenness and how it could be proven was obscure.<sup>33</sup> The NSW Parliament wished to avoid these difficulties of interpretation and proof.<sup>34</sup> The parliamentary debates reveal that there was a disjunction between the commonly understood meaning of drunkenness in the community and the level of drunkenness that was dangerous when driving. One MP told an anecdote about a King’s Counsel in Melbourne who, in an attempt to assist the court with a definition of drunkenness, quoted Thomas Love Peacock:

He is not drunk who from the floor,  
Can rise and drink, and ask for more;  
But drunk is he who prostrate lies,  
Without the strength to drink or rise.<sup>35</sup>

This appears to have been a popular refrain in the context of drink-driving at the time as it also appeared in an article in the *Maitland Weekly Mercury* titled ‘When is a man Drunk?’ in 1928.<sup>36</sup> More than an amusing anecdote, the repetition of this passage is indicative of the reliance on lay knowledge for proof of drunkenness and the anxiety in the community caused by the uncertainty of the tests used in court. As the author of ‘When is a man Drunk?’ wrote: ‘[i]n the popular mind the demarcation between sobriety and inebriety is vague and indeterminate.’ In the absence of breath analysis technologies and widely publicised guidelines promulgated by health experts, drivers relied on local newspaper accounts of drink-driving cases from the courts as a guide.<sup>37</sup>

Some commentators argued that the courts were applying a standard of drunkenness that was too high thereby encouraging people to drive in a state that presented an enormous danger to the public.<sup>38</sup> By way of contrast, some factions in the community thought the standard of drunkenness was too low. In a 1929 example, the National Roads and Motorists’ Association

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<sup>33</sup> s 40(1), see Light, above n 9, 16.

<sup>34</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1929, 3233 (Mr Ely).

<sup>35</sup> *Ibid.*

<sup>36</sup> ‘When is a Man Drunk’, *Maitland Weekly Mercury* (NSW), 16 June 1928, 13.

<sup>37</sup> See *ibid* and, eg, ‘Traffic Prosecutions: Cases in Court To-day’, *Barrier Miner* (Broken Hill, NSW) 27 January 1928, 1. On lay knowledge of drunkenness in drink-driving cases in North America see Ron Levi and Mariana Valverde, ‘Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness’ (2001) 26(4) *Law & Social Inquiry* 819.

<sup>38</sup> See, eg ‘When is a Man Drunk’, above n 36, 13.

(the 'NRMA') protested against the over-zealousness of a witness who was a medical practitioner:

One drink will not make a man drunk. Doctors should apply practical tests to themselves as to a man's sobriety. If a doctor is a teetotaler, he cannot judge whether a man is drunk or not." These remarks were made at Parramatta Court by Mr Kemp, defending a motorist who, after holding a license for 23 years, made his first appearance in court. The motorist was fined £15 and delicensed for six months for driving while drunk.<sup>39</sup>

In an attempt to address these problems, the NSW Parliament added the phrases 'being under the influence of intoxicating liquor' and 'is incapable of properly controlling such vehicle' when drafting the new *Crimes Act* offence, a move which, rather than removing the difficulties experienced in England, merely created new ones.

At the same time as these problems were being grappled with, the 1915 offence of DUI, which existed alongside the new 1929 offence of being drunk or under the influence and incapable, was also causing difficulties, and the confusion persisted for decades. A newspaper article in 1943 summarising successful appeals from the summary jurisdiction to the Court of Quarter Sessions under the MTA set out in detail the evidence led in one case in relation to the question of whether the appellant was 'under the influence':

Constable Swaddling ... noticed that the appellant's breath smelt strongly of intoxicating liquor. Appellant said he had had about six glasses of beer, the last about a quarter of an hour before ... At the police station appellant had been unsteady on his feet and the pupils of his eyes were dilated and his speech rather hesitant ... Up to the time that he approached the appellant in the car [the constable] had no reason to think that he was under the influence. He got out of the car quite well and walked quite well, but a little unsteadily to the police station. His eyes had been a little bleary, but his speech was quite intelligible, but a little hesitant. The car proceeded past him to the corner about 200 or 300 yards quite steadily and in a straight line... [Counsel for the appellant] took the view that anyone who had had liquor was to some extent under the influence ... [The appellant stated] he had had some drink but was not drunk. He was perfectly capable of driving the car.<sup>40</sup>

The article then reported the Court's decision:

His Honour said that he had no doubt that the appellant was under the influence and drove the car in that condition. Under the Section he did not have to show drunkenness, but that a defendant was under the influence. He agreed that there were degrees of 'under the influence', and in this case the degree was a slight one.

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<sup>39</sup> 'The Motor World: News and Notes from the NRMA', *Grenfell Record and Lachlan District Advertiser* (NSW) 7 November 1929, 5.

<sup>40</sup> 'Motor Traffic Act: Successful Appeals', *Riverine Grazier* (Hay, NSW) 13 April 1943, 4.

By 1951, after 14 years in operation, it had become clear that s 526B of the *Crimes Act* was not only unworkable but counterproductive. It was unworkable because the double requirements of proving that a driver was drunk or under the influence of intoxicating liquor *and* incapable of controlling the vehicle had rendered guilt under s 526B so difficult to prove that police preferred to prosecute DUI under the MTA despite its lower penalty.<sup>41</sup> Because the DUI offence was restricted to motor vehicles, s 526B was being used only in relation to drivers of vehicles other than motor cars, such as trams or trains.<sup>42</sup> As a result, s 526B had become ‘almost useless in the administration of justice’.<sup>43</sup>

Section 526B was counter-productive because the motoring public was confused about the difference between being ‘drunk or under the influence and incapable’ under the *Crimes Act*, and DUI under the *MTA*, and the permissible level of inebriation.<sup>44</sup> The parliamentary debates on the repeal of s 526B of the *Crimes Act* provide evidence that the disjunction between the commonly understood meaning of drunkenness and a level of drunkenness that was dangerous when driving had persisted into the 1950s. Parliament scolded the press for using the term ‘drunken driving’ as a label for the DUI offence under the MTA because it had led people to believe one was permitted to drive unless drunk, a word associated with a high degree of intoxication as discussed above.<sup>45</sup> The press was encouraged to use the term ‘drinking driving’ for the DUI offence to clear up the confusion.<sup>46</sup>

For all of these reasons, the government — with the agreement of the opposition — repealed s 526B of the *Crimes Act* and increased the penalty for DUI under the MTA from a fine and disqualification to a maximum sentence of six months imprisonment. Because s 526B had carried a maximum penalty of twelve months imprisonment, concern was expressed in the debates that its repeal represented an effective reduction of penalty from 12 to 6 months imprisonment, which would send a message to the public that drink-driving was not serious.<sup>47</sup>

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<sup>41</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4832 (Mr McCaw).

<sup>42</sup> *Ibid.*

<sup>43</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4850, (Mr Sheahan).

<sup>44</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4832 (Mr McCaw).

<sup>45</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4833 (Mr McCaw).

<sup>46</sup> Eg, ‘drunken’ v ‘drinking’: New South Wales, *Parliamentary Debates*, Legislative Council, 11 December 1951, 4934 (Mr Sommerland).

<sup>47</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4831 (Mr McCaw); New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4825 (Mr Bruxner, Chair of the Select Committee on Road Safety). The Hon Richard Thompson said ‘The government is entirely out of tune with

The government justified doing so on the basis that ‘real objects of the bill ... are primarily to deal with a social rather than a criminal problem,’<sup>48</sup> reflecting a broader shift in criminal justice from correctionalism to rehabilitation under the welfare state.<sup>49</sup> To this end there was some indication that alternative or complementary governmental strategies, such as education in schools about road safety, were being explored.<sup>50</sup> The government also introduced compulsory third party insurance alongside the development of the criminal law.<sup>51</sup> Underpinning this policy approach that sought solutions beyond the criminal law was a concern that increasing punitiveness was eroding the rule of law. Mr Sheahan warned honourable ‘[m]embers to beware lest they impair the temple of justice that has been built in this State, by attempting to “cash in” on current popular publicity.’<sup>52</sup>

### *Normative underpinnings of the difficulties of interpretation and proof*

The practical difficulties with criminalisation enumerated above can be understood as being underpinned by the normative debate about whether people convicted of drink-driving were ‘true criminals’<sup>53</sup>. This debate arose in the context of discussions about the perceived leniency of the penalties being imposed by the courts. Contemporary newspaper reports reveal how the debate manifested itself. For example, in the 1943 case mentioned above, the appellant, Ronald James Horton, was appealing against a penalty of £10 and an automatic licence disqualification of 12 months for an offence of driving under the influence to which he had pleaded guilty. Mr Horton was a grazier and a corporal in the Volunteer Defence Corps (‘VDC’). It was the drinks he had consumed following a VDC parade that had led to the DUI charge. Counsel for the appellant urged the court to take into account the evidence of good character and give him the benefit of a dismissal under s 556A of the *Crimes Act*. This provision, introduced in 1929, enabled the court, in cases concerning trivial offences where the offender was otherwise of good character, to find

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public opinion in its reduction of penalties for offences against the traffic law’: New South Wales, *Parliamentary Debates*, Legislative Council, 11 December 1951, 4936 (Mr Thompson).

<sup>48</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4831 (Mr Sheahan).

<sup>49</sup> David Garland, *Punishment and Welfare* (Gower, 1985) ch 8.

<sup>50</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 11 December 1951, 4936 (Mr Sommerland).

<sup>51</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 11 December 1951, 4918 (Mr Downing).

<sup>52</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4847 (Mr Sheahan). The government was united in its defence of the rule of law. In the Legislative Council Mr Downing stated that mandatory minimums would not be an ‘acceptable principle of British justice’: New South Wales, *Parliamentary Debates*, Legislative Council, 11 December 1951, 4915 (Mr Downing).

<sup>53</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 Dec 1951, 4850 (Mr Sheahan); New South Wales, *Parliamentary Debates*, Legislative Council, 11 Dec 1951, 4915 (Mr Downing).

an offender guilty but dismiss the charge without proceeding to a conviction and, importantly, without imposing a penalty.<sup>54</sup> The judge reminded counsel of the rule of law principle of equality before the law by observing that while the appellant's good character was relevant, 'his station in life' was not. His Honour explained, '[t]he effect of [s 556A] was to give a man a second chance. However, he warned [the] defendant that the Legislature took a very serious view of this offence and it was unlikely that any Court would give a third chance in relation to such an offence.' Then, as now, evidence of good character inclined the courts towards leniency. Reports of the sentencing decisions in drink-driving matters, such as that of Ronald James Horton, suggest that 'good character' in this context extends beyond the offender's lack of criminal antecedents to reputation. As Mr A.S McDonald, Stipendiary Magistrate said in 1952, 'men charged with driving under the influence of liquor were usually of good character 'but I must view the offence seriously as there have been more than 100 deaths this year as the result of road accidents''.<sup>55</sup>

The press had been expressing concerns about the leniency of penalties for drink-driving for some time.<sup>56</sup> For instance, in April 1951 *The Sun* ran a lengthy report on Judge Nield from the Court of Quarter Sessions, who, over a period of two weeks, had granted, on appeal, s 556A dismissals to 17 out of 23 offenders who had been convicted of DUI. In a strident critique the article declared that Judge Nield's 'policy':

must, the Sun believes, inevitably increase these offences, by breeding contempt among a section of drivers for the laws of the road and their penalties, and thus it must help to defeat the good work done by police and magistrates in the cause of road-safety. In the opinion of this newspaper, drunken or dangerous driving is one of the gravest breaches of the criminal code, and should be punished with the utmost severity.<sup>57</sup>

There were two perspectives in the 'truly criminal' debate. The first, propounded by members of the government of the day, derived from a rule of law perspective and is exemplified by the speech of Mr Sheahan in relation to the repeal of s 526B discussed above.<sup>58</sup> Mr Sheahan,

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<sup>54</sup> Now *Crimes (Sentencing Procedure) Act 1999* (NSW) s10.

<sup>55</sup> 'Drinking Drivers "Difficult problem" for Magistrates', *Glen Innes Examiner* (NSW), 2 June 1952, 2.

<sup>56</sup> See, eg, 'Courts Often Show Strange Clemency to the Drunk at the Steering Wheel', *Sun* (Sydney), 31 August 1949), 5; 'Appeal Judge's Practice on Drinking Drivers', *Sun* (Sydney) 12 April 1951, 3.

<sup>57</sup> 'Appeal Judge's Practice on Drinking Drivers', above n 56, 3.

<sup>58</sup> The rule of law is a contested concept, but its key elements appear to be relatively uncontroversial. The concept is frequently attributed to Albert Venn Dicey: Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, The Making of the Modern Law, Gale, Cengage Learning, 2017, 7<sup>th</sup> 1908 ed) 183. In this thesis the rule of law is understood as a reference to the principles that no person shall be subjected to arbitrary exercises of power

who had had ‘over twenty years’ experience’ in criminal practice as a solicitor, was of the view that ‘juries, comprised of ordinary men of the world’ do not regard traffic offences as ‘truly criminal’. A bulwark of justice, he argued, was ‘criminal intent that British communities have come to regard as essential before convicting.’<sup>59</sup> While the parliamentary debates do not draw the link expressly, this perspective can be seen as a concern that the criminal liability ought not to be imposed where there is a risk that the defendant did not know they were drunk to a sufficient degree to be in breach of the criminal law. The second perspective on the ‘truly criminal’ debate derived from a class argument — that motorists are not common criminals and should not be treated as such.<sup>60</sup>

It was not only members of Parliament who participated in the debate about whether drink-driving was truly criminal, but also government departments and their officers. In a speech reminiscent of *Yes Minister*, Mr Sheahan declared that ‘[g]overnment departments have a structure that comprises both a democracy and an aristocracy’, and the Attorney-General’s Department, the Justice Department and the Police Department consider themselves to be in charge of the criminal law. Some in these departments regarded the *Crimes Act* as the ‘aristocrat of penal enactments’ and ‘[a]ny intrusion by departments other than those three into the field of penal law was frowned upon as just “not the thing”’.<sup>61</sup> This can be understood as an indication of the developing professionalisation of the public service and adds another layer of complexity to the process of criminalisation.

### ***From the Late 1960s to the 1980s***

During this period, between the late 1960s and the 1980s, the introduction of breath analysis technology went some way towards addressing the problems of proof of drunkenness. This period is characterised by renewed attempts to criminalise drink-driving that had been made possible by this new technology. However, there were two main impediments to criminalisation, both of which were underpinned by rule of law issues. The first was a concern that the new

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on the part of the government, no person is above the law, and that the criminal law must be announced in advance of its imposition. See, eg Nicola Lacey, ‘Legal Constructions of Crime’ in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (OUP, 2002) 264, 271-2. Of course these seemingly straightforward principles are complex, particularly in the field of criminal justice which is permeated by discretion.

<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4846 (Mr Sheahan).

<sup>60</sup> Eg, New South Wales, *Parliamentary Debates*, Legislative Council, 11 December 1951, 4939 (Mr Alam).

<sup>61</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1951, 4849 (Mr Sheahan).

technology presented a threat to civil liberties, and the second was the inconsistency of sentencing practices among magistrates.

In 1968 the NSW government revolutionised the law of drink-driving by introducing breath analysis technology. Until this point the police had relied upon ‘mere observation’ of signs of intoxication to prosecute drink-drivers.<sup>62</sup> Breath analysis addressed, to a large extent, the problems of proving the driver’s degree of intoxication, and clarified the law for motorists by providing them with ‘an objective guide to follow’.<sup>63</sup> While the adoption of procedural practices that were designed to protect individual liberties perpetuated problems of detection, the incontrovertibility of the scientific knowledge demonstrating the dangers of drink- driving, and its acceptance in the general community, meant that the amendments to the law attracted bipartisan support.<sup>64</sup>

The new technology of breath analysis enabled Parliament to insert a new offence of driving with the prescribed concentration of alcohol (‘PCA’) into the MTA, and the mode of imposing criminal liability for drink-driving has not changed since it was enacted in 1968.<sup>65</sup> The provision read:

- Any person who while there is present in his blood the prescribed concentration of alcohol-
- a. Drives a motor vehicle; or
  - b. Occupies the driving seat of a motor vehicle and attempts to put the motor vehicle in motion,

Shall be guilty of an offence under this Act and shall be liable to a penalty not exceeding four hundred dollars or to imprisonment of a period not exceeding six months or to both such penalty and imprisonment.<sup>66</sup>

Viewed from the perspective of criminalisation this provision has several notable features. When the provision was first introduced the prescribed concentration was 0.08 per cent despite Victoria and some other countries already having adopted a limit of 0.05 per cent. This discrepancy reflects conflicting scientific literature about safe levels of alcohol consumption at the time. The original provision did not create a hierarchy of offences distinguishing between low, medium and

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<sup>62</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 December 1968, 3413 (Mr Morris).

<sup>63</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 December 1968, 3414 (Mr Morris).

<sup>64</sup> The body of scientific knowledge appears to have reached a critical mass. See eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 December 1968, 3413 (Mr Morris); New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1968, 3470 (Mr Jackett).

<sup>65</sup> See *DPP v Bone* (2005) 64 NSWLR 735, discussed in this chapter below.

<sup>66</sup> *Motor Traffic Act* 1909 s 4E(1), inserted by the *Motor Traffic (Amendment) Act* 1968 (NSW).

high levels of blood alcohol concentration. Instead, all drivers with a blood alcohol concentration above 0.08 were placed in the same category. Concerns expressed in the debates about the failure to ‘differentiate between the person driving at a concentration of 0.05, 0.08 or 0.09...and the person who is the real danger on the road’ hint that the offence of drink-driving was beginning to attract increasing moral condemnation, but only at the higher levels of blood alcohol concentration.<sup>67</sup>

While these changes to the substantive law, which were made possible by technological advancements, went some way towards addressing the problem of proof, accompanying changes made to procedural law undermined criminalisation. The government of the day was concerned that the new powers being conferred upon the police would unduly encroach upon individual liberty. For this reason they rejected random breath testing.<sup>68</sup> Weighing community safety against individual liberties the government concluded that prevention of the harm of road deaths justified incursions into individual rights.<sup>69</sup> But, in an attempt to convince the chamber that they had built in adequate protection of those rights, the government included a procedural restriction on the new police powers in relation to the administration of breath analysis. There were two stages to the breath analysis procedure: a ‘breath test’ administered at the roadside; and a ‘breath analysis’ conducted at the police station.<sup>70</sup> Before police could lawfully administer the first test the legislation required them to have ‘reasonable cause to believe’ one of three things: (a) that the driver had breached a road traffic provision;<sup>71</sup> (b) ‘by the manner in which any person drives a motor vehicle, or occupies the driving seat of a motor vehicle and attempts to put the motor vehicle in motion, that person has alcohol in his body’;<sup>72</sup> or (c) the driver had been a driver involved in an accident.<sup>73</sup> However, this ‘reasonable cause to believe’ procedural protection in the drink-driving context created an obvious problem for detection, apprehension and proof. Unless the driver had breached a road traffic rule, or been involved in an accident, enforcement

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<sup>67</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1968, 3487 (Mr Stewart).

<sup>68</sup> The Minister for Transport in his second reading speech said ‘I should like to stress that this test will not be applied at random, in any circumstances. The Government is not out to hound all drivers who take their cars out on to the road.’ New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 December 1968, 3415 (Mr Morris).

<sup>69</sup> *Ibid.*

<sup>70</sup> Motor Traffic Act 1909 (NSW), s 4E(2).

<sup>71</sup> s 4E(2)(a).

<sup>72</sup> s 4E(2)(b).

<sup>73</sup> s 4E(2)(c).

of the criminal law was dependent, once again, upon ‘mere observation’ — the very feature Parliament was attempting to eradicate.

The second stage of the test, which was conducted at the police station, caused understandable consternation in the parliamentary debates for its restriction of liberty. If the preliminary roadside test detected a level of alcohol above 0.08, the provision empowered police to arrest the driver without a warrant, ‘or cause that person to be taken with such force as may be necessary’ to the police station ‘and there detain him’ in order to administer a breath analysis.<sup>74</sup> Mr Cox, spokesperson for the opposition, protested that being detained by police pursuant to either the first or second stages of the test was a deprivation of liberty and a form of criminalisation.<sup>75</sup> The opposition noted that the test kits were not yet reliable and objected to the possibility of motorists being subjected to coercive police power on the basis of a false positive. Notwithstanding these problems and objections, the Bill passed and the two-stage test was enacted into law.

Attempts by defence lawyers to find loopholes in the new legislation led to judicial clarification of the law that facilitated criminalisation. Deriving inspiration from a series of cases in the United Kingdom known as the ‘loophole cases’, where offenders had escaped conviction because of ‘failure to follow the procedures precisely’,<sup>76</sup> one offender, Mr Merchant, from New South Wales, through his lawyer, appealed his conviction under the new PCA provision all the way to the High Court.<sup>77</sup> The case gave common law imprimatur to the PCA offence and the accompanying procedural provisions that dealt with the admissibility of the results of the new technology of breath analysis. Despite the introduction of breath analysis, a residue of confusion and/or concern about how to know when one was sufficiently intoxicated to fall foul of the law is evident in contemporary newspaper reports on drink-driving cases.<sup>78</sup>

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<sup>74</sup> s 4E(3) and (4).

<sup>75</sup> See, eg, Mr Cox and his reference to the embarrassment that would flow from being subjected to a road side test, New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1968, 3462 (Mr Cox).

<sup>76</sup> Light, above n 9, 84 quoting *Scott v Baker* (1969) 1 QB 659 where the Court of Appeal held that ‘for a valid breath test the procedures laid down by the Act had to be followed precisely’. This decision was later upheld ‘with reluctance’ by the House of Lords in *Spicer v Hold* [1977] AC 987: at 94.

<sup>77</sup> *Merchant v R* (1971) 126 CLR 414.

<sup>78</sup> ‘Court of Petty Sessions’, *Western Herald*, Bourke, 4 August 1967, 5.

### *From the Early 1980s to Present*

During the period from the 1980s to the present, technological advancements have revolutionised the law of drink-driving and facilitated criminalisation. Faced with statistical evidence of an escalating road toll, Parliament, and then the courts, attempted to increase the degree of moral blameworthiness attaching to the offence of drink-driving. This was done primarily through increasing penalties and the promulgation of sentencing guidelines. Implicitly grounded in deterrence theory, such efforts were designed to render the criminal law a more effective tool for regulating the harmful behaviour of drink-driving. Both historically and today, evidence of the harm caused by drink driving has been seen to legitimate the ascription of criminal liability to, and the imposition of significant penalties upon, drivers who are caught with the prescribed concentration of alcohol in their blood. Technological advancements, in the form of breath analysis, and the promulgation of alcohol consumption guidelines, have gone a significant way towards addressing the difficulties of definition and proof that previously undermined the legitimacy of the criminal law in this context.

In 1982, amid escalating concerns about the ‘tragic road toll’, which are exemplified by an editorial declaring that ‘[t]he Roads of NSW are awash with blood’,<sup>79</sup> random breath testing (RBT), which had already been introduced in other jurisdictions, including Victoria, was introduced in NSW almost without objection.<sup>80</sup> Members of Parliament recognised that RBT would change the structure and content of the criminal law in two important respects. Firstly, RBT reflected a broader change in the orientation of the criminal law from being reactive and backward-looking to being preventive and forward-looking. As one Member of Parliament pointed out, this entailed ‘a complete reversal of the normal roles for the traffic police in NSW’.<sup>81</sup> Secondly, it eliminated the need for the procedural protection requiring police to

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<sup>79</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 1982, 3437 (Mr Calabro) quoting an editorial entitled ‘Licence to Kill’. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 2969 (Mr Cox). See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1982, 3349 (Mr Paciullo) noting that Australia had one of the highest rates of road fatalities in the world.

<sup>80</sup> The measure attracted multi-partisan support. Indeed the Road Safety Committee was credited with depoliticising road safety: New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1982, 3346 (Mr Paciullo).

<sup>81</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 1982, 3483 (Mr Paciullo).

believe on reasonable grounds that the driver was under the influence of alcohol thus eradicating the reliance upon lay knowledge of intoxication from the criminal law of drink-driving.<sup>82</sup>

While widespread community support for the measure made such bi-partisan support politically palatable,<sup>83</sup> the changes to the law were only possible because of several advancements in scientific knowledge and technology. The scientific evidence on the effect of alcohol on driving was, by this time, incontrovertible.<sup>84</sup> A specialised Traffic Accident Research Unit in NSW was contributing to the production of ‘world-class’ research on traffic accidents and road safety.<sup>85</sup> The statistics, much repeated in the debates, demonstrated a clear link between fatal road accidents and the blood alcohol level of drivers, and both the government and opposition were persuaded by statistics indicating that random breath testing in Victoria had dramatically reduced the number of road deaths.<sup>86</sup> Finally, the breath testing technology had been vastly improved so that police needed to detain people only for a very short time to administer them,<sup>87</sup> a fact that eroded the basis of the civil liberties objection to RBT.

In addition to RBT, the 1982 legislative package contained features that suggest drink-driving, at least in the higher range of blood alcohol concentration, was beginning to be regarded as truly criminal. The prescribed concentration of alcohol was lowered from 0.08 to 0.05, bringing NSW into line with other states such as Victoria, and a three-tiered hierarchy of offences was introduced based on ranges of blood alcohol concentration with corresponding penalties that were intended to be commensurate with differing levels of moral blameworthiness.<sup>88</sup> It will be recalled that in the debates on the introduction of the PCA offence

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<sup>82</sup> The Hon P Landa explained ‘... with the introduction of random breath testing drivers will be liable to be tested at any time...’, New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 1982, 3432 (Mr Landa).

<sup>83</sup> Several MPs commented on the ‘widespread community support for random breath testing’ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 2967 (Mr Cox). The list of community organisations and government departments in the debates indicates the wide level of community support: New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 1982, 3457. Opinion polls also indicated widespread support: New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 1982, 3433 (Mr Landa). The widespread support may have been a result of media campaigns such as the ‘Slob’ campaign: Kathleen Freedman, Traffic Accident Research Unit, Department of Motor Transport NSW, *The ‘Slob’ Campaign: An Experimental Approach to Drink-Driving Mass Media Communications* (1979).

<sup>84</sup> See eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November, 1982, 3350 (Mr Paciullo) citing the Report of the Standing Committee on Road Safety.

<sup>85</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 1982, 3439 (Mr Burton).

<sup>86</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 2967 (Mr Cox).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Motor Traffic Act 1909* NSW ss 4E(1E), s 4(1F) and s 4(1G) inserted by *Motor Traffic (Road Safety) Amendment Act 1982* (NSW). For low range PCA the maximum penalties were, for a first offence, a \$500 fine, and for a second

in 1968, the offence was criticised for failing to differentiate between drivers with a low percentage of blood alcohol (implicit in which is the assumption that such levels are not dangerous) and ‘the person who is the real danger on the road’.<sup>89</sup> In making this distinction the 1982 provisions went some way towards reconciling the substance of the criminal law with community attitudes.

Members of Parliament voiced a need for education to change community attitudes towards combining driving with alcohol consumption.<sup>90</sup> There was evidence that drink-driving was, at this time, ‘less clearly a crime in public consciousness than other behaviours traditionally regarded as such’.<sup>91</sup> Through an extensive ‘multimedia publicity campaign’ the government planned to educate the public about the new regime and ‘influence community attitudes and behavior in relation to drinking and driving’.<sup>92</sup> In this way the law of drink-driving became part of the ‘preventive turn’ in the criminal law from the 1980s, which was precipitated by a desire to prevent road injuries and fatalities, and was fueled by scientific knowledge and statistics.<sup>93</sup>

While the government was attempting to shape community attitudes towards drink-driving through legislation such as the 1982 reforms and media campaigns, there is evidence that the sentencing practices of magistrates were undermining, or at least failing to reinforce, those efforts. In response to the perceived leniency of magistrates’ sentences for drink-driving, in 1978 the government increased the maximum available penalties in the statute in an attempt to place pressure on magistrates to increase penalties.<sup>94</sup> This tactic was chosen despite available criminological evidence that the risk of detection, which had been increased by the introduction

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or subsequent offence within five years, \$1,000. For mid-range PCA, for a first offence, \$1,000 or six months imprisonment. The penalty for a second or subsequent offence for mid-range is the same as for a first offence. For high range PCA, for a first offence, \$1,500 or 9 months imprisonment or both, and for a second or subsequent offence within 5 years, \$2,000 or 12 months imprisonment or both. The offence of DUI under the *Motor Traffic Act* 1909 (NSW) was retained and was considered to be equivalent to mid-range PCA (0.8-0.15), therefore attracting the same penalty: New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 2968 (Mr Cox). A ‘special range’ of 0.02-0.05 was introduced in 1985: *Motor Traffic (Random Breath Testing) Amendment Act* 1985 (NSW), and a ‘novice range’ of 0.00 was introduced in 2004: *Road Transport (Safety and Traffic Management) Amendment (Alcohol) Act* 2004 (NSW).

<sup>89</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 December 1968, 3487 (Mr Stewart).

<sup>90</sup> See eg, New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 1982, 3443–3444 (Mr Burton). Even as late as 1981 criminologist and statistician Mukherjee wrote: ‘Petty offences [which include drink-driving] are not actually offences in the strict sense of the word’: Satyanshu Mukherjee, *Crime Trends in Twentieth Century Australia* (Allen & Unwin, 1981) 45.

<sup>91</sup> Homel, above n 27, 115.

<sup>92</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 2968 (Mr Cox).

<sup>93</sup> Pat O’Malley, *Crime and Risk* (SAGE, 2010).

<sup>94</sup> Homel, above n 27, 115.

of RBT, was the greater deterrent.<sup>95</sup> A study of the sentencing practices of magistrates in drink-driving matters dealt with in NSW courts of Petty Sessions in 1976 and published in 1981 showed that magistrates did not yet perceive drink-driving as truly criminal.<sup>96</sup> This was significant because the study found that one of the most highly influential factors in sentencing was the ‘sentencing style’ of the magistrate, which was said to include their ‘sentencing philosophy as well as the magistrate’s perceptions of the nature and seriousness of the offence.’<sup>97</sup> During the sentencing process magistrates tended to pay heed to driving offences only, and not other criminal offences in their prior offending history. The author of the study concluded that the existence of this practice ‘supports the argument that drinking and driving is not perceived as a crime, and that blameworthiness is seen in the context of delinquent driving rather than in the more general context of law breaking and criminal behaviour.’<sup>98</sup> The study also found that the practice of individualised sentencing, whereby the sentence is tailored to the particular characteristics and circumstances of the offender, was resulting in a ‘direct bias against lower-class groups in the sentencing process.’<sup>99</sup> There was ‘enormous variation in penalties from court to court’ which indicated that the influence of magistrate sentencing style was pervasive.<sup>100</sup> In the 1970s the rotation of country magistrates had been introduced ‘to neutralize differences in sentencing between magistrates, without encroaching on their judicial independence’,<sup>101</sup> but this had not solved the problem. The author of the 1976 study recommended that sentencing guidelines be introduced to diminish the impact of magistrate sentencing style and the corrosive effect of inconsistent penalties on general deterrence.<sup>102</sup> Such guidelines were not introduced until 2004.

Throughout the remainder of the twentieth century, magistrates, and judges in the District Court on appeal, continued to use s 556A of the *Crimes Act* (which became s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) to exercise mercy in cases of drink-driving, including for high range PCA cases, despite regular admonishment from Parliament and calls for the

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<sup>95</sup> Ibid 115–6.

<sup>96</sup> Ibid 121.

<sup>97</sup> Ibid 120.

<sup>98</sup> Ibid 121.

<sup>99</sup> Ibid 120.

<sup>100</sup> Ibid 124.

<sup>101</sup> Golder, above n 1, 184.

<sup>102</sup> Homel, above n 27, 124.

limitation of its use in drink-driving cases.<sup>103</sup> This is evidence that magistrates (and indeed District Court judges) still did not regard drink-driving as truly criminal, especially when faced with the offenders' good character. It is also evidence of a relatively unfettered sentencing discretion. In the decades between 1969 and 2004 Parliament had steadily increased the maximum penalties and minimum disqualification periods for PCA offences,<sup>104</sup> but there is evidence in the parliamentary debates throughout the period of concern that the perceived leniency of the courts was continuing to undermine attempts to convey the seriousness of the offence to the public. In 2004, in another attempt to force the courts to impose harsher penalties for drink-driving offences, the Attorney General, acting on instructions from the government, sought a guideline judgment from the Court of Criminal Appeal ('CCA') under s 37 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>105</sup> In promulgating a guideline for high range PCA the CCA listed the features of an 'ordinary case', which included 'prior good character', and stipulated that prior good character should no longer result in a dismissal under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) unless the case was otherwise extra-ordinary. The Court also held that dismissal under s 10 for a first or subsequent offence that displayed the characteristics of the ordinary case 'will rarely be appropriate'.<sup>106</sup> The court reasoned that Parliament's recurring increase of the penalties was evidence that it considered drink-driving to be a very serious offence. It acknowledged submissions put by the Public Defender that 'there are more effective ways of deterring drink-driving' but concluded:

... that is a matter for the legislature and not the courts. Parliament ... has sent a clear message to the courts that it believes that a penal regime is the appropriate method for addressing this social problem.<sup>107</sup>

These attempts by Parliament and the courts to curtail the sentencing discretion of magistrates can be seen as juridification: the replacement of informal practices with formal legal rules.

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<sup>103</sup> See the discussion above, and, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 2969 (Mr Cox).

<sup>104</sup> See discussion above and the 'History of PCA legislation' annexure to *Application by the Attorney General under s37 of the Crimes (Sentencing Procedure) Act 1999* (2004) 61 NSWLR, 305, 341 ['History of PCA Legislation'].

<sup>105</sup> Following a practice developed in England 'to ensure consistency in sentencing', a guideline judgment 'formulates general principles and, sometimes, an indication of an appropriate range' of penalties to guide inferior courts. See *Juriscic* (1998) 45 NSWLR 209 per Spigelman CJ at 216.

<sup>106</sup> *Application by the Attorney General under s37 of the Crimes (Sentencing Procedure) Act 1999* (2004) 61 NSWLR, 305, 340.

<sup>107</sup> *Ibid* 239.

Juridification in this context becomes a tool for controlling the level of moral blameworthiness being attached to a particular behaviour.

The following year a single Judge of the Supreme Court, in *DPP v Bone*,<sup>108</sup> was called upon to determine whether the PCA drink-driving offence<sup>109</sup> was an offence of absolute liability or of strict liability according to the ‘tripartite classification of statutory offences’ set out by the High Court in *He Kaw Teh*.<sup>110</sup> As is well-known, *He Kaw Teh* divided criminal offences into three categories: (1) those that require the prosecution to prove a mental element; (2) offences of strict liability where the prosecution is not required to prove a mental element but the defence of honest and reasonable mistake of fact is available; and (3) absolute liability where the prosecution is not required to prove a mental element and the defence of honest and reasonable mistake of fact is not available. By the final decades of the twentieth century, and subsequent to the High Court’s decision in *He Kaw Teh* in 1985, the courts had detected ‘a discernible trend in modern authorities away from construing statutes as creating absolute liability and towards recognising statutory offences as falling within ... the category in which the prosecution must negative the honest and reasonable belief in innocence...’.<sup>111</sup> Thousands of drink-driving offences are finalised in the NSW Local Court yearly,<sup>112</sup> but the higher courts were not called upon to clarify the classification of the offence until 2005. One reason for the delay in seeking judicial clarification of the construction of PCA was that scientific and technological advancements had helped Parliament to close the loopholes in the legislation to such an extent that by the end of the century most people charged with drink-driving entered a plea of guilty at first instance.<sup>113</sup> Many offenders appeal to the District Court each year against the severity of the

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<sup>108</sup> (2005) 64 NSWLR 735.

<sup>109</sup> At that time it was in the *Road Transport (Safety and Management) Act 1999* (NSW) s 9.

<sup>110</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523; for discussion see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) 214.

<sup>111</sup> *R v Wampfler* (1987) 11 NSWLR 541 at 547; *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120. See David Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of NSW* (Federation Press, 6<sup>th</sup> ed, 2015) 203; and Bronitt and McSherry, above n 110, 216.

<sup>112</sup> In 2015 the Local Court of NSW finalised 18,823 charges of exceeding the prescribed concentration of alcohol. See NSW Criminal Courts Statistics 2015, NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2015* <[http://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx)>.

<sup>113</sup> Eg, in 2015 the offence was proven in 99% of cases. This is well above the average conviction rate in the Local Court of between 85 and 90%. See NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2015* above n 112.

penalty, but challenges to criminal liability were rare.<sup>114</sup> In deciding that it was a strict liability offence Justice Adams, paraphrasing Chief Justice Gibbs in *He Kaw Teh*, confirmed the degree of moral blameworthiness attaching to the offence from the perspective of the common law:

it must now be accepted that conviction for an offence of driving while having a prohibited range of PCA in one's blood will result in public obloquy and disgrace, especially for a mid range or high range offence.<sup>115</sup>

The Court's reasoning in *DPP v Bone* illustrates how the degree of moral blameworthiness attaching to a criminal offence impacts upon how the offence is dealt with procedurally.<sup>116</sup>

The cases of *Application by the Attorney General under s 37 of the Crimes (Sentencing Procedure) Act 1999* (2004) and *DPP v Bone* (2005) tell us two things about the use of the criminal law in summary form to achieve criminalisation. The first is the pivotal role played by the degree of moral blameworthiness attaching to the subject matter of the offence in determining how the offence will be dealt with procedurally; namely, to paraphrase Chief Justice Gibbs in *He Kaw Teh*, whether the subject matter is 'truly criminal'.<sup>117</sup> The second is that the classification of an offence as summary cannot be assumed to imply that an offence is not truly criminal; or, in other words, is merely regulatory and does not attract a high degree of moral blameworthiness.

The lens of criminalisation also helps to explain why drink-driving has not (yet) been 'defined down'<sup>118</sup> as an infringement (or penalty) notice offence. In 1961, to clear a backlog of 40,000 traffic cases in the courts of Petty Sessions, Parliament introduced a penalty notice system in NSW for 'various moving traffic offences'.<sup>119</sup> In the 1980s a 'self-enforcing infringement notice scheme', according to which infringement notices are enforced administratively through the State Debt Recovery Office without the intervention of a magistrate,

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<sup>114</sup> *Application by the Attorney General under s37 of the Crimes (Sentencing Procedure) Act 1999* (2004) 61 NSWLR, 305, 317.

<sup>115</sup> *DPP v Bone* (2005) 64 NSWLR 735, 749.

<sup>116</sup> Cf *Giachin v Sandon* (2013) 276 FLR 180 where the Federal Court construed the ACT equivalent provision as an absolute liability offence indicating that the classification of such offences is a matter of statutory interpretation in each instance.

<sup>117</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523, 530 per Gibbs CJ.

<sup>118</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 117.

<sup>119</sup> This was done by inserting s 18B(7) into the *Traffic Act 1909* (NSW). See Richard Fox, *Criminal Justice on the Spot: infringement Penalties in Victoria*, Australian Studies in Law, Crime and Justice (Australian Institute of Criminology, 1995) 32.

was introduced to free up magistrates' time for other work.<sup>120</sup> It has been estimated that self-enforcing infringement notices 'removed almost 450,000 traffic matters from court lists'.<sup>121</sup> But despite the enormous number of drink-driving matters finalised yearly in the NSW Local Court, drink-driving has never been included amongst those traffic offences that may be finalised by way of infringement notice. O'Malley has argued that the infringement notice regime effected the 'monetisation' of justice, which enabled it to become a primary mechanism for the 'massification' of criminal justice in the latter decades of the twentieth century. This massification was accompanied by the 'de-moralisation' of crime, by which O'Malley means that moral blameworthiness has been removed from the impugned behaviour.<sup>122</sup> If the saving of court time were the decisive factor in 'defining deviance down' it might be expected that drink-driving would be converted into an infringement notice offence, especially given the high conviction rate. However, the fact that it has not been supports the argument that moral blameworthiness may be conveyed via the summary jurisdiction.

### ***Conclusion***

This chapter argued that the lens of formalisation is helpful for understanding the use of the criminal law in summary form to regulate the major new threat of harm resulting from the technological development of the motor car. It showed that change over time in this context has been a product of the dynamic interaction between technological advances and the development of new bodies of scientific knowledge, which generated changes in social conditions and led to changes in practices of procedure and proof. The development of the science of breath analysis is a key illustration of this point. Before breath analysis emerged as a reliable means of proof of degrees of drunkenness, the courts were dependent upon the evaluative judgments of non-expert witnesses, usually police officers. For decades, the legal meaning of drunkenness did not map on to the popular meaning of drunkenness. The science of breath analysis, and the technology of random breath testing, led to changes in practices of detection and proof that removed evaluative judgement from the practices of proof in the law of drink-driving. This can be understood as

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<sup>120</sup> New South Wales Law Reform Commission ('NSWLRC'), *Criminal Procedure: First Issues Paper*, General Introduction and Proceedings in Courts of Petty Sessions (1982) 52. See also Local Court of NSW Annual Review, 2010, 2 <  
<http://www.localcourt.justice.nsw.gov.au/Documents/2010%20Local%20Court%20Annual%20Review.pdf>>.

<sup>121</sup> Local Court of NSW Annual Review, 2010, above n 120, 2.

<sup>122</sup> Pat O'Malley, 'The Politics of Mass Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP, 2013) 273.

juridification. Breath analysis also enhanced enormously the efficiency of the summary jurisdiction.

While the lens of formalisation helped to expose these under-analysed aspects of the development of the law of drink-driving, it does not explain it fully. My analysis revealed the competing forces that have impacted upon the development of the law. As practices of procedure and proof changed, Parliament grappled with rule of law issues that arose as a result of technological advances and debated the level of seriousness of the offence. On the one hand, the high risk of physical harm suggested that the behaviour of drink-driving should attract a high degree of moral blameworthiness, and a correspondingly higher level of seriousness. My analysis led to recognition of a relationship between proof and the degree of moral blameworthiness. The degree of moral blameworthiness has been pivotal in determining how an offence will be dealt with procedurally. The debates over the degree of moral blameworthiness that should attach to drink-driving suggested that the classification of an offence as summary cannot be assumed to imply that it is not 'truly' criminal as tends to happen in scholarly accounts that focus on the nineteenth century. On the other hand, the resource implications of the sheer number of offences finalised every year requires expeditious treatment, which suggests a lower level of seriousness is warranted. It may be that the current strict liability offence, which gives offenders an opportunity to raise a defence of honest and reasonable mistake of fact in the Local Court, is a compromise between a trial on indictment and proceeding by way of infringement notice.

## Chapter 7: Contravening an Apprehended Violence Order

Contravening an apprehended violence order ('CAVO') is one of the most important offences in the summary jurisdiction in the current era because it, and offences like it, has been responsible for the enormous expansion of the use of the criminal law in summary form to regulate harmful behaviours. CAVO is one offence in a category that I call 'breach of justice orders'. The growth of this offence category has created a new cohort of defendants in the summary jurisdiction. The gravamen of breach of justice orders is a breach of standards of behaviour that have been set by the courts under a range of mechanisms such as Apprehended Domestic Violence Orders ('ADVO', formerly Apprehended Violence Orders), Suspended Sentences and Good Behaviour Bonds. Of these, by far the largest categories of offence are breach of bond – supervised and unsupervised,<sup>1</sup> breach of suspended sentence,<sup>2</sup> and breach of violence order.<sup>3</sup>

The focus of this chapter is the ADVO and accompanying offence of CAVO (the 'ADVO/CAVO mechanism'). It is necessary to understand the ADVO/CAVO mechanism because in the 1980s it became a key weapon in the battle against domestic violence. I use the war metaphor advisedly; feminist scholars and lobby groups consciously chose to employ the rhetoric of 'gender war' in its campaign to raise awareness of domestic violence.<sup>4</sup> With the prevalence of domestic violence, CAVO, a summary only offence,<sup>5</sup> brought the front line of the domestic violence battle to the summary jurisdiction.

This chapter argues that juridification is the most prominent dimension of formalisation in this context. As set out in the Introduction to this thesis, I use the concept of juridification as a means of understanding what I have identified as the turn to law to regulate the constructed harmful behaviour of domestic violence. This chapter shows how the criminalisation of domestic violence has been achieved via the summary jurisdiction. It can be seen as an example of

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<sup>1</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(1).

<sup>2</sup> *Ibid* s 98(3). Suspended sentences and good behaviour bonds were abolished in NSW on the 24 October 2017 by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) but it was not yet in force at the time of writing.

<sup>3</sup> Currently *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1); formerly *Crimes Act 1900* (NSW) ss 562I(1), 562ZG(1). The Australian and New Zealand Standard Offence Classification groups them under the broad banner of 'Offences against Justice Procedures, Government Security and Government Operations' ('Offences against Justice Procedures').

<sup>4</sup> Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Duke University Press, 2008) 7.

<sup>5</sup> *Criminal Procedure Act 1986* (NSW) s 6.

horizontal criminalisation. While domestic violence has been constructed as harmful for at least one-and-a-half centuries, the way in which it has been criminalised has changed significantly in the current era. Analysing the ADVO/CAVO mechanism through the formalisation lens reveals that the criminalisation of domestic violence has been as much a product of changing procedures and enforcement practices as it has a product of changes to the substantive law.

In analysing the development of the ADVO/CAVO mechanism, three chronological periods emerge from my research: the period prior to the late nineteenth century; from the late nineteenth century to the final quarter of the twentieth century; and from the final quarter of the twentieth century to the present. The reason why the time periods in this chapter differ from those in preceding chapters is because change in the context of domestic violence, at least since the 1970s, has been the product of different social factors, in particular lobbying by victims' and women's groups. However, as in all of the preceding chapters, the final period is the most important for understanding the summary jurisdiction in the current era.

### ***The Period Prior to the Late Nineteenth Century***

The direct ancestor of the ADVO/CAVO mechanism, the surety to keep the peace, arose out of custom prior to the fourteenth century in England and was then incorporated into the Commission of Justices of the Peace (the 'Commission of the Peace'), which, as set out in chapter 2, was a statutory instrument enacted by King Edward III, in 1361.<sup>6</sup> The power to bind over to keep the peace was one of the earliest forms of summary jurisdiction and was called a security or surety.<sup>7</sup> It empowered justices to cause those who threatened the peace to appear before them and be bound over to keep the peace. Only if the bound-over person breached the surety did justices have power to imprison them.<sup>8</sup> Despite its inclusion in the Commission of the Peace, it remained a broad discretionary power that was not amenable to precision and could not be enforced. The primary purpose of the surety to keep the peace was to preserve peace in the community, although it could also have the effect of protecting the individual complainant.

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<sup>6</sup> *Justices of the Peace Act 1361* 34 Edw III. c 1.

<sup>7</sup> By 1885 Pollock describes the bind-over as 'one of the commonest forms of summary jurisdiction'. See Frederick Pollock, 'The King's Peace' (1885) 1 *Law Quarterly Review* 37, 50. The terms 'surety' and 'security' are used interchangeably in the treatises and case law. From 1883 the preferred term was 'recognisance'.

<sup>8</sup> Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, first published 1754, 15<sup>th</sup> ed, 1785) vol 1, 5.

The surety to keep the peace was one of the ‘so-called powers of preventive justice’<sup>9</sup> that have long been a cause of concern to treatise writers and academics. For example, Dr Burns, writing in 1845, lamented that the requirement to keep the peace had been so broadly construed that it had ‘become difficult to define how far it shall extend, and where it shall stop’.<sup>10</sup> These powers of preventive justice stem from an ‘executive or ministerial’ power which has its roots in the royal prerogative, rather than from a judicial power, and is a legacy of the policing role magistrates formerly performed.<sup>11</sup> The surety to keep the peace is an ancestor of what is known in Australia as the ‘common law bond’,<sup>12</sup> and in the UK as the ‘common law bind over’.<sup>13</sup>

Justices were empowered to grant a surety of the peace ‘wherever a person has just cause to fear that another will burn his house, or do him corporal hurt,—as, by killing or beating him, or that he will procure others to do him such mischief’.<sup>14</sup> Thus the surety was designed to protect ‘people, concerning their bodies, or the firing of their houses’,<sup>15</sup> and ‘just cause to fear’ could be proven by giving evidence upon oath of such fear ‘by reason of the other’s having threatened to beat him, or laid in wait for that purpose’.<sup>16</sup> Sureties to keep the peace did not require a conviction, and therefore were not premised on the usual justifications for the use of coercive state power. There was no requirement that they be associated with an alleged criminal offence. Indeed, they could be imposed ‘[i]f a complaint for an assault is dismissed, and the Justices think from the evidence such a precaution is necessary’.<sup>17</sup> The usual course was for a surety to be imposed on information provided ‘by the person who fears the personal injury’, but Justices could also act upon information provided by others. This underlines its focus on the community

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<sup>9</sup> *Griffiths v The Queen* (1977) 137 CLR 293, 321 per Jacobs J.

<sup>10</sup> Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, first published 1754, 29<sup>th</sup> ed, 1845) vol 5, 1217, 1218.

<sup>11</sup> David Feldman, ‘The King’s Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding over Powers’ (1988) 47(1) *Cambridge Law Journal* 101, 127.

<sup>12</sup> *Griffiths v The Queen* (1977) 137 CLR 293, 319.

<sup>13</sup> Currently *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1); formerly *Crimes Act 1900* (NSW) ss 562I(1) and 562ZG(1). On the common law bind-over origins of the ASBO in the UK see Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP, 2012). The good behaviour bond, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9, 98(1), and the suspended sentence, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 12, 98(3) are also descendants of the common law bond.

<sup>14</sup> Burn (1845) above n 10, vol 5, 1203.

<sup>15</sup> *Ibid* 1202.

<sup>16</sup> *Ibid* 1203.

<sup>17</sup> William Hattam Wilkinson and Frederick Bushby Wilkinson, *The Australian Magistrate* (Law Book Co, 7<sup>th</sup> ed, 1903) 34, 1110, citing *ex parte Davis* 24 LTNS 547; *Hartley v Hindmarsh* L R 1 C P 553.

and the role of magistrates at that time in preserving peace in the community.<sup>18</sup> As Stephen CJ said in *Ex parte Beckett*, justices:

are conservators of the public peace; and if they are satisfied that it is likely to be endangered, it is their duty to preserve it by whatever preventive powers the law gives them...A refusal to do so on the part of a justice would be something contrary to the very nature of his office.

The person against whom the surety was being sought could resist it on the basis that the fear was unfounded, or, by ‘direct’ evidence, proving that it was ‘preferred from malice only’.<sup>19</sup>

When NSW was colonised in 1788, justices of the peace, who brought with them all the powers of justices in England, had the power, pursuant to the commission of the peace, to bind a person over to keep the peace. This was the state of the law until 1883.

### ***From the Late Nineteenth Century to the Final Quarter of the Twentieth Century***

Close examination of the surety during the period from the late nineteenth century to the final quarter of the twentieth century reveals that the shortcomings of the criminal law as a means of responding to domestic violence account for the development of the ADVO/CAVO mechanism. During this period magistrates used the surety as a means of protecting victims of domestic violence when it was not possible to convict the perpetrator of a more serious assault-based offence. By the latter decades of the nineteenth century the criminal law intervened in non-fatal domestic violence via two mechanisms: a charge of an offence such as assault or aggravated assault;<sup>20</sup> and the surety to keep the peace. Although the police tended to intervene in domestic assaults only where serious injury or death was inflicted,<sup>21</sup> there is evidence that domestic violence-related charges were brought far more frequently than scholars have previously recognised, but in the summary jurisdiction.<sup>22</sup> These cases, which ‘crossed class lines,’<sup>23</sup> were sometimes commenced by police arrest, although the most common means of commencing prosecutions was a ‘victim-initiated summons’.<sup>24</sup> This is significant because it disrupts the orthodox narrative that domestic violence was considered to be a private matter until second

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<sup>18</sup> *Ex parte Beckett* 11 SCR 1, 3.

<sup>19</sup> Wilkinson and Wilkinson, above n 17, 1108, citing *R v Parnell*, 2 Burr 806.

<sup>20</sup> See Chapter 5 of this thesis.

<sup>21</sup> Judith Allen, *Sex & Secrets: Crimes Involving Australian Women since 1880* (OUP, 1990) 9.

<sup>22</sup> Carolyn Ramsey, ‘Domestic Violence and State Intervention in the American West and Australia, 1860–1930’ (2011) 86 *Indiana Law Journal* 185, 199.

<sup>23</sup> *Ibid* 201.

<sup>24</sup> *Ibid* 204.

wave feminism began to agitate for it to be brought into the public sphere in the second half of the twentieth century.

Even though the criminal law intervened in domestic violence more frequently than previously recognised, it was not an effective option for most women, and because of the reluctance of women to give evidence in assault cases, convictions were often difficult to secure. For this reason courts were often forced to resort to the surety to keep the peace, sometimes for extremely serious assaults that could not otherwise have been dealt with summarily.<sup>25</sup> Carolyn Ramsay recounts one case from the state of Victoria where a police officer had found the victim ‘covered in blood from being stabbed with a three-cornered file’ and had intervened to prevent her husband from choking her.<sup>26</sup>

The reasons why women were reluctant to pursue criminal sanctions are complex. Some relate to the inhospitableness of the criminal justice system. This includes the unwillingness of police to collect evidence or lay charges and the trauma of the prosecution process. Others relate to the social circumstances in which women found themselves. In the late nineteenth century, at a time when women were not encouraged to join the workforce, and before the state assumed responsibility for financial welfare, women were largely financially dependent upon their spouses.<sup>27</sup> In such circumstances the conviction and imprisonment of a woman’s husband would often leave her — and any children she may be responsible for — without financial support. Bringing charges could also result in reprisals from the husband. For these reasons, among many others, victims frequently refused to testify or withdrew the charges. It was in the context of failed prosecutions that the surety to keep the peace came to play a central role in the criminal law’s response to domestic violence.

The surety to keep the peace had many statutory incarnations from 1883 onwards.<sup>28</sup> The first ‘native’ version, the recognizance to keep the peace in cases of apprehended violence (‘the recognisance’), was incorporated into the *Criminal Law Amendment Act 1883* (NSW)<sup>29</sup> and was

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> For a detailed discussion of the development of welfare systems in Australia see Brian Dickey, *No Charity There: A Short History of Social Welfare in Australia* (Allen & Unwin, 2<sup>nd</sup> ed, 1987).

<sup>28</sup> The power was used extensively in the criminal law consolidations in the UK in 1861. In NSW it was adapted to sentencing as an alternative to imprisonment. See *Griffiths v The Queen* (1977) 137 CLR 293, 320 per Jacobs J.

<sup>29</sup> (46 Victoria No 17) s 466.

in force, almost unchanged, for a century.<sup>30</sup> This recognisance was a descendant of the surety to keep the peace and the immediate ancestor of the current ADVO.<sup>31</sup> It was not directed specifically to domestic violence and was, in practice, unenforceable because, as with its predecessor, the only penalty for breach was forfeiture of the surety, if one had been imposed. The recognisance was based on a present subjective apprehension of *future* violence to ‘the person ... or of his wife or child, or of apprehended injury to his property ...’.<sup>32</sup> From the wording it can be seen that it was not originally designed for the protection of women and children from domestic violence; it was adapted to that purpose.<sup>33</sup> It was a broad, imprecise power circumscribed only by the objective test of whether the justice was of the view that the apprehension was reasonable. Like its predecessor it could be imposed for conduct that did not amount to a criminal offence and therefore a conviction was not a prerequisite. Unlike its predecessor, it could be sought only ‘on the complaint of the person apprehending violence to the person’. This made it impossible for women who feared retribution from their assailants to distance themselves from the enforcement process. The only order justices were empowered to make was a general one requiring the defendant to enter a recognisance to ‘keep the peace’ — it could not be tailored to the defendant or the circumstances of the relationship between the complainant and the defendant. If the defendant refused to enter into the recognisance he (or she) could be imprisoned for three months but there was no judicial power to punish for breach. The recognisance persisted in this form in NSW until 1982.

### ***From the Final Quarter of the Twentieth Century to Present***

As seen in previous chapters, against a backdrop of the rise to prominence of ideas of social equality and human rights in the post-war era, the late 1970s was a time of immense social and political change in NSW, and also at the federal level. In 1972 the federal left-leaning Whitlam Labor government was elected after decades of conservative rule. Similarly, in 1976 in NSW the

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<sup>30</sup> It was re-numbered as *Crimes Act 1900* (NSW) s 547. It did not refer to imprisonment. It merely said ‘...the Justice may require the defendant to enter into a recognisance to keep the peace, with or without sureties, as in any case of a like nature.’: Wilkinson and Wilkinson, above n 17, 339. By 1982 this had been amended to read ‘...in default of its being entered into forthwith, the defendant may be imprisoned for three months, unless such recognisance is sooner entered into.’: *Crimes Act 1900* (NSW), historical version for 1 July 1982–16 December 1982, avail < <https://www.legislation.nsw.gov.au/#/view/act/1900/40/historical1982-07-01>>.

<sup>31</sup> *Crimes (Domestic and Personal Violence) Act NSW (2007)* s 16.

<sup>32</sup> This is an extension of the common law bond, which was not available for apprehended violence to goods. See Burns (1845), above n 10, vol 5, 1203.

<sup>33</sup> Hawkins stated that ‘a wife may demand it against her husband and *vice versa*’: Wilkinson (1903), above n 17, 1109 citing 1 Hawk, c 50 s 2.

left-leaning Wran Labor government was elected and each government immediately set about implementing their progressive agendas. The impact of second wave feminism can be seen in one of the key initiatives in NSW — reform of the public service based on the values of equal opportunity for minorities and women, and promotion on merit rather than seniority.<sup>34</sup> At the federal level the government instituted no-fault divorce and introduced a sole parent pension,<sup>35</sup> among many other reforms. The federal reforms in particular created conditions that made the introduction of the ADVO/CAVO mechanism possible because they provided women with an avenue of escaping a violent marriage and accessing independent financial support.<sup>36</sup> In doing so, these reforms went some way towards addressing one of the most significant impediments to the efficacy of the criminal law in addressing domestic violence, namely, the woman's dependence on her spouse.

In 1982 the front line of the battle against domestic violence was brought to the summary jurisdiction by the NSW Wran Labor government's strategy of creating the ADVO, which was based on the recognisance discussed above. The criminal law's treatment of domestic violence altered radically at this time as Australian jurisdictions, and common law jurisdictions around the world, began to implement varying statutory domestic violence regimes.<sup>37</sup> The NSW legislation was explicitly drafted 'to make keep the peace orders more *effective* in relation to domestic violence through the introduction of specific apprehended domestic violence orders.'<sup>38</sup> While it was recognised that violence was also perpetrated against children, the initial focus was on domestic violence against women because of the 'particularly high incidence of wife beating'.<sup>39</sup>

The immediate impetus for the 1982/83 legislative changes to the criminal law relating to Domestic Violence in NSW was the discovery in the 1970s of a link between homicide and

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<sup>34</sup> Peter Wilenski, *Review of NSW Government Administration Further Report: Unfinished Agenda* (NSW Government, 1982) 14. See also Peter Wilenski, *Review of NSW Government Administration Directions for Change: Interim Report* (NSW Government, 1977).

<sup>35</sup> *Family Law Act 1975* (Cth) s 48; Dickey, above n 27,179.

<sup>36</sup> The support provided was not sufficient to lift women above the poverty line: New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2369 (Mr Wran).

<sup>37</sup> See, for instance, *Justices Act 1921* (SA) s 99 enacted in 1982. For discussion see Ngaire Naffin, Women's Adviser's Office, Department of the Premier and Cabinet South Australia, *Domestic Violence and the Law: A Study of S 99 of the Justices Act (SA)* (1985). On international campaigns against domestic violence, see Dianne Martin, 'Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies' (1998) 36(1) *Osgoode Hall Law Journal* 151 .

<sup>38</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Mr Wran) (emphasis added).

<sup>39</sup> New South Wales Task Force on Domestic Violence, *Report* (1981) 32 ('*NSW Task Force Report*').

domestic violence.<sup>40</sup> This link was revealed by studies, both in New South Wales,<sup>41</sup> and internationally,<sup>42</sup> which exposed the fact that a high proportion of murders were committed by intimate partners. This revelation prompted the government to undertake law reform to address the serious end of domestic violence offending.<sup>43</sup> Changes made to the criminal law included removal of the immunity from prosecution for rape in marriage in 1981,<sup>44</sup> and the law relating to provocation began to evolve to enable a defence on the basis of ‘battered women’s syndrome’.<sup>45</sup> Investigations into the domestic context of homicide revealed that these homicides had often been preceded by incidents of lower level domestic violence.<sup>46</sup> This realisation in turn led to the discovery of the prevalence of lower level, but nonetheless serious, domestic violence. It was against this backdrop of a rising awareness of the prevalence of lower-level domestic violence that attention turned to the potential for a civil-based ADVO to provide a means of protecting women.

It was widely acknowledged by the early 1980s that the criminal law was, in its current form, an ineffective means of responding to domestic violence for the reasons discussed above, and because it was *reactive* rather than *proactive*.<sup>47</sup> In response to research and lobbying by various women’s groups, the measures introduced in 1982 took a holistic approach to the problem, addressing allied problems such as health and housing, as well as attempting to make the criminal law more effective.<sup>48</sup> The criminal law was a central measure for both practical and normative reasons. The practical reasons concerned the belief in the criminal law’s potential to protect victims through both pre-emptive protection orders and deterrence. The normative reasons, which were related to the practical ones, concerned the criminal law’s capacity to

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<sup>40</sup> Julie Stubbs and Anne Wallace, ‘Protecting Victims of Domestic Violence?’ in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book 1988) 52, 53–55.

<sup>41</sup> *Ibid* 54.

<sup>42</sup> See eg, R Emerson Dobash and Russel P Dobash *Violence against Wives: A Case against the Patriarchy*, (Free Press 1979). For discussion of this and subsequent texts by these authors see Mandy Burton, *Legal Responses to Domestic Violence* (Routledge, 2008); Stubbs and Wallace, above n 40, 54.

<sup>43</sup> For a history of the reforms in the US see Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2000). In the UK see, eg, Burton, above n 42.

<sup>44</sup> *Crimes (Sexual Assault) Amendment Act 1981* (NSW), s 61(4), discussed in Stubbs and Wallace, above n 40, 55.

<sup>45</sup> Stubbs and Wallace, above n 40, 56.

<sup>46</sup> *Ibid* 53–54.

<sup>47</sup> See eg the reports of the various Domestic Violence committees, such as in South Australia, Naffin, above n 37 and in NSW, the *NSW Task Force Report*, above n 39; Reg Baker, ‘Domestic Violence: Legal Considerations’ (1984) 8 *Criminal Law Journal* 33; New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Mr Wran).

<sup>48</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2369–74 (Mr Wran); *NSW Task Force*, above n 39, ch 5, ch 7.

convey to the community that domestic violence is no longer tolerated. Regarding the former, measures included introducing an exception to the rule against the compellability of spouses in cases of domestic violence.<sup>49</sup> By denying women the choice not to give evidence, this exception was designed to address the impossibility of proving substantive offences when the victim refused to give evidence.<sup>50</sup> A further problem was the high criminal standard of proof.<sup>51</sup> In relation to proactive measures, it was recognised that the recognisance in NSW,<sup>52</sup> and injunctions under the *Family Law Act 1975* (Cth) at a federal level, were ‘notoriously ineffective’ for protecting women against domestic violence.<sup>53</sup> This ineffectiveness was attributed to the fact that ‘there is no power of arrest attached directly to a breach of the order and it is necessary to institute further legal proceedings of contempt of court to enforce them.’<sup>54</sup> Regarding the normative reasons for including the criminal law in its reforms, Wran said in his Second Reading Speech: ‘community attitudes still have a long way to go before the last vestige of the tacit sanctioning of wife beating is eliminated.’ Therefore, in addition to ‘making the police and courts more effective’, the government intended the legislative reforms to help to re-shape community attitudes by ‘recognising that domestic assault is assault’.<sup>55</sup>

The impact of lobbying by feminist and victims’ groups on these reforms is evident in the long list of individuals and organisations that Premier Wran thanked in his Second Reading Speech when introducing the 1982 Bill to the NSW Parliament.<sup>56</sup> These included the Women’s Legal Resources Centre, the Women Lawyers’ Association and the Women’s Electoral Lobby. The list also included the NSW Police Association, refuges, churches, universities, hospitals and numerous government departments, indicating the extent of public concern about domestic violence in this period.

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<sup>49</sup> *Crimes Act 1900* (NSW) s 407AA, inserted by *Crimes (Domestic Violence) Amendment Act 1982* (NSW) sch 1. It is now in *Evidence Act 1995* (NSW) ss 18, 19 and *Criminal Procedure Act 1986* (NSW) s 279.

<sup>50</sup> *Crimes (Domestic Violence) Amendment Act 1982* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2367 (Mr Wran). The provision was controversial and magistrates and prosecutors were known to circumvent it by excusing, or not calling, the victim to give evidence. See Australian Law Reform Commission (‘ALRC’), *Domestic Violence*, Report No 30 (1986) pt 5 7[3–4].

<sup>51</sup> Heather Douglas and Lee C Godden, ‘The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence’ (2003) 27(1) *Criminal Law Journal* 32, 34.

<sup>52</sup> *Crimes Act 1900* (NSW) s 547.

<sup>53</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2368 (Mr Wran).

<sup>54</sup> *Ibid.*

<sup>55</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Mr Wran).

<sup>56</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2369–74 (Mr Wran).

Why did feminist and victims' groups choose to channel reform efforts into the criminal law rather than, for example, the civil family law jurisdiction? An injunction against violence had been available in the federal family law jurisdiction since 1975. It too had been criticised for its ineffectiveness,<sup>57</sup> as the recognisance and its predecessors in the criminal jurisdiction had been, but reform of the family law injunction was not pursued with the same vigor as reform of the recognisance in the criminal jurisdiction. At the risk of over-simplification, the reason for choosing the criminal law as a key state response to domestic violence was its capacity to force offenders (men) to accept responsibility for perpetrating violence against women and children through the responsibility attribution practices of the criminal law. Doing so was a 'key strategy of feminists ... to seek to make lines of accountability for gendered violence clear' in order to disrupt patriarchal social structures.<sup>58</sup> Simultaneously, the denunciation function of the criminal law served the purpose of conveying the state's moral condemnation of violence against women. Via the imposition of criminal liability, punishment and retribution, the state recognises and denounces the 'harm done to the victim and the community'.<sup>59</sup> Also, because police are often the first to respond to domestic violence, their activities feed easily into the infrastructure of the criminal law. Other reasons for favouring criminal law over family law include the fact that legal aid was more readily available for state criminal matters than for federal family law matters.

### ***The Apprehended Domestic Violence Order***

Having set out the reasons why the criminal law, up to the final quarter of the twentieth century was an ineffective tool for dealing with domestic violence, and the social context within which the ADVO/CAVO mechanism was introduced, this section examines the content of the ADVO/CAVO mechanism and assesses the utility of the formalisation lens for understanding the subsequent changes to the substantive law, procedures and practices.

The ADVO, enacted in 1982, was a civil order that empowered a court of summary jurisdiction to impose 'such restrictions or prohibitions on the behaviour of the defendant as appear necessary' if satisfied on the balance of probabilities that 'the person in need of protection' ('PINOP') 'apprehends' 'the commission by a person of domestic violence upon

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<sup>57</sup> Naffin, above n 37, 60–70.

<sup>58</sup> Julie Stubbs, 'Introduction' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology, 1994) 1, 6.

<sup>59</sup> This sentencing principle is expressed in the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

another person' and the court is satisfied 'that the apprehension is reasonable.'<sup>60</sup> Thus the key criterion of the ADVO is the PINOP's perception of threats. While this is circumscribed by an objective test, the civil standard of proof, which was consciously chosen by women's groups to overcome the difficulties of meeting the criminal standard,<sup>61</sup> reduces the limiting effect of the reasonableness requirement.

The ADVO extended the reach of the criminal law by criminalising a broader range of behaviours than were previously captured by the recognisance (and its ancestor, the surety to keep the peace). It did so by shifting the focus of the recognisance from protection of the king's peace to protection of personal autonomy. As such it was constructed around an expanded conception of 'the person' of the victim; specifically, as originally designed, 'the person' of a class of women.<sup>62</sup> Some scholars, such as Peter Ramsay, have charted these changes in the English context in detail,<sup>63</sup> but their impact on the operation of the criminal law in the summary jurisdiction has been little studied in Australia.<sup>64</sup> As Farmer's work shows, personhood now extends beyond harm to the body of the person to the 'victim's own perception of threats and of their vulnerability in particular contexts ... Personhood is understood as a kind of personal space in which an individual is able to exercise or develop their autonomy and sense of self.'<sup>65</sup> As a result of this new understanding of personhood, our understanding of the responsible individual has extended to incorporate 'responsible conduct in relation to others',<sup>66</sup> both of which developed in the domestic violence context.<sup>67</sup> The ADVO brought about this change to the criminal law in NSW.

These changes to the substantive law were accompanied by changes to enforcement practices, which were designed to improve the effectiveness of the criminal law. For example,

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<sup>60</sup> s 547AA, inserted by *Crimes (Domestic Violence) Amendment Act 1982* (NSW).

<sup>61</sup> See Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30(3) *Sydney Law Review* 439, 444. The objective test is an important point of difference between the ADVO and the ASBO. On the vast scope of the ASBO see Ramsay, above n 13.

<sup>62</sup> It has since been recognised that men are also victims of domestic violence, and the concept of a relationship has moved away from a hetero-normative construct.

<sup>63</sup> Ramsay, above n 13; Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (OUP, 2016) ch 8, esp 253–63.

<sup>64</sup> A notable exception is Heather Douglas who has studied the implementation of domestic violence protection orders in Queensland, but her work is not framed around this shift to protection of personal autonomy. See Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' above n 61.

<sup>65</sup> Farmer, 'Making the Modern Criminal Law: Criminalisation and Civil Order', above n 63, 260.

<sup>66</sup> *Ibid* 261.

<sup>67</sup> *Ibid*.

either the aggrieved person or a police officer could lay a complaint, instead of the aggrieved person only.<sup>68</sup> This was an important change that attempted to address victims' fears of reprisals, as discussed above. Further, the court was empowered to impose 'such restrictions on the behaviour of the defendant as appear necessary or desirable', which enabled orders to be moulded to the defendant and the particular circumstances of the relationship, thus creating a personalised criminal law.<sup>69</sup>

When first enacted the ADVO provision contained two important restrictions that have since been discarded. The erosion of these restrictions shows how rule of law issues have played out in the summary jurisdiction in NSW. The first restriction was that a court could only make an order if the complainant feared being subjected to behaviour that was already a criminal offence. Additionally, it could not be a fear of just any offence, but only a selection of offences classified as 'domestic violence offences'.<sup>70</sup> The legislation did not create a new domestic violence offence but deemed pre-existing offences to be domestic violence offences.<sup>71</sup> Only one year after its enactment, the ADVO provision was extended to include an apprehension of conduct, which, at the time, did not constitute an existing criminal offence, namely, 'conduct consisting of harassment or molestation, falling short of actual or threatened violence.'<sup>72</sup> This amendment offends the rule of law principle of equality before the law because it expands the range of behaviour that is considered to be harmful, but not for everyone in the community, only for individuals who had been made the subject of an ADVO.

The second restriction was that the period of the order was limited to six months. In 2007 the duration of an order was extended to 'as long as is necessary, in the opinion of the court, to ensure the safety and protection of the protected person',<sup>73</sup> or 12 months if the court fails to specify the period of the order.<sup>74</sup> This is a considerable expansion of the reach of the criminal law by extending the duration of what Andrew Ashworth and Lucia Zedner have called 'self-

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<sup>68</sup> *Crimes Act 1900* (NSW) s 547AA(2).

<sup>69</sup> *Ibid* s 547AA(3)(a). This provision set out examples of conduct that the court could restrict, including 'approaches by the defendant to the aggrieved spouse of the defendant'. See Ramsay's discussion of the ASBO in England which contains a similarly broad power: Ramsay, above n 13.

<sup>70</sup> See Stubbs, 'Introduction', above n 58, 6.

<sup>71</sup> *Crimes Act 1900* (NSW)s 4(1) inserted by the *Crimes (Domestic Violence) Amendment Act 1982* (NSW).

<sup>72</sup> Stubbs, 'Introduction', above n 58, 7.

<sup>73</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 79(2).

<sup>74</sup> *Ibid* s 79(3).

policing' mechanisms.<sup>75</sup> Self-policing mechanisms are mechanisms like the ADVO which, Ashworth and Zedner argue, have reoriented the criminal law away from its traditional 'retrospective orientation of punishment for past actions towards what might be termed 'future law''.<sup>76</sup> They govern behaviour by eliciting a quasi-contractual consent from the defendant to be subjected to punishment in the future if they breach the conditions of the mechanism.<sup>77</sup> Thus self-policing mechanisms challenge the rule of law principle that no punishment shall be inflicted without a determination by the courts that there has been a breach of law. Eroding core principles of the rule of law in this way has facilitated criminalisation. It was a conscious choice — a political choice — not only of the NSW government, but also of the women's groups who advocated for the changes.

### *Contravening an Apprehended Violence Order*

The creation of the contravening an apprehended violence order ('CAVO') offence is an example of the maturation of the summary jurisdiction, by which I mean, as explained in the Introduction to this thesis, it was given the power to regulate its own processes by imposing a punishment for breach of its orders. But this power extended far beyond the creation of court procedures. It created a new regime for regulating the behaviour of citizens. CAVO served both normative and practical purposes. The terms of the offence were that 'a person against whom an [ADVO] has been made' and who 'has been personally served with a copy' of the order, and who 'knowingly fails to comply with a restriction or prohibition specified in the order' is guilty of an offence.<sup>78</sup> In normative terms it gave effect to the criminal law's denunciation function by conveying the state's moral condemnation of domestic violence.<sup>79</sup> When initially enacted, CAVO was punishable by six months imprisonment.<sup>80</sup> The penalty has now been increased to 2 years imprisonment and if the breach 'was an act of violence against a person', the defendant

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<sup>75</sup> Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2(1) *Criminal Law and Philosophy* 21, 42.

<sup>76</sup> Ibid 21. Andrew Ashworth and Lucia Zedner, *Preventive Justice* (2014, OUP), ch 4, 77.

<sup>77</sup> Ibid 42–3.

<sup>78</sup> s 547AA(7) was inserted into the *Crimes Act 1900* (NSW) by the *Crimes (Domestic Violence) Amendment Act 1982* (NSW), sch 3.

<sup>79</sup> s 547AA was inserted into the *Crimes Act 1900* (NSW) by the *Crimes (Domestic Violence) Amendment Act 1982* (NSW), sch 3.

<sup>80</sup> S547AA(7). The penalty for breach has now been increased to 2 years imprisonment but it remains a summary offence: *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 14(1).

*must* be sentenced to imprisonment ‘unless the court otherwise orders’.<sup>81</sup> If the court otherwise orders it must give reasons for doing so.<sup>82</sup> These provisions are evidence of the seriousness with which the behaviour is regarded and reflects the impact of demands for greater recognition of harm to victims.

In practical terms, the offence of CAVO addressed the main criticism of its predecessor, the recognisance to keep the peace; namely, its lack of enforceability. As Premier Wran said in his Second Reading Speech to Parliament when it was first introduced: ‘I believe that this last reform [i.e., the creation of the offence of CAVO] will provide effective and immediate relief for those women who spend their lives worrying when the next battering will be.’<sup>83</sup> When considering how best to adapt the recognisance to the domestic violence context the various law reform bodies around Australia considered models implemented in the United States and the United Kingdom.<sup>84</sup> In NSW the Domestic Violence Task Force recommended the English model but with important adaptations. In the English model, the police had no power to arrest for breach of a recognisance unless the court had attached such a power to the order.<sup>85</sup> This created uncertainty for the police about their powers of arrest in each case and either delayed or deterred intervention.<sup>86</sup> To avoid this uncertainty, the NSW Parliament enacted a specific police power to arrest for CAVO.<sup>87</sup> The legislative changes also confirmed the right of police to enter premises when invited and empowered magistrates to issue warrants to police via radio or telephone.<sup>88</sup> Thus the ADVO/CAVO mechanism made a relatively unregulated field of social interaction amenable to regulation by the criminal law. This can be seen as a process of juridification that has facilitated criminalisation.

It might be objected that the ADVO/CAVO mechanism has resulted in de-criminalisation rather than criminalisation. In a study of breaches of domestic violence orders in Queensland,

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<sup>81</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(4).

<sup>82</sup> *Ibid* s 14(5).

<sup>83</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2368 (Mr Wran).

<sup>84</sup> In South Australia it was the Domestic Violence Committee, see Naffin above n 37, 4; in NSW it was the NSW Task Force on Domestic Violence. See *NSW Task Force Report* above n 39.

<sup>85</sup> For discussion see Naffin, above n 37, 5–6.

<sup>86</sup> *Ibid* 6.

<sup>87</sup> s 547AA(7). South Australia took the same approach, although their offence was broader: *Justices Act 1921* (SA) s 99. For discussion of the SA provision see Naffin, above n 37, 6–7.

<sup>88</sup> *Crimes (Domestic Violence) Amendment Act 1982* (NSW) sch 2; New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Mr Wran).

Heather Douglas found that convictions for the Queensland equivalent of CAVO were being accepted in cases where the facts warranted a conviction for more serious assault offences; or, the nature of the breach that was recorded in court minimised the violence actually experienced by the victim.<sup>89</sup> Douglas observes that this constitutes *de*-criminalisation (or a failure to criminalise) because the offender is being held liable and being punished for an offence that is much lower in the offence hierarchy than that actually committed, and some offenders are escaping conviction entirely. Even though this was a Queensland-based study, NSW has faced similar issues.<sup>90</sup> Examination of individual cases in this way indeed paints a picture of *de*- or non-criminalisation. However, the power of an analysis of change over time to substantive law that incorporates an examination of procedures and practices lies in its capacity to paint a different picture. It shows that the law is facilitating convictions for CAVO in circumstances where offenders have previously escaped conviction for the reasons set out earlier in this chapter, the main one being the refusal of the victim to give evidence in court. Viewed from this perspective, the ADVO/CAVO mechanism represents criminalisation rather than *de*-criminalisation. Douglas' study was conducted in 2008 and much has changed since then. An analysis of recent legislative changes in NSW illustrates how the turn to law to regulate police enforcement practices is facilitating criminalisation.

In the twenty-first century the prevention of domestic violence has become a high-profile national priority. In response to a series of reports and inquiries, broad-ranging domestic violence regimes designed to address the problem holistically have been introduced across Australia. Due to Australia's federal structure, those regimes differ across jurisdictions, but there have been moves to develop a national strategy.<sup>91</sup> The most prominent and comprehensive inquiry was the Victorian Royal Commission into Family Violence which issued a seven-volume report in 2016.<sup>92</sup> In NSW, the 2006 Ombudsman's special report to Parliament, *Domestic Violence – Improving Police Practice* ('2006 Ombudsman's Report'), led to the NSW

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<sup>89</sup> Heather Douglas, 'The Criminal Law's Response to Domestic Violence', above n 61.

<sup>90</sup> NSW Department of Attorney General and Justice, *The NSW Domestic Violence Justice Strategy: Improving the NSW Criminal Justice System's Response to Domestic Violence 2013–2017* <[http://www.crimeprevention.nsw.gov.au/domesticviolence/Documents/domestic-violence/jag2391\\_dv\\_strategy\\_book\\_online.pdf](http://www.crimeprevention.nsw.gov.au/domesticviolence/Documents/domestic-violence/jag2391_dv_strategy_book_online.pdf)>. ('NSW Domestic Violence Justice Strategy')

<sup>91</sup> Finance and Public Administration References Committee, Commonwealth of Australia, *Domestic Violence in Australia*, Report (2016).

<sup>92</sup> Victoria, Royal Commission into Family Violence, *Report* (2016) ('Victoria RCFV Report').

government's Domestic Violence Justice Strategy 2013–2017.<sup>93</sup> The strategy 'outlines the approaches and standards justice agencies in NSW will adopt to improve the criminal justice system's response to domestic violence'.<sup>94</sup> A key pillar of that strategy was implementation of the *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* ('*NSW Police Code of Practice*').<sup>95</sup> The core goal of the *NSW Police Code of Practice* is 'building trust and confidence in the NSW Police Force amongst victims ... with the aim of increased reporting and legal action rates'.<sup>96</sup> Increasing the reach of the criminal law — which will be achieved primarily through the ADVO/CAVO mechanism in the summary jurisdiction — is therefore central aim of these initiatives.

Amendments to the ADVO/CAVO mechanism made since the tabling of the 2006 Ombudsman's report can best be understood as attempts to increase the criminalisation of domestic violence. A selection made in 2007, 2013 and 2015 illustrate the ongoing nature of those efforts. In response to calls from women's group advocates,<sup>97</sup> in 2007 the domestic violence regime was removed from the *Crimes Act* and enacted in a stand-alone Act, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).<sup>98</sup> The reasons given by the government for doing this were expressed in the language of denunciation and improving the effectiveness of the criminal law. In the parliamentary debates members of the government said the stand-alone regime would give 'full recognition to the seriousness of violence against women and children', make it 'easier for women and children to obtain apprehended violence orders', and easier for police and practitioners to navigate the legislation.<sup>99</sup> Two examples illustrate how the amendments facilitated criminalisation. The first was the granting of a power to magistrates to impose an interim apprehended violence order automatically where the alleged assailant was charged with a 'serious personal violence offence' 'to spare victims of violence the trauma of

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<sup>93</sup> *NSW Domestic Violence Justice Strategy*, above n 90.

<sup>94</sup> NSW Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* NSW (2013), 8 ('*NSW Police Code of Practice*').

<sup>95</sup> The Code was implemented in 2013 and updated in 2016. It seems that NSW is always a few steps behind Victoria where a Police Code of Practice was introduced in 2004: *Victoria RCFV*, above n 92, vol VIII, 2.

<sup>96</sup> *NSW Police Code of Practice*, above n 94, 8.

<sup>97</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Ms D'Amore).

<sup>98</sup> This followed a discussion paper and a report by the NSWLRC on Part 15A of the *Crimes Act 1900* (NSW): New South Wales Law Reform Commission ('NSWLRC'), *Apprehended Violence Orders: Part 15A of the Crimes Act*, Discussion Paper No 45 (November 2002); New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (October 2003).

<sup>99</sup> *Crimes (Domestic and Personal Violence) Bill 2007* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4327 (Ms Gadiel).

being cross-examined at the hearing for an apprehended violence order as well as at the hearing of the criminal charges'.<sup>100</sup> The second was a mechanism 'to identify repeat offenders' by requiring domestic violence offences to be noted on an offender's criminal record.<sup>101</sup> It will be recalled that there is no specific 'domestic violence' offence. Instead, offenders are convicted of offences such as assault and assault occasioning actual bodily harm. Before the 2007 amendment, when these offences were entered on an offender's criminal history, there was no indication of the domestic violence context of the offence. The proposal to note the domestic violence context of such offences on the offender's record was intended to serve two functions. The first was to make it easier for courts to identify repeat offenders and impose harsher penalties. The second was the use of labelling to shame repeat offenders.<sup>102</sup>

In this tranche of amendments, however, Parliament again acknowledged that the criminal law alone could not solve the problem of domestic violence. Both the government and the opposition pointed to the complexity of the issues underpinning domestic violence, including gender inequality, learned behaviour and socioeconomic factors that require a more nuanced approach than the criminal law is capable of delivering.<sup>103</sup>

In 2013 police powers in relation to domestic violence were expanded,<sup>104</sup> and recorded statements were introduced in 2015.<sup>105</sup> The 2015 amendments enable the complainant in Local Court trials relating to a domestic violence offence to 'give evidence in chief ... wholly or partly in the form of a recorded statement that is viewed or heard by the court.'<sup>106</sup> This practice only applies to hearings relating to applications for domestic violence orders that are connected to the alleged commission of a domestic violence offence,<sup>107</sup> and is intended to avoid the necessity of the complainant giving evidence twice in two different proceedings.<sup>108</sup> The statement is often

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<sup>100</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4327 (Ms Gadiel).

<sup>101</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12. See New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Mr Smith).

<sup>102</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Mr Collier).

<sup>103</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Ms Firth, Ms Goward).

<sup>104</sup> *Crimes (Domestic and Personal Violence) Amendment Act 2013* – see especially ss 89, 89A.

<sup>105</sup> *Criminal Procedure Amendment (Domestic Violence Complaints) Act 2014* (NSW), which came into operation on 1 June 2015.

<sup>106</sup> *Criminal Procedure Act 1986* (NSW) s 289F, inserted by *Criminal Procedure Amendment (Domestic Violence Complaints) Act 2014* (NSW) sch 1[19].

<sup>107</sup> *Criminal Procedure Act 1986* (NSW) s 289H.

<sup>108</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2014, 1486 (Mr Hazzard).

taken from the victim at the time of the offence when any injuries that may exist are visible and the alleged victim is likely to be emotional, which renders them highly compelling. These provisions, which mirror provisions previously enacted to protect vulnerable witnesses and victims in prescribed sexual assault proceedings,<sup>109</sup> do not entirely preclude the defendant from cross-examining the complainant. In principle the complainant is still required to attend court to give evidence on oath. However, they reduce the opportunity for defendants to confront their accuser. These changes in the practices of procedure and proof were explicitly designed to overcome two impediments to criminalisation: domestic violence incidents not being brought to the attention of the police; and the failure of complainants to attend court.<sup>110</sup> In his Second Reading Speech the then Attorney General (Brad Hazzard) noted a 2014 BOCSAR study which estimates that ‘only half of domestic assaults are reported to police.’<sup>111</sup> Failure to report domestic violence to police has been recognised as a problem at least since the issue of domestic violence rose to prominence in the late 1970s. The 2015 amendments were also designed to ‘increase the number of early guilty pleas’,<sup>112</sup> which, Hazzard argued on behalf of the government, would have the dual benefits of improving efficiency and reducing the trauma of the process for victims.

As well as these ongoing reforms aimed at increasing the criminalisation of domestic violence, initiatives have been introduced that go some way towards ‘redefining success’.<sup>113</sup> In 2005 the Domestic Violence Intervention Court Model (‘DVICM’) was implemented in two Local Courts, one in western Sydney at Campbelltown, and one in the regional town of Wagga Wagga. Its purpose was ‘to apply good practice in the criminal justice process for domestic violence matters and improve the coordination of services to victims and defendants.’<sup>114</sup> The main features of the ‘inter-agency’ scheme are: the provision of ‘regular, although not specialist, police prosecutors’;<sup>115</sup> victims being excused by agreement with the magistrate from all but the

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<sup>109</sup> Ibid. See *Criminal Procedure Act 1986* (NSW) pts 5 and 6 inserted in 2005 and 2007 respectively.

<sup>110</sup> *NSW Police Code of Practice*, above n 94, 18.

<sup>111</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2014, 1486 (Mr Hazzard).

<sup>112</sup> *NSW Police Code of Practice*, above n 94, 18. This is not just aimed at efficiency and cost, but also at reducing trauma for victims, a central focus of the amendments. New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2014, 1486 (Mr Hazzard).

<sup>113</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 119.

<sup>114</sup> Chief Magistrate Henson, Local Court of NSW, *Annual Review 2014*, 16 <<http://www.localcourt.justice.nsw.gov.au/Pages/Publications/annualreviews.aspx>> (‘NSWLC Annual Review 2014’).

<sup>115</sup> Ibid 16.

first court appearance (and presumably the hearing if the matter is defended); the police being supplied with ‘domestic violence evidence collection kits’ which assist them to collect high quality evidence and their being supported to produce briefs of evidence at the earliest possible date. By 2007 the evidence kits were being rolled out around the State.<sup>116</sup> A victims’ advocate provides support for victims through the process and assists with matters relating to personal security.<sup>117</sup> Two evaluations of the scheme, one in 2008,<sup>118</sup> and one in 2012,<sup>119</sup> showed that while the incidence of guilty pleas had not increased as was hoped, the scheme had reduced court delays and victims reported satisfaction with the process and improved feelings of personal security. The scheme remains active in Campbelltown and Wagga Wagga but has not been rolled out across the State. The Victoria Royal Commission into Family Violence (‘Victoria RCFV’) has recommended augmenting moves towards a similar ‘therapeutic approach’ in Victorian Magistrates Courts.<sup>120</sup> While schemes such as the DVICM provide an opportunity to redefine success in terms of participant satisfaction rather than by the number of convictions or a reduction in the incidence of domestic violence, criminalisation through securing convictions remains at the heart of the process.

We are yet to see what the NSW response to the Victoria RCFV will be, but one legislative measure recently introduced in Victoria portends increasing criminalisation via the summary jurisdiction. In July 2016 Victoria introduced self-executing interim family violence intervention orders (the equivalent of the NSW interim ADVO) despite the recommendation of the Victoria RCFV that they not be adopted.<sup>121</sup> The benefits of self-executing orders include that they save court time and they relieve the victim of having to return to court for confirmation of the final order. However, as the Victoria RCFV pointed out, they make the ‘person subject to the order responsible for independently challenging the order.’<sup>122</sup> In light of evidence demonstrating

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<sup>116</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Mr Paluzzano) where parliament debated the *Crimes (Domestic and Personal Violence) Bill 2007*.

<sup>117</sup> Laura Rodwell and Nadine Smith, ‘An Evaluation of the NSW Domestic Violence intervention Court Model’ (NSW Bureau of Crimes Statistics and Research, 2008), 4; *NSWLC Annual Review 2014*, above n 114, 16.

<sup>118</sup> Rodwell and Smith, above n 117.

<sup>119</sup> Emma M Birdsey and Nadine Smith, ‘The Domestic Violence Intervention Court Model: A Follow-Up Study’ (NSW BOCSAR, Contemporary Issues in Crime and Justice No. 155, 2012).

<sup>120</sup> *Victoria RCFV Report*, above n 92, vol VIII, 118. For discussion see Anne Wallace, ‘Australia’s Lower-Level Criminal Courts: Tackling 21<sup>st</sup> Century Problems in a 19<sup>th</sup> Century Paradigm?’ in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 201.

<sup>121</sup> *Victoria RCFV*, above n 92, vol VIII, 180.

<sup>122</sup> *Ibid.*

that a high proportion of defendants (and PINOPS) do not understand family violence orders when they are dealt with in court,<sup>123</sup> self-executing orders carry the obvious risk of exacerbating that lack of understanding. The *NSW Police Code of Practice* pledges what may be interpreted as extra-curial surveillance: ‘Police will work with local communities and external agencies to reduce and prevent domestic and family violence through monitoring the behaviour of offenders.’<sup>124</sup> The inevitable result of such far-reaching criminalisation will be greater numbers of prosecutions by an increasingly vigilant police force that will swell the ranks of defendants and increase the prison population, as the final part of this chapter shows.

In the current era the offence category of breach of justice orders has created new cohort of defendants. This phenomenon is best illustrated by an investigation of the impact of CAVO on a particular social group: Aboriginal people. The overrepresentation of Aboriginal people in the summary jurisdiction charged with low-level public order offences, such as offensive language, has been examined in detail in the criminal law literature, due, in large part, to the revelations of the Royal Commission into Aboriginal Deaths in Custody in 1991.<sup>125</sup> What is less well-known is the impact that the summary jurisdiction’s increasing maturity is having on the Aboriginal charging and incarceration rates. The oft-quoted statistics on the overrepresentation of Aboriginal people in prison are well-known: Aboriginal people comprise approximately 3 per cent of the total population and are imprisoned at a rate that is 13 times greater than non-Indigenous persons.<sup>126</sup> BOCSAR has drawn attention to the fact that the broad category of ‘offences against justice procedures’ has contributed to the overrepresentation of Aboriginal people in the criminal justice system,<sup>127</sup> but a less-well-known statistic is the extent to which Aboriginal people are overrepresented as both victims and defendants of, and among those sentenced to imprisonment for, CAVO.

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<sup>123</sup> Ibid 121.

<sup>124</sup> *NSW Police Code of Practice*, above n 94, 11.

<sup>125</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, ch 7.

<sup>126</sup> Australian Bureau of Statistics (‘ABS’), Media Release, 30 August 2013 ‘Aboriginal and Torres Strait Islander Population Nearing 700,000’ <

<http://www.abs.gov.au/ausstats/abs@.nsf/latestProducts/3238.0.55.001Media%20Release1June%202011>>;

Australian Bureau of Statistics, Catalogue Number 4517.0, Prisoners in Australia (8 December 2016) <

<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

<sup>127</sup> Jacqueline Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?*, Issues Paper No 41 (NSW Bureau of Crime Statistics and Research, 2009).

Victimisation rates are notoriously difficult to measure but a number of policy documents have noted that ‘the occurrence of violence in Indigenous communities and among Indigenous people “is disproportionately high in comparison to the rates of the same types of violence in the Australian population as a whole”’.<sup>128</sup> The reasons for this, again, are complex and are beyond the scope of this thesis, but they include interrelated factors such as generational trauma caused by colonisation, higher rates of socioeconomic disadvantage and removal of children from their families.<sup>129</sup> The Australian Bureau of Statistics reports that in NSW, ‘Aboriginal and Torres Strait Islander people had more than three times the victimisation for Assault compared to non-Indigenous people, and the rates are rising,<sup>130</sup> while the national rates of assault have been decreasing since 2011–2012.<sup>131</sup> A disproportionately large proportion of the victims of such violence are women, accounting for 65 per cent of Aboriginal and Torres Strait Islander assault victims.<sup>132</sup>

Conviction rates are more readily determined, but they are not without their problems. Because the way in which statistics were recorded and organised changed in 1994 it is not possible to compare the data from 1982 (when CAVO was introduced) to 1994 with post-1994 data. Even the post-1994 data must be approached with caution. For example, it is clear that the recording of Indigenous status improved between 1994 and the mid-2000s such that the size of the category of offender whose Indigenous status was ‘unknown’ decreased from 431 in 1994 to three in 2008. Despite these limitations it is possible to make some general observations.<sup>133</sup> Between 1995 and 2015 the total number of CAVO offences finalised in the NSW Local Court more than doubled from 1555 to 3626. In 1995, Indigenous people accounted for 19 per cent of

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<sup>128</sup> Janet Stanley, Adam M Tomison and Julian Pocock, *Child Abuse and Neglect in Indigenous Australian Communities* (Australian Institute of Family Studies, 2003) quoting Paul Memott, Rachael Stacy, Catherin Chambers and Catherine Keys, Commonwealth of Australia, *Violence in Indigenous Communities*, Report to Crime Prevention Branch of the Attorney-General’s Department (2001).

<sup>129</sup> See Kylie Cripps and Megan Davis, *Communities Working to Reduce Indigenous Family Violence*, Brief No 12 (Indigenous Justice Clearing House, 2012)  
<[http://www.healthinfonet.ecu.edu.au/uploads/resources/23797\\_23797.pdf](http://www.healthinfonet.ecu.edu.au/uploads/resources/23797_23797.pdf)>

<sup>130</sup> Australian Bureau of Statistics (‘ABS’), Catalogue Number 4510.0 Recorded Crime – Victims, Australia, 2015 (13 July 2016)  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2015~Main%20Features~Victims%20of%20Crime,%20Aboriginal%20and%20Torres%20Strait%20Islander%20Victims~5>>.

<sup>131</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2017* (Commonwealth of Australia) vol C, 10.

<sup>132</sup> ABS, *Recorded Crime 2015*, above n 130.

<sup>133</sup> The source of all of the data referred to in this section is: NSW Bureau of Crime Statistics and Research. I use the term ‘Indigenous’ in this section because that is the term used by BOCSAR.

CAVO charges finalised in the Local Court of NSW. By 2005 this proportion had increased to 24.5 per cent, but this increase may be explained by the improvements in the recording of Indigenous status. In 2008, after the enactment of amendments in 2007 that changed police enforcement practices, that figure had increased to 28 per cent and it has remained between 27 per cent and 30 per cent ever since.<sup>134</sup>

Perhaps more striking is the proportion of offenders sentenced to imprisonment for CAVO, and of those the proportion that is Indigenous. Between 1995 and 2015 the total number of people sentenced to imprisonment has almost tripled from 217 to 565. Over the same period, the proportion of those that are Indigenous has fluctuated between 38 per cent and 50 per cent.<sup>135</sup> Contributing to the disproportionately high Indigenous imprisonment rate is the fact that Indigenous offenders sentenced to imprisonment for CAVO have ‘significantly higher’ reconviction rates than their ‘non-Indigenous counterparts’.<sup>136</sup> One reason for this is that Indigenous offenders are more likely to have a lengthier prior history of offending,<sup>137</sup> which is one of the predictors of being sentenced to imprisonment.<sup>138</sup> Similarly, offenders from ‘socio-economically disadvantaged areas’ also had higher recidivism rates for CAVO.<sup>139</sup> Another factor leading to imprisonment for CAVO is where the breach involves a physical assault,<sup>140</sup>

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<sup>134</sup> Source: NSW Bureau of Crime Statistics and Research.

<sup>135</sup> Source: NSW Bureau of Crime Statistics and Research.

<sup>136</sup> Robin Fitzgerald and Timothy Graham, *Assessing the Risk of Domestic Violence Recidivism*, Crime and Justice Bulletin No 189 (NSW Bureau of Crime Statistics and Research, 2016) 9 <<http://www.bocsar.nsw.gov.au/Documents/CJB/Report-2016-Assessing-the-risk-of-domestic-violence-recidivism-cbj189.pdf>>.

<sup>137</sup> Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 55.

<sup>138</sup> Sarah Napeir, Suzanne Poynton and Jacqueline Fitzgerald, *Who Goes to Prison for Breaching an Apprehended Domestic Violence Order? An Analysis of Police Narratives*, Issue Paper No 107 (NSW Bureau of Crime Statistics and Research, 2015) 7.

<sup>139</sup> Fitzgerald and Graham, above n 136, 9.

<sup>140</sup> On 24 October 2017 changes to the sentencing regime in NSW were passed by Parliament and assented to, but were not yet in force at the time of writing. The changes abolish the existing regime of non-custodial penalties (suspended sentences, good behaviour bonds and community service orders) and replace them with a new regime of intensive correction orders, community correction orders and conditional release orders. The new non-custodial penalties are available as an alternative to a period of imprisonment that does not exceed two years. For this reason they will have a particular impact on the summary jurisdiction. The new sentencing regime establishes a presumption that an offender who has been convicted of a ‘domestic violence offence’ (defined in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)) will be sentenced either to imprisonment, or, will be given a penalty that includes supervision in the community unless the ‘court is satisfied that a different sentencing option is more appropriate in the circumstances and gives reasons for reaching that view’: *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017* (NSW) schedule 1[4]. The government described the new non-custodial sentencing regime as ‘tougher and more onerous’ and the presumption in relation to domestic violence offences as

## *Conclusion*

This chapter argued that the lens of formalisation is helpful for understanding how the criminal law in summary form has been used to regulate domestic violence. It showed that the ADVO/CAVO mechanism has deep historical roots in the surety to keep the peace, thus revealing the longevity of the use of the criminal law as a preventive tool. However, in the 1980s the summary jurisdiction was used to effect a radical shift in the way in which the criminal law responds to domestic violence. The broad and open textured mechanism of the surety to keep the peace, which became the recognisance to keep the peace, was replaced with the ADVO/CAVO legislative mechanism. The ADVO/CAVO mechanism extended the reach of the criminal law by criminalising a broader range of behaviours than were previously captured by the recognisance (and its ancestor). But the criminalisation of domestic violence has been achieved primarily via myriad legislative provisions enacted from the 1980s to the present that regulate enforcement practices. This proliferation of statutory provisions can be seen as juridification. This process has been driven by the efforts of expert consultative bodies rather than the government choosing unilaterally to respond to domestic violence punitively. These bodies, activated by the lobbying of feminists and victims groups, consciously chose the criminal law as a key measure to combat domestic violence rather than alternative regulatory systems such as the civil family law jurisdiction. This choice was motivated, in large part, by the criminal law's capacity to convey the state's moral condemnation of domestic violence, and the ready availability of the infrastructure of the criminal law. However, while the formalisation lens revealed these under-appreciated aspects of criminalisation, it does not explain it fully. The ADVO/CAVO mechanism empowers magistrates to mould a personalised criminal law to the circumstances of the defendant and (usually) his relationship with the PINOP.<sup>141</sup> This move away from offences of general application to offences defined with increasing particularity can be seen as a return to the type of informality that was prevalent until the mid-nineteenth century when offences were defined with a high degree of specificity. This move from the general to the particular has

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reflecting and supporting 'the Premier's priority to tackle domestic violence reoffending': New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 2. These amendments are evidence of the continuing prominence of domestic violence as a social issue, particularly in the wake of the Victoria Royal Commission into Family Violence.

<sup>141</sup> Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014), ch 4, 77.

produced a new cohort of defendants in the current era and has raised rule of law issues that have been under-analysed in the criminal law literature.

## Conclusion

This thesis presents an analysis of the NSW summary jurisdiction. It is built on an argument that the concept of ‘formalisation’ is useful for understanding the historical development of the summary jurisdiction. My concept of formalisation, which arose from my research and was then applied as an analytical lens, has four overlapping and interacting dimensions: juridification, rationalisation, professionalisation together with ‘lawyerification’, and separation of law from other spheres of social power, such as religion and politics. In conclusion I offer an assessment of how the formalisation concept has helped me to develop a fresh understanding of the summary jurisdiction, and discuss the implications of my analysis for criminal law scholarship.

To demonstrate the utility of the formalisation lens it is useful to return to Doreen McBarnet and Lindsay Farmer, the two scholars who have given the most comprehensive accounts of the summary jurisdiction. McBarnet’s account is particularly pertinent because the way in which it has been taken up in the criminal law literature in NSW has shaped our understanding of the summary jurisdiction. McBarnet’s account is that ‘two tiers of justice’ operate in the criminal justice system. In the higher courts — the upper tier — the ‘ideology of justice is displayed’ for public consumption.<sup>1</sup> In the summary jurisdiction — the lower tier — the imperative is to secure convictions to achieve crime control. It therefore operates according to a paradigm that differs from that operating in the higher courts. An ‘ideology of triviality’ operates to justify the absence of due process and common law fair trial protections of accused persons. McBarnet’s account presents a static image of a summary jurisdiction that diverges sharply from the traditional processes of justice that apply in the higher courts. This understanding persists in the scholarly literature in Australia, as demonstrated by a book chapter written in 2017 that characterises the summary jurisdiction as operating according to a nineteenth century paradigm.<sup>2</sup> However, the formalisation lens reveals that while McBarnet’s account may once have been true, significant changes to procedures and practices in the final quarter of the twentieth century, particularly from 1995, have brought the two jurisdictions into closer alignment. For example, in the current era, procedural protections of accused persons and the common law principles of fair

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<sup>1</sup> Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice*, Oxford Socio-Legal Studies (Macmillan Press, 1981) 122.

<sup>2</sup> Anne Wallace, ‘Australia’s Lower-Level Criminal Courts: Tackling 21<sup>st</sup> Century Problems in a 19<sup>th</sup> Century Paradigm?’ in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 201, 201.

trial (which I will call, collectively, ‘procedures and protections’) are seen to apply equally to matters being finalised summarily as to matters tried by judge alone in the higher courts.<sup>3</sup> This shift has been a product of formalisation; in particular, lawyerification.

Another prominent understanding of summary jurisdiction in the criminal law literature is that it deals exclusively with regulatory or other minor offences that carry no moral blameworthiness. An exemplar of this understanding is that of Alan Norrie.<sup>4</sup> Similarly, as set out in the Introduction to this thesis, the understanding of the ‘modern criminal justice system’ that Lindsay Farmer developed through his examination of the formalisation of summary jurisdiction in the nineteenth century was that;

it is a complex administrative system geared towards dealing with large numbers of people in a summary manner and controlling behaviour through small penalties for minor offences. And the crucial period for its formation was the nineteenth century.<sup>5</sup>

Due, primarily, to Farmer’s work, it is now accepted that the mid-nineteenth century saw the creation of a form of jurisdiction defined by procedure as summary jurisdiction began to formalise.<sup>6</sup> What this thesis shows, through an historical analysis that encompasses the twentieth century and beyond, is that the contemporary summary jurisdiction is no longer confined to ‘small penalties for minor offences’. Practices and procedures have been transformed and the summary jurisdiction now employs significant penalties of up to two years’ imprisonment—five years for cumulative sentences—to generate moral condemnation as a means of regulating constructed harmful behaviours. The crucial period for this transformation was the final quarter of the twentieth century. However, while the understanding of the summary jurisdiction developed in this thesis differs from that of Farmer’s, it corroborates Farmer’s argument that the criminal law does not represent community values, but rather ‘seeks to create them’.<sup>7</sup>

As noted in the Introduction to this thesis, few criminal law scholars have studied the summary jurisdiction. It has, instead, attracted the attention of sociologists and criminologists.

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<sup>3</sup> *DPP (NSW) v Wililo* (2012) 222 A Crim R 106 [42]–[44], citing *DPP (NSW) v Yeo* (2008) 188 A Crim R 82. Due process protections extend beyond the phase of establishing of criminal liability and into the sentencing phase.

<sup>4</sup> See Introduction to this thesis at 21; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths, 2nd ed, 2001) ch 5.

<sup>5</sup> *Ibid* 182–3.

<sup>6</sup> Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997).

<sup>7</sup> *Ibid* 183.

And yet, the discussion in this thesis demonstrates that it is of great interest to criminal law scholars for two reasons. First, my demonstration that the summary jurisdiction has been used by parliament to produce moral condemnation as a means of regulating constructed harmful behaviours raises a question about whether criminal offences can, or should, be defined in moral terms. Much of the theoretical criminal law scholarship proceeds upon the assumption that moral blameworthiness arises organically from the impugned behaviour in the absence of the law.<sup>8</sup> Such scholarship tends to focus on what is considered to be the ‘core’ of the criminal law: offences such as murder and rape. To the contrary, this thesis shows that moral blameworthiness is not reserved for a core of morally culpable behaviours; it is generated by the criminal justice system as new harmful behaviours are recognised.

The second reason why the summary jurisdiction is of great interest to criminal law scholars is because of its implications for the growing normative literature on criminalisation theory. Generally speaking, this body of literature assumes that criminalisation is achieved through the creation of new offences.<sup>9</sup> This thesis shows that a large proportion of criminalisation happens not through the creation of new offences, but through changes to the infrastructure of procedures and practices that supports existing offences. A key example of change to the procedural infrastructure that emerges from my analysis is the evolution of the reclassification mechanism, which I analysed in Part I. This mechanism began its life in the mid-nineteenth century attached to a particular offence: simple larceny. It was then detached from simple larceny and re-enacted as a provision of general application at the end of the nineteenth century. Over the twentieth century, slowly at first, and interspersed with long periods of inactivity, this mechanism was used to organise the jurisdictional allocation of offences. Then, in 1995, introduction of the Table System—a magnified and systematised version of the reclassification mechanism—precipitated a tsunami of reclassifications, and the process is ongoing. I characterise the evolution of the reclassification mechanism as the rationalisation of the jurisdictional allocation of offences; a dimension of my formalisation concept. It can be

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<sup>8</sup> See eg, Antony Duff, 'Perversions and Subversions of Criminal Law' in Antony Duff et al (eds), *The boundaries of the Criminal Law* (OUP, 2010) 88, 88–92.

<sup>9</sup> A notable Australian exception is Luke McNamara, 'Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015) 33.

understood as vertical criminalisation, and has facilitated the increasing use of the criminal law by, to choose just one example from this thesis, making plea negotiation more attractive.

Part II of the thesis explores the relationship between formalisation, the practices of the actors, and criminalisation. In relation to magistrates; lawyerification, and the separation of law from politics, are the most helpful dimensions of formalisation. An illustration of the utility of the formalisation concept here is supplied by the changes that were precipitated by the ‘constitutional crisis’ that happened in the 1980s. The dearth of legal qualifications among magistrates and their lack of independence from the NSW government had been recognised as problems since the early decades of the colony, but it took revelations of corruption and the ensuing crisis of confidence in the justice system to force the government of the day to address them. This crisis led to the intensification of lawyerification, which had begun in the mid-twentieth century, and the separation of the magistracy from the executive branch of government. Lawyerification and autonomy from the government provided conditions that have made it possible to escalate vertical and horizontal criminalisation in the current era.

In relation to the justice personnel, formalisation has been piecemeal and particular to each actor. One example that illustrates the utility of the formalisation lens in this context is the persistence of police prosecutors who have resisted lawyerification and separation from the executive branch of government. The impact of the piecemeal nature of formalisation is discernible in my analysis of the practice of plea negotiation. Complex protocols designed to maintain an appearance of (and actual) propriety have been constructed around plea negotiations conducted by police prosecutors. This has been necessary because of their lack of structural independence from the police force. This complexity slows or eliminates plea negotiation and reduces the efficiency of the summary jurisdiction. Another example that illustrates the utility of the formalisation lens is the increasing appearance of defence lawyers in the current era. On an individual level, defence lawyers can insist on the application of procedures and protections thereby increasing the formality of court hearings. However, on an institutional level, defence lawyers can be understood as facilitating criminalisation; they oil the cogs of the plea negotiation process and have helped to respond to legitimisation demands raised by escalating criminalisation.

Part II concludes with an exposition of defendants and victims, which shows how certain behaviours have been constructed as harmful, the diversity of those behaviours, and how they

have been criminalised by the summary jurisdiction. Due to the diversity of those behaviours it is not possible to depict them globally as sharing the same features, such as an absence of moral blameworthiness, as is the tendency in some of the existing scholarship. This exposition also shows how victims have shifted from the periphery to take up a more central position, not only in the conduct of individual cases as they progress through the courts, but also in law reform.

Part III the thesis exposes the relationship between formalisation, the development of substantive offences, and changes to the infrastructure of procedures and practices in the summary jurisdiction. In relation to assault and affray, rationalisation and juridification are the most useful dimensions of formalisation. The power of the formalisation lens is demonstrated by its capacity to explain why the rationalisation of the jurisdictional allocation of common assault was not achieved until the late 1980s. In the final quarter of the twentieth century the formalisation of the summary jurisdiction meant that it could perform the function of legitimating the imposition of the coercive powers of the criminal law, a function which, until that time, had been performed by the jury trial for formerly strictly indictable offences.

Formalisation is also helpful for understanding the development of the law of drink-driving, but because change over time in this context has been driven by technological advances and emerging bodies of scientific knowledge, formalisation has taken on a different hue. The example of breath analysis illustrates this point. Aided by the technological development of breath analysis, formalisation of the law of drink-driving comprised the eradication of evaluative judgments in the proof of degrees of drunkenness. This enhanced enormously the efficiency of the summary jurisdiction, both in the sense of increasing the proportion of convictions, and in the sense of improving the flow of matters through the court. However, the lens of formalisation is not able to account fully for the development of the law of drink-driving. As I discussed in Chapter 6, the current strict liability offence can be seen as a compromise that attempts to reconcile the competing imperatives faced by Parliament in attempting to regulate the behaviour of drink-driving.

Finally, this thesis uses the formalisation lens as a way of exploring the development of the ADVO/CAVO mechanism. Juridification proved to be the most applicable dimension of formalisation here. In the 1980s the recognisance to keep the peace, a descendant of the surety to keep the peace, was replaced by the ADVO/CAVO legislative mechanism to effect a radical shift

in the way in which the criminal law regulates domestic violence. When considered together with the many legislative provisions regulating enforcement procedures that have been enacted subsequently, the turn to the criminal law via the ADVO/CAVO mechanism can be seen as rendering non-fatal domestic violence amenable to regulation by the criminal law.

In broad terms, the formalisation lens has also been useful for revealing that there are diverse reasons why criminalisation is the regulatory tool of choice. Illustrations of this diversity include the type of criminalisation that can be characterised as a knee-jerk reaction to populist outrage triggered by an atypical event, of which my analysis of ‘use weapon to resist arrest’ in Chapter 5 is a good example. That analysis exposed a hidden political dimension of the jurisdictional allocation of offences. Another illustration of the diversity of criminalisation is that resulting from extensive research, the development of new bodies of knowledge, and consultation. The law of drink-driving and the ADVO/CAVO mechanism are paradigm examples of this type of criminalisation.

Overall, the formalisation concept exposed hitherto neglected aspects of the summary jurisdiction and assisted in understanding how the summary jurisdiction achieves criminalisation. My analysis therefore makes it clear that if criminalisation theory is to determine the proper boundaries of the criminal law, it needs to account for the role of procedures and practices in achieving criminalisation.

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