

POLICE SUMMARY PROSECUTIONS: THE PAST, PRESENT AND FUTURE

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Introduction

In Australia, most summary criminal prosecutions in the lower courts are conducted by prosecutors who are full-time serving members of the police Force or Service in the relevant jurisdiction. The main exceptions are summary prosecutions in the Australian Capital Territory, conducted by lawyers from the Office of the Director of Public Prosecutions (OPP).¹ This power of the police to conduct summary prosecutions throughout Australia is, it is suggested, quite remarkable for at least two reasons. First, Australia and New Zealand appear to be the only common law countries where police are engaged to conduct summary prosecutions. In the United States the office of District Attorney conducts such prosecutions and in most European countries, a public prosecutor, not the police, is used.² Second, in Australia over the last three decades, no less than four Royal Commissions of Inquiry, three Commissions of Inquiry, and several other government-appointed Reports have all strongly recommended that the power of the police to conduct summary prosecutions should be abolished and responsibility transferred to an independent prosecution agency, and yet, no government in Australia has implemented that fundamental recommendation.³ In this context it is worth noting that an Office of Public Prosecutions (OPP) has now been established in all Australian jurisdictions as an independent public prosecution agency. The basic issue is whether it is appropriate that the same body responsible for the *investigation* of alleged criminal offences should also be responsible for *prosecuting* those same offences?

The basic argument (expanded below) against the police acting as prosecutors is that prosecutorial decision-making should be in the hands of an agency which is not only independent and impartial as a matter of fact, but also seen to be independent and impartial. By definition, the police cannot be independent and impartial if they are both the investigators and the prosecutors. Apart from the issue of lack of independence, it may also be more efficient and cost-effective for the one agency (the OPP) to conduct all prosecutions. Not only would such a reform avoid unnecessary duplication of paperwork but OPP lawyers possess greater legal knowledge and skills thus making it 'fairer' for all concerned.

This background raises a number of important questions relating to the historical and contemporary administration of criminal justice in Australia. For example, from an historical perspective, how did it come about that police in Australia became prosecutors, can the apparent unwillingness of governments to implement reform be justified, and from a broader perspective, are there any connections between changing models of police functions and the prosecution role of police?

¹ The other main exceptions are commonwealth offences throughout Australia, conducted by the Commonwealth OPP, committal proceedings typically conducted by the OPP, breaches of community-based orders prosecuted by Corrections personnel, and the plethora of regulatory offences prosecuted by personell from the relevant government agencies.

² See Osnow, Quinn and Crown, *Criminal Justice Systems in Other Jurisdictions*: Research paper prepared for the Runciman Royal Commission of Inquiry Into Criminal Justice (London: HMSO (1993).

³ These have been the *Stewart Royal Commission into Drug Trafficking* (1983) at 258; the *Street Royal Commission into Certain Committal Proceedings Against K Humphrey* (1983) at 99; the *Fitzgerald Royal Commission of Inquiry* (Qld) (1989) at 235-238; and the *Wood Royal Commission of Inquiry* (NSW) 1997 at 316. The Inquiries have been the *Commission to Inquire into the New South Wales Police Administration* (the Lusher Report) 1981 at 258; and the *NSW Independent Commission Against Corruption Report* 1994 at 53.

The purpose of this paper is to explore these questions by reviewing the past and present systems of summary prosecutions in each jurisdiction in Australia, focussing upon the political dynamics of reform and reform proposals in those jurisdictions where the issue has been seriously considered, and to speculate upon broader shifts in policing models in Australia. The argument presented by the writer is that in all jurisdictions in Australia, summary prosecutions should, as a matter of basic principle, be removed from the police and transferred to the relevant OPP. It is recognised however that in some jurisdictions, geographic and administrative constraints may not permit an immediate and wholesale transfer from the police to the OPP in which case greater consistency in the quality and nature of prosecution decision-making can be achieved by greater involvement by the OPP in the conduct of police prosecutions by way of supervision, training, and secondments. It is also suggested that conducting summary prosecutions was never a planned core function or role of the 'new police' in England or the Australian colonies and the existence of such a function might be seen as an historical 'hiccup'. The transfer of that function should be regarded as a form of restoring the police to their original model rather than the loss of a prized role. A useful beginning is a brief review of the historical emergence of police as prosecutors.

Historical background

England

The most significant feature of criminal law enforcement in England prior to the middle of the nineteenth century was the central role of the ordinary citizen as crime victim. From the time of the Restoration to the mid 1800's, the individual citizen as crime victim was expected to carry out investigations, apprehend the suspect, and conduct the actual prosecution in court either personally or by engaging legal counsel.⁴ The victim might be fortunate enough to receive some assistance from the local parish constable or magistracy in terms of the issuing of a warrant or the passing on of information, but in general, responsibility for law enforcement and prosecutions rested with the individual victim and in this sense, crime control was very much a community or citizen oriented model. Perhaps a more accurate way to describe the system is to emphasise the absence of Crown or State prosecution authorities at this time, at both local level and nationally.

The lack of public prosecution structures in England is mainly explicable in terms of the negative images conjured up by the public prosecution 'machinery' and law enforcement practices in many of the contemporaneous European societies. In this context the power of any English citizen to prosecute any other citizen for any crime was regarded as not just a social responsibility but an important constitutional right and check against abuse of State power. There were of course a plethora of public officials and institutions such as the constable, watchmen, sheriff, magistrate, grand jury, and justice of the peace, all performing various law enforcement roles but, within this state based framework, the vast majority of all criminal prosecutions were conducted by the individual citizen as crime victim. The office of Director of Public Prosecutions was not established until 1879, and even then had a very limited role in the conduct of prosecutions,⁵ and prior to 1829, although a few cases were prosecuted by the local constable, such prosecutions were always regarded as a private proceeding initiated by one citizen (albeit a constable) against another.

⁴ According to Williams, "Prosecution by private people was frequent and important before the advent of the modern police forces, in period when it could be asserted that prosecuting for criminal offences was the patriotic duty of all citizens" see D G Williams, "Prosecution, Discretion and the Accountability of the Police" in R Hood (ed) *Crime Criminology and Public Policy* p.32.

⁵ D. Hay and F. Snyder, (eds) *Policing and Prosecution in Britain 1750-1850* Clarendon Press Oxford (1989) at 37.

In felony cases, which required a preliminary hearing, the key public official was the Justice of the Peace (JP) who presided, including the questioning of witnesses and the accused. Originally, the preliminary hearing was held in private. The Justice of the Peace was assisted in this role by the local 'constable', a centuries old office, who remained under the control of the JP. In the early part of the nineteenth century, the nature of the preliminary hearing underwent significant change by becoming a public forum for the determination of whether there existed a prima facie case against the accused. These changes roughly coincided with the establishment of the first modern professional police force in London in 1829.

This 'community-based' system of prosecutions did however suffer from a number of weaknesses. Prosecuting a crime could be relatively expensive, difficult, and time consuming. If successful, the victim could receive some recompense from the court but usually not sufficient to cover costs. For these reasons, various 'Associations for the Apprehension of Felons' emerged towards the end of the seventeenth century. These were groups of local traders, landowners and merchants who clubbed together to share the costs of criminal investigation and prosecution in the event that one of their members became a victim of crime. It is difficult to estimate the exact number of such associations in England between 1750 and 1850 but there would appear to have been hundreds at any one time and many thousands over this period of time.⁶ In any event there is no doubt these associations represented an important citizen initiated law enforcement mechanism. Apart from the cost and time involved with a private prosecution, another difficulty was that many victims preferred to 'compound' the crime by accepting a monetary payment from the offender rather than lay charges. For those cases which did proceed, the quality of presentation of the prosecution case was poor. By the end of the eighteenth century, there were some suggestions for the creation of a system of public prosecutions. By this time, the standard of private prosecutions had seriously declined.⁷

It was in this context that the *Metropolitan Police Act* was passed in 1829. This act established for the first time a fully professional, state based police force which became the model for the creation of subsequent police forces in most common law countries. This act was limited to the policing of the London metropolitan area but by 1856, further legislation had been passed making it mandatory for a police force to be established in every county in England. It is important to emphasise however that the creators of the 'new police' did not envisage that the police would become the full time prosecutors in summary courts and indeed it is probably more accurate to say that such a prosecutorial role was specifically rejected by Peel and Parliament given the centuries old constitutional protections offered by the old system of private citizen prosecutions. However, this did not exclude the possibility of the new police constable laying a charge and prosecuting his case in the capacity of ordinary citizen, a practice accepted in England for several centuries:

“Although prosecutions were suits in the name of the Crown, they were viewed in political ideology as well as in law, as adversarial proceedings between private individuals. Even associations for the prosecution of felons were sometimes criticised for the possible abuses inherent in more collective decisions. In these circumstances it was unthinkable that the new police should be designated public prosecutors.”⁸

⁶ Phillips in Hay and Snyder *Ibid* at..

⁷ “Prosecutions were compounded, that prosecutions were instituted for vexatious purposes, that, when there was no private prosecutor with means, cases came to trial in an unprepared state”, Williams *op cit* at p.169 quoting Maitland at 148.

⁸ Hay *op cit* 35.

However, by the 1850's the police had appropriated the role of public prosecutor in London⁹ and by the end of the nineteenth century, dominated summary criminal prosecutions throughout England "...and it was these who, by default and not by a deliberate political decision, filled the void."¹⁰

Hay suggests that there were three ways in which the new police evolved as the summary public prosecutor. First, by bringing the victims to court to be 'bound over' to prosecute the case (even if the victim did not want to prosecute the case). Here, the real complainant was the constable not the actual victim. Second, the constable might be the actual complainant entering the bond to prosecute the case eg following an arrest at a public brawl or theft. Finally, in either event, the constable might conduct the actual prosecution in court.

The role of the new police as public prosecutors was criticised as early as the 1830's with allegations of corruption and intensified during the proceedings of the 1854/55 *Select Committee on Public Prosecution* with evidence such as the following from the then Attorney-General:

"I will add another to my mind very serious evil which I have observed very often myself, when sitting as recorder, and that is the manner in which policemen mix themselves up with these prosecutions. I must say that I think it is a great scandal (to use no milder term) to see a case brought into court by one of the inferior ministers of the law such as a policeman. I do not think it is consistent with the proper administration of public justice in a great country such as this, that you should have a subordinate officer, who is merely the keeper of the prisoner, clothing himself with the functions of public prosecutor. I think it has also, this other mischievous effect. I have observed often and have had occasion to notice it in court, how police become over-zealous in the conduct of prosecutions. I can quite account for it now...(that I know)... that the promotion of policemen is made to depend upon the prosecutions which they successfully conduct.'¹¹

Criticism of police as prosecutors appears to have abated by the 1880's and from at least the turn of the twentieth century, if not earlier, this role became accepted English practice. The next major stage occurred in 1962 when the Royal Commission into the Police recommended removal of that function from the police.¹² Subsequent Commissions and Reports in England made the same recommendation¹³ but it was not until 1985 however, that the role of the police in summary prosecutions in England was eventually transformed with the transfer of prosecution responsibility from the police to the newly created Crown Prosecution Service (CPS), thus implementing reforms that were proposed over one hundred years earlier. The 1985 transfer could not however be described as an initial success. Given strong police opposition to the transfer it is not surprising that tensions arose between the police and the CPS.

In summary, an historical review of the police in England shows that prior to the formation of the new police in 1829, the local constable (itself a centuries old office) performed a very limited role in the prosecution of offenders. Although constables were associated with court proceedings through their connection with the Justice of the Peace, it was rare for the constable to be bound over to personally conduct a prosecution; responsibility for prosecuting crime lay with the individual victim. By the beginning of the nineteenth century the old system of private prosecutions was breaking down in the context of increased social disorder and crime. The

⁹ *Ibid* 40

¹⁰ Williams *op cit* at 170.

¹¹ P.186 Q. 2396 quoted in Hay *op cit* at

¹² *Final Report of the Royal Commission on the Police* CMND 1728 London HMSO May 1962.

¹³ See for example, the Justice Committee, *The Prosecution Process in England and Wales* 1970.

creation of the London Metropolitan police in 1829 resulted in a new form of policing and surveillance and more police appearing regularly in court to prosecute offences. Between 1829 and the 1880's, the police gradually appropriated the role of public prosecutor appearing not only as the complainant but also on behalf of other complainants. This occurred without any legislative authority or government mandate. The English model of police summary prosecutions was in stark contrast to the public prosecution systems that had developed in the United States, Scotland, and most European countries where independent public prosecution authorities were created. The appearance of the police as prosecutors in England sparked early trenchant criticism in the 1830's and 1850's but it was to be another hundred years before an English government was prepared to accept that it was no longer appropriate for the police to conduct criminal prosecutions.

Australia

For Governor Phillip (and the other authorities) on the First Fleet in 1788, the issue of policing a civil society in the new colony was probably of minimal significance if not an irrelevancy. Of more concern would have been how to police a penal society including such basics as the construction of adequate dwellings, securing the convicts, and the maintenance of sufficient supplies. In his second Commission, Phillip had been granted authority to appoint constables.¹⁴ Nevertheless, Phillip brought with him the traditional English model of policing and criminal law enforcement, described above. At that time (1780's) policing England involved the old watch system, the parish constable, the citizen-victim, the Justice of the Peace and the Magistracy. There was no professional full time paid police force in existence, no Directors of Public Prosecution, and even the word 'police' was apparently not used in England until 1798.¹⁵ The writer has not come across any evidence to suggest that prior to his departure for Australia, Governor Phillip supported a public prosecution system and it is reasonable to assume that he simply accepted the traditional English model.

In 1789 in the colony of New South Wales, Governor Phillip appointed the first 'constables' from the ranks of the convict population.¹⁶ In what could be described as Australia's first industrial demarcation dispute, the marine troops refused to act as policers of the convicts, leaving Phillip with no other options but to appoint the convicts. The role of the constable was essentially to maintain some semblance of order and security in the colony, analogous to the traditional role in England. This early system of policing failed due to the misconduct or ineptitude of the constables. As the number of free persons in the colony increased, subsequent Governors (eg Hunter in 1796)¹⁷ introduced elections for the appointment of local constables, similar to the English model¹⁸ followed by the 1833 *Sydney Police Act* which permitted Justices of the Peace to appoint constables for their respective areas.¹⁹ At this time, policing encompassed a broad range of social services (regulation and inspection of health and transport services) as well as criminal investigation. Local governments did not exist at this time.²⁰ Given these functions it is not surprising that, as early as 1820, the early police also assisted the courts in terms of adducing evidence relevant to the enforcement of laws and regulations.²¹

¹⁴ H. King 'Some Aspects of Police Administration in New South Wales, 1825-1851' (1956) *Royal Australian Historical Society: Journal and Proceedings* Vol.42 Part 5 pp.205-230.

¹⁵ King *op cit* 207.

¹⁶ Milte K and T Weber *Police in Australia* (1977) Butterworths at 22; and Swanston B *The Police of Sydney 1788-1862* Aust Inst Crim in Association with NSW Police Historical Society (1984) at 2.

¹⁷ King *op cit* 215.

¹⁸ *Ibid* at 215.

¹⁹ Lusher Report *op cit*

²⁰ King *op cit* at 218.

²¹ *Ibid*.

It is important to note however that for the first thirty years in the colony of NSW, it appears that the bulk of criminal prosecutions in the lower courts were initiated and conducted by private citizens, not the constables. Most offences committed by convicts were prosecuted by the overseer or master.²² At the time there would not have been anything unusual about this system as a private prosecution model had been the norm in England for centuries.

By 1850 a centralised police force had been established in NSW followed by Victoria five years later. In the other colonies, a similar pattern emerged with the early constables assisting the Justice of the Peace and becoming increasingly involved in court proceedings.²³ As early as 1856, the first internal Regulation issued for the newly created Victoria Police Force included prosecuting as a function of individual members.²⁴ The writer is not aware of any evidence that equivalent organisations to the English 'Associations for the Apprehension of Felons' existed in the colonies.

Prior to the establishment of permanent prosecution departments in the police forces, and in the absence of a permanent police prosecutor in the courts, each individual police officer prosecuted their own cases, a practice which continued up until the 1960's in some jurisdictions, particularly in country areas. At common law any private citizen could (and still can) lay a 'complaint' for a summary criminal offence²⁵ and in most jurisdictions it is still the case today that the police summary prosecution is brought in the name of the individual police officer rather than the Police Force or the State. Thus, the idea of a police officer conducting their own case is in law consistent with that precedent. By the beginning of the twentieth century, it became practice for the sergeant based at the local police station to conduct prosecutions on behalf of police informants. The practice of a police prosecutor without a law degree conducting the prosecution on behalf of another police officer was authorised by the courts in the exercise of the Magistrates' inherent common law discretion to conduct proceedings in a 'just' and 'efficient' manner.²⁶

It is important to note however that, identical to the English experience, the emergence of police as prosecutors in Australia was not specifically sanctioned by any colonial government nor authorised by statute; it occurred by a gradual process of accretion and administrative convenience given the absence of any alternative agency. Admittedly the office of 'sheriff' had been firmly established in England from at least the sixteenth century and, along with the office of constable and Justice of the Peace, represented an important component in the administration of justice. When colonising the United States in the 16th century, England transported the office of sheriff to the American colonies and that office was to become a key mechanism to maintain social control. The important feature of this office was that the office holder, responsible for local law and order, was usually appointed by the local community thus ensuring a high degree of public accountability and power resting in the hands of the community rather than an autocratic governor. Given the US War of Independence, by 1788, England had learnt the dangers in the development of community elected law enforcement officials. Against this background, it is suggested that Phillip and subsequent governors would have been reluctant to utilise the office of sheriff as a mechanism of social control. The

²² Bryne *Criminal Law and Colonial Subject: New South Wales, 1810-1830* Cambridge University Press 1993 pp.19-72.

²³ R. Haldane, *The Peoples' Force: A History of the Victoria Police* (1986) 2nd Ed MUP.

²⁴ *Manual of Police Regulation 1856* Government Printer p.66. I am indebted to Robert Haldane for advising me of this.

²⁵ Devlin *The Criminal Prosecution in England* Oxford 1960 at 17.

²⁶ *O'Toole v Scott* [1965] *Appeal Cases* 39.

English model of sheriff was not only totally inappropriate for the penal nature of the colony but also in the long term, represented a potential threat to the government given the anti-authoritarian movements in the United States including the emergence of elections for public officials such as the sheriff.²⁷ Arguably, this was an important reason why the police in Australia and New Zealand became the prosecutors in summary courts. If the office of sheriff had developed in the Australian colonies as it did in the American colonies, summary prosecutions may well have been seen as outside the police functions.

Permanent and specialist police prosecutors soon emerged. It appears the first colony to create a permanent police prosecution department was Tasmania in 1896. In New South Wales, the Prosecution Department of the NSW Police Force was formally established in 1941 as a specialist unit within the CIB,²⁸ initially operating within the Central Law Court but soon expanded into all courts in NSW by the 1950's.

In most Australian jurisdictions up until approximately the early 1980's, the police prosecution department was held in high esteem by members of the force, there were no major difficulties in attracting police to work there, and the department was deemed a 'specialist' unit thereby attracting higher rates of pay and overtime opportunities for the prosecutors.

In summary, since the creation of centralised police forces in each of the Australian colonies last century, the police gradually and unquestionably assumed the role of prosecutor in the lower courts initially with each informant prosecuting their own cases or the local sergeant conducting the case for other police, and then, by the creation of permanent prosecution departments within each police force. The adoption by police in England and Australia of this prosecutorial role occurred more by way of 'accretion' or administrative convenience rather than a specific decision by any legislature to grant the police this power. Historically, the geographic, political, and legal reality was that in the Australian colonies, there simply was no other viable alternative agency capable of performing summary criminal prosecutions. The Crown Law Offices were not adequately resourced to deal with the thousands of summary cases processed each year and it was not until the 1980's and early 1990's that the office of Director of Public Prosecutions (DPP) was established in each of the jurisdictions in Australia.

By comparison, in the United States, the Office of 'District Attorney', and the earlier office of 'Sheriff' assumed responsibility for criminal prosecutions rather than the police. As stated above, at common law, every police officer, like any other citizen, has always possessed a right to lay a complaint in summary matters but that individual right is not the same thing as the power of a police force to take over virtually all summary proceedings.

²⁷ C. Edwards *Changing Policing Theories for 21st Century Societies*, The Federation Press (1999) at 33-35.

²⁸ Bishop, J *Prosecution Without Trial* (1989) Sydney, Butterworths at 50 quoting the Lusher Report at 238.

Contemporary Prosecution Models in Australia

Australian Capital Territory

On 2 July 1973 the conduct of summary prosecutions in the ACT was transferred from members of the Australian Capital Territory Police Force to the Deputy Crown Solicitor in Canberra.²⁹ Some police members were seconded to this office and worked as prosecutors. Prior to this date, the 'Legal Section' in the ACT police had full prosecutorial powers including the charging of offences and advocacy of the prosecution case in court. The transfer of prosecutorial responsibilities in 1973 still permitted the police to lay charges and summon witnesses to court. According to Bishop the transfer was not fully successful with significant police opposition to the reform and major confusion regarding divisions of responsibility between the police and the Deputy Crown Solicitor's office.³⁰ The police argued that the Crown lawyers were inexperienced, more expensive than police, and did not represent the interests of law and order. In short what could be described as 'cultural conflicts' arose between the police and the lawyers; a phenomena which was to be repeated twelve years later in the United Kingdom when police summary prosecutions was transferred to the CPS.

In 1979 the Australian Federal Police took over policing responsibilities in the ACT from the former ACT Police Force. Further reforms occurred on 1 November 1984 when responsibility for summary prosecutions was transferred to the newly established commonwealth Office of the DPP (created in 1983) in Canberra. Most of the prosecution staff from the Deputy Crown Solicitor's Office transferred to the DPP. The ACT police retained the power to lay charges and summon witnesses. As at 1984 the Commonwealth DPP was thus responsible for conducting all indictable and summary matters in the ACT in respect of offences against both Commonwealth and Territory laws.

In 1990 however an ACT office of DPP was created pursuant to the *Director of Public Prosecutions Act 1990 (ACT)*. That office came into effect on 1 July 1991 and then assumed responsibility for prosecuting summary and indictable offences against Territory laws. By agreement between the two DPP's, the ACT DPP prosecutes Commonwealth offences which arise out of or in connection with the enforcement of Territory laws. At present members of the AFP conduct criminal investigations, select the initial charges, bring the defendant before the court, provide the 'remand brief' on or before the first court mention and the full hearing brief on contested matters, but do not conduct any prosecutions. The DPP assesses the police briefs to decide which charges, if any, should proceed, provides a copy of the brief to defence, and conducts the prosecution. The relationship between the AFP and the ACT DPP is governed by relevant legislation (eg the acts establishing each DPP), a 'Protocol on Prosecution Support', and the Statement of Prosecution Policy and Guidelines produced by the ACT DPP.

In summary, the ACT is the only jurisdiction in Australia where the police do not conduct any summary prosecutions. The present system has developed out of a complex array of political, legal, and administrative factors. Initial police opposition to the transfer of responsibility for summary prosecutions has been overwhelmed by the subsequent establishment of a commonwealth DPP and a Territory DPP in that jurisdiction.

²⁹ *Ibid* at 55-56.

³⁰ *Ibid* 56.

New South Wales

Prior to 1941, summary prosecutions were conducted by either individual officers or by ad-hoc appointed prosecutors (typically at sergeant level) based at particular courts. In 1941, as the result of a recommendation by the then Commissioner of Police (Mr W J McKay), a permanent police prosecution branch was established within the CIB.³¹ By 1951 the Police Prosecution Branch was responsible for acting on behalf of all police informants³² and by 1965 the police prosecution department had become a separate specialist department.³³

As of March 1997 there were approximately 236 police prosecutors in NSW, of whom about 8% hold a law degree.³⁴ The police prosecute the bulk of all summary offences. The DPP conducts some summary prosecutions (eg where the defendant is a police officer or the matter is complex, indictable offences triable summarily and all committals). No legislative reforms would be needed in order for the DPP to take over all summary matters.

Over the last two decades, the topic of removing summary prosecutions from the NSW Police Service has been the subject of several Inquiries and Reports. For the purposes of this paper, the three major reports have been the Lusher Report (1981), the Independent Commission Against Corruption Report (1994), and the Wood Report (1997).³⁵

The first inquiry to consider the issue of police prosecutions in any detail was the 'Commission to Inquire Into the New South Wales Police Administration' in 1981 (Mr Justice Lusher), following allegations of corruption and maladministration within the force. The Report acknowledged that the current system of police prosecutions had a number of strengths (pp.244-245). For example, prosecutors can possess expertise and high legal skill even though they do not possess a law degree. They also have a greater understanding of police procedures, can be scrupulously fair, are able to provide advice to other police on policing work generally, and assist in maintaining order in the court.

On the other hand, Justice Lusher expressed concerns about the lack of independence of police prosecutors and the potential for adverse public perceptions of justice in the lower courts:

³¹ Lusher *op cit* 238.

³² Bishop *op cit* 50.

³³ Sweeny 'The Role of the Prosecutor in the Magistrates' Court System' in I Potas (ed) *Prosecution Discretion* (1984) p.135; and Wood *Final Report op cit* Vol.2 p.314.

³⁴ Wood *Final Report ibid* Vol.2 p.314.

³⁵ Other bodies to consider the issue have included the Stewart Royal Commission into Drug Trafficking (1983) recommended removing summary prosecutions from the police, citing an earlier Canadian Task Force into Policing (1972-74) p.260. Also in 1983 the NSW *Street Royal Commission into Certain Committal Proceedings against K E umphrey* stated:

"The restructuring of the Magistrates Court will bring under examination again the question of the role of the police as prosecutors in Magistrates Courts. This question was considered by Mr Justice Lusher in his recent Inquiry into the New South Wales Police Administration...without addressing myself to the details of those recommendations, I commend to the government the recognition and adoption of the conclusion that underlies them, namely that prosecutions should be handled by a Prosecuting Department under the Ministerial authority of the Attorney-general in place of the present system of their being handled by a branch of the police force" (p.99). In 1987 the NSW 'Task Force on Services for Victims of Crime' touched on the issue of police prosecutions from a victims' perspective but did not consider that reform was needed.

“The principle for which the Inquiry contends is that the administration of justice in the community at all levels is important. It is in the Courts of Petty Sessions and of summary jurisdiction that the citizen has the most contact with it and where impressions are formed and consolidated and where he is most likely to be unrepresented. It is not only desirable but essential for its acceptance that it be seen in the best possible light. In the Inquiry’s opinion, this is not achieved with prosecutor who are members of the police force and the Inquiry goes so far as to say *whether they are qualified or not (italics added)*. The police function should not intrude into organised, active participation in the administration of justice. On the question of advising, the complexities of the law and its interpretation are sufficient to tax and perplex those who have spent a lifetime in its pursuit and it is not only unreasonable but unfair to expect unqualified police to embark upon its intricacies.”³⁶

The Commission concluded:

“That the prosecutors branch be phased out as soon as possible and within five years and its personnel cease to act as prosecutors in Courts of Petty Sessions and of summary jurisdiction and in Coroners Courts and other courts where they presently appear in that role, other than in remote areas and in respect to minor matters. that immediate steps be taken to replace them with an appropriate prosecuting department through the Attorney-Genera or other appropriate officer and comprised of persons admitted as barristers or solicitors. That this should commence with the conduct of committal proceedings of serious charges considered likely to proceed to trial, and be extended as soon as possible to all prosecutions. That in the meantime, steps be taken immediately to enable the Clerk of the Peace to take over and conduct the committal proceedings of such complex and lengthy prosecutions as he thinks fit to preventing unnecessary delays and duplication and expenses in the preparation and presentation of such matters as may be likely to go to trial.”³⁷

The key point of Mr Justice Lusher is that even if police prosecutors did possess an LLB, it would still be inappropriate for them to conduct prosecutions because of the requirement for independence in prosecutions.

Despite the recommendations of the Lusher Report (and other Commissions and Inquiries) no reforms were undertaken in NSW.

The issue re-surfaced in 1994 as part of the Independent Commission against Corruption (ICAC) investigation into police and criminals.³⁸ The Report stated that police can interfere with prosecution processes and provided several factual examples.³⁹ The report also identified a lack of proper supervision of investigations and lack of review of briefs before being sent to prosecutions and recommended a review of those processes to be conducted by the DPP and the NSW police (p.50). In relation to the issue of who should conduct summary prosecutions the report noted the higher legal skills of DPP solicitors who are also subject to a set of ethical and legal obligations, a breach of which could lead to the loss of the right to practice, consistency in prosecution criteria and policy, and the need for independence in prosecutions from the investigatory stage:

³⁶ Report *op cit* p.255-256.

³⁷ *Ibid.*

³⁸ *ICAC Investigation Into the relationship between police and Criminals, Second Report*. Ch 4 `police and prosecutions.

³⁹ For example, bail, losing witnesses and inaccurate summaries *Ibid* at 49.

“At present there is certainly room for the perception that police prosecutors will tend to do the bidding of their police colleagues, rather than to ensure that a just result is achieved. I speak in terms of perceptions because I have no evidence of that tendency manifesting itself in practice.”⁴⁰

The report referred to the Lusher report and the Fitzgerald Report (238 and 381) and concluded:

“There are good reasons why prosecutions should be conducted by properly qualified lawyers. However in my view what needs to be done is to undertake a pilot study to determine change of a particular type. Perhaps certain prosecutions should remain in police hands - I think possibly not - but this will best be sorted out between the Police service and the DPP. The fact that the police service is organised on a regional basis provides the opportunity to trial it in a limited geographic area”.

The Commission also recommended:

“... that the Director of Public Prosecutions and the Police Service hold discussions with a view to having all prosecutions in a particular police regions conducted by DPP lawyers for a trial period commencing in the fourth quarter of 1994. A review should be conducted at the end of the trial period and the results of the review should be made subject of a public report.”⁴¹

Although the proposed discussions subsequently occurred, the ICAC recommendation for a pilot program was not implemented, at least not immediately.

In April 1995 and July 1995, the NSW DPP Mr Nick Cowdrey QC formally submitted proposals to the NSW government for his office to take over police prosecutions⁴² and in October 1995, Mr Cowdrey QC forwarded the same proposal to the Wood Royal Commission, established in May 1994 to examine corruption within the NSW Police Service.⁴³ Significantly Mr Cowdrey's submission occurred before the Commission itself raised the issue.

In its Interim Report the Commission raised the question of police as prosecutors: “A question arises as to the appearance of impartiality, and the potential for corruption which exists when the Police service...uses members of the Police Prosecuting Branch (only 20% of whom are legally qualified and admitted to practice) to prosecute the majority of summary matters”.⁴⁴ The options raised included transfer to DPP.

Throughout the early part of 1996 the Commission received various submissions on the issue. Most submissions supported the transfer. These included submissions from the NSW Law Society, Council for Civil Liberties, Magistrates' Association, Womens' groups, the Aboriginal Legal Centre, and the NSW Bar.

⁴⁰ *Op cit* 51.

⁴¹ *Ibid* 53.

⁴² 18 April 1995, Submission from NSW DPP to Attorney-General proposing DPP takeover and 17 July 1995 Submission from DPP NSW Nick Cowdrey QC to Attorney-General regarding resources and proposing details of the restructure, starting at Downing Centre and Central Local courts then expand statewide. This would allow 200 police to return to other duties.

⁴³ 26 October 1995 Letter from DPP NSW to Wood RC proposing transfer.

⁴⁴ February 1996 Ch.6 'Anti-corruption measures Immediate measures' at p.127.

In July 1996 a Trial Takeover project was conducted at the Dubbo and Cambeltown Courts. An Evaluation Report of the project generally supported the proposed transfer of police prosecutions to the DPP, not just on the grounds of independence, but also on the basis that such a transfer would result in a 25% reduction in the cost of prosecutions.⁴⁵ The Evaluation itself was criticised by the NSW Police Association who argued the findings were flawed because hidden costs of a transfer were not taken into account. The NSW Bureau of Crime Statistics also advised that no firm conclusions could be drawn from this project because only two courts were used and only for a six month period.

Nevertheless in the Commissions Final Report, the idea of a wholesale transfer of police prosecutions was unequivocally supported and advocated:

“The desirability of having the prosecution process separate from the investigative process does not depend on evidence of misconduct or corrupt behaviour on the part of the police prosecutors. It rests essentially on the principles of independence and impartiality which are relevantly affected in the present context by:

- The fact that police prosecutors are not answerable to their supervisors in the chain of command;
- They do not owe a legal duty to the court in the same way that solicitor and barristers do; and
- They are not subject to the code of behaviour and professional discipline as members of their legal profession.”⁴⁶

and:

“This Commission is in favour of this function being transferred to the Director of Public Prosecutions. Every effort however needs to be made to avoid the difficulties experienced in England to which Commissioner Ryan referred and which related to ... speed with which the CPS was set up, initial lack of suitable personnel, friction between police and CPS.”⁴⁷

In response to the recommendations of the Wood Commission Report, the NSW Police Association established a ‘Focus Group’ in July 1997 to consider restructuring the police prosecution department to make it more independent and staffed by civilians. The police prosecutions would be subject to the same goals and prosecution policies applicable to the DPP, and aim to have 80% of all police prosecutors possess a law degree.

From August 1997 to November 1997, the NSW Police Association embarked on a major publicity campaign opposing the possible transfer and sent letters to all members of Cabinet and all members of the ALP.

⁴⁵ Premiers Department, *Prosecuting Summary Matters in New South Wales: Progress Report on the evaluation of the DPP Summary Prosecutions Pilot Project* October 1996. This Pilot program ran at Campbelltown and Dubbo Courts by staff from the OPP starting 1 July 1996 for 6 months to 31 December 1996.

⁴⁶ Volume II: *Reform* May 1997

⁴⁷ Final report *op cit* 318.

The current situation (in June 1999) is that the NSW government has not announced any planned reforms to the police prosecution role. The writer was advised by the Director of the Criminal Law Revision Division in the NSW Attorney-General's Department that "I am unaware of any current policy or plans of the Government to transfer the responsibility for summary prosecutions from the Police to the Office of the DPP".⁴⁸ The NSW office of the DPP has also advised the writer that the NSW Government has never advised the DPP as to why the relevant recommendations of the Wood Royal Commission have not been implemented.⁴⁹ The lack of any clear future directions for the police prosecution department has resulted in considerable uncertainty within the Police Prosecution Department.

Western Australia

In Western Australia the police conduct all summary prosecutions whilst the DPP conducts all committals and most of the indictable offences triable summarily and indictable offences triable summarily in the Children's Court heard by the President of the Children's Court (a judge). Indeed the DPP has no statutory power to conduct summary prosecutions as a result of the following wording in s.12 of the *Director of Public Prosecutions Act 1991 (WA)*:

"It is a function of the Director:

- (a) to bring and conduct prosecutions, not on indictment for indictable offences, including the summary trial of indictable offences; and
- (b) to take over a prosecution, not on indictment, for an indictable offence brought by another person, including the summary trial of an indictable offence, or with the consent of that person to act as solicitor or counsel for that person in respect of that prosecution..."

There is no provision in the Act permitting the DPP to conduct summary prosecutions. The denial to the DPP of a power to prosecute summary matters was the result of intense lobbying by the WA Police Association in 1990, concerned about the DPP encroaching upon traditional police responsibilities. As a consequence, if a police officer is charged with an indictable offence the DPP can and will handle the prosecution but if the police officer is charged with a summary offence, the DPP is not authorised to conduct the prosecution and the matter must be taken over by the Crown Law Department. The current situation in Western Australia cannot be understood without a brief description of the historical background.

Prior to the 1980's, the prosecution department was held in high esteem.⁵⁰ The prosecution department was a centralised unit overseeing all prosecution in the state. Prosecutions, along with the CIB, Homicide and Drugs units, were classified as 'specialist' departments. Many prosecutors possessed an excellent knowledge of the law and were highly skilled advocates. The standard of briefs submitted to the prosecution department was generally high as a result of preceding close screening and scrutiny of the briefs by experienced superior officers of the informant. The Police Service recognised that time spent in the prosecution department was highly regarded for the purposes of promotion. Many experienced prosecutors were able to rise through the ranks to ultimately head large police stations, passing on their knowledge of the law to younger officers, or, became full time legal advisers in the police Legal Services unit. At this time, promotion was based on seniority rather than merit per se.

⁴⁸ Mr Andrew Haesler 29 June 1999.

⁴⁹ Correspondence dated 23 August 1999 from Robyn Gray, Deputy Solicitor NSW Office of the DPP.

⁵⁰ Based on personal interviews by the writer with existing police prosecutors, former police prosecutors and former detectives of the WA police Force.

However, by the early 1980's, the higher echelons within the WA police service began to rethink the traditional model and functions of policing in WA. A new policy of merit based promotion was adopted by the WA Police Service. In particular, the possession of management skills and related 'human relations' skills became paramount, not just for the purposes of promotion, but more generally in terms of a new model of policing. The service began to think in terms of decentralisation and the adoption of more 'corporate' concepts and practices. This shift in policy occurred relatively quickly. As a consequence, many experienced police prosecutors who applied for promotion were rejected because they lacked the new pre-requisites of human management skills. It was made clear to such applicants that if an officer did not possess the new skills their future in policing was very limited. At this time, many senior members were completing traditional courses which focussed on legal process, criminal law and the like but it was soon realised that if the course did not contain human management components, the officers were essentially wasting their time. Many of the most experienced police prosecutors began to leave the Service. One overall effect was that police in WA began to lose their prosecution and advocacy skills and police prosecutions came to be seen as an unattractive 'dead end' role.

In 1991 the Office of DPP was established in WA further marginalising the role of police prosecutors as the DPP took over the conduct of committals and indictable offences triable summarily.

The next major change to policing in WA occurred in 1994 when Mr Bob Falconer was appointed Commissioner of Police. The earlier shifts in policing structures and models were accelerated and developed under what was to become known as the 'Delta Program'. Under Delta, policing was to become more of a local matter than the responsibility of a centralised bureaucracy and the idea of specialised units was questioned. Under Commissioner Falconer, the concept of 'multi-skilling' was introduced within a broader context of a 'back to the community' or at least 'sharing with the community' policy. The CIB was abolished and the old centralised prosecution department was replaced by a more decentralised structure whereby local command would be in charge of prosecutions for that particular area. Regionalisation became linked with de-specialisation. Great emphasis was, and still is, placed on defining the 'core' functions of the police with particular reference to which functions might be performed by civilian personnel. For example, under Delta, the police subsequently jettisoned their traditional functions of guarding and transporting prisoners and court security. Prosecutions was no longer classified as a specialist department and the issue of whether of prosecutions should be a police function at all was raised.

Given these momentous changes that were occurring to police policy and practices, it is not surprising that the prosecution department continued its downward spiral in terms of decreasing support and resources from the WA Police Service. The standard of prosecutions and advocacy declined. Many of the most experienced police prosecutors began to leave the Service. The quality of briefs submitted for prosecution also declined as the number of experienced senior officers, able to scrutinise the briefs of junior officers under their command, dropped.

The first suggestion that the office of the DPP should take over police summary prosecutions appears to be a proposal from the then DPP Mr John McKechnie QC dated 15 March 1994 to the Attorney-General that the DPP progressively take over all summary prosecutions, commencing with preliminary hearings⁵¹ The response of Commissioner Falconer was general agreement with the DPP taking over all preliminary hearings (because it would free up prosecutors ‘to return to core function policing’) and indictable offences triable summarily but a more guarded response to the proposition that the DPP take over all summary matters:

“The proposal has quite naturally created some concerns within the ranks of police prosecutors that their role and function will disappear. In due course this may well be so. However in the short term, summary offence prosecutions and indictable offences triable summarily, will continue to be the responsibility of the police.”⁵²

The WA Police Association was initially strongly opposed to the idea of transferring summary prosecutions to the DPP⁵³

The next major development occurred in October 1997 when the Police Service announced there was to be a major review of investigation practices. The review was headed by two specialist police officers from the Strathclyde Police Force (Assistant Chief Constable John Welsh and Chief Superintendent Andrew Cameron). In the Final Report of the Investigative Practices Review (January 1988) the police investigation and prosecution system in WA was scathingly criticised. The relevant part of the report began by emphasising:

“Timely, complete and high quality briefs are central to effective prosecutions. The relationship between the arresting or charging police officer, supervisor, Police Prosecutors and the Director of Public Prosecutions is important for effective management in the prosecution phase and corruption prevention’⁵⁴

The report then stated that:

‘... the service must take responsibility for a number of prosecution matters that have been withdrawn, subject to nolle prosequi decisions, dismissed or where alleged offenders have been acquitted.’⁵⁵ (p.119).

As part of the review, extensive interviews were conducted with relevant external and internal stakeholders. The views expressed included: a lack of effective supervision of investigations, a lack of credible evidence, failure to follow up all possible lines of inquiry, lack of training in conducting investigations, lack of experience and expertise in investigation, charges without corroboration and no formal review of withdrawn, dismissed or acquitted briefs or briefs that have been the subject of a nolle prosequi. The report noted that these were the same sort of deficiencies identified by the Wood Royal Commission in NSW. The performance of police supervisors was also highly criticised:

⁵¹ I am indebted to Acting Superintendent Robin Moore for permitting me to peruse relevant correspondence..

⁵² Letter dated 15 September 1994 to Minister for Police.

⁵³ Correspondence from the Association to the Minister for Police and to the Commissioner of Police.

⁵⁴ *Final Report* January 1998 p.118.

⁵⁵ *Ibid* at 121.

“The current role of supervisors is unclear, they do not know whether they are managers, supervisors, patrol inquiry officers, or a combination of all of them. Some have a very heavy case load themselves that prevents them from performing their role of leading, mentoring, monitoring, evaluating, training and developing their staff”⁵⁶(121).

The report concluded that it is rare for a uniformed supervisor to attend court to give evidence “For one reason or another, supervisors are not leaving their office. This places enormous pressure on young inexperienced officers who therefore move from one incident to another without quality supervision’ (p.122) Supervisors also failed to scrutinise prosecution briefs and when they did, a test of ‘prima facie case’ was used rather than the more rigorous criteria used by the DPP. Proper screening of the brief was ‘... not the responsibility of those prosecuting the brief...they are currently being left to perform the role that should be undertaken by supervisors” (p.123).

The issue of transferring summary prosecutions to the DPP resurfaced in December 1997 when the DPP Mr McKechnie QC and the Police Commissioner forwarded a joint submission to the government (Public Sector Management Unit) proposing the transfer⁵⁷ In June 1998 a feasibility Plan was developed and a Working Party set up in October 1998. The Working Party was chaired by Dr Ken Michael and consisted of the DPP and the Commissioner of Police. A Steering Committee was subsequently created to consider the issues in depth. The Report of the Committee conceded there would be an increase in the net additional cost to the Consolidated Fund of about \$3m in the third and subsequent years although some set off in costs could be expected. The Committee worked up until December 1998 when the Final report was submitted to Cabinet. The Committee did not receive any submissions opposing the idea of the transfer.⁵⁸ Further support for extending the prosecution role of the DPP arose from a report into the first year of the DPP conducting committal proceedings in the Perth Central Law courts in 1997.⁵⁹

In April 1999 Cabinet accepted the report of the Working Party and the principle of the transfer but due to insufficient funds postponed the implementation to a later date.⁶⁰

In summary, there is a very clear movement in WA for the DPP to take over police summary prosecutions. A number of factors have driven the proposed reform. From the early 1980’s the police prosecution system has been in decline in terms of resourcing, advocacy and legal knowledge skills, and the quality of preparation of briefs by investigating officers. The decline has largely been due to significant policy shifts within the WA Police Service based on a program of decentralisation, regionalisation, multi-skilling, and redefining ‘core’ police functions. It is also clear that the impetus for change has not arisen from any allegations of

⁵⁶ To address these problems the report recommended, inter alia, the creation of the position of ‘Brief handling Manager’ and to put in place review systems for cases withdrawn, acquitted, or nolleed. Some thirteen other recommendations relating to the management of prosecutions were provided.

⁵⁷ I am indebted to Dr Bruce Carrol of the WA Attorney-Genral’s Department for providing relevant information. Also see Office of the DPP WA *A review of the Role of the Director of Public Prosecutions in the Court of Petty Sessions* (1997) p.3.

⁵⁸ Carrol *op cit* interview.

⁵⁹ “Even though the DPP took over 124 committals and ‘nearly 1000 election briefs’ in 1997, it appears that no police prosecutors were thereby freed up to conduct other functions” (pp.14-15). The report also referred to the tardy delivery of police briefs and poor quality of briefs submitted by police “...the pattern is continuing into the 1998 and figures in the first four months continue to show that nearly one-third of all election briefs do not meet the statutory time requirements in the Justices Act” (p.27).

⁶⁰ Mr Bruce Carrol *op cit*.

corruption. Indeed previous and existing police prosecutors are regarded as dedicated, hard working, and under excessive work loads. It appears that initial police opposition (at least from the Police Association) has been replaced with an acceptance that the transfer of summary prosecutions to the DPP will result in an overall superior public prosecution system (interviews).

Victoria

Prior to the establishment of the Victoria Police Force in 1853, the first police in the colony of Victoria were less than satisfactory in terms of discipline, training, and general conduct.⁶¹ However, from at least 1856, police members were instructed by the Chief Commissioner to conduct prosecutions in the summary courts in an individual capacity.⁶² From the beginning of the 20th century, it became the practice for the local sergeant to conduct prosecutions on behalf of other police; a practice which was to continue up until at least the 1980's, particularly in country and regional areas. The Prosecution Department of the Victoria Police was not formally established until 1981 following the development of specialist prosecution skills by two legally qualified police at a suburban court, focussing on committals.⁶³ The idea of a specialist prosecution unit soon spread to all courts in Melbourne and ultimately State-wide.

Although there had been many earlier inquiries into the Victoria Police Force, the first official report to specifically question the role of police as prosecutors was in 1971 by Colonel Sir Eric St. Johnston.⁶⁴ The St. Johnston report criticised police acting as prosecutors on the grounds that it was not part of basic police functions, conflicts of interest arise, and a lack of independence, and recommended that lawyers be used instead.⁶⁵ It is reasonable to assume that the views of St. Johnston were influenced by the 1962 Royal Commission on the Police in England which had recommended that police should not act as prosecutors except in minor cases. When appointed to write his report on the Victoria Police, St. Johnston was the Chief Inspector of Constabulary for England and Wales.

In 1995 the Justice Department commissioned KPMG management Consultants to review the operation of the entire criminal justice in Victoria.⁶⁶ In relation to a 'Rationalised prosecution service' the Report stated:

“It is envisaged that there would be a single prosecutorial body for criminal matters. This body would be responsible for the prosecutorial role currently performed by Police, Correctional services officers and the Office of Public prosecutions. It would prepare and present cases throughout Victoria...The roles of police, corrections and the prosecution would take on a very different philosophy, police and corrections focussing solely on the gathering of evidence and the prosecution body focusing on the preparation of the case itself.”

⁶¹ Haldane op cit.

⁶² *Manual of Police Regulation* 1856 Government Printer p.66.

⁶³ Former Chief Commissioner Kel Glare and Assistant Commissioner Bill Horman, at Preston Court.

⁶⁴ *St Johnston Report of the Victoria Police Force (1971)*.

⁶⁵ *Ibid* p.179.

⁶⁶ Department of Justice *Project Pathfinder Reengineering the Criminal justice System Stage 1 Redesign Opportunities*. Final Report July 1996 KPMG.

According to the Report, the major benefit with such a reform would be to:

“... uphold the core principles of justice, particularly the independence of the investigative and prosecution functions, not necessarily cost savings.’

It was estimated that the establishment cost would be about \$5.2m and recurrent cost \$3m higher than existing costs and that the police would incur a transition cost of \$6.7m if police prosecutors were made redundant.

The attitude of the Victoria Police Association is that any proposed transfer to the DPP will be opposed. If a transfer occurred, then in theory, it should mean an additional 200 police available for operational in the field work but according to the Association, because there are over 900 current vacancies, those members would simply fill the vacancies rather than there be any increase in total police numbers.

South Australia

Whilst the issue of police prosecutions had been raised by some early Inquiries in SA,⁶⁷ no significant analyses occurred until the early 1990's when the idea of transferring police prosecutions to the DPP was seriously mooted. The emergence of this issue coincided with the creation of the Office of the DPP in SA in 1992. early The current DPP Mr P Rolfe QC has expressed the view that ideally his office should be responsible for the prosecution of all criminal matters in that State and that the current prosecution role of the police raises questions concerning their impartiality and independence. The DPP view is however dependent on adequate resources being available and co-operation from the police. In 1998 the SA Police Force conducted a review of Prosecution Services Division.⁶⁸ That review concluded that existing prosecution system was in need of reform due to inefficient work practices, inefficient information technology, and poor human resource management. The report acknowledged however a “...lack of perception of impartiality and independence between investigation and prosecution functions.”

The Commissioner of Police has no fundamental objection to a proposed transfer of prosecutions from the police to the DPP provided an adequate standard of prosecution is maintained. However, at this stage it appears that the government will not introduce any significant reforms in the near future.

Tasmania

In Tasmania the police conduct all summary prosecutions apart from Commonwealth matters and regulatory offences. It appears that the Tasmania Police Force was the first colony to establish a specialist prosecutions department 1896. The office of DPP was in 1986. In Annual Reports of the Office of DPP the issue of removing summary prosecutions from the police role was raised as a matter of public interest by the then DPP Mr Damian Bugg QC in the mid 1990s.

⁶⁷ South Australia, *Criminal Law and Penal Methods Reform Committee* 1974 the ` Mitchell Report', see *Criminal Investigation in South Australia* Report (1974) p.175, recommending that private lawyers take over all police prosecutions, on the basis of the need for independence. The Report noted that in general police should not act as prosecutors but that it was impractical to immediately phase in such a takeover, but that at least the police should consult with the Crown Law Dept on difficult cases.

⁶⁸ Focus 21 Review.

During 1997, the issue was addressed by the Treasury Department which initiated an 'Output Study' to determine the financial implications of such a transfer.⁶⁹ At subsequent meetings during 1997-1998, attended by senior police, officials from Treasury and the Justice Department, Mr Bugg QC supported the transfer on the grounds of independence as distinct from financial cost saving, arguing that the prosecution services should be amalgamated. It was clear that the police force and the Police Association strongly opposed the proposal on the basis that wide experience would be lost and that prosecutions was a valuable step in police officers career and promotion opportunities. The police also raised the question of whether it would cost more.

The Justice Department took the view that for such a transfer to be viable there would have to be a transfer of relevant resources from the Police Department to the Justice Department in order to fund the additional workload. The government at that time (ie prior to the election in September 1998), through Treasury, advised that it was not prepared to reduce police resources, and in particular, not prepared to reduce police numbers. It was assumed that if the transfer occurred then somewhere between 10 and 20 police would be made redundant and their positions not filled. It appears that the figure of 1052 was regarded by the government (and presumably the police) as the ideal or minimum number of police and any figure below that was unacceptable. The idea of a reduction in total police numbers in Tasmania was, from a political perspective, anathema. This decision needs to be placed in the context of a significant Law and Order debate that was on going, and a vocal Police Association which publicly campaigned for an increase rather than a decrease in police resources.

After the election in September 1998 with a new government, the new Attorney General was briefed on the issue and decided there would be no change to the status quo. In summary, no change can be expected in Tasmania due to combination of financial (Treasury) and political concerns in that the government does not want to be seen as reducing total police numbers. The issue of police prosecutions has thus been linked to border discourse in that State regarding 'law and order'.

Queensland

Currently the police conduct the vast majority of summary prosecutions and committals in Queensland. The DPP does not prosecute summary matters apart from prosecuting police as defendants. The DPP only conducts committals at Brisbane and Ipswich, the police conduct all other committals. The first time the issue of transferring police prosecutions to the DPP was seriously raised in Queensland was in 1989 in the report of the Fitzgerald Royal Commission of Inquiry. That report recommended that all summary prosecutions be taken away from the police and responsibility transferred to the DPP. The main concern expressed in the report was that prosecuting is not a 'core' function of the police and that this role could be performed by civilians⁷⁰. To date, this specific recommendation of the Fitzgerald Report has not been implemented.

According to the current DPP Mr R Miller QC in relation to transferring police summary prosecutions to the DPP: "...that day is far off" and "It would only be when we have taken over all committal hearings that we could begin to consider seeking approval for funding and considerable staff increases to cope with the work summary prosecutions would entail."⁷¹

⁶⁹ I am indebted to Mr Richard Bingham of the Tasmanian Justice Department for providing this information.

⁷⁰ Report of a Commission of Inquiry pursuant to Orders in Council (1989) the 'Fitzgerald Report' at 235-238 and 381.

⁷¹ Letter dated 8 June 1999 to the writer from Mr Miller QC.

Thus, the issue revolves around the government providing the necessary resources to implement such a reform. At the time of writing, it would appear that the government is not prepared at this stage to provide the requisite funding. If anything, it appears that more police prosecutors are required to cope with increased work loads.⁷²

However, one effect of the Fitzgerald Report has been to improve and increase the legal training of police prosecutors. In Brisbane there are 36 prosecutors of whom 2/3 have a LLB. Elsewhere about 1/3 of police prosecutors have LLB. The Police Service assists in training and education. It appears that in Queensland, transferring police prosecutions to the DPP would be a last step in a graduated takeover, starting with indictables triable summarily then committals, and finally summary offences. The time frame would clearly be linked to the geographic vastness of this jurisdiction.

In summary, a transfer of summary prosecutions from the police to the DPP in the near future is most unlikely not only because of the administrative and financial resources required to cover the vastness of this State, but also because it would be necessary for the DPP to firstly take over the majority of committal proceedings.

*Northern Territory*⁷³

Prior to February 1998 members of the Northern Territory Police Force prosecuted virtually all summary matters apart from complex or contentious cases which were routinely transferred to the Crown Law Office. However, from at least the early 1990's, the standard of police prosecutions was highly criticised by, inter alia, the Magistracy. As a result, in 1991 the first DPP in the NT Mr Len Flanagan QC, raised the issue of transferring police prosecutions to the newly created Office of Public Prosecutions. No reforms were however introduced. Criticisms of the quality of police prosecutions continued. Moreover, the findings and recommendations of the Wood Royal Commission in NSW in 1997 acted as a catalyst for reform, or at least raised the level of concerns regarding police prosecutions.

The second NT DPP, Mr Rex Wild QC, initially addressed the problem by engaging three solicitors in 1996 to conduct summary prosecutions on behalf of the OPP. Those solicitors were under contract to the DPP and seconded to the Police Prosecutions Department. A senior police officer with extensive prosecution experience, including as Crown Prosecutor, (Peter Thomas) was also appointed in May 1997 to head the police prosecutions department in order to improve the training and skill level of the police prosecutors.

More significant reforms occurred on 11 February 1998 when a *Memorandum of Understanding* between the DPP and the Commissioner of Police was signed on 11 February 1998 under which the police prosecutions unit in Darwin and Alice Springs came under the day to day supervision of the DPP and renamed 'Summary Prosecutions' which thus removed the term 'police' from the earlier departmental title. Existing police members and staff became 'attached' to the OPP. The three solicitors who had been employed under contract with the OPP and seconded to police prosecutions, were 'patriated' back to the OPP. Some functions of the officer in charge of Police prosecutions were reallocated as non-core police functions. Prior to the MOU, there were 15 staff all of whom have been preserved.

⁷² Information provided to the writer by Sgt Geoff Biffin (22.6.99).

⁷³ I am indebted to Peter Thomas, Officer in Charge of the Police Prosecutors in the NT for pointing out these recent reforms.

In Alice Springs, the Summary Prosecutions Unit is directly responsible to the Assistant Director of the ODPP and conducts all summary prosecutions apart from complex or sensitive cases. A prosecutor also attends on circuit to outlying areas. Police members continue to conduct summary prosecutions at Yulara, Yuendumu, Papunya and Tennant Creek. There are six staff at the Alice Springs Summary Prosecutions. Police members continue to prosecute in the more remote areas of the NT but increasingly under the supervision of the ODPP.

In summary, in the Northern Territory an 'Integrated' model of summary prosecutions has evolved whereby some police members continue to conduct summary prosecutions along with solicitors contracted to the ODPP. The police prosecutors remain employees of the Northern Territory Police Force but under the direct control and supervision of the DPP. The effective superior officer of the police prosecutors in the day to day running of summary prosecutions, is the DPP. The police prosecutors see themselves as working within or attached to the ODPP. Correspondence from the police prosecutors, for example, is on ODPP letterhead.

It is also worth noting that in the NT there has not been any concerted campaigns to ensure that police prosecutors hold a law degree. Of the ten police prosecutors in Darwin, only two are pursuing law related studies.

This integrated model is unique in Australia and in the common law world. It is suggested that this model has emerged as a viable option to the traditional 'police only' system as a result of three basic factors. First, concerns about police summary prosecutions had to reach what could be described as a 'crisis' situation. This occurred with the Magistracy making formal complaints to the ODPP for several years, compounded by the revelations of the Wood Royal Commission in NSW. Whilst there was no evidence of corruption in the NT police prosecution department, the Wood Reports, it is suggested, forced all prosecution authorities in Australia to closely examine their overall systems and processes. Second, it required a DPP with a commitment to improving not only the standard of public summary prosecutions but also achieving consistency within prosecution decision-making and processes. This meant rejecting the traditional dichotomy between summary prosecutions on the one hand and higher court prosecutions on the other and in its place, the notion that all criminal prosecutions should serve the same public interest and should all be governed by the same criteria and approaches. Third, the NT reforms also required a commitment on the part of the police to improve the old system. This meant overcoming traditional conflicts and tensions between the police and Offices of Public Prosecutions, and a willingness on the part of the police to jettison, or at least modify the traditional police view that summary prosecutions is the sole domain or territory of the police. Under the integrated model, the police have not relinquished their prosecution function. This is not to suggest that no difficulties have arisen at all. It would be highly surprising if some tensions between the police and the ODPP have not arisen and in this context the role of the 'liaison officer' is to act as a buffer between the two groups.

Perhaps the key to the success of the integrated model is precisely because it developed outside the political arena and arose out of a common sense approach by the key players themselves rather than being imposed by politicians. Arguably, if a political attempt was made to embody the integrated model in legislation rather than a Memorandum of Understanding, the model may not have been created. The NT Attorney-General's Department advised the writer "This Department has no policy on this issue."⁷⁴

⁷⁴ Letter dated 23 June 1999.

Summary of arguments against police as prosecutors

From the above overview, the basic arguments for transferring summary prosecutions from the police to the Office of DPP can be summarised as:

1. ***Impartiality***: The requirement for impartiality in prosecutions attempts to divorce the ideological and organisational values of police investigators from one of the most sensitive decision-making processes within criminal justice administration⁷⁵. This requirement was one of the most compelling rationales for the establishment of the office of DPP in Australia and the CPS in England.⁷⁶ Apart from the possibility of actual bias in prosecution decision-making, the perception of a fair and impartial system is also important from the perspective of public confidence in the administration of criminal justice to avoid what the United Kingdom 1962 Report called a “suspicion of alliance.
2. ***Lack of legal training***: In all Australian jurisdictions only a small percentage of police prosecutors possess an LLB or equivalent legal qualification. This must impact upon the ability of the police to make informed and accurate judgments concerning matters of evidence and, more generally, the appropriateness of proceeding with certain charges. Admittedly there are few reported cases of inept police conduct of prosecutions but such cases are hardly likely to be the subject of complaint by defence counsel. The lack of legal qualifications of police was one of the main reasons why the office of DPP has taken over committals in most jurisdictions.⁷⁷ Poor legal training can result in high rates of acquittals and it is important to note the significant increase in the range of indictable offences now triable summarily.
3. ***Lack of accountability***: Police prosecutors are not subject to the same rules of conduct and ethics as solicitors and barristers. Accountability is essentially maintained by police organisational rules and practices and whatever training the prosecutors receive within the force. As a result it is likely that the initial decision to proceed with a prosecution, and the actual conduct of the prosecution, may be inconsistent with prosecution criteria and guidelines published by the office of the DPP.
4. ***Inefficiency***: There are two aspects to this concern. First, is the issue of whether summary prosecutions should be a function of the police at all? In some jurisdictions in Australia, there are clear moves to remove prosecutions from the ‘Core functions’ of the police not simply because of the way police have conducted those prosecutions but rather, because it is thought this role should be performed by civilians or other external agencies. In this way, the topic of police prosecutions is linked to the broader process whereby policing functions are being redefined. The second aspect to the issue of efficiency is that there is considerable evidence, at least in some jurisdictions, that police do not conduct prosecutions in a particularly efficient manner. For example, the United Kingdom Report in 1981 found a high rate of acquittals with police prosecutions and the Investigative Review in WA in 1997 found an unacceptably high percentage of prosecutions which failed or ended in a nolle prosequi. The WA review of committals (1998) found that the

⁷⁵ Discussed by the UK Royal Commission on Criminal procedure 1981 *op cit* para 381; St Johnston Report 1971 (Vic) *op cit* p.178; Lusher Report 1981 (NSW) *op cit* p.246. Also see Price v Ferris (1994) *Aust Crim R* 127 at 130).

⁷⁶ J. Toombs, ‘Independent Prosecution Systems’ in (Zednkowski et al) *The Criminal Injustice System* (1987) Pluto Press 90-110.

⁷⁷ D. Brereton and J. Willis *The Committal in Australia* (1990) AIJA at 898ff.

performance of the DPP was greatly superior to that of the police and in NSW the Second Progress Report into the pilot program at Dubbo and Campbelltown contained some data suggesting superior performance by the DPP (admittedly the NSW police Association criticised these findings and the NSW Bureau of Crime statistics and research concluded there was insufficient data to draw reliable conclusions). Fitzgerald (235) and Lusher (247) was critical of the unwillingness of police prosecutors to drop inappropriate charges. In the Northern Territory, Magistrates had been complaining for many years about the standard of police prosecutions. In terms of the relative financial costs of conducting summary prosecutions, there is little clear-cut evidence that the DPP could perform this role cheaper than the police although all the indications are that the DPP would operate more cost-effectively in the long term.

5. **Consistency**; This ideal requires that, in principle, all public prosecutors employ and apply common prosecution criteria and policies. At present there are major disparities between police and DPP systems of prosecution. The danger here is that police may feel constrained to comply with the wishes of the informant or superior.
6. **Corruption**: Linked to the accountability concerns is the possibility of corruption within police prosecutions. The ICAC report (1994) has been the most outspoken on this possibility. In his report Mr Justice Wood said that although there was no direct evidence of corruption in the police prosecution department but:

“In many instances, however, an astute and fair-minded prosecutor might well have been expected to entertain a suspicion that all was not above board, to the point of initiating an internal investigation”⁷⁸
7. **Improved access**. There is some evidence that aboriginal defendants are reluctant to complain to the police prosecutor (in uniform) about some aspect of police treatment compared to discussing the issue with an independent prosecutor who is not in uniform.
8. **Core Functions**. On this view, conducting prosecutions was never part of the original core functions of the police, this role was simply taken over as a matter of administrative convenience. Now that the Office of DPP has been established in all jurisdictions, there is no reason for the police to continue this function.

Discussion

The above historical and contemporary review of police prosecutions raises a plethora of issues, questions, and lessons. Space does not permit a detailed discussion of all. Rather, an outline is provided of what the writer regards as some pertinent aspects for consideration.

1. One question is why have governments in Australia been reluctant to introduce reform given the strong recommendation of four Royal Commissions, two Commissions of Inquiry and many other authorities advocating the removal of prosecutions from the police role? Or, in other words, if the above arguments against police prosecuting have any force, how has the State been able to ‘manage’ these concerns? A number of factors can be identified. Prior to the creation of the office of DPP (from 1983 onwards), there would have been major difficulties in transferring summary prosecutions to the then Crown Law departments, many of whom had difficulties just coping with the workload of indictable

⁷⁸ Report op cit p.109.

prosecutions. Further, unlike the experiences in England, there has not been any widespread crisis or scandal within police prosecutions in Australia and accordingly, little direct pressure on governments to implement reform. Uncertainty regarding the financial implications of a transfer has also been a factor. In Tasmania, the refusal of governments to introduce reforms is linked to concerns about reducing total resources to provide law and order. The issue of prosecutions has always been peripheral to the terms of reference of the various Commission of Inquiry into the police. In Australia there has not been any Commission of Inquiry specifically into the issue of police prosecutions. More generally, the apathy of most governments may reflect what McBarnett refers to as an ‘ideology of triviality’ surrounding summary criminal proceedings⁷⁹ ie the notion that what transpires in Magistrates Court is unimportant and not deserving of pure principles of justice as they apply to proceedings in the higher courts.

2. It is significant that in England, New Zealand and Australia, the police simply ‘took over’ the role of prosecutor in the lower courts rather than the legislature specifically authorising that role. It is as if governments have turned a blind eye to the issue of principle, and found it too easy to simply accept the accretion process. In all the above jurisdictions it has been the police forces themselves which have created and developed the formal departments of prosecution as a specialist branch of modern policing-rather than being decided by government. No doubt the lack of any significant or sustained public demands for an alternative system added to the governmental complacency.
3. Clearly, the pace of change varies between jurisdictions in Australia depending on ‘local’ political, social and perhaps geographic conditions; all of which constitute the ‘policing milieu’. The ACT has already completed a wholesale reform, followed by the Northern Territory. It is suggested that reforms can be expected in WA in the near future. In other jurisdiction such as Queensland, Victoria and Tasmania, little if any reforms can be expected in the near future. There are also differences in terms of who or what is driving the reform process. In WA the initial impetus came from the DPP and Attorney-General, based more in terms of creating a more efficient and economically rational system of prosecutions whereas in NSW the concerns have more ideologically driven in terms of a lack of independence but again with strong campaigning by the DPP to support the reform. In Victoria there is no evidence that any DPP has campaigned for such a reform where it appears that the legal profession raised the initial proposal for the transfer. The attitude of Police Associations has varied considerably. In NSW the Association has consistently and strenuously campaigned against transferring prosecutions to the DPP and to date, with some success no doubt bouyed up by the equivocal view taken by Commissioner Ryan to the proposed transfer. In WA there was initial opposition by the WA Police Association but it appears that the Association now accepts the advantages of such a transfer. The Western Australia. In Victoria the Police association has consistently opposed any transfer to the OPP but to date has not been required to engage in public campaigns because there has not been any concerted push by the DPP or the government to introduce this reform.

⁷⁹ D. McBarnett, *Conviction-Law, The State and the Construction of Justice* (1981) McMillan.

Options for reform and potential consequences

In Australia (and New Zealand) relevant governments have three basic options in relation to the issue of whether police should continue to prosecute summary matters:

- (a) *Status Quo*: Retain the status quo without any fundamental changes to the current structure of prosecutions though perhaps improving the training and number of police prosecutors. The difficulty with this option is that all of the above arguments as to why police should not prosecute remain.
- (b) *Restructure*: This option involves no formal transfer of prosecutions to the DPP but rather an internal restructuring of the police prosecution department to make it more independent from the criminal investigation arm of the police force. This has been the strategy adopted in New Zealand,⁸⁰ This model has also been proposed in NSW and SA. Restructuring may or may not involve the incorporation of civilian lawyers to work alongside the police. Where this incorporation is used, it is more accurate to refer to this model as an 'integrated' model, as has developed in the Northern Territory in relation to summary prosecutions in Darwin and Alice Springs. It is suggested, the integrated model is only viable given a relatively small number of personnel involved to make the administrative arrangements manageable. The viability of the NT integrated model for other jurisdictions is a complex question. Its successful implementation will depend on a combination of factors such as the strength of police opposition to any change in the status quo, the attitude of the relevant DPP and police Commissioner, the state of 'crisis' regarding summary prosecutions, the number of police prosecutors, and the willingness of government to provide the necessary funding.

This option does not address the fundamental ideological objection that police should never prosecute, regardless of where the prosecution department is located within the force (or within an office of DPP) and regardless of the legal qualifications of the police prosecutors. Restructuring also raises a plethora of potential problems arising from the working inter-relationship between police and DPP lawyers, and the different systems that each is used to operating. This aspect will require further research in the future.

- (c) Wholesale transfer of all police prosecutions to the DPP. It is suggested that this is the most appropriate long term option for all jurisdictions. In creating the office of DPP, all governments in Australia have clearly accepted the need for independence in the prosecution of indictable offences and to not require independence in summary matters is simply hypocrisy. The historical and contemporary 'convenience' of having police conduct prosecutions is no longer a sufficient justification for this practice. There have been no major difficulties with the DPP taking over committal proceedings throughout Australia; most probably the police welcomed such a transfer. Admittedly, transferring all summary prosecutions from the police to the DPP would have more far-reaching consequences. It is suggested that before a transfer of summary occurred, it would be necessary for the conduct of the majority of committals to first be transferred to the DPP. Committals are in a sense a summary prosecution except the arguments for the DPP

⁸⁰ In 1997 the New Zealand Law Commission published a report on Criminal Prosecution raising all of the issues discussed in this paper and recommending that reforms take place as soon as possible. On 26 July 1999 the writer was advised by Ms Louise Symons, senior researcher for the Commission that a major restructuring of the NZ Police Force was underway whereby the prosecution department was to be separated from the investigative arm.

taking them over are far more powerful, ie. avoid duplication of documentation, speedier resolution of issues, more direct consultation between defence and Crown prosecutors. Thus, taking over committals is a first step in larger process of transferring all summary matters to the DPP.

Consequences of wholesale transfer

Although it is clear that major problems occurred with the transfer of police prosecutions to the CPS in England, it is difficult to predict exactly what the consequences would be if all summary prosecutions were transferred to the DPP in Australia. Not only are there different policing environments in each jurisdiction, but much depends on how such a transfer is implemented in terms of a time frame and transitional administrative arrangements. Despite these caveats, some general suggestions can be made:

It can be expected that community and judicial confidence in the integrity of the criminal justice system would be increased not only because of increased independence and impartiality in the system, but also because of improved consistency in decision-making. In financial terms, it is reasonable to expect initial establishment costs to be substantial and operational costs may well exceed current expenditures in the short term. However in the longer term operating costs are likely to reduce substantially.

For the police, a wholesale transfer would be consistent with contemporary processes of redefinition of police functions whereby the police will only engage in 'core' policing, leaving the other tasks to civilians, a process which is already underway.

Clearly, resources of the DPP would need to be increased. It is not clear that this could be achieved simply by transferring the 'prosecution component' of the police budget to the DPP budget. The review of the WA committal project showed that a transfer to the DPP of prosecution functions did not necessarily free up police resources.⁸¹ The DPP would have to either use current in-house lawyers to conduct the prosecutions or train up new recruits. The latter possibility could be a welcome and promising opportunity for recent law graduates who, at present, have very little scope to acquire prosecution and advocacy skills. For how long such recruits would be prepared to stay in summary prosecutions is a matter of speculation, particularly given the 'conveyor belt' nature of new procedures such as 'Mentions' where there is little scope to develop legal and advocacy skills.

The overall efficiencies of the courts are likely to improve in terms of reducing the number of contested matters, reducing the length of contests and reducing waiting times for cases to be heard. Court facilities such as the number and size of rooms available for prosecutors to prepare and conduct negotiations would also improve assuming that lawyers from the office of the DPP in some jurisdictions would not be prepared to work in the current work environment of police prosecutors (eg WA).

⁸¹ See Office of the Director of Public Prosecutions, *A Review of the Role of the DPP in the Perth Court of Petty Sessions* 1997.

Conclusion

It is suggested that the above analysis shows there have been three basic stages in the development of systems of summary public prosecution in Australia. First, from 1788 to the 1850's summary prosecutions were characterised by the dominant role of private citizens as the informant and prosecutor, alongside ad hoc policing structures with some police constables acting as prosecutors. This first era replicated the model that had been operating in England for many centuries, with minimal State involvement. It appears that during this era, no permanent police prosecutions personnel or departments existed. Either the informant constable or the local sergeant conducted the case.

The second stage was from approximately the 1850's to the 1980's. During this period, the ad hoc arrangements, whereby individual constables prosecuted their own cases, transformed into more permanent and structured arrangements whereby the police became the routine and accepted prosecutors in the lower courts, virtually excluding the private citizen as prosecutor. By the middle of the twentieth century, specialist prosecution divisions had been created within all Australian police forces thus cementing in place this public function of police.

The 1990's marks the third and current stage of prosecution systems whereby the traditional model is being questioned and found wanting.

The distinction between the investigative and prosecutorial function of the police has come under great scrutiny within the context of broader reform discourse concerning all aspects of the administration of criminal justice. Structural reforms have already taken place in some jurisdictions, and in other jurisdictions, the issue of transfer has been placed on the agenda. It is now clear that in all but one (ACT) jurisdictions in Australia, there exists two systems of public prosecution. That which operates in the higher courts is based on the principle of independence, fairness, and impartiality but the system operating in the lower courts is not based on those same principles.

The way in which governments and police in Australia are grappling with this fundamental contradiction varies significantly depending upon a complex array of 'local' policing and political factors. It may be some time before a wholesale transfer of summary prosecutions to the DPP takes place, but, it is suggested, the driving forces are so compelling that it is inevitable that sooner or later a single system of summary prosecutions conducted by a single agency will emerge. When this last step occurs, the traditional prosecutorial role of the police will be seen for what it has always been, a temporary measure to meet the practical and administrative needs of societies in transition.

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