AVOIDING DELAY IN MAGISTRATES' COURTS

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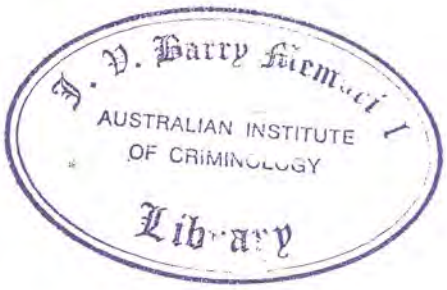

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INTRODUCTION

I began this project seven years ago with the aid of a grant from the Australian Criminology Research Council. It seemed to me then as it does now that there was a need for an Australia wide survey of magisterial jurisdiction. Since I began my project the Law Book Company has published a work under the title "Summary Justice" by Ward and Kelly which is a comprehensive review of magisterial jurisdiction in South Australia. The Law Book Company has also published commentaries on the work from other Australian jurisdictions. I assisted in writing the Tasmanian commentary. This publication fulfilled a real need for an Australia wide survey of lower court jurisdiction but only from a strictly legal point of view. In writing this project I have tried to make sense of magisterial jurisdiction; to find its place in the legal system and to predict in which way it ought to develop in the future. So far as I am aware nothing of a similar nature has been written in Australia, though one of the earliest legal text books in Australia was published in the eighteen thirties - Plunkett on Magisterial Jurisdiction in New South Wales. I have written in the hope that my work will be of value and interest to law makers and law reformers as well as other magistrates.

I think now my title could have been better chosen. The primary aim of the lower court system should not be merely to dispose of cases efficiently but to dispose of them justly. The recent criminal trial and conviction of the former Chairman of the Bench of Stipendiary Magistrates for New South Wales (Mr. M. Farquhar) has demonstrated that public trust in the integrity of the magistracy is essential if cases are to be disposed of justly. Accordingly the achievement of independence of the magistracy from the public service is probably the most important change which has occurred since I began this project. However, it is only a first step; it is only de jure and not de facto independence from the executive

government. So long as the purse strings are held firmly by the executive government the possibility of undue influence will always exist.

The next most important development has been the progress in computer technology which has made the introduction of the computer into the lower court system imminent. At the request of a former Attorney-General for Tasmania (the Honourable B. Miller M.L.C.) I prepared a plan for the introduction of the computer into our system several years ago. One of the reasons for the delay in the completion of this project was because I hoped to describe in detail the installation of our system. Unfortunately we are still waiting, though a trial run has been successful. I have no doubt that the introduction of the computer will revolutionise the lower court system and make it possible to enact and monitor much more rational legislation. In particular traffic legislation requires to be monitored so as to facilitate research in order to achieve the object of road safety.

The last decade has seen a remarkable surge of public interest in child care. Each Australian jurisdiction has conducted enquiries into its children's court systems. Several years ago I was appointed as a member of a committee which prepared a report on our children's court system for the Minister for Social Welfare. Legislation to implement the report is still pending. Hopefully it may be introduced next year. Among the proposals made was a suggestion that proceedings against children be heard and disposed of within six months unless the leave of the court is obtained to extend proceedings. In the commentary which I wrote to Ward and Kelly I explained the history of the six months time limitation on proceedings which exists in most Australian jurisdictions in adult courts as well as children's courts. This provision was originally introduced by Sir John Jervis into English law in 1848. His

intention undoubtedly was that proceedings should be heard and terminated within six months. This provision was duly adopted in the Australian colonies. Unfortunately there was a flaw in the drafting and the provision has never worked as intended. Hence the courts, particularly in the larger states, are unnecessarily burdened with stale cases. This is but one example of the lack of comprehensive planning which exists with regard to the lower court system in Australia.

Hopefully this situation is changing. Under the direction of the Victorian Government a Courts Management Change Program was formulated in 1984. Already an excellent series of papers have been produced. Victoria has also produced the best paper in Australia so far on children's courts and child welfare services (The Carney Report 1984). I acknowledge with gratitude the assistance given to me by the Victorian Director of Legal Research and Commissioner of Law Reform (Dr. Joscelynne A. Scutt) in making some papers available to me.

It is to be hoped that Australia's other jurisdictions will follow Victoria's lead as they must inevitably do to some extent when introducing the computer into their systems.

In the course of preparing this project I visited all the Australian capital cities except Darwin and heard cases in the lower courts in those cities. I was impressed with the professional competence and integrity of all the magistrates I heard.

I wish to thank the chief magistrates and other magistrates who provided me with assistance. During the currency of this project the Australian Stipendiary Magistrates' Association was formed and over the years I have had the pleasure of forming friendships with many interstate magistrates. The biennial conferences of the Aus-

tralian Magistrates' Association have provided me with a platform to deliver papers and air my views to a patient audience of fellow magistrates.

Fundamentally the institution of the Australian magistracy is the same in all Australian jurisdictions. Although the laws in the jurisdictions are not uniform, magistrates do uniformly assist in the enforcement of federal laws. The magistracy needs to be considered as an Australian institution. That is one of the reasons the Australian Stipendiary Magistrates' Association was formed.

This project is my contribution towards achieving a national awareness and appreciation of the institution of the Australian magistracy.

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1985.

THE EARLY HISTORY OF THE MAGISTRACY

INTRODUCTION:

Some knowledge of the early history of the magistracy is indispensable in order to understand how the magistrates courts function today in Australia. Furthermore, it is also necessary to know something of the history of the English criminal justice system in general because the magistracy forms a part only of that system.

The criminal justice system may be conveniently divided into four parts; the substantive criminal law at any given time, the methods of detection of offenders and the bringing of them to justice, the kinds and structures of the courts set up to deal with offenders, and finally the methods of disposal and punishment of offenders. At no time over the course of English or Australian history have these elements of the criminal justice system been consciously planned or integrated with one other. So the word system is not entirely apt. The English adversary system of criminal justice which Australia inherited was in fact the product of centuries of haphazard change and experiment, informed at times no doubt by a respect for tradition and the liberty of the subject, but also by the desires of the ruling class, particularly in the field of the substantive criminal law. True there has been some modification of the substantive criminal law in Australia. But the criminal justice system today in Australia is in fact not a planned system but largely a copy of English criminal law. Later I will draw attention to the need for

critical analysis as to how the system presently operates in each Australian jurisdiction. The need for such analysis has become much more pressing since the advent of computer technology. The pace of advance of modern technology has been such that no appropriate critical analysis has yet taken place; for example in the index of the National Library at Canberra no entry is presently recorded against the title "Adversary system - criminal justice" except for some references to United States publications of relatively minor value. What is required is a practical appraisal of the criminal justice system in order to ascertain how efficiently it works. This cannot be done without adequate statistical information and a knowledge of history.

THE KING'S PEACE.

In early English law the primary responsibility for keeping law and order rested with the members of a small local community. It was accepted that the victim of a crime and members of his family could exercise a liberal degree of self help; for example, they could lawfully retake goods stolen from them by force. There was a scale of monetary compensation which provided an alternative to an act of vengeance by a victim. However, even before the Norman Conquest the King found it necessary (though only in certain circumstances) to intervene in the affairs of local communities in order to keep the King's peace. He intervened through his officials known as conservators appointed by the King, the King being "by his office and dignity royal and principal conservator of the peace within his dominions who may give authority to others to see the peace kept and to punish such as shall break the same". See

Halsbury: Laws of England, Vol. 21 at p 515, 2nd edition. Others were elected by the people and the limits of their authority varied according to the nature of their office. Thus the Lord Chancellor, the Lord Stewart, the Lord Marshall and the Justices of the King's Bench were conservators of the peace throughout the kingdom. Other judicial officers were peace conservators within narrower limits; Justices of the Common Pleas and Barons of the Exchequer within the limits of their courts, justices of assize and gaol delivery within the limits of their commission. Of elected officers, sheriffs and coroners were peace conservators within the limits of their counties, and constables, headboroughs tithing men and borsholders within the limits of their township or hundred. In addition to these, other persons who did not hold any office, were elected by the general body of freeholders of each county to act as peace conservators for that county; furthermore, there were conservators of the peace by prescription or tenure of lands (see Halsbury above). This may appear to be a bewildering array of royal officials and certainly the history of each office holder is complex. However, the general picture is quite clear. The history of the criminal law is the history of the intrusion of the king's peace.

As Windeyer has said the state as a legal entity was deliberately never recognised by the law of England. See Windeyer: Lectures on Legal History p 17. So even today in a criminal prosecution before a judge and jury the jury is not called on behalf of the people to determine the truth of a matter; rather the jury is called upon to determine the issues in dispute in litigation between the sovereign and the bar and a true verdict given according to the evidence they have been permitted to hear. The practical consequences have been unplanned but are nevertheless momentous and

important. For example, it is a fundamental doctrine of the common law that the King can do no wrong. Accordingly a lapse of time cannot operate to bar the civil or criminal litigation of the King against his subjects. Thus the common law could never develop any doctrine of delay as barring the right of the sovereign to institute legal action. "Nullum tempus occurrit regi" is the maxim at common law. Today in the civil law this prerogative of the Crown has been whittled away by statutory intrusion; however in the criminal law the Crown's prerogative has remained almost entirely unaffected except in the field of statutory summary offences as will be seen later.

Although it is the king's peace which is at issue in a criminal prosecution, the opportunity to invoke the king's peace by an ordinary member of the public still exists. In the absence of alternative statutory provision the private citizen still has the right to initiate criminal proceedings. True the Crown may eventually decline to bring an alleged offender before a jury, but in most cases summary criminal proceedings may be launched and pressed to a conclusion by a private prosecutor. Indeed until the formation of effective police forces in the last century, the Crown relied chiefly upon private prosecutors to bring offenders to justice if they were to be brought to justice at all.

THE OFFICE OF JUSTICE OF THE PEACE.

This office grew directly from the office of the conservator of the peace.

In 1327 Edward III chose members of the local gentry to act as his conservators of the peace and keep his peace.

This had a decisive impact upon the future direction of English criminal law which persists to this day. The fifty years reign of Edward III from 1327 to 1377 in fact resulted in legislation which is one of the foundations upon which the modern magistracy is built. Why did the King choose local knights to keep his peace? For a strong King it was an act of decentralisation of power. The increase of crime and the effect of disease in reducing the labouring population would appear to be one cause. Perhaps also there was a need to spread judicial and administrative power as widely as possible. Whatever the reason one of the first legislative acts of Edward III was, as principal conservator of the peace, to assume the responsibility for appointing all conservators of the peace in the future. The King nominated each conservator in his commission for each county, and provided that a clerk of the peace for each county should keep the commission in his custody, so as to identify who was in the King's commission to keep his peace. Later these conservators, or justices of the peace as they came to be known, were authorised to hear and determine felonies and authorised to hold courts four times a year. These Quarter Sessions held by justices of the peace owe their origin to an Act of 1362 (36 Edward III c.12).

Today the direct descendants of courts of quarter sessions are the Australian courts of intermediate criminal jurisdiction, for example the district courts in New South Wales and the county courts in Victoria. Justices of the peace presided over jury trials in quarter sessions although in practice the most serious criminal matters were dealt with by the King's itinerant judges at the assizes. Regrettably the statutory requirement that justices should sit with someone learned in the law quickly fell into desuetude.

These matters are of course more relevant to the history of trial by jury. What is more to the point so far as the unique office of the justice of the peace is concerned is the deliberate assumption of exclusive power by the sovereign in 1327 to appoint such office holders. Even greater in importance was the vesting of jurisdiction in them by Act of Parliament. Today the most outstanding feature of the magistrate is that his office and most of his jurisdiction owe nothing to the common law.

> "The whole of the law relating to summary conviction is solely the creation of statute . . . . . at common law there was no such thing as summary conviction."
>
> R v Beacontree Justices 1915 3 K.B. 388 at p 401.

It is probably true to say that the common law is still at the heart of serious criminal offences in Australia notwithstanding that Queensland, Western Australia and to some extent Tasmania have codified their substantive criminal law. But in the far more extensive and practically important realm of summary criminal offences heard without a jury, the justice of the peace, and eventually the magistrate, proved to be the most popular instrument of the legislative will. One obvious reason was the close and regular contact of the justice of the peace with a local community. A more subtle reason was the ease of control which could be exercised by the legislature over justices when it chose. An inarticulate minor premiss of the common law is that in essence the law is a body of amorphous principle, never quite capable of complete and definitive exposition, but always capable of fresh judicial interpretation and exegesis so as to meet changing needs and circumstances. The common law can be, and of course is often excluded by express statutory

enactment, but it is a peculiarly difficult task totally to exclude the common law on any given subject. If for example it were sought completely to codify the whole of the criminal law in any Australian jurisdiction, it would ultimately become necessary to codify the whole realm of the law, civil and criminal. But the magistrate and his court are fundamentally isolated from and foreign to the common law because they are fundamentally statutory in origin. Thus the magistrates courts have always been much easier for the legislature to control and direct.

The Justices of the Peace Act of 1361 probably best marks the birth of the summary power of justices of the peace. The Act was part of the English law brought with the first colonists in 1788 and is probably still in force in every Australian jurisdiction. In Tasmania the Act may be found with such parts omitted as were considered appropriate by a former Tasmanian Parliamentary Draftsman in the 1959 reprint of Tasmanian Statutes (Vol.6 p 997). See too the draftsman's comments under the title "Justices" in the 1936 Tasmanian reprint of statutes (Vol. 4 at p 977). See too Vickers v Pearson 1981 A.C.R. 12 (A.C.T. Supreme Court per O'Connor J.).

Notice the conferring of jurisdiction to take measures to prevent crime, that is the power to take sureties to guarantee the good behaviour of persons of "good fame". The word "not" before "good fame" is thought by some to be a translator's error, as it was not in the original Norman French. See The English Magistracy - Milton p 4.

The jurisdiction conferred was unique, there ought to have been no question of the common law intruding. It will be noticed that the statute itself provides no express

procedure for regulating the exercise of the jurisdiction - presumably it was left to the justice to devise his own procedure.

In the centuries to come this pattern was to recur again and again until today an immense amount of statutory jurisdiction has been heaped upon the shoulders of magistrates. Maitland puts it picturesquely - justices became the judicial beasts of burden. There was little interference by the common law to prevent justices acting in a speedy and flexible manner. The common law knows only one method of determining a disputed criminal issue of fact; that is by the verdict of a duly constituted jury after hearing duly admissible evidence. At common law there is no comprehensive code of procedure with regard to the conduct of statutory tribunals and the due performance of a statutory jurisdiction. There is, it is true, at common law, a supervisory jurisdiction by superior courts over justices by means of the prerogative writs. However, this supervisory jurisdiction is confined to restraining excesses of jurisdiction and compelling action where there is a duty to act. Until the last century there was no statutory right of appeal from the decision of a justice and the prerogative writs were resorted to relatively seldom even by persons of means, because they could not correct the decision of a justice when he acted within his discretion and jurisdiction. It was (and still is) true that the superior courts could interfere with justices when they failed to comply with the rules of "natural justice". However, the rules can be virtually summed up as amounting to no more than two principles, first that no man should be condemned unheard, and second that every judge must abstain from being a judge in his own cause. "Audi alteram partem" and "nemo iudex in re sua", is, in essence, all they amount to.

The rules have been attributed to a divine origin, but the realistic view was expressed by Maugham J. in Maclean v The Workers Union 1929 1 ch. 602 at p 604:

> "The phrase (natural justice) is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. The phrase "the principles of natural justice" can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an enquiry necessarily imports that the accused should be given his chance of defence and explanation."

When Edward III conferred his jurisdiction in preventive disorder upon justices in 1361 did he contemplate a fair hearing? The layman would probably say no, and so too, probably most justices who exercised the jurisdiction thereafter did not trouble to conduct a formal hearing. In 1963 a magistrate in England heard and dismissed a charge of assault and then bound over all the parties to keep the peace. The complainants appealed on the ground that the justices did not give them a chance to be heard before binding them over. The appeal was upheld on the ground that the rules of natural justice were infringed. Sheldon and another v Bromfield Justices 1964 2 All E.R. 131.

Part of the judgment of Lord Chief Justice Parker appears below.

> "LORD PARKER C.J.: These proceedings come before this court on a Special Case Stated for the opinion of the court, pursuant to S.11 of the Quarter Sessions Act, 1849. (His Lordship stated the facts, and continued.) It is well known that the justices have power pursuant to their commission (1) or pursuant to the Justices of the Peace Act, 1361, to

bind over all persons brought before them. It is a very important jurisdiction and is in the nature of preventative justice. No offence need be proved at all. There has been some argument before this court as to when it can be said that a person is brought before, or is before, justices, whether the jurisdiction can only be invoked if complaint has been made, and matters of that sort. For my part, I do not want to throw any doubt whatsoever on the jurisdiction of justices to bind over not only the defendant but also the complainant, and, indeed, witness who are before them. Indeed, as I understand it, the decision of the court in R v Wilkins (2), which is binding on this court, makes it clear that at any rate a complainant can be bound over. In that case, LORD ALVERSTONE C.J. said this (3):

> 'It is contended on behalf of (the complainant) that the order so far as regards him is bad. It is said in the first place that the justices had no power to order him to be bound over, because no formal charge, and indeed, no charge of any kind, had been made against him. In my opinion, when a person appears before justices, although his appearance is in the capacity of complainant, and facts are proved to the satisfaction of the justices which would justify them in binding him over to keep the peace, the justices have jurisdiction to make an order to that effect, although no formal proceedings by way of information or otherwise have been instituted against the person.'

It may be that in some future case it will be necessary to consider the width of the statement there by Lord Alverstone C.J., but, as I have said, for my part I do not wish to say anything in the present case which will suggest any limitation on the power of justices.

What have concerned the court however, are the two findings that the appellants were not accorded the opportunity of being heard in their own defence, and that they had not been warned of what was passing through the court's mind. It has been argued on behalf of the respondent justices that provided, as in this case, the persons whom it is proposed to bind over had, in effect, their say of being examined, cross-examined and re-examined, there is no need at all that

> they should know what is passing through the court's mind, and, indeed, that the justices can bind them over without giving them any advance notice or any opportunity of dealing with it. I must say that I shudder at the idea that that can be done, although it is said that it is done quite generally. It seems to me to be elementary justice that particularly a mere witness before justices should at any rate be told what is passing through the justices' minds, and should have an opportunity of dealing with it. Indeed, as it seems to me, that was dealt with also by Lord Alverstone C.J. in Wilkins' case (4) in these terms. He goes on after the passage which I have just read (4):
>
> > 'Justices have a general power under their commission to bind over any person if it appears that that person has been guilty of violent conduct tending to a breach of peace, even though there is no proof of a threat towards any particular person, provided of course, that the person bound over has had a reasonable opportunity of knowing the nature of the charge brought against him and of making his answer to it.'
>
> . . . . . .
>
> In my judgment the respondent justices can be said here to have acted contrary to natural justice, and, accordingly, for my part I would allow this appeal and quash the binding over order."

What is significant is that even this meagre intrusion of the common law took six centuries to take place. In fact over the centuries the common law has left the justices largely to themselves not merely because of the difficulty and expense of judicial review, but also because the common law was unable to cope with the new statutory methods of keeping order and determining criminal guilt. The philosophy of the common law, or to put it another way, the vision and imagination of the judges of the superior courts, was simply unequal to the task. This was probably

not a consequence unintended and unforeseen by the legislature.

THE DETECTION OF OFFENDERS.

In ancient English law the prevention of crime and the apprehension of offenders was a community responsibility. There was a duty for example to raise a hue and cry when a crime was committed and to join in the chase to apprehend an offender.

To this day the right of arrest by an ordinary member of the public in the case of serious crime still remains. But as early as the 13th century there was a movement to appoint and organise watchkeepers and constables on a more effective basis.

The Statute of Winchester 1285 provided for a system of policing known as the "watch and ward" whereby a specific number of watchmen were to be appointed to each city town and borough, and keep watch from sunset to sunrise, and when necessary raise a hue and cry.

The Statute also provided for the appointment of high constables in each hundred among other things to supervise the watchmen and constables.

By the end of the 13th century the constable had two distinct characteristics:-

> ". . . . . as the annually elected representative of the manor or parish, he was its executive agent, embodying the principle of collective responsibility established by the Saxon Tithingman and duly making his presentments to the court leet; but he was also

> an officer recognised by the Crown as having a particular responsibility for keeping the King's Peace by the hue and cry and other means, and the use of the designation "constable" gave his authority a royal flavour which, marking him out from other local officers, would have established his ascendancy in the manor or parish."

See T.H. Critchley: A History of Police in England and Wales 1967.

The establishment of justices of the peace during the 14th century marked the commencement of a relationship between justices and constables which was to last some five centuries. The constable came to obey the direction of his social superior, the justice of the peace. Apart from some minor allowances he was unpaid and his duties were performed in his spare time. His office lasted one year and was usually served in rotation with other small holders or minor tradesmen in the community.

For some centuries the unpaid partnership of the local justices and constables in keeping the peace would appear to have worked well. The historian F.M. Trevelyan wrote:-

> "The institution of Justices of the Peace, local gentry appointed by the Crown to govern the neighbourhood in the King's name, was a move away from inherited feudal jurisdictions. But it was also a reversal of the movement towards bureaucratic royal centralisation: it recognised and used local connections and influence for the King's purposes, a compromise significant of the future development of English society as distinct from that of other lands."

Service as a constable was probably never popular. They had no uniform, they were unarmed except for a stave and

their unpaid duties could be onerous and dangerous. Daniel Defoe described the appointment as being an "unsupportable hardship" and wrote that "it took up so much of a man's time that his own affairs are frequently totally neglected, too often to his own ruin. Yet there is neither profit nor pleasure therein".

Nevertheless the partnership worked well until the 18th century.

> "It has been said that under the Tudors and the Stewarts the Justices of the Peace, their numbers always increasing, gradually set themselves up as the rulers of the country. These were the days long before County, Borough and District Councils, when the only form of local government authority was that of justices in Quarter Sessions.
>
> Between 1500 and 1600 by various statutes the justices were given control of nearly every aspect of county life. They regulated wages, prices, profits, employment, marriages, wearing apparel, apprenticeship and housebuilding and they even enforced compulsory church attendance on Sundays. Systematically they were put in charge of the regulation dealing with weights and measures, the maintenance of bridges, the licencing of inns, the upkeep of roads, the administration of the Poor Law and the buildings and control of local prisons known as "Houses of Correction" or "Bridewells". They also became completely responsible for the appointment and the supervision of petty constables."

A House in Bow Street Anthony Babington p 28.

Sir John Smith wrote in 1589 that -

> "There never was in any commonwealth devised a more wise, a more dulce and gentle, nor a more certain way to rule the people."

Sir Edward later Chief Justice of the King's Bench

wrote in 1613 that -

> "The whole Christian world hath not the like office as Justice of the Peace if duly executed."

The justices jurisdiction in Quarter Sessions continued; technically only treason was excluded from their jurisdiction. Three or four justices habitually sat in Quarter Sessions being assisted of course by a common jury and occasionally by a visiting judge. During the 16th and 17th centuries the practice grew up of committing all offenders charged with capital crimes to the Assizes before a judge. Nevertheless the jurisdiction in Quarter Sessions remained extensive.

As mentioned above the acquisition of power in 1361 by justices to take sureties to guarantee the good behaviour even of citizens of "good fame" probably marks the beginning of the summary power of justices, for not only was the jurisdiction itself unique but it was to be exercised without the aid of a jury. Several centuries were to pass however before justices of the peace began to acquire a summary jurisdiction in any volume. This is worth looking at in greater detail, a good account may be found in the introduction to Paley: Law and Practice of Summary Convictions 9th Edition.

> "This power and duty, however, at first, was simply that of guarding and taking security for the preservation of the peace, nor was it till a considerable time had elapsed from their first appointment by Edward III, that they were invested with any judicial authority in relation to other statutory offences, - nor until a much later period still, that a discretionary power of conviction was vested in individual justices, without the intervention of a jury or any popular form of trial . . . . . As the offences subjected by various

> statutes to the cognizance of justices became more numerous, and particularly during the reign of Henry VII, when their number was vastly increased, their assembling in each quarter of a year was found insufficient to afford the dispatch, which the nature of those offences required; to provide a remedy for which, without introducing any new extraordinary jurisdiction, or departing from the ancient mode of conviction by verdict, the statute 33 Henry 8 C.10 enacted, that at the Easter Sessions in every year, the justices should diligently peruse and study the statutes therein enumerated (comprehending, in fact, all those in the execution of which they had authority) and should then divide themselves according to hundred, wapentakes etc., assigning at least two to each division, who in their respective divisions should (six weeks before each of the general quarter sessions) hold a special session expressly for executing those statutes, at which they should enquire of the offences specified, either upon presentment i.e. by indictment, previously found by the grand jury or upon information by a private person; but, whether upon indictment or information, as the statute expressly takes notice, the party, previous to any punishment, was always supposed to be convicted by confession or verdict of twelve men; and the same statute contains regulations for impanelling the jury upon those occasions. The obvious inconvenience, however, resulting from this Act, of calling the county together every six weeks for the special and general sessions, was very soon felt to be greater than the advantage proposed from it in the disposal of offences; and, therefore, four years afterwards, it was repealed by another Act, 37 Hen 8 C.7, for the reason expressly assigned, viz. "that the King's most loving subjects are much travailed and otherwise encumbered, in coming and keeping of the said six weeks' sessions, to their costs, charges and unquietness", and, by this latter Act, the articles enumerated in the former were referred to the general quarter sessions as before."
>
> (Paley (supra) pp 2-5.)

Apart from a few instances, such as the Act of 1361 mentioned above, it is not possible to say precisely when justices began determining criminal offences themselves out

of sessions without postponing their trial to quarter sessions. Paley cites certain cases of offences committed in the view of justices, and certain offences confessed to by offenders, as being early exceptions to the requirement of trial by jury; but these were isolated exceptions. The first incursion of any substance was the statute 11 Hen. 7 C.3; which,

> ". . . pretending that many wholesome statutes were not executed, by reason of the embracery and corruption of the inquests ordained that it should be lawful for the justices of assize, and the justices of peace in every county, upon information (for the King), at their discretion, to hear and determine all offences short of felony against any statute then in being.
>
> This discretionary authority, fettered by no rules, and intentionally absolved from the observance of law and usage, enabled the justice to execute all penal statutes without any presentment of trial by jury. The real intention of the statute, which was that of replenishing the Exchequer by the terror of arbitrary and vexatious prosecution, under colour of penalties, upon all the most obsolete penal statutes, however obscure or inconsistent with the times, was rigorously seconded by Empson and Dudley, whose activity was stimulated by a grant of the extraordinary office of Clerks of the Forfeitures."
>
> (Paley (supra) p 10.)

The statute was repealed in the first year of the reign of Henry VIII and Paley remarks that the attainder and atonement of Empson and Dudley was measured by the iniquity rather than the illegality of their acts.

> "The earliest statute, upon which a summary conviction by a justice is on record, or of which a precedent is found in the books, is that of 33 Hen. 8 C.6 against the practice of carrying daggers or short guns. Mr. Lambard has given a precedent of a conviction upon

> this statute; it then appears to have been removed into the Court of Queen's Bench by certiorari as early as the forty third year of Elizabeth, 1600; and this very case affords a proof of the objection, which, in the state of manners at that day, might well exist against relaxing the jealousy of the common law, by entrusting anything like arbitrary authority in private hands. It appears that a sheriff's officer, going to execute a writ against a justice of the peace for a debt, and taking with him a hand gun, from the apprehension of a rescue, the justice, instead of obeying the writ, apprehended, convicted and imprisoned the officer, till he paid a fine of 10l, under colour of the Act of Parliament.
>
> The few instances in which a summary power of fine or imprisonment was committed to individual justices, amounting, up to the end of the reign of Elizabeth, to no more than four or five, attests the unwillingness of the legislature to quit the safe and approved forms of criminal judicature. In the following reign the multiplied statutes against a variety of petty disorders, such as those relating to alehouses, profane swearing, drunkenness, game, wagers, embezzlement and such like, occasioned a more frequent recourse to the summary interference of justices of peace which was gradually extended to matters of greater importance, as the nation became more familiarised to its use; and, after the Restoration, by the first Excise Acts, and by several statutes affecting the regulation of trade, and, lastly by the Game Act, 22 and 23 Car. 2. C.25, the practice was insensibly moulded into the jurisprudence of the country; of which it still continues to form an important branch."
>
> (Paley (supra) pp 10, 11.)

I have quoted extensively from Paley first because the text book is not freely available and second because Paley's introduction (though written in the last century) is still an accurate reflection of the feelings of some lawyers today. The common lawyer still looks, at times, with dislike and jealousy at the statutory accretions of jurisdiction by justices (not to mention the acquisition of

jurisdiction by statutory tribunals). There is still a strong feeling in the community that the guilt or innocence of serious criminal offenders ought to be determined by a jury. This feeling extends back through many centuries, and may in fact be traced back to the promises of Magna Carta. To the modern scholar Magna Carta was not meant as a guarantee of trial by jury. (See Windeyer Legal History p 65.) Nevertheless in the popular mind Magna Carta has been regarded as a promise of trial by jury and a promise that justice would not be sold or denied or delayed to any man. This popular understanding of Magna Carta persists to this day and is part of the Australian heritage from the English criminal system. However these twin promises of Magna Carta had proved to be hopelessly conflicting as early as the 17th century when justices began to acquire a summary jurisdiction in crime in considerable volume.

Today the true question is not whether serious offences ought to be tried by jury. The questions which should be asked are what kinds of delay are tolerable within the criminal justice system and what kinds of cases are more suitable for hearing before a jury rather than a magistrate.

Today well over ninety-five per cent of criminal issues in Australia are determined by the magistracy. The truth is, that the gradual accretion of criminal jurisdiction by justices has, more than anything else, ensured the continuance of the precious heritage of trial by jury.

THE MAGISTRACY, PUNISHMENT, PRISONS AND TRANSPORTATION IN THE EIGHTEENTH CENTURY

A. THE MAGISTRACY.

Eighteenth century England was a time of tremendous social upheaval, increase and movement of population, land enclosure, industrial revolution, increase in wealth for the few, poverty for the many, and lawlessness above all.

In London in 1752 Horace Walpole wrote:-

> "One is forced to travel even at noon as if one was going to battle."

Smollett wrote of the period about 1730:-

> "England was at this time infested with robbers, assassins and incendiaries, the natural consequences of degeneracy corruption and the want of police in the interior government of the kingdom. This defect in a great measure, arose from an absurd notion that laws necessary to prevent these acts of cruelty, violence and rapine would be incompatible with the liberty of British subjects . . . "

However, the quality of life in England did improve in the latter half of the century.

> "First perhaps, by certain definite improvement in administration and police. One of the chief causes of demoralization was the trading justice - a London character well known in the days of Elizabeth - who preyed on the people and exploited their shortcomings. Fielding's Justice Thrasher (in Amelia)

is not a caricature, it is a portrait (ironic but not exaggerated) of a type. His like is to be found in many formal reports of the Middlesex Sessions of the Lord Chancellor on the scandalous enormities of the justices who were bringing the whole Bench into discredit. When we remember the manners of the time, the prevalence of 'tippling in alehouses', gambling, swearing, Sabbath-breaking, together with laws against these and many other offences, put in force by informers and punishable with fines, fees accruing to the magistrates, as they did for commitments and for bailing-out, part of the business of trading justice is manifest. Other business came from the encouragement of petty litigation amongst a people who were by ancient tradition intensely litigious. The attitude of the better sort of Middlesex magistrate was in general benevolent, but his activities seldom went beyond some attention to parish affairs and attendance at the Sessions which came eight times a year. He left to the trading justice the disagreeable and discredited business of sitting regularly in a pestilential atmosphere to hear complaints and disputes and to commit, discharge or bail out offenders.

When the court-justice developed into the police magistrate, and when, as an intermediate stage (which may be dated from Fielding's appointment to Bow Street in 1749 as chief magistrate for Westminster with an official salary), he became disinterested and public-spirited, he also became a social reformer with expert knowledge and the ear of the government. De Veil, Fielding's predecessor at Bow Street, had been a trading justice whose dissipations demanded a close attention to the profits of office, though he was more instructed and more capable than most of his kind. Fielding made his office a public place for the administration of justice instead of a justice-shop for trafficking in fines and commitments, and set himself to composing instead of inflaming 'the quarrels of beggars and porters'. He realized the terrible state of the poor and the perversities of the laws with the imaginative sympathy of a great novelist who was also a trained lawyer. . . . . .

The latter eighteenth century according to the more modern school of social historians, is regarded as

> the beginning of a dark age, in which there was a progressive degradation of the standards of life, into the blight of a growing industralism, while the earlier part of the century is considered a golden age, one of those periods when English working class prosperity was at its height. The social history of London obstinately and emphatically refuses to adjust itself to this formula. There is a cleavage, certainly about the middle of the century, but it is improvement not deterioration, which can be traced about 1750 and becomes marked between 1780 and 1820."
>
> London Life in the Eighteenth Century: Dorothy George pp 15, 19.

The death rate in London fell substantially after about 1750.

> "London had become healthier; the dangers and uncertainties of life had lessened, partly by a change of manners, greater cleanliness, less drinking, partly by a better police and by the reform of some gross abuses in poor law administration. Crimes of violence were fewer and different in kind, and there had been a great reduction in the number of prisoners for debt. The traditional violence and brutality of the London populace was gradually diminishing."
>
> Dorothy George (op.cit.) p 17.

Part of the credit for this change is undoubtedly due to the efforts and integrity of the police magistrates who sat at Bow Street during the century. The greatest of them was the novelist and magistrate Sir Henry Fielding, arguably the greatest magistrate who has ever lived.

He was fiercely independent, completely impartial and scrupulously honest. His capacity for work was phenomenal, he literally sat in his court night and day. He knew how to secure favourable official and public attention

in the cause of reform.

He was the intellectual superior of all who appeared before him and deferred to no-one in his knowledge of the law. Above all he possessed a breadth of human compassion and understanding which he successfully communicated to others. His greatest achievement came after his death and his influence is felt even today. He deserves to be known as the first and greatest professional magistrate.

Dorothy George asks how the improvements in the eighteenth century England are to be accounted for. In her view, Fielding's magistracy marked a turning point in the social history of London.

> " . . . . . it coincides with the first effective measure dealing with the horrors of gin-drinking, due partly at least to himself. Part of his code, it is true, was to 'bring a rogue to the gallows', a maxim which has now a curious ring, but another part was to save the young and reclaimable from the contaminating influence of prison. He was fully conscious of the seething underworld of London, ready to sack, and burn, which might at any moment overwhelm the very scanty forces of law and order. 'When a mob of chairmen or servants, or a gang of thieves or sharpers, are almost too big for the civil authority, what' he asks 'must be the case in a seditious tumult or general riot'.
>
> The spirit of his magistracy can best be gathered from the Convent Garden Journal in which he tried to give the public some of that knowledge of social evils and their causes which he himself learned at Bow Street. For instance, ... several wretches being apprehended the night before by Mr. Welch, were brought before Mr. Fielding and Mr. Errington: when one who was in a dreadful condition from the itch was recommended to the overseers; another, who appeared guilty of no crime but poverty, had money given her to enable her to follow her trade in the market . . . He used the case of a poor woman, 'mother of three small children, charged

with the petty larceny of a cap, value threepence' (whom he discharged against the strict rigour of the law, 'the evidence not being positive') to denounce the law by which those accused of the most trifling thefts, often on very questionable evidence, were committed for trial at the Sessions. He made repeated protests against the public executions at Tyburn: 'we sacrifice the lives of men, not for the reformation but for the diversion of the populace'. John Fielding, who succeeded him and ruled at Bow Street from 1754 to 1780, developed his brother's policy. He identified the office with social reform, made it more efficient in dealing with street outrages and laid the foundations of a paid and permanent police."

Dorothy George (op. cit.)

In his published work titled Causes of the Late Increase of Robbers, Fielding commented as follows on the case of the poor woman he discharged against the strict rigour of the law for stealing a cup.

"By the law of England as it now stands, if a larceny be absolutely committed, however slight the suspicion be against the accused, the justice . . . is obliged in strictness to commit the party, especially if he have not sureties for his appearance . . . Nor will the trifling value of the thing stolen, nor any circumstance of mitigation justify his discharging the prisoner. Nay, Mr. Dalton says, that when the felony is proved to have been done, should the party appear to demonstration innocent, the justice . . . must commit or bail. And however absurd this opinion may appear, my Lord Hale hath thought fit to embrace and transcribe it in his Pleas of the Crown. Thus, for a theft of twopence or threepence value, a poor wretch may lie starving and confined in jail near two months in this town, and in the country above half a year, before he is brought to his trial. The consequences of which are, first, that he is even thus punished infinitely above the degree of his guilt. Secondly, that he is absolutely undone, his business lost and his reputation gone for ever. Thirdly, that he is totally contaminated and corrupted by the conversation of notorious thieves . . . . . In a word, he hath lost all restraints

> and acquired every incitement to villainy, and every qualification for it."

Fielding urged the summary trial of petty charges of larceny and thus anticipated legal changes which were well over a century away. He and his brother John Fielding and other Bow Street magistrates deserve most of the credit for the eventual formation of a paid police force in the next century.

But the major contribution of the Bow Street magistrates towards the improvement of the criminal judicial system was the creation of a professional, honest and hard working magistracy.

It is difficult now to comprehend how infamous the magistracy had become at the beginning of the eighteenth century.

> "The principal responsibility for the degeneration of the magisterial bench during the seventeenth century lay at the feet of the government who deliberately removed from the Commission a number of justices who were thought to oppose their policies and then filled the vacancies with their own supporters. This innovation of attempting to substitute political nominees - most men of humble station - for the local squirearchy proved disastrous. . . There can be little doubt that this new type of magistrate, known as "The Justice of Mean Degree' frequently used his authority for the ends of private gain . . .
>
> Whereas the magisterial system in country districts was only tinged with corruption, in heavy populated urban areas it became totally debased. In the Metropolis and in the neighbouring areas of Middlesex and Surrey it was well-nigh impossible to find a suitable type of justice because, as explained by a writer of the time 'In places inhabited by the scum and dregs of the people and the most profligate

> class of life, gentlemen of any great figure and fortune will not take such drudgery upon them'. The result was that the authorities had no alternative but to fill the Commission with tradesmen and small-time professionals, whom Smollett has described as 'needy, mean, ignorant and rapacious'. He goes on to say that they 'often acted from the most scandalous principles of selfish avarice'. These people were known as 'Trading Justices' because many of them quite openly earned an income from their fees and from other illicit devices which they employed when exercising their authority as magistrates.
>
> The greatest source of revenue to the trading justices was the granting of bail, for which a small fee was paid by the prisoner. Townsend, the Bow Street Runner, told a Parliamentary Committee at a later date 'The plan used to be to issue warrants and take up all the poor devils in the streets, and then there was the bailing them, 2/4d, which the magistrate had; and taking up a hundred girls, that would make, at 2/4d, 11-13-4 (sterling). They sent none to gaol, for bailing them was so much better.' "
>
> Babington: A House in Bow Street pp 35,36.

By the beginning of the eighteenth century justices had an extensive statutory jurisdiction to hear and determine criminal charges without a jury either sitting alone or sitting with another justice. According to the particular statute vesting them with jurisdiction they might order punishment by fine, whipping, placing in the stocks or committing to a house of correction or a county gaol. There were seldom any particular rules of procedure laid down in the statute and required to be observed by justices. The formation of a comprehensive code of procedure governing justices was undreamt of and was not to be achieved until half way through the next century. Consequently justices pleased themselves, they sat in private in their own residence and devised their own codes of procedure with a negligible chance

of correction for error in the superior courts. As they were not obliged to maintain a record book or a register any chance of correction by means of the prerogative writs was slim indeed. So perhaps a well meaning minority of justices, particularly in country districts, did their best, and a rapacious majority of justices in urban areas did their worst until the appearance of the Bow Street magistrates in London. They set the precedent of a professional paid magistracy sitting in a court open to the public and administering the law fairly without fear or favour or profit to themselves. Many of their numerous proposals for reform have long since become a respected part of the present criminal justice system.

Henry Fielding was appointed as a magistrate in 1748 and died a premature death in 1754, at the age of 47. His blind half brother succeeded him in office and ably continued his work until his death in 1780. He was knighted for his efforts as a magistrate. Two contemporary newspapers tributes indicate the impression he made on the London public. Lloyds Evening Post reported as follows:-

> "On Monday evening at eight o'clock died at his house in Brompton near Knightsbridge, after a long and painful illness, which he bore with the utmost patience, Sir John Fielding, Knt., one of His Majesty's Justices of the Peace for the counties of Middlesex, Essex, Herts, Kent, Surrey and the City and liberty of Westminster, whose abilities as a magistrate could only be equalled by his humanity as a man, and whose loss will be most severely felt by the public, but by none so much as the poor, to whom he was a warm and unalterable friend."

Another delightful tribute described him as -

> "a consummate magistrate who was universally allowed

> to have the head of a philosopher, the heart of a christian and the hand of a hero."

Each of the Fieldings wrote extensively on the subject of the prevention of crime. Each gave evidence before Parliamentary Committees of Enquiry in 1750 and 1770, and each succeeded in influencing political, official and public opinion.

Henry Fielding's sensible suggestion that only professionally qualified magistrates should deal with criminal cases of substance is to this day a standing reproach to the parsimony of the governments mainly of Western Australia, South Australia and Queensland which continue this day to make use of lay justices in criminal matters of difficulty or importance involving the liberty of the subject. However, substantial restrictions have recently been imposed upon the jurisdiction of justices in Victoria. It seems likely that Western Australia, South Australia and Queensland will eventually follow the rest of Australia.

The Fieldings were well aware of the social conditions underlying the existence of crime and the need for the reform of the poor law. Their proposals were by no means confined to reforms in the machinery of the law.

> "Each of the two Fieldings approached his chosen subject from a different angle. Henry for all his practical aims, painted on a broader canvas, was pugnacious, vivid and humane. John, more painstaking and pedestrian, drafted detailed plans for immediate reform. But their aims were the same and in their writings on public order and the police, unity of purpose overrides all differences of scope and style. Their views were often not particularly original but were rather a formulation of many of the floating ideas of their age. Their greatness as educators of public opinion lies in the single minded determination with which, over a period of

> nearly thirty years, they strove to demonstrate to their contemporaries how serious were the dangers which threatened to engulf the nation and how pressing was the need for discarding fragmentary remedies in favour of a larger plan."
>
> Radzinowicz: A History of English Criminal Law, Vol. 3, p 14.

Most of the limitations from which the proposals of the Fieldings suffered were understandable having regard to the customs of the times in which they lived; what would today rank as a scandal calling for the appointment of a Royal Commission of Enquiry escaped their attention. Under their control the precedent of a small but efficient police force was established. However they never foresaw the eventual need to separate the magistracy from the police. They set the precedent of magisterial integrity subject to continual public scrutiny, but did not foresee the need for a code of procedure governing magistrate's courts. They did not question the efficiency of the adversary system of criminal justice which they administered, nor did they acknowledge any need to govern or monitor the processing of offenders in the courts. The idea of instituting a statistical information system with regard to offenders was never realised by them except for the limited purpose of detecting offenders. They made no proposals for abolishing the death penalty and they developed no comprehensive plan with regard to secondary punishments.

Nevertheless they set a precedent of simple humanity for all to see and understand. Their example ultimately proved a more fruitful source of reform than anything else they could have done. It was part of the magisterial tradition which Governor Phillip brought with him to Australia.

B. PUNISHMENT.

1. Punishment for Felonies.

Before the year 1775 the main criminal punishments were transportation, branding, the pillory, and of course hanging. Imprisonment was a relatively insignificant punishment. Between 1770 and 1774 only about two per cent of judges' sentences at the Old Bailey were terms of imprisonment. None were longer than three years and most for a year or less. Ignatieff: A Just Measure of Pain p 15. Indeed until the late eighteen forties the longest sentences in English prisons were three years and most prisoners served six months or less. It was not until the mid eighteen fifties that sentences of imprisonment for ten years or more became commonplace. It would seem that the commencement of transportation to Australia curbed the need for lengthy terms of imprisonment which became pressing again when transportation was abandoned in the middle of the next century.

The nominal punishment for a felony was of course death; the avowed purpose of the "Bloody Code" as it came to be known was to deter the offender by terror, and largely by terror alone, since the means for bringing offenders to justice were meagre in the extreme. In 1688 fifty felonies were punishable by death, in 1765 one hundred and sixty and approximately 225 by 1815. Ignatieff, (supra at p 20), suggests that it is difficult to account for this drastic increase in a rational manner; the commercialisation of agriculture and industry, the growth in population and crime are no doubt indirectly responsible. The punishment of death was largely mitigated by the punishment of transportation and the pious perjury of jurors, who sometimes rebelled

against the death penalty by reducing, for example, the value of a stolen handkerchief beneath one shilling, or by reducing the value of goods stolen from a dwelling below forty shillings, thus enabling the offender to escape hanging. It is difficult to account rationally and comprehensively for the calculus of mitigation applied by the dramatis personae involved in bringing an offender to justice; the informer, victim, complainant, magistrate, prosecutor, judge and juror. What is certain is that the vast majority of offenders prosecuted (let alone total offenders) escaped the rope as a result of the vagaries of human compassion and rebellion against the "Bloody Code". This was tacitly condoned by the judiciary and by the government.

> "All we have is the clear fact that both Parliament, the judiciary and the jury co-operated in extending the use of transportation as a punishment in place of both whipping and hanging. By the late seventeen sixties transportation to the American colonies accounted for 70 per cent of sentences at the 'Old Bailey', and a higher though indeterminable percentage if we include those convicts whose death sentences were later commuted."
>
> See Ignatieff (supra) at p 20.

2. Punishment for Summary Offences.

During the eighteenth century there was a significant increase in the powers of justices to order imprisonment for summary offences. By 1735 they had authority to imprison for "vagrancy, desertion of family, disobedience and embezzlement in most trades, thefts of turnips and other field produce, taking of firewood and deadfall from privately owned woods, and minor game law offences". Ignatieff (supra) at p 25.

One may be pardoned for suspecting that the efforts of the ruling gentry and commercial classes to control the movement of the labouring class by means of the criminal law met with as much success as the efforts of the legislature today to control the road toll by means of harsh penalties. Of course, the justices in those times lacked the assistance of a modern police force which may explain their lack of success. The prison reformer John Howard lists only 653 offenders in prison in 1776 as a result of conviction for a summary offence in England and Wales. These represented only 15.9 per cent of the total numbers confined at the time of Howard's visit. Of the remainder 59.7 per cent were debtors (2437 persons) and 24.3 per cent were felons (994 persons). Of the felons most were awaiting trial, transportation, or execution, and only a few were serving sentences of imprisonment. Thus in 1776 the prisons were in reality places with a transient population and mainly a transient population of debtors at that with only a few persons serving terms of imprisonment short by today's standards.

C. THE PRISONS.

Three different kinds of prisons may be distinguished in the eighteenth century; the debtors' prisons, the houses of correction, or bridewells, and the common or county gaol. Debtors' prisons existed all over England, but the largest, Ludgate, King's Bench, the Fleet, and the Marshalsea, were in London. Debtors could not be required to work, they were maintained at their creditors' expense and they remained confined until they could give satisfaction to their creditors or until they were discharged as insolvents by an Act of

Parliament. According to their ability to pay the turnkey, debtors could live very comfortably and even be sold "a run on the key" amounting to the privilege to live outside the walls of the prison within a radius of several miles. Members of the public were freely admitted to prisons in which debtors were confined and families of debtors were permitted to live in the prison according to the means of the debtor to pay. The common or county gaols varied considerably in size and construction.

> "Of the fifty county jails listed in Howard's census, made during the extremely crowded year of 1787, only seven were holding a hundred or more prisoners at the time he visited, eleven were holding between fifty and a hundred, and the thirty two remaining institutions held fifty or less."
>
> Ignatieff (supra) at p 30.

County gaols usually contained a heterogeneous collection of debtors and felons or summary offenders awaiting trial, undergoing sentence, or awaiting execution or transportation.

Houses of correction or bridewells were originally intended as an opportunity for contractors to utilise and exploit prison labour and in return make a contribution towards maintaining them. By the eighteenth century the system had failed in most gaols, due primarily to the rate of turnover of prisoners, their unsuitability or disinclination to work and no doubt the inefficiency and greed of the contractors. Jacob Ilive, a London bookseller sentenced to serve a term of imprisonment in the Clerkenwell House of Correction for libel early in the eighteenth century, found men and women serving terms whiling away their time in the prison taproom, playing chuck farthing, tossing up, playing leapfrog and "a very

merry but abominably obscene game called 'rowly powly'". For all their frightfulness, there was often a joy of life in the gaols which the later penitentiary system was to crush.

In a few bridewells in county areas some contractors did make a success of utilising prison labour but in most justices were forced to provide food of a meagre kind in default of provision by contractors. Sir John Fielding told a Parliamentary Committee of Enquiry in 1770 that there was no dietary provision for the six or seven hundred prisoners committed annually to the Gate House of Correction. The Fieldings were both well aware of the scandalous state of the gaols, but neither ever advanced a plan of penal reform.

Prisons were supposed to be supervised by the sheriff, the magistrate and the grand jury. The assize judge regularly made an order for a general gaol delivery. In practice, however, the keepers of gaols were unregulated by official interference. The discipline and control of their charges was at the beginning of the eighteenth century a matter of indifference to the gaolers. At common law English prisoners were subjects of the Crown entitled to the protection of the law. In practice they were outcasts. Many died in prison of so called "natural causes" and no questions were asked. Gaolers were free to augment their income in any way they chose by oppressing their subjects without official or public interference.

As the century progressed men of influence and humanity appeared who were prepared to arouse the public conscience. In 1729 a Parliamentary Committee under General Oglethorpe was appointed to make an examination of the gaols.

The Committee's Report to the House of Commons details the shocking cruelty, barbarity and extortion which then existed in the gaols. Oglethorpe again secured the appointment of a Committee of Enquiry in 1754 into "irregularities" in the King's Bench Prison in London. In the following year he secured the passage of a bill in the House of Commons to provide for the complete rebuilding of that institution.

By the latter part of the eighteenth century it was generally acknowledged that the prison system was disorganised and corrupt and in need of comprehensive reform. The need became urgent after the cessation of transportation in 1776 to the American colonies. But this need only became urgent because the public and official conscience had been aroused; the prisons had been overcrowded before without public interest and the prisoners themselves represented only a small and uncomplaining proportion of the total population.

A number of persons deserve the credit for arousing humane concern for prisoners. Among the prison investigators James Nield, Samuel Hoare, Fowell Bunton and Elizabeth Fry figure prominently. The evangelists led by Wesley deserve great credit. But as the Fieldings mark a turning point in the administration of the criminal law, the prison reformer John Howard marks a turning point in the administration of the gaols.

John Howard.

In 1773 at the age of about 47 Howard was appointed High Sheriff of Bedfordshire in return for certain public services. Soon after he was shocked to find that acquitted prisoners were not discharged from gaol until they paid the gaolers' fees. He suggested to the local justices in control

of the prison that the gaoler ought to be paid a salary instead of being forced to subsist on what he could extract from prisoners. The justices replied by asking for a precedent. So Howard commenced an extensive journey throughout England in order to visit gaols. He never found his precedent but he brought the cruelties and abuses in the gaols to public and official attention.

In 1774 he gave evidence in the House of Commons in Committee and was afterwards called to the bar of the House and complimented for his humane zeal and his "interesting" observations. He secured the passage of two bills for abolishing gaolers' fees and improving sanitation in gaols. He distributed copies of the legislation at his own expense. When he found the legislation was ignored for lack of effective sanctions he must have suffered from the mortification most aspiring reformers come to know well. He was not discouraged.

Following further visits to prisons in England, Scotland, Ireland and Wales and repeated visits to prisons on the continent Howard published his monumental work "State of the Prisons in England and Wales" in 1777. In 1778 he was examined before a select committee of the House of Commons appointed to enquire into the working of the hulk system of incarceration of prisoners recently set up by statute. Sir William Blackstone and others considered that buildings were more suitable for the confinement of prisoners than hulks. Accordingly Howard set off once more to investigate prisons on the continent.

In 1779 an Act was passed empowering the erection of penitentiary houses under the superintendence of three supervisors, one of whom was Howard. They were unable to

agree and Howard subsequently resigned. Nothing was achieved or built, probably for lack of finance. Howard continued his investigations spending in the process thirty thousand pounds of his own money - a considerable fortune in those days. He died in Kherson in Southern Russia in 1790 where his grave has been preserved largely as a result of attention from foreign visitors. Howard was not recognised for his greatness in Czarist Russia. He still awaits recognition in Soviet Russia.

Howard's life story has been called typically English. In the field of legislative reform he appears to have been an ineffective dilettante, in terms of practical reform he appears to have achieved very little. In fact he was a model reformer. He went to enormous trouble to accumulate factual detail relating to prisons in an orderly and scientific manner. Presumably he was influenced by the scientific attitude in the physical sciences, his application of the scientific attitude with regard to a social problem, particularly a social problem in connection with the criminal law was unique. His method had the great merit of attracting favourable official attention. He levelled blame at no person or institution, his factual data speaks for itself and was the best design for arousing compassionate public attention. The would be reformer of today has much to learn from him.

Howard has been criticised unjustly; in the next century the inhuman segregation and discipline which displaced the barbaric chaos of the eighteenth century prisons has been attributed to him. True it is that Howard disapproved of transportation and favoured a penal system, but he produced no penal design or theory such as Bentham's grotesque "Panopticon" design for a penal institution.

Today the faults in the penal system are attributable to a failure to follow along the trail which Howard blazed - the honest and methodical collection of data in prisons, informed by a zeal to expose cruelty and abuse without gratuitous attack on officials and their administration. A well informed and sympathetic public is the key to opening the way to penal reform. This Howard managed to achieve. Without his unique effort the convict settlement of Australia may well have not taken place. Howard deserves a share of the credit for the founding of Australia. He also deserves credit as a great reformer.

D. TRANSPORTATION.

Exile or transportation was a punishment unknown to the common law (except by abjuration which disappeared when sanctuary was abolished). Apparently a practice grew up in the reign of Charles II for judges to reprieve convicted prisoners for the purpose of enabling an application to be made to the sovereign for a pardon on condition of their transportation to America.

In 1717 the practice was regularised by the enactment of a statute that transportation would have the effect of a pardon under the Great Seal (4 Geo. I, C.11). Predictably this was followed by a statute which provided in effect that a felon transported and attainted could not be returned to his full civil rights until after the expiration of the term for which he was transported. In addition to the judicial method of enabling the executive to arrange for transportation during the pendency of a reprieve, a number of statutes during the eighteenth century were enacted which specifically provided

that transportation might be ordered as a punishment upon conviction for a specific offence. Characteristically for criminal legislation passed during the century, these statutes were passed in a haphazard manner and display no uniformity in style or in principle.

The loss of the American colonies did not ensure the resumption of transportation elsewhere. Prison hulks were the first answer; as a "temporary expedient", the government refitted a number of superannuated warships as floating prisons and moored them on the Thames near Woolwich. Later additional "hulks" as they were called were stationed at the entrance to the harbours of Plymouth, Gosport and Portsmouth. By 1787 about two thousand convicts were employed on the hulks in chain gangs, raising sand for ships ballast, or constructing new dockyard facilities. Ignatieff: A Just Measure of Pain p 80.

The hulks could never serve as an alternative for transportation.

> "For one thing they could only absorb 60 per cent of those under sentence of transportation when the American War broke out. The rest, several thousand of them, had to be kept in the county and borough prisons along with those new transportees sentenced after 1775."
>
> Ignatieff (supra) at p 18).

As mentioned earlier the prison reformer Howard was against transportation. He, Eden and Blackstone were the original draftsmen of the Penitentiary Act of 1779. Their original plan was for the creation of a nation wide system of gaols at national expense. If their plan had succeeded New South Wales may never have been settled by the British. However in the result the legislation was scaled down to

provide for the construction of two penitentiaries in the London area. In 1785 the plans lapsed (see Geo. III C.74). In 1794 another Act was passed for the acquisition of the sites for these gaols but nothing more was done, it would appear, because of the settlement which had taken place at Botany Bay. The 1779 Act authorised the erection of gaols which would accommodate six hundred males and three hundred females. It soon became clear that this was not going to be the answer.

> "The sudden resort to imprisonment" (following the loss of the American colonies) "thrust an added burden on institutions that had shown signs of overcrowding even before 1775. Until 1783 however, the system managed to function without outbreaks of fever. Howard did not find a single case during his tour of 1779. This was not, however, because magistrates took any precautionary measures. Most did not. They assumed that after an early victory against the Americans the transports crowding their gaols would be shipped off once again to a defeated and pliant colony. Accordingly, they did little about prison conditions assuming that the problem of numbers would go away. Moreover the wartime demands for manpower acted to stabilise the crime rate and thus to reduce pressure on the jails. Judges also helped to relieve overcrowding by sentencing offenders to serve in the fleet or the army instead of prison. . . . .
>
> It was the return of peace in 1783 that brought on the real crisis. Demobilisation, accompanied by a trade depression following the loss of the colonial market, resulted in the most serious increase in crime since the 1720's."
>
> Ignatieff (supra) at p 82.

Another unsuccessful expedient was attempted by Parliament. In 1783 an Act was passed authorising the appointment of overseers to whom criminals sentenced to transportation might be assigned. The overseers were permitted to

set the prisoners to work and retain the profits of half of their labour in return for which they were to clothe and feed them (24 Geo. III C.12).

The beginning of the eventual solution was found when in 1784 legislation was passed giving the King in Council power "to declare the places in or out of his dominions to which such offenders" (transportees) "should be conveyed".

At common law prisons are the property of the sovereign who is impliedly their governor (Chitty: Prerogatives of the Crown p 103). It may therefore seem strange that the move led by Howard did not have more success. Blackstone stated the ideal behind the Penitentiary Act of 1779 as follows:-

> "In framing the plan of these penitentiary houses, the principal objects were sobriety, cleanliness and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work and by some religious instruction to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection and to teach them both the principles and practice of every Christian and moral duty."

This was to be the philosophical basis which supported the building of penitentiaries in the next century, particularly when transportation ceased. However in 1779 it was a novel doctrine which raised the prospect of considerable government expenditure in building new prisons and providing staff to run them. But there was more to account for the lack of government activity in building new prisons than mere sloth and parsimony. By various statutes the custody of the

gaols was vested in the sheriffs of the different counties.

> "But there was more to the ministry's coolness than mere sloth. There were constitutional objections to its entry into the field of prison administration. Prisons were a county and borough matter, left to local justices. At most, these justices were prepared to tolerate the passage of non binding prison legislation. But they had influence enough in Parliament to prevent Whitehall from taking an activist role. As a result, while the government had established the hulks as a 'temporary expedient' it decided not to proceed beyond this to the management of permanent institutions. Such constitutional objections also scuttled Howard's suggestion that Parliament establish two inspectors of prisons.
>
> Another factor, harder to pinpoint but perhaps decisive, was the ministry's reluctance to abandon the banishment of notorious offenders for a system of imprisonment that would result in the eventual return of convicts to the community. The potential of confinement still remained to be demonstrated. For a society that had long accepted the incorrigibility of offenders, it was difficult to adjust to a punishment that presumed their eventual reintegration into the labor market."
>
> Ignatieff (supra) at pp 95,96.

However Howard and his colleagues in humanitarian prison reform had their victory. Botany Bay was a vastly more humane alternative than the gaols and hulks of England. The penitentiary system foreshadowed in 1779 came into being in England and Australia during the next century.

Transportation was, therefore, the only alternative left to the government of the United Kingdom if a public scandal over the overcrowding of the gaols was to be avoided. Accordingly Lord Sydney, the Secretary of State for Home Affairs, wrote to the Lords Commissioners of the Treasury on

August 18th 1786 and announced that the government had decided to transport convicts under sentence of transportation. The overcrowding of gaols and the danger of disease was admitted. The failure of attempts to locate other suitable places for a convict settlement such as the coast of Africa was tacitly conceded.

Botany Bay was disclosed as the government's choice for a new convict settlement. Sydney requested ships and provisions for the carriage of 750 convicts. Later the same month Lord Sydney wrote to the Lords of the Admiralty and requisitioned further assistance for carrying into effect the decision of the government. Lord Sydney, otherwise known as "Tommy Townshend", took a leading part in the disputes with the American colonists up to and during the War of Independence. He was raised to the peerage at the end of the war but it may be assumed that he and his cabinet colleagues were still smarting from the loss of the American colonies. The acquisition of a new colony greater in size than Europe without the risk of war was no doubt regarded at least as one of the fringe benefits of the new convict settlement. But above all, the resumption of transportation was seen as a traditional, humane, and effective solution of the convict problem.

Governor Phillip, Australia's first justice of the peace, was destined to translate this public and official sentiment into reality at Botany Bay.

THE INTRODUCTION OF THE MAGISTRACY INTO AUSTRALIA

A. INTRODUCTION.

It will be appreciated that in the eighteenth century the justice of the peace was an indispensable part of executive and judicial government. In the absence of a system of local government he was the chief instrument of local government. In the absence of an effective police force he was the chief instrument for setting in motion the processes of the criminal law for the investigation of crimes and the apprehension of offenders. In the absence of an organised system of paid magistrates he was the chief instrument of judicial government, responsible not only for hearing and determining a great range of summary offences, but responsible also for preparing the cases against more serious criminal offenders by means of committal proceedings. With his colleagues he presided at courts of quarter sessions on the hearing of criminal charges before a jury.

It was therefore natural that justices of the peace should be expected to exercise much the same functions in the new Australian colony at Port Jackson. And so indeed they did. The Governor, Lieutenant Governor and the Judge Advocate were constituted as justices of the peace ex officio before they left England. Governor Phillip was vested with power to appoint justices of the peace and exercised the power soon after his arrival in Australia. Today justices of the peace and the courts of summary jurisdiction they preside over may trace their ancestry in Australia directly back to the beginning of settlement; the only trace which now remains of the assorted judicial baggage which arrived with the First Fleet.

There can be little doubt that the overcrowding of English gaols following the loss of the American colonies was one of the primary reasons for Australian settlement. But why was a country so remote as Australia chosen for a convict settlement? What were the other causes for settlement? These are problems for the historian; for example Professor Blainey has suggested that Australia was settled with "the twin hopes of giving England the naval supplies it needed" (in the form of flax and timber) "and ridding England of the people it did not need". (The Tyranny of Distance.) The suggestion is no doubt plausible, but the legal historian is not so much concerned with the relative importance of the causes of settlement, but rather with the kind of settlement which was envisaged. New colonies had been founded by Englishmen for centuries past and the constitutional principle which was applicable was relatively clear as far as it went. The principle was (and still is) that the colonists carried with them to the new colony such part of the common law and statutory law of England as was appropriate to their changed circumstances. This principle of the common law itself was well known and accepted in the eighteenth century. It was stated by Sir William Blackstone in a famous passage in his commentaries as follows:-

> "It hath been held that if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject, are immediately in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their new situation and the condition of an infant colony."
>
> Commentaries, Vol. 1, 107.

As to how much English law and liberty a colonist carried

with him, Blackstone thought this would be progressively determined in detail by the provincial legislature subject to the overriding authority of the Imperial Parliament. But what if there was no provincial legislature? Would changes in English law automatically apply (as modified by the circumstances)? As to this the law was uncertain.

Before he left England Governor Phillip had no doubt that the laws of England would be introduced in New South Wales; he was for example determined that there would be no slavery and wrote "there can be no slavery in a free land and consequently no slaves". Phillip's belief was to prove vindicated; English laws and liberties as modified by the circumstances of the new colony were thought to apply and basically did apply from the time the first settlers stepped ashore. From the beginning there was a judicial system, a criminal court for the trial of serious offenders, a civil court, a military court, an Admiralty court and courts of summary jurisdiction presided over by justices of the peace. These courts owed their existence partly to imperial legislation but mainly to an exercise of the royal prerogative. In the criminal court a person could be tried only for a crime known to English law. The trials were conducted with due form and ceremony and the punishments imposed were in accordance with English law. In theory at least the law applied to everyone whether he was a free settler, an official or a convict. At first the population of the new colony was entirely composed of officials and their families and convicts, and the convicts naturally carried with them the legal disabilities of their status modified or accentuated according to the circumstances of their new situation. The convicts had no legal voice in the running of the colony, but then except for the Governor no-one else had any legal voice either. The commissions

appointing the first six governors, Phillip, Hunter, King, Bligh, Macquarie and Brisbane, were virtually identical in form and purported to vest them with supreme legislative and executive power. Except for the Governor there was no legislature of any kind in the colony until the passage of the New South Wales Act in 1823 (4 Geo. IV c.96) which set up a legislative and executive council in New South Wales.

But it was never assumed by any of the early governors that they were despots with absolute powers over their subjects. All were aware their powers were limited by the laws of England (as modified) and the orders of the home government. As Sir Victor Windeyer has put it "The moral inheritance of christian civilisation and the law of England were the most important parts of the cargo which Governor Phillip brought to Australia".

(Responsible Government - Highlights, Sidelights and Reflections - Proceedings of the Royal Australian Society 1957 Part 6 p 263)

Led by the Lieutenant Governor, Major Ross, the officers were not slow to dispute the Governor's powers. Phillip had power by precept under his hand to summon six of his officers to serve in effect as a jury on the Criminal Court together with the judge advocate. Some officers maintained that this was no part of their military duties and that they had no legal obligation to obey the governor's summons. The dispute was eventually settled only by reference by the home government to the legal opinion of crown law officers. The opinion was in the governor's favour and expressed the view that the officers had the duty to obey the governor as part of their civil duties. One of

Phillip's officers, Lieutenant Tench wrote in 1788 describing the criminal court in these terms:-

> "To liken this Court to any other that we know of were impossible: Its institution is new, though its verdict is directed to be given according to the laws of England 'or as nearly as may be, allowing for the circumstances and situation of of the Settlement'. Were it not for this necessary and saving clause, the wisest among us would be now and then puzzled how to act; but this solver of difficulty unties every gordian knot and levels every impediment which might otherwise obstruct the career of justice, in her most exemplary form. For how long a period it may, however, be found requisite to continue this present system, I do not take on me to determine; and how far adventurers, who may intend to settle here, will approve of it, I do know not."

Prophetic thinking indeed by Lieutenant Tench!

The Criminal Court was set up by statute in 1787 (27 Geo. III c.2) and the words quoted by Tench are from the letters patent of 2nd April 1787 (otherwise known as the First Charter of Justice) which implemented the provisions of the statute by royal command.

> "And . . . the said court . . . shall consist of our Judge Advocate for the time being, together with such six officers of our Sea and Land Service as Our Governor . . . shall, by precept under his hand and seal, convene from time to time for that purpose. And that the said court . . . shall have power to enquire of, hear, determine and punish all treasons or misprision thereof, murders, felonies, forgeries, perjuries, trespasses and other crimes whatsoever, committed in the place or places aforesaid, such punishment so to be inflicted being according to the laws of England or as nearly as may be, considering and allowing for the circumstances and situation of the place and settlement and the inhabitants thereof."

No doubt Tench had particular regard to the concluding words above quoted from the First Charter; he may have been unaware of the general constitutional principle, (quite apart from statute or royal command), to the effect that only so much English law arrived in the new colony as could be regarded as appropriate. The creation of the Court of Criminal Jurisdiction by statute was an implicit acknowledgement by the Imperial Parliament that it was constitutionally necessary to remove the right of trial by a common jury in the new colony. The remainder of the judicial system (including the magistracy) was introduced by an exercise of the royal prerogative in the well founded belief that this was lawfully sufficient. (See Campbell, The Royal Prerogative to Create Colonial Courts Vol. IV Sydney Law Review 343, 362.)

Phillip's commissions and other instruments of government were read to the assembled colonists on the 7th February, 1788. No doubt these instruments were carefully scrutinised by Phillip's officers; it was an age which respected form and ceremony. But the legislative and executive instruments of government which set up the colony of New South Wales did not furnish it with a constitution. The colonists looked in vain for a recital of their rights and duties. Colonisation was not new, the instruments were not novel in form, they were based upon precedents which can be traced back for centuries. Certainly New South Wales was a unique experiment in British colonial history; a new settlement created for the disposal of convicts, presided over by a governor with both military and civil authority, equipped with both legislative and executive authority, and in addition the effective head of the judicial system. The governor was the commander of all military and naval forces. He had the charge and superintendence of all government supplies.

The governor's powers reached their extreme limits with regard to convicts, as no doubt was intended. In the eighteenth century there were few English laws in existence regulating the conduct of English gaols so that there was little question of any of Phillip's regulations being inconsistent with English law. He was able to make his laws in a legislative vacuum. For example, the Imperial Gaols Act of 1791 (31 Geo. III c.46, s.2) enabled a local authority to make rules for the governing of gaols but the legislation would hardly have been applicable in New South Wales where no gaolhouse as such was built until 1796.

In fact New South Wales was, at first, little more than an open air prison but there was never any doubt about the ultimate authority of the British Parliament and the residual authority of the courts over convicts. As early as 1774 Lord Mansfield had "no doubt of the power the Courts had over all prisons in the Kingdom".
(See Zellick, The Prison Rules and the Courts 1981 Criminal Law Review p 602.)

B. THE INSTRUMENTS OF GOVERNMENT.

The instruments of government under which the colony of New South Wales was settled may be summarised as follows:-

(a) The Transportation Act, 1784 (24 Geo. III c.56).
(b) Captain Phillip's First Commission 12/10/1786.
(c) Two Orders in Council 6/12/1786.
(d) The Act for a Court of Criminal Jurisdiction in New South Wales 1787 (27 Geo. III c.2).
(e) The First Charter of Justice 2/4/1787 and Letters Patent for a Vice Admiralty Court 5/5/1787.
(f) Captain Phillip's Second Commission 2/4/1787.

(a) THE TRANSPORTATION ACT 1784 (24 Geo. III c.56)

This Act empowered the King in Council to declare the places in or out of his dominions to which persons sentenced to transportation should be conveyed. Probably Botany Bay was not finally chosen until 1786.

The Act made provisions for assigning the services of convicts to contractors but as Phillip must have known the kind of servitude which existed in the American colonies was not planned for New South Wales.

(b) CAPTAIN PHILLIP'S FIRST COMMISSION 12/10/1786.
(H.R.A., Ser. 1., Vol 1, 2.)

This commission appointed Phillip as Governor, defined the territorial boundaries of New South Wales, commanded all officers and soldiers to obey him, and required him to obey the orders of his superior officers according to the rules and discipline of war. Likewise he was required to obey the orders of his sovereign under his signet or sign manual, the orders of the Treasury, and the orders of any one of the Principal Secretaries of State. This was a brief commission, military in form, and ought to have made it clear to Phillip's subordinate officers that they were bound to obey him just as he was bound to obey orders from his superiors, military and civil, at home.

(c) TWO ORDERS IN COUNCIL 6/12/1786.

These were passed pursuant to the Act of 1784 and declared the "Eastern Coast of New South Wales or some one or other of the adjacent islands" as places to which offenders sentenced to transportation might be conveyed. Later there

was to be doubt expressed as to whether Van Diemen's Land was to be regarded as an adjacent island.

(d) THE ACT FOR A COURT OF CRIMINAL JURISDICTION IN NEW SOUTH WALES (1787) (27 Geo. III c.2).

This Act provided that:-

> "His Majesty may, by his Commission under the Great Seal, authorise the person to be appointed Governor, or the Lieutenant Governor, in the absence of the Governor, at such place as aforesaid, to convene from time to time as occasion may require, a Court of Criminal Jurisdiction for the trial and punishment of all such outrages and misbehaviours as, if committed within this realm, would be deemed and taken, according to the law of this realm, to be treason, or misprision thereof, felony or misdemeanour, which Court shall consist of the Judge Advocate to be appointed in and for such place, together with six officers of His Majesty's forces by sea or land."

The Act of course abridged the common law right of trial by jury but the very fact that it was passed indicates the limitations which were assumed to exist upon the exercise of the governor's powers from the beginning.

The Court was bound to give its decisions according to the laws of England as "nearly as may be". The penalties provided were hanging in capital cases and corporal punishment in other cases.

It would seem to follow that the Act implicitly recognised that it was beyond the power of the Governor to create new felonies and misdemeanours (leaving aside for the moment the question whether British legislation passed after settlement applied in the colony and if not whether the Governor had the power to make it applicable).

Today, the Court of Criminal Jurisdiction looks like a military court martial. By the standards of those days it ought perhaps to be regarded as a benevolent experiment by the British Government. The rule of law was to apply in the new colony but it was essential that criminal justice at the highest level should be summary and swift. It was entirely consistent with the complete design that the Governor should be granted a power in the Charter of Justice to determine whether a sentence of death should be carried out.

(e) THE FIRST CHARTER OF JUSTICE 2/4/1787 and LETTERS PATENT FOR A VICE ADMIRALTY COURT 5/5/1787.

The First Charter of Justice was a warrant under the hand of the sovereign, George III, for the issue of letters patent. It set up a court of civil jurisdiction. It constituted the Governor, Lieutenant Governor and Judge Advocate or Justices of the Peace, and it implemented the Act which set up a Criminal Court.

(i) The Court of Civil Jurisdiction.

The warrant recited in part:-

> "We find it necessary that a Colony and Civil Government should be established in the place to which such convicts shall be transported and that sufficient provision should be made for the recovery of debts and for determining of private causes between party and party in the place aforesaid . . . . . and being desirous that justice may be administered to all our subjects . . . . . "

The warrant set up a court of civil jurisdiction to consist of the Judge Advocate together with two fit and

proper persons to be appointed by the Governor. The court was to hear and determine in a summary matter -

> " . . . all pleas concerning lands, houses, tenements and hereditaments and all manner of interests therein, and all pleas of debt, account or other contracts, trespasses and all manner of other personal pleas whatsoever".

As Windeyer remarks, lawyers will recognise that the court was vested with all forms of civil action then known to the law in England.
(A Birthright and Inheritance 1962 Tasmanian University Law Review 635 at p 648.)

The court was authorised to proceed in a summary manner without the aid of a jury. It will be noticed that the court was established by an exercise of the royal prerogative, that is without any statutory backing whatsoever. In fact it was not until Supreme Courts were created by statute for New South Wales and Van Diemen's Land in 1823 that there was any statutory backing for courts of civil jurisdiction in either colony (see Act 4. Geo. IV. c.96). Doubts have therefore arisen as to whether the civil courts were validly constituted. Windeyer considers these doubts, which were much expressed during the governorship of Macquarie, were erroneous.

> "The question really arose because New South Wales was a colony and also a command. Considered as a colony, it was not ceded or conquered; and therefore, according to the ordinarily accepted doctrine, the Crown could not legislate for it. Yet it was not at the outset 'settled' in the ordinary sense, that is by voluntary migrants; it was set up by the Crown. Its inhabitants were at first nearly all either servants of the Crown or prisoners of the Crown.

> It was not the same sort of colony as others. Lawyers might not fit it neatly into the accepted legal classification of colonies, as acquired by conquest, cession, or settlement. It was established by the Crown, but with the recognition of an Act of Parliament. It was settled, not conquered; but its settlers were not persons who had gone out freely to form a colony. But it was to be a colony. It was not to be either a military occupation, although it had a strong military complexion, or just a gaol."

(A Birthright and Inheritance at pp 638 and 649. See also Enid Campbell: The Royal Prerogative to Create Colonial Courts 1964 4 Sydney Law Review 343 and Else Mitchell: The Foundation of New South Wales and the Inheritance of the Common Law 1963 Journal Royal Australian Historical Society Vol 49, 1.)

> " . . . . . the courts in early New South Wales lacked clear guide lines on the context of the substantive law to operate in the Colony in some circumstances. The Act of 1787 and the first two Charters of Justice presumed that English law would apply in the Colony. These instruments, however, did not state clearly the extent to which they were to be construed as making inroads upon the operation of the principles of the common law providing for the transplantation of English law to settled colonies. Insofar as the Act and Charters limited the jurisdictions of the courts, English law could only be applied within the boundaries set by these instruments. As a result, in practice at least, if not in theory, the common law principles were only operative to the extent that they were not modified or excluded from operation by the Act of 1787 and the Charters of Justice."

(Castles: An Introduction to Australian Legal History p 118.)

(ii) Justices of the Peace.

The First Charter appointed the governors,

lieutenant governors and judge advocates as justices of the peace within the new colony.

> "And further know ye that We, for preserving the peace of the said settlement and the islands thereunto adjacent of Our especial grace, certain knowledge and mere motion . . . . . by these presents do Grant Ordain, Direct and Appoint that our present and all Our future Governors and Lieutenant Governors and Our Judge Advocate for the time being shall be Justices of the Peace within the said place or settlement, and that all and every such Justice and Justices of the Peace, shall have the same power to keep the peace, arrest, take bail, bind to good behaviour, suppress and punish riots, and to do all other matters and things with respect to the inhabitants residing or being in the place or settlement aforesaid, as Justices of the Peace have within England within their respective jurisdictions."

Thus Phillip, Ross and Collins, as Governor, Lieutenant Governor and Judge Advocate, stepped ashore in New South Wales as ex officio Justices of the Peace and (arguably) as the first stipendiary or professional magistrates.

(iii) The Criminal Court.

As mentioned earlier the statute 27 Geo. III c.2 authorised the establishment of the Criminal Court. The First Charter implemented these provisions by constituting a criminal court composed of six naval or military officers together with the Judge Advocate who was to act as both prosecutor and judge.

The Charter conferred jurisdiction to try all crimes, whatsoever, meaning no doubt crimes according to the law of England. It was the punishments which were to be imposed according to the law of England, as nearly as may be, consider-

ing and allowing for the circumstances and situation of the place and settlement.

THE VICE ADMIRALTY COURT - LETTERS PATENT 5/5/1787.

The judicial establishment of the colony was rounded off by the establishment of a Vice Admiralty court for the trial of offences committed upon the high seas. The Lieutenant Governor was the judge. The Governor had a commission constituting him Vice Admiral of the Territory and another vesting him with power to hold general courts martial. The major commandant of the detachment had the usual power of assembling courts martial for the trial of offences committed by soldiers under his command.

(f) CAPTAIN PHILLIP'S SECOND COMMISSION APRIL 1787.

Phillip's First Commission established little more than a military command over a penal experiment, the second appointed him as the Governor of a new colony subject no longer to the orders of his superior officers but subject only to orders from the King by sign manual or signet or by Order in Council. This commission read as follows:-

> "To our trusty and well beloved Arthur Phillip Esquire. We reposing especial trust and confidence in the prudence courage and loyalty of you, the said Arthur Phillip of our especial grace, certain knowledge and meer motion have thought fit to constitute and appoint you the said Phillip to be our Captain General and Governor in Chief in and over our territory called New South Wales . . . . . and of all islands adjacent in the Pacific Ocean . . . . . "

Melbourne (Early Constitutional Development in Australia) makes the following comment (at p 6):-

> "It is probable that, since the days of Gilbert and Raleigh, no one had sailed from England armed with such an extensive delegation of authority."

Phillip was granted power to appoint Justices of the Peace as follows:-

> " . . . and we do hereby authorise and empower you to constitute and appoint justices of the peace, coroners, constables and other necessary officers and ministers in our said territory and dependencies for the better administration of justice and putting the law into execution."

The power to appoint justices of the peace had frequently been conferred upon governors in the past. McLaughlin remarks that no consideration appears to have been given whether the legal institution of a justice was appropriate to the needs of the new settlement.

> "Neither at the foundation of the colony nor at any time thereafter was the slightest consideration given to the fundamental question of how justice at its lowest level should be administered . . . . Throughout the period from the foundation of New South Wales until 1850 it was assumed, without question, that the only way in which justice could be administered at its lowest level was by Justices of the Peace. The experience of the first sixty three years of the colony reveals that the administration of justice at its lowest level was unsatisfactory and was unsuited to the circumstances of the colony."

(McLaughlin: The Magistracy and the Supreme Court of New South Wales 1824-1850.
1976 Journal Royal Australian Historical Society Vol. 62 Pt. 2 p 91.)

There is no doubt that abuses of power by the lay

magistracy in particular took place in the early years of settlement, both before and after the establishment of the Supreme Court of New South Wales in 1824. But it is another question as to whether or not the institution of the justice of the peace was appropriate in the new colony. Before examining this issue it is instructive to examine in detail the first hearing of a summary charge before justices of the peace in New South Wales.

C. THE FIRST HEARING BEFORE MAGISTRATES IN AUSTRALIA.

The record of proceedings at the end of this chapter is my copy of the original handwritten minutes of proceedings of the Sydney Bench of Magistrates located in the New South Wales State Archives (1/296,1.) The numbers have been inserted by myself for the purpose of facilitating examination in detail.

1. Headquarters - Port Jackson.

Professor Castles states that the first Sydney Bench of Magistrates sat for a time on board the Sirius at anchor in Port Jackson. (Castles: Introduction to Australian Legal History p.42.) The evidence for this contention appears to be based possibly on a misunderstanding of part of a despatch to the effect that Captain Hunter, when the Sirius was in harbour, assisted the Judge Advocate as a justice of the peace. It is more likely that the proceedings were held ashore in a tent, possibly the same tent in which proceedings of the criminal court had commenced on the 11th February, the proceedings of which are also recorded as having taken place at Headquarters in Port Jackson. The ceremony and military flavour of proceedings in both the

criminal and magistrates' courts point to the proceedings being conducted in the tent appointed as military headquarters with an appropriate military guard. This would be consistent with the need to display the working of criminal justice openly to all and sundry.

The magistrates exercised no powers on the voyage to Australia, their powers were confined to the territory of New South Wales. Phillip exercised his disciplinary power over the First Fleet in his capacity as Commodore and not as Governor elect or as a justice of the peace. Sailors and marines were punished by courts martial during the voyage while convict discipline was normally entrusted to the officer of marines in charge of the convicts. On several occasions Phillip had to intervene to enforce convict discipline, for example with regard to the convict women on board the vessel Friendship.
(See McLaughlin: The Magistracy in New South Wales 1788-1850 University of Sydney LL.M thesis 1973.)

2. 19th February, 1788.

The better view would appear to be that there was no earlier sitting of magistrates. The matter is discussed by McLaughlin (supra, at p 69).

3. David Collins Esquire, Augustus Alt Esquire.

Collins was Judge Advocate and a justice of the peace ex officio. He was not a lawyer but had some experience of military law and presumably some liking and ability for the law as the records certainly demonstrate. Collins was probably Phillip's most valued officer; personally attractive, able and intelligent, he unselfishly

gave service to the colony above his own advancement and later suffered financially for his sacrifice. Later he became Lieutenant Governor in charge of the first settlement in Van Diemen's Land at Hobart where he died in 1810.

Alt was surveyor general for the Colony; and although aged fifty-seven at the time of his appointment was by no means the "decayed Hanoverian" he has been called. He married a convict woman and settled in Australia. The records of the bench of magistrates show that he sat often with Collins and their decisions and sentences were fair and sensible - having regard to the standards of the times. Alt was the first person appointed by Phillip as a Justice of the Peace.

4. Mary Jackson.

She was probably as typical as any of the female convicts. She was transported for stealing. No doubt she was one of the female convicts who arrived for transportation aboard the Lady Penrhyn without sufficient clothing, a circumstance which moved Phillip to express anger towards the justices responsible. Nevertheless Phillip was apparently unable to provide proper clothing for the women and the circumstances of the case indicate how Mary Jackson overcame her difficulties. She subsequently appeared before the court for misbehaviour and appears to have had little difficulty in caring for herself and expressing herself in voluble detail.

5. Was brought before them.

Presumably she was brought before the court under guard having surrendered herself to the guard a short time

previous to the sitting of the court. There was no prison built in the colony until 1796. Thornton records, though without reference to authority, that male convicts were chained to a log while awaiting trial and female convicts were allowed to go free.
(Thornton: A History of the Court of Petty Sessions in New South Wales (Sydney 1946).)

It would also seem that male prisoners were confined on "Pinchgut" Island awaiting trial. There was early and successful opposition by Major Ross to making his men available as convict overseers which must have added immensely to Phillip's difficulties.

The lack of any police force forced Phillip to organise a night watch recruited from among the convicts themselves in order to curb stealing at night, but even this measure provoked opposition from Ross insofar as the night watch sought to control the movements of private soldiers at night as well as convicts. Consequently, the lack of means to enforce work and discipline among the convicts may readily be imagined. Soon after settlement the French explorer La Perouse arrived at Botany Bay. He recorded his embarrassment and annoyance at the efforts of some convicts to secure a passage back to Europe on his ship. Apparently the convicts artfully offered the services of their women in return for the passage little knowing that La Perouse and his crew were destined for shipwreck and death in the Pacific. Phillip courteously provided La Perouse and his officers with the services of horses to visit him at Port Jackson. It is a significant commentary on the lack of an effective police force in the new colony that the convicts who made a nuisance of themselves with a distinguished foreign guest were not detected and punished even though official complaint was made

to Phillip. For the offending convicts it might be said that they (and presumably their women) set a precedent of defiance of authority and resource in adversity which was to be followed by their descendants and become part of the Australian tradition. Georgian rather than Victorian England seems closer to popular Australian tradition.

6. Charged.

There was in fact no written or sworn complaint laid before the justices and no complainant, in the ordinary sense.

Presumably the charge was stated orally by Collins and then recorded as shown in the minutes. In contrast a charge in the criminal court had to be formulated in writing and exhibited before the court by the Judge Advocate. Collins commenced a pattern for the hearing and disposal of summary offences which continued indefinitely into the future. In 1810 when Deputy Judge Advocate Ellis Bent commented upon the jurisdiction of the Bench of Magistrates he remarked that magistrates dealt with -

> "breaches of the peace, larcenies of a petty nature, prisoners brought up for neglect of work, and complaints of a trivial nature."

Windeyer (A Birthright and Inheritance (supra at p 657)) writes that after the first sitting on the 19th February -

> "Magistrates dealt regularly with minor offences, including disobedience of standing orders. They also dealt with squabbles and complaints by one convict against another. Much of their time was occupied with such matters, some of them really

> civil claims. No one questioned this jurisdiction. Indeed later, during the period in which the Home Government had neglected to set up courts in Van Diemen's Land, one of the duties of the magistrate there, Governor Macquarie said, was to settle petty debts. It is worth noting that what is sometimes called the first civil action tried in Victoria was really a complaint of detention of some tools heard before Bate, the Deputy Judge Advocate at Port Phillip, sitting as a Justice there, before Collins transferred the settlement to Hobart."

There were two other charges dealt with by the court on the 19th February. A convict was charged with insolence to an overseer, found guilty, and sentenced to a hundred lashes; but on the application of the prosecutor overseer forgiven by the Governor (a reflection surely on the status and difficulties of overseers). The third charge was a breach of trust brought by one convict against another; the prosecutor having given his fellow a possum to mind and his fellow in breach of trust having exchanged the possum for a bottle of rum which he had drunk. The prisoner was found guilty of disobedience of orders (on what amounted to an amended charge) on the ground that he ought not to have exchanged the possum for rum. He was sentenced to one hundred lashes which the Governor characteristically reduced to fifty. What was thought to be a disparity between the punishment imposed in magistrates' courts and the punishment imposed upon soldiers by court martial was soon to evoke grumbles of discontent from the military. Then, as now, uniformity in sentencing was a matter of keen public interest.

7. Detaining.

This was and still is a charge unknown to English and Australian law. True theft as a bailee became an

offence in England in 1857 and was copied in the Australian colonies. However, the essence of every form of stealing was and still is a dishonest intent, which the draftsman of the charge has omitted. Similarly the third charge of breach of trust was unknown to English law while the second charge of insolence to an overseer was not apparently related to any specific order communicated to the convicts by the Governor. This same pattern was to continue indefinitely into the future, almost as if it was assumed by the magistracy that there was an unwritten code of behaviour regulating discipline, with which the convicts were required to conform at their peril. Later Phillip did issue orders regulating discipline which were communicated to the convicts when they were mustered weekly, but there never seems to have been a satisfactory comprehensive collection of these standing orders. Commissioner Bigge records that during the Governorship of Macquarie, the Governor caused three freemen, three convicts and two women to be arrested for trespass without authority. Without hearing any defence the men were ordered to be lashed and the women detained in gaol for forty-eight hours. This incident was certainly exceptional, but it does illustrate that from the beginning the hearing and determination of summary charges commenced on the wrong footing because they were not distinctly related to existing law.

The quotation which appears below is taken from the 1784 edition of Burns Justices of the Peace. The work was first published in 1754. It was then and remained until recent times the leading text book on justices of the peace. Collins probably brought a copy with him to Australia. A 1784 edition is in the magistrates' library at Hobart. It is inscribed "J. Tarleton" and was presumably brought to Tasmania by Tarleton when he was appointed a police magistrate

at Hamilton in Tasmania in 1842. Tarleton's son was later stuck up by Ned Kelly when he became manager of the bank at Jerilderie in Victoria.

> "The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace; but the intendment will be against it. Therefore where a special power is given to a justice of the peace by act or parliament to convict an offender in a summary manner, without a trial by jury, it must appear that he has strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed nevertheless according to the course of the common law in trials by juries, and consider himself only as constituted in the place both of judge and jury. Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then, if the person is found guilty, there must be a conviction, judgment, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a record of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction."

The cardinal principle was then and is now that a justice may only proceed where some actual breach of the law is alleged. It may be assumed without question that the Governor had power, by means of orders communicated to the

convicts at their musters, to regulate their discipline. Similarly it may be assumed that when free settlers arrived the Governor had power by order and proclamation to regulate their conduct; at least in a manner not inconsistent with English law. The failure of Phillip and Collins to formulate a written code of convict discipline from the beginning is understandable. However, the failure of their successors to do so is not. That failure above all was the cause of the scandals surrounding the abuse of power by magistrates which occurred early in the next century.

Notice that Mary Jackson was discharged, but reprimanded for disobedience to the Major. She had of course been subject to summary discipline for the disobedience of an officer's orders during the voyage, and it was natural to assume that she remained subject to the same discipline ashore, but in fact this was not so. Collins later amended a charge of breach of trust relating to a possum to a charge of disobedience of orders and it may perhaps be questioned why he did not amend the charge with regard to Mary Jackson. The answer can only be based on surmise. Perhaps Collins saw past the brash exterior the convict woman presented and remembered how and in what state she arrived aboard the Lady Penrhyn. Certainly he avoided the corporal punishment of women if he could help it. It may be assumed his dislike of Major Ross did not influence his decision although one may detect too the tactlessness of Major Ross in handling the situation. No doubt he considered it beneath his dignity to listen to the defendant before authorising a charge.

It is evident that the law followed a need in the early years of settlement. The magistrate's court became a clearing house for complaints of a criminal and civil nature

because there was no other forum to which convenient recourse could be had without troubling the governor himself. The magistrate's court thus filled a gap for which it was designed. What was omitted from its design was provision for the regulation of its procedure and provision for the review of its determinations and sentences. Review of sentence by the governor was to ultimately prove an inadequate check.

8. Being duly sworn.

There is no indication that any person appeared to prosecute and lead the evidence of the prosecution witnesses. Presumably this was done by Collins himself. Presumably Mary Jackson was given the opportunity to question the witnesses, though this is not recorded.

9. The evidence.

The use of this word is curious. It seems to be intended to describe the complainant.

10. Mary Jackson being asked what she had to say.

It was not until the last decade of the nineteenth century that an accused person was given an unqualified right to be sworn and give evidence in his own defence. However, he was permitted to make an unsworn statement and it is apparent that Mary Jackson was invited to say something in her defence if she wished. The origin of the accused's inability to give evidence on oath appears to rest on two bases at common law; the first being that he had an interest in the outcome of the proceedings and the second that an accused person

had a privilege to refrain from inculpating himself. Cross (Evidence 2nd Edition p 161) remarks that it may seem odd that the privilege against self inculpation should be allowed to militate against all exculpation. He attributes the disability of the accused to give evidence in his own defence to a reaction against the practice of the Star Chamber, which required those persons who appeared before it to give evidence on oath, and answer all questions put to them, regardless of whether the answers tended to incriminate them or not.

Dr. Glanville Williams writes:-

> "The strong insistence after the abolition of the Star Chamber, that the administration of an oath to a defendant was contrary to the law of God and the law of nature, was a race memory from those evil days."
>
> (The Proof of Guilt 3rd Ed. 41)

Convicts who had been convicted of an infamous crime (that is at least treason, felony or perjury), were regarded as incompetent as witnesses for life. This was modified in 1828 by the Civil Rights of Convicts Act which rendered them capable of giving evidence after they had served their sentence, and by the English Evidence Act 1843 (and similar colonial legislation) which abolished incompetence as a witness for infamy. This evidentiary rule clearly caused considerable difficulty in the young colony. If a Supreme Court had been established in the colony in its early days it is quite likely that a judge would have held the evidentiary disqualification inappropriate as most of the settlers in the colony were convicts. In 1828 the Bank of Australia in Sydney was broken into and a large sum of money was stolen. Two persons named Farrell and Dingle were subsequently convicted of the crime partly on account of the evidence of an attainted felon who was

permitted to be sworn to give evidence. On appeal to the Supreme Court of New South Wales the conviction was upheld by Justices Dowling and Stephen with Chief Justice Forbes dissenting.

Dowling held that -

> "This canon of evidence, regarded as a fundamental principle of the common law was not, as yet, adapted to the state and condition of the colony which still retained its original predominating character as a penal settlement of the mother country."

The case is discussed by C.H. Curry, Sir Francis Forbes 1968 p 463.

It is interesting to compare the first civil case heard by the Court of Civil Judicature on 1st July, 1788. This was an action brought by Henry Cable and his wife Susannah against Duncan Sinclair, Master of the transport Alexander. Briefly, both plaintiffs had been convicted of crimes of dishonesty and sentenced to transportation. They met in gaol and in 1786 she gave birth to an illegitimate child under the name of Susannah Holmes. Cable aged about twenty was the father and she was about a year or so older. She was ordered to be transferred to the hulk Dunkirk at Plymouth to await transportation. The master of the hulk refused to accept the baby; the mother was led below lamenting, and the gaoler escort, one Simpson, was left holding the baby. Stirred by compassion, Simpson journeyed by coach to London with the baby and waited on Lord Sydney with the baby on his lap and demanded audience. Sydney not only issued orders that the child should join its mother, but upon learning that the parties wished to marry, ordered that

Cable be permitted to join the mother of his child to await transportation with her. It is said that gaoler Simpson travelled to and fro with the baby in his care some seven hundred miles. The plight of the young family attracted newspaper publicity. As a result some charitable persons subscribed about twenty pounds and the money was spent on the purchase of clothing and other articles for the family. The parcel was entrusted to Chaplain Johnson who in turn entrusted it to the care of the master of the Alexander, Duncan Sinclair. The Cables duly sailed in the vessel Friendship, but when the Alexander arrived in Sydney it was found that the parcel had been pillaged.

Hence the Cables brought a civil action against Sinclair, obviously with some helpful assistance from some unknown person; Chaplain Johnson perhaps who sat with Collins in the civil court to hear and determine the cause.

The draftsmen of the pleading described Cable and his wife as "New Settlers of this Place" but the words have been struck out, presumably by some person with the knowledge that convicts serving a sentence for felony were incompetent to bring a civil action. In the record of proceedings Cable is discreetly described as a labourer, thus avoiding any reference in the record to the fact that he was a convict. But why could not the pleading have been left as it was? The Cables were indeed convicts, but they were also new settlers of this place, to wit, Sydney Cove in the County of Cumberland. They carried so much of the law of England as was appropriate to their changed circumstances, and it soon ought to have become obvious that it was not practical to prevent convicts from maintaining a civil action in the new colony. Similarly to prevent a convict from giving evidence in a criminal proceeding in the new colony was also quite inappropriate.

Apart from impeding the detection and conviction of offenders, it was to have the effect of encouraging the administration of flogging and other wrongful means in order to extract confessions something unknown to English law and custom even at that time. If a competent lawyer had been appointed as Judge Advocate from the beginning of settlement such difficulties might have been avoided.

It is pleasant to record that Cable and his wife won their action and later became wealthy settlers in their new home. Their first son was joined by other children. The case is discussed in detail by Windeyer, A Birthright and Inheritance (supra) at p 658.

There was of course no question of legal representation for Mary Jackson. Up to 1831 it was doubted whether a defendant appearing before magistrates either in quarter sessions or sitting out of sessions was entitled to legal representation. The matter was settled in Collier v Hicks (1831) B. & Ad. 663, in which Lord Tenterden held defendants were not so entitled. The ends of justice would be satisfactorily attained by justices hearing the parties themselves -

> ". . . without that nicety of discussion and subtlety of argument which are likely to be introduced by persons more accustomed to legal questions."

No doubt this was the view taken by such practical men as Lord Sydney and Governor Phillip in 1788 for there never appears to have been any proposal by them to introduce lawyers into the new colony.

However, by 1836 the decision in Collier v Hicks was regarded by the British Government as being out of

keeping with contemporary thought. In that year the Prisoners Counsel Act of 1836 provided a right for persons accused to be represented by counsel. Lord Glenelg, the Secretary of State, ordered Governor Bourke to implement the Act in New South Wales, but it seems that country magistrates persisted in maintaining they had the right to refuse legal representation. See McLaughlin: The Magistracy and the Supreme Court of New South Wales 1824-1850 (supra).

11. She was discharged.

The proceedings of the first magistrates court reflect credit upon Collins and Alt. They were humane and just men. Their preoccupation with offences of dishonesty is an indication that the most prevalent offence in their tiny community was stealing. The same is probably true in any open gaol today. In those days it was clearly imperative for the sake of survival itself to regulate the material resources of the community in an orderly manner. Without a police force and with a night watch consisting of convicts without military force, the magistrates found it difficult enough to keep order without being required to apply the strict letter of the law. And this was no doubt foreseen. The judicial system was intended to be flexible; the limits of power were purposely left vague and the would be lawyer scrutinised the instruments of government for constitutional certainties in vain. The first judicial system in the colony of New South Wales was reasonably well adapted to ensure its survival without undue grievance from any section of the community. But what would happen if the military deserted their obligation of loyalty for commerce and greed? What would happen when free settlers arrived?

It may be argued that there was little that Collins and the early justices could have done to prepare for the conflicts which were looming in the future. But some things could have been done. First the justices ought to have insisted that convicts only be punished in accordance with predetermined law, either in accordance with the terms of some English law or in accordance with some order of the governor duly transmitted to the convicts at their musters. Second, with the assistance of the governor some elementary rule of procedure governing the magistrates ought to have been formulated and promulgated. Third, steps ought to have been taken to preserve for easy reference in the future the governor's orders and the rules of court. Fourth, the use of flogging to extract confessions or ascertain the whereabouts of stolen goods ought to have been discouraged together with other questionable methods of criminal investigation condemned by educated opinion at the time. Fifth, there was a need for some summary procedure to review the suitability of a person to act as a justice of the peace. This need arose early in the next century when the settlement expanded into country areas and the justices found themselves beyond the reach of the governors scrutiny or control.

Nevertheless by setting a conspicuous example of humanity in the administration of justice in the infant colony, Collins laid the surest foundation for the eventual achievement of a sound system of criminal and civil justice in the next century. He was in truth Governor Phillip's staunchest supporter. He planted the office of justice of the peace in fruitful Australian soil.

"1. Head Quarters - Port Jackson.

At a meeting of two of Her Majesty's Justices of the Peace for the Territory of New South Wales -

2. 19th February, 1788.

Present

3. David Collins, Esquire; Augustus Alt, Esquire.

4. Mary Jackson, a convict, 5. was brought before them 6. charged with 7. detaining a shirt, a pair of trousers and a new frock and a pair of stockings the property of Edward Dease, a Seaman belonging to the Lady Penryhn Transport.

Edward Dease, a Seaman, 8. being duly sworn, deposes that he gave the articles mentioned in the charge to the prisoner Mary Jackson for the purpose of getting them washed, on or about last Tuesday night giving her at the same time quarter of a pound of tea to satisfy her for her trouble and some soap to wash them. On Saturday night he procured a pass from the master of the transport to go ashore and get his things from the prisoner who told him at first that they were lost out of the tent but that if the Corporal (who was attending with the 9. evidence) would go with her she would endeavour to find them - that when she came to the tent she said she would not restore them giving at the same time . . . . much abuse . . . that the Evidence (sic) not being able to get his things from her went away returning again the next morning applying to Major Ross who sent a Private Marine to the prisoner with directions to her to deliver the things or he would send a file of men for her - that the prisoner would not comply with these orders and a file of men were sent for her - that then she gave up the things first cutting or tearing the frock and throwing the other things out of the tent and that he then returned to the Major and informed him of having got his things producing to him the frock where it had been cut.

Samuel Bacon, Private Marine, doing corporal duty being sworn, deposes that on Sunday morning last he received orders from the Sergeant of the Guard to go to the prisoner and see that she delivered the articles mentioned in the charge to Edward Dease who went with him for that purpose - there if she refused to give them up he was to bring her a prisoner to the guard having a file of men with him - that she had a dispute with Dease and said it was very hard she should give the things up, wanting to see Major Ross first - that on her being ordered to give the things to Dease she went into the tent and threw them out first tearing out the lining of the frock - that he did not see her tear the lining but saw it remain in her possession and had all the appearance of belonging to and being torn from the frock.

William Smith, Corporal of Marines, being sworn, deposes that on Saturday morning last he was ordered by the officer of the guard to go with Edward Dease to the prisoner and see that she delivered what things she had of his, that on Dease asking for them she said she had none of them - that they were lost - that he advised her to give them up - that on going to the tent she said she could not find them but that she would return them the next morning, that he did not hear her make use of any abusive language and that on finding he could not get the things from her he returned with Dease to the officer of the guard who he acquainted with what he had done. 10. Mary Jackson being asked what she had to say says that Dease gave her the shirt and told her the frock she might have for a shift if she would bleach it and the trousers she might have to mend her stays - that she told him she would mend whatever he had that wanted mending, that in return for the trousers he gave her he asked her for a canvas petticoat she had which would make him a good pair of trousers that the stockings he gave her for a pair of warm ones he had worn of hers in the cold weather - that he asked her often to go

on board with him one night bringing a hat and greatcoat to take her disguise and that she refused to go with him and that in consequence of such refusal he came to claim his things off her and that she told him she would speak to some of the officers and tell them her story and if they thought she should she would give them up.

The prisoner was reprimanded for not giving up the things when she was sent to by the major and it appearing that the Prosecutor cohabited with her during the voyage had given her the articles for her own use and required them again on her refusing to go on board ship with him, 11. she was discharged."

THE MAGISTRACY IN THE NINETEENTH CENTURY

As the numbers of free settlers and emancipists in the colony increased, so there was an increasing need for the services of the magistracy. Until the arrival of Governor Macquarie magistrates were chosen from military officers or the official class. As settlement spread to country districts the importance of the magistrate in the scheme of government became evident. He was the only agent of civil government in country districts.

> "As the population of the country districts increased, the magistrates power and importance increased proportionately. His activities included not merely the primary function of exercising his judicial role in court. In addition he was in control of the police in his district, was responsible for the assignment of convicts as servants, organised musters of convicts and other inhabitants, drew up jury lists (after the introduction of trial by jury), organised and presided at public meetings, presented petitions on behalf of the inhabitants to the appropriate authorities in Sydney, was responsible for the taking of local census and carried out many other non judicial functions."
>
> McLaughlin: The Magistracy and the Supreme Court of N.S.W. 1824-1850. 1976 Journal Royal Australian Historical Society Vol 62, p 92.

At first magistrates did not receive any salary for their services. However some received grants of land and it was customary for them to be assigned the services of convicts maintained at public expense. As well as exercising jurisdiction in criminal matters magistrates exercised jurisdiction in civil matters - petty debt and disputes between master and servant.

Governor King wrote to the Secretary of State in favourable terms about the magistracy and it would seem that there was little complaint about them until the governorship of Macquarie. Justices of the peace exercised jurisdiction in the first settlement at Port Phillip and later sailed for Hobart Town on the Derwent when Port Phillip was abandoned in 1804. They were the only resident source of judicial authority in the colony of Van Diemen's Land until the establishment of the Supreme Court in 1824. Until that time persons accused of serious crime had to be tried in Sydney although there was a sitting of the criminal court in 1821 presided over by Baron Field who sailed to Hobart from Sydney for the purpose of trying serious criminal offenders.

1. The First Police Magistrate.

Until fairly recent times it was customary to refer to magistrates as police magistrates. This was an historical survival from the earliest days when the magistrate was responsible for the superintendence of the police force. However there was no specific legislative authority in New South Wales for the appointment of police magistrates until 1833 when the Governor was given authority to appoint two or more justices of the peace to execute the duties of police magistrates within Sydney. Later a similar authority was given to appoint police magistrates in the country. The peculiar pre eminence of a police magistrate in recent times, after he lost his authority to control the police force in the last century, was due to the fact that he had authority to exercise the jurisdiction which could only be exercised by two or more justices of the peace. Most of the criminal jurisdiction of justices of

the peace could only be exercised by two or more justices sitting on the bench. The jurisdiction of a police magistrate to sit alone in New South Wales may be traced back to 1850 (14 Vic No. 4 S.29). In 1947 the title police magistrate was belatedly altered to stipendiary magistrate in New South Wales. Of course by 1947 the system of stipendiary magistrates had become permanently established in that State, indeed in view of the allowances made for them it may be said that special provision was made for the magistracy from the commencement of settlement. Up to the passing of the Police Act in 1833 police magistrates in New South Wales were appointed by administrative act. A despatch dated 11th September 1825 records that Earl Bathurst authorised the Governor to establish courts of petty sessions throughout the colony and to appoint stipendiary magistrates at a small stipend to preside at the principal towns. Thus it would have been appropriate at a very early stage to re-name police magistrates as stipendiary magistrates, particularly after they lost their police powers, but this change was not achieved till modern times. In pursuance of Earl Bathurst's instructions Governor Darling recommended an appointment of a "stipendiary police magistrate" at Campbell Town but the mixed title never found popular favour. In Tasmania the designation police magistrate was also changed to stipendiary magistrate in recent times (1969) in the well founded belief that the professional magistracy had no special connection with the police. The recent change in designation from stipendiary magistrate to magistrate (peculiar to Tasmania) has however opened the possibility of confusion with the lay magistracy.

The western wall of the number one court room at the Central Court of Petty Sessions in Sydney used to be inset with a bust of Charles Windeyer inscribed "First Police

Magistrate 1839-1855". In a paper delivered to New South Wales magistrates in 1974 R.G. Fisher suggested that the inscription was misleading and incorrect. It seems that John Harris, William Balmain, Samuel Marsden and perhaps a few others have some claim to the title. As already indicated in the singular circumstances of Australian settlement it was appropriate from the earliest days that there should be some kind of night watch (or police force), that justices should control it, and that they should receive some remuneration for their services. However the major claim for the title as first Australian police magistrate would appear to lie with D'Arcey Wentworth, the father of William Charles Wentworth, on the grounds specified by Fisher as follows:-

> "(a) he was the first justice of the peace to be paid a salary for duties performed as a Superintendent of Police and Police Magistrate,
>
> (b) he was the first magistrate to sit daily,
>
> (c) he exercised a special jurisdiction,
>
> (d) he was Chairman of the Bench of Magistrates at Sydney from 1811 to 1825 when he retired."

2. The Stipendiary Magistrate.

There are sound historical reasons for the fact that most of the jurisdiction exercised in courts of summary jurisdiction throughout Australia today is exercised by stipendiary magistrates. From the beginning of settlement in New South Wales and Tasmania, it was appreciated that it was necessary to remunerate the magistracy in some way in order to secure their regular services and control the convicts. But Victoria and South Australia were not settled

by convicts and yet the police magistrate (or special magistrate as the office was called in South Australia) was established early in the history of each colony. Governor Bourke appointed Captain William Lonsdale as police magistrate for Port Phillip in 1836. It would seem that the Reverend Knopwood, Lieutenant Sladden and the Surveyor General Harris exercised jurisdiction as justices of the peace at Port Phillip during the aborted settlement by Lieutenant Governor Collins in 1803. However the legality of their provisional appointment as justices of the peace by Collins would appear to be questionable until subsequently confirmed by Governor King in March 1804. In 1859 a Victorian Civil Service Commission reported that there were 93 courts of petty sessions in the colony, 46 presided over by magistrates paid as such, 26 by police magistrates receiving salary in respect of other appointments, and 21 by honorary magistrates. See Weber: The Origins of the Victorian Magistracy 1980 Australian and New Zealand Journal of Criminology 142.

As mentioned earlier, in England in the eighteenth century magistrates were remunerated by fees. The Fielding brothers were however remunerated by the government. In 1754 Henry Fielding wrote:-

> "A predecessor of mine used to boast that he made 1000 pounds a year in his office, but how he did this (if indeed he did it) is to me a secret. His clerk (now mine) told me I had more business than he had ever known there; I am sure I had as much as any man could do. The truth is, the fees are so very low when any are due, and so much is done for nothing, that if a single justice of peace had business enough to employ twenty clerks, neither he nor they would get much by their labour. The public will not therefore think I betray a secret when I inform them that I received from the government a yearly pension out of the public service money."
>
> Journal of a Voyage to Lisbon 1775.

Although Fielding refers to "public service money" the public or civil service as such was not set up in England until 1816. The subject is explored by His Honour Mr. Justice Wells in his judgment in The Queen v Moss (1982) 29 SASR 385. As in Victoria the need for stipendiary or special magistrates was recognized from the beginning of settlement.

> "It is not surprising that the legislature in South Australia, without loss of time, gave to Special Magistrates important jurisdiction and powers; and, certainly from 1850, made provisions for the payment to them of proper salaries. In the developing stages of an infant province, it was hardly to be expected (to use Stephen J's words) that 'the administration of justice' would be 'a matter of honourable ambition and interest to large numbers of persons well qualified for the purpose by education and social standing'. Not only were there not comparatively 'large numbers' of such persons, but the weight and complexity of the responsibilities which magistrates were expected to shoulder virtually ensured, almost immediately, that only those with special knowledge and capabilities, and who could give their whole time to the discharge of their duties could expect to be, and were appointed. The structure of the legislation, viewed quite apart from history, tells the tale. Whereas England finally ushered the stipendiary magistrate onto the social scene in order to cure a vice of long standing in the administration of the law, South Australia saw him as an immediate necessity, and assigned to him judicial and ministerial duties of ever increasing importance. It may be regarded as the logical outcome of almost a century of such legislation that Parliament should endeavour to ensure that those appointed to the office of Special Magistrate should have qualifications which could only be professional qualifications - that suitably equip them to perform the duties of their important office."
>
> Per Wells J. p 411.

Today the great bulk of magisterial business in Australia is disposed of by the professional stipendiary

magistracy. In England the reverse is true - honorary justices hear and determine most summary prosecutions and the role of the stipendiary professional magistrate is limited to certain urban areas. However lay justices in England are assisted by clerks with professional legal qualifications which is not the case anywhere in Australia. There are apparently about thirty to forty stipendiary magistrates in England and twenty-two thousand lay justices. The stipendiary magistrates sit mainly in London.

3. The Jurisdiction of the New South Wales Magistracy in 1832.

Some idea of the complicated nature of the magisterial jurisdiction in New South Wales may be gained from a brief description of the jurisdiction of the magistracy in 1832. It was as follows:-

1. The English laws which the settlers brought with them so far as appropriate to the circumstances of the colony. It was always a matter of doubt whether English legislation passed after settlement applied to the colony (so far as appropriate), especially as there was no provincial legislature until 1824. The Australian Courts Act 1828 (9 Geo IV C.83), fixed the closing date for the reception of English law as the 25th July 1828. The first Chief Justice of New South Wales, Sir Francis Forbes, was chiefly responsible for this well drafted measure which put beyond doubt the entitlement of New South Wales to the benefit of recent reforms in English criminal law.

2. Jurisdiction conferred by Imperial acts expressly made applicable to the colony.

3. The Governor's orders from 1788 to 1823.

4. Acts of the New South Wales Legislative Council from 1824.

5. The Charter of Justice 1823 (4 Geo IV C.96).

The Charter of Justice 1823 is remembered today in Australia as the beginning of self government. It marked the separation of New South Wales and Tasmania and the grant of authority to create Supreme Courts in both colonies. It also authorized the setting up of courts of intermediate criminal jurisdiction in each colony to be known as Courts of General and Quarter Sessions. This Court was the ancestor of the present system of district criminal courts in New South Wales. There is no court of intermediate criminal jurisdiction in Tasmania.

In 1835 the Solicitor-General of New South Wales, J.H. Plunkett, published what must be one of the earliest legal texts published in Australia. The title was "The Australian Magistrate or A Guide to the Duties of a Justice of the Peace for the Colony of New South Wales". It is an early acknowledgement of the complicated nature of Australian magisterial jurisdiction and a further reason for the growth of a professional magistracy in Australia. The federation of Australia at the end of the nineteenth century and the conferring of federal jurisdiction upon the magistracy added to the complications of magisterial jurisdiction.

4. Procedure in Magistrates Courts in the Nineteenth Century.

There was a great need in early Australia for a uniform code of procedure to regulate proceedings before magistrates. From the beginning of settlement justices

exercised a general disciplinary supervision over convicts without at times specific legal justification, as the hearing of the "charge" against Mary Jackson discussed in the last chapter demonstrates. Early in the next century there were a succession of scandals revolving around allegations of abuses of power by the magistracy. Complaints were not made by the convicts themselves who had no right of appeal or public audience. Allegations of judicial misconduct were rather made by representatives of one faction of free settlers against another. Thus the Reverend Marsden charged that Dr. Douglas had ordered a convict to be flogged on suspicion of a robbery in order to extract a confession. This accusation brought counter charges against Marsden and McArthur that they had made similar orders when acting as justices. Upon enquiry by Governor Brisbane the practice was traced back to the establishment of the colony and found to be common to many magistrates. The result was an Act of Indemnity introduced by Chief Justice Forbes into the Legislative Council in 1825 acknowledging that magistrates had acted unlawfully in the past and staying criminal prosecutions against them for acts done in their capacity as magistrates.

The establishment of Supreme Courts in New South Wales and Tasmania marked the beginning of effective judicial control over magistrates. In 1832 the powers of justices over convicts were substantially reduced (fifty lashes for a first offence). Governor Bourke was responsible for the change with the assistance and approval of Chief Justice Forbes. Bourke thought the amending legislation was still excessively severe and "out of place in any but a slave code", but it brought forth a storm of scurrilous protest, particularly from the lay New South Wales country justices. Heavy punishments continued, for example between 1830 and 1837 42,039 convicts were flogged and the total number of lashes

administered was 1,865,658 - incomparably more than in England and a blot on early Australian history.

There was little by way of procedural reform in magistrates courts in Australia until the middle of the century when English legislation was copied in the Australian colonies.

Sir John Jervis introduced his monumental reforms with regard to the jurisdiction of justices in England in the year 1848 in a series of three Acts. Two of the three Acts passed (11 and 12 Vict. C.43) deal with the duties of justices sitting out of sessions with regard to indictable offences and summary convictions and orders. The third Act deals with the protection of justices from legal proceedings in executing the duties of their office. A fourth Act was passed in 1849 dealing with the places at which courts of summary jurisdiction could be held.

Jervis has not been given the credit he deserved. He modestly claimed his reforms were only consolidations of existing law but they were much more than that. Archbold wrote a commentary on the Acts in 1848 and claimed that Jervis had done more for the administration of criminal justice in England than anyone else except perhaps Sir Robert Peel. Jervis's reforms were quickly copied by all the Australian colonial legislatures. Today we may be grateful for their uniformity in adopting English legislation. Jervis's reforms are still the basic structure of every statute in Australia regulating the practice and procedure of justices in Australia. An excellent account of these reforms may be found in an article under the title "The Making of English Criminal Law - Sir John Jervis and his Acts" by Freestone and Richardson in 1980 Criminal Law Review at page 5.

At the opening of the Supreme Court of New South Wales on the 5th of December 1850 the Chief Justice, Sir Alfred Stephens, is reported as having addressed himself as follows:-

"His Honour said, that within the last few days an Act of Council had come into operation, which was of more importance, as affecting the administration of justice, than any other Statute passed by the Colonial Legislature. His object, he said, in mentioning this Act, and in alluding briefly to a few of its leading features, was to direct to it the attention of the public, and particularly of Magistrates, to whom a knowledge of its provisions was absolutely necessary. This Act, the 14th Victoria, No. 43, had been passed on the 2nd of October last, and had come into operation on Monday last. By the Act itself, and by three British Statutes which were adopted by and embodied in it, the duties of a Justice of the Peace, both in and out of sessions, were clearly defined; and while the Magistrates were protected from all vexatious actions, there were means provided by which all those who were affected by magisterial proceedings could protect themselves against error or injustice, by resorting to a most simple and inexpensive proceeding of a summary nature, by which the intervention of the Supreme Court would be obviated. The second clause of the Act of Council directed, that as soon as possible after the termination of every case, the depositions shall be transmitted by the committing Magistrate to the office of the Attorney General. This had been hitherto the usual, although not the invariable practice, but there had not, until the present time, been any legal enactment to enforce it. The third clause provided, that all prisoners should be entitled to copies of the depositions when committed or held to bail by a Justice or a Coroner, and to copies of examination or cross-examination, upon paying a certain rate per folio. The ninth clause gave to the Supreme Court a power of correcting all errors in point of form or mistakes not affecting the substantial merits of the case, and prohibited the discharge of a prisoner by Habeas Corpus, for any cause of this nature. As a counterbalance to this provision, however, the twelfth clause gave a summary and a simple means of relief in cases of erroneous orders or convictions. An inexpensive application to the Supreme Court or to a

Judge of that tribunal, was the means provided for this purpose. The effect of these changes in the law, in point of fact, was to put an end to all opportunities of deriving advantage from mere technical objections and quibbles, and to ensure the administration of justice according to the plain facts and merits of each case. The first point which was defined in the embodied Acts of Parliament was the power and duties of the Magistrate as to the issue of a summons or a warrant, and forms were given for all cases of this kind. The eighth clause defined the cases in which it was necessary the original information should be taken on oath or affirmation, and in which mere parol and unsworn testimony or complaint without writing would be sufficient. It also provided that no objection as to want of form should be of any force in such cases. The whole course of proceedings in these cases was distinctly laid down so clearly as to render any error almost impossible. When there was any variance which, in the opinions of the Justices, might have misled the party charged, a power was given to them to remand the case until the defect could be remedied. Powers for compelling the attendance of witnesses, and for summarily punishing any person who might refuse to be examined, were also given. The seventeenth section of the same Act would change very materially the mode of taking depositions. It had been the practice hitherto to have only what was considered the substance of a witness's evidence, or a prisoner's statement reduced to writing; but this clause rendered it compulsory upon the Magistrate to have the whole of the evidence taken down, and in the first person. It was not, of course, meant that all which was said on such occasions should be placed in writing, but all that was pertinent to the case should be recorded upon the depositions, and that in the very terms used. The Judges had, indeed, entertained very considerable doubts whether the statements and admissions of a prisoner were even admissible at all as a matter of evidence, unless they had been written down in the first person, and in the very terms used, no matter whether the latter were clear and intelligible or not. A power was given to the Justices to sit with closed doors in cases where they were acting ministerially, and where they conceived that the ends of justice would be furthered by this course; but whenever they acted judicially, the place where they sat was to be deemed an open Court, and defendants were to be allowed to avail themselves of the advocacy of a barrister or

> attorney if they thought fit. Power was given to a Justice to remand upon warrant, and to admit to bail even after committal. Full directions were given as to proceedings under the powers of summary jurisdiction possessed by the Justices, and it was optional with them to adopt the forms of conviction given by this new Act in preference to those provided by other statutes by which they possessed these powers. Directions and forms of every nature, indeed, were contained in this Act so plain, that it was almost impossible to err. The Magistrate had beside, a power of appealing to the Supreme Court for an expression of its opinion upon any point whereon he entertained a doubt. He might stay the progress of the case until he obtained this opinion, and provided that he acted upon it, he was not liable to any action. A gentleman of the legal profession, thoroughly competent to the task, was about, he understood, to prepare a synopsis of these enactments, and he hoped when this was done, that not only every member of the profession, and every magistrate, but every constable would procure a copy, as it was important that the knowledge of their provisions should be widely diffused."

His Honour's address is reported in the preface to Nicholls: Justices Acts of New South Wales published in 1851.

It would be a laborious task to explore in detail the reforms introduced by Jervis. But their importance can hardly be exaggerated; matters of procedure are of vital importance so far as the fair and efficient functioning of the lower courts is concerned. In illustration two subjects may be considered together; time limits upon the institution of proceedings and the power to amend defective charges or complaints. It is enlightening to trace Jervis's reforms into the twentieth century.

The common law never developed any doctrine of time limitation for bringing criminal proceedings. Time does not run against the Crown. So far as criminal trials before a jury are concerned the result has been deplorable delay in

the hearing and disposal of criminal trials all over Australia. When Jervis prepared his legislation he found many separate instances of statutory time limitations in respect of specific summary offences. He decided to introduce a standard time limitation of six months. Today Section 26 of the Tasmanian Justices Act 1959 is still essentially the same as it was when its ancestor was passed in 1848.

> "S.26 . . . . . unless some other time is limited for making complaint by the law relating to the particular case, complaint must be laid within six (6) months from the time when the matter of complaint arose."

With some variation with regard to time a similar provision exists in every other Australian jurisdiction. No doubt Jervis did not foresee the loophole in his provision which merely requires the <u>institution</u> of proceedings within six months by the laying of a complaint and not their <u>termination</u> within six months. To that extent Jervis did not achieve what he intended. By modern standards Jervis's drafting was not first rate. However, there can be no doubt the provision was intended to secure the prompt hearing and disposal of summary proceedings.

As to the amendment of defective complaints Jervis drafted a somewhat obscure provision. There is no point in quoting it, it is reproduced in almost the same language in Section 100 of the English Magistrates Court Act of 1952 as follows:-

> "(1) No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the

prosecutor or complainant at the hearing of the information or complaint.

(2) If it appears to a magistrates court that any variance between a summons and a warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance the court shall, on the application of the defendant, adjourn the hearing."

Jervis stopped short of conferring an express power of amendment. However, the modern view is that a power of amendment is implied.

"Those extremely wide words, which on their face seem to legalise almost any discrepancy between the evidence and the information, have in fact always been given a more restricted meaning, and in modern times the section is construed in this way, that if the variance between the evidence and the information is slight and does no injustice to the defence, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practise is for the court to require the prosecution to amend in order to bring their prosecution into line. Once they do that, of course, there is provision in Section 100(2) whereby an adjournment can be ordered in the interests of the defence if the amendment requires him to seek an adjournment."

Per Lord Widgery CJ Garfield v Maddocks 1974 QB/7 at p 12.

What if there is an application to amend an information which is defective when the application is made after the expiration of the six months time limitation period? The modern English view is that an information may be amended in such circumstances provided there is no injustice done to the defence. The matter is within the

discretion of the court.

> "In my view the six months limitation provision in Section 104 of the Magistrates Court Act 1952 is to ensure that summary offences are charged and tried as soon as reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by magistrates throughout the country of the summary offences brought before them to be tried. It is in this context that their power to permit the amendment of an information under Section 100 referred to by Lord Widgery CJ in Garfield v Maddocks 1974 QB 7 12 is to be exercised. It must be exercised judicially. It must be exercised so as to do justice between the parties. But where it can be so exercised, where an information can be amended, even to allege a different offence, so that no injustice is done to the defence, I for my part see no reason why the justices should not so exercise it even though the amendment is allowed after the expiry of the six months period from the commission of the alleged offence."
>
> Per Hay J Regina v Newcastle-upon-Tyne Justices ex parte John Bryce (Contractors) Ltd. 1975 1 WLR p 517.

In the Tasmanian Justices Act of 1919 the drafting of Jervis's provision with regard to defective complaints was substantially improved.

> "27. Want of form or variance in warrant etc. No objection shall be taken or allowed to any complaint or to any summons or warrant to apprehend a defendant issued upon any complaint, for any alleged defect therein, in substance or in form, or for any variance between it and the evidence in support thereof, and the justices present, and acting at the hearing, shall at all times make any amendment necessary to determine the real questions in dispute, or which may appear desirable."

> "28. Amendment - If any such defect or variance appears to the justices to be such that the defendant has been thereby deceived or misled, they may, and at the request of the defendant shall, upon such terms as they think fit, adjourn the hearing of the case to some future day, and in the meantime may suffer the defendant to go at large or may commit him to some gaol, or discharge him upon recognisance for his appearance at the time and place to which the hearing is adjourned."

An express power of amendment was not conferred, Jervis had left it to be inferred as a matter of necessary implication. However, the Tasmanian draftsman did not expressly confer a power to dismiss the complaint in lieu of amendment. This was no doubt implied.

The Tasmanian provision did confer an express power of amendment by justices in order to determine the real question in dispute. But did it confer power to amend a complaint which failed to disclose an offence?

The question was considered by the Full Court of Tasmania in Davies v Andrews 1930 Tasmanian Law Reports 84. The respondent was charged upon a complaint -

> "That on January 18, 1930, William Andrews of No.35 Newdegate Street, Hobart, was the owner of the said premises No. 35 Newdegate Street aforesaid whereon a horse was kept and a stable was provided and used for the accommodation of such horse, the said William Andrews not having obtained a licence, contrary to By-Law No. 27 . . . ."

By-Law No. 27 of the Hobart City Council provided -

> "No stable shall be used for the shelter or accommodation of horses until a licence has been obtained by the owner or occupier of the premises on which the same stands."

At the hearing before a police magistrate the evidence was that the respondent was the owner and occupier of the premises in question and in fact used them without a licence. It was objected that the complaint was bad in that it did not state or imply that the respondent used the premises as owner or occupier. An application to amend the complaint was rejected and the complaint was dismissed. On appeal the Full Court was scathing in its denunciation of the complaint.

> "The liberty of the subject still is a matter of some concern to the law, and I can see no principle of law or justice, which requires it to be laid down that prosecutors and complainants need not go to the trouble of ascertaining the law and the facts, and, when they charge others with offences, take the trouble to state their facts in such fashion, that their charges shall disclose matters with which the Court whose intervention is sought has power to deal. The right to drag a man to Court to answer a charge involving fine or imprisonment is a right to be exercised intelligently and responsibly, and it still is the duty of the Court to be much more careful to give their just rights to defendants, than to establish a right for prosecutors to be careless and slovenly or even worse.
>
> In the end, to my mind it all comes to this - a complainant must either lay a charge of some offence known to the law or the justice has no jurisdiction to try the complaint. That in my opinion is the only sound rule. And it is based not only upon principles, centuries old and deservedly cherished, but also is in conformity with justice and common sense."
>
> Per Nicholls CJ at pp 88,89.

The dilemma which the Full Court considered may be simply stated. If a valid complaint is necessary to confer jurisdiction how may an invalid complaint be amended? Where is the jurisdiction to amend a nullity? This is the classic stance of the common lawyer to the amendment of criminal process.

The same problem was faced a few years earlier in South Australia in the case of Tregilgas v Howie (1926) SASR 123. In that case the Chief Justice of the Supreme Court of South Australia held that a complaint which disclosed no offence could not be amended after the statutory period of time limitation had expired. His Honour said:-

> "It is obvious that if the effect of an amendment would be to create a valid information or complaint for the first time after the statutory period for taking proceedings has expired, the amendment cannot be made."

His Honour's judgment necessarily involved a conclusion that the powers of amendment of an information or complaint in Sections 182 and 183 of the South Australian Justices Act could not be utilized to amend the complaint. In principle these sections were the same as Sections 27 and 28 of the Tasmanian Justices Act of 1919 founded as they were on Jervis's original provisions.

It would appear that as a consequence of the decision in Tregilgas v Howie, and such decisions as O'Connell v Lee (1922) SASR 320, the South Australian Justices Act was amended in 1931 by the insertion of a provision which now appears as Section 22 of the South Australian Justices Act. This provision was copied into the Tasmanian Justices Act by Section 24A of the 1954 amendments. It would appear that no other Australian jurisdiction has copied South Australia. It would seem that the 1954 amendment was intended to overcome the decision in Davies v Andrews (supra). The provisions which Tasmania copied now appear in Section 30(1) of the Justices Act 1959 as follows:-

> "30(1) Any complaint, summons, warrant or other document that is laid, issued or made for the purpose

of, or in connection with, proceedings before justices shall be sufficient if it -

(a) describes the matter of complaint with which the defendant is charged or of which he is convicted in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the complaint; and

(b) contains such particulars as will give reasonable information of the nature of the matter complained of."

The 1931 amendments in South Australia ought to have struck Tregilgas v Howie (supra) a death blow. On the contrary the case is still alive and flourishing; the amendments designed to overcome it seem never to have been argued or even considered judicially in South Australia. See Fred Wakefield Pty. Ltd. v Dowd (1980) 20 SASR 388 and Robbins v Horton (1980) NTR L.1. In Tasmania a former Chief Justice of the Supreme Court has referred to the decision in Tregilgas v Howie with apparent approval. See Morrisons Tourist Services Pty. Ltd. v Barnett (unreported judgment No. 9 of 1968). Moreover in South Australia another test has been developed for deciding whether a complaint is capable of amendment. This is the "pith and substance" test first enunciated by Chief Justice Napier in Crafter v McKeogh (1943) SASR 371. According to this test a complaint may be amended even if an essential ingredient is missing but only if it remains the same in "pith and substance". The test would seem to be objectionable if only upon the ground that it is a judicial invention and a substitution for the language of the statute itself. Nevertheless, the test is still good law in South Australia. See Reedy v O'Sullivan (1953) SASR 114 and O'Hair v Killian (1971) SASR 1.

The rest of Australia and England have passed South Australia by. Apart from Tasmania no other jurisdiction copied the 1931 South Australian amendments. The legal genius of Sir Owen Dixon solved the dilemma posed in Tregilgas v Howie and Davies v Andrews (supra).

> "Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. Some Victorian cases will be found discussed by Cussen J in Knox v Bible and the matter is very fully examined by Clark J in Davies v Andrews where cases from other jurisdictions are collected. Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. An offence may be clearly indicated in an information, but in its statement there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charges with any offence known to the law. Such a case may not be covered by the power of amendment."
>
> Broome v Chenoweth (1946) 73 CLR 583 at p 601.

These words of wisdom were echoed by Lord Parker CJ in Hutchinson Cinemas v Tyson (1970) 134 J.P. at p 202:-

> "It seems to me that one might find an information which was so defective, so fundamentally bad, that it could not be heard at all and the only proper course would be for justices to dismiss the information. At the other end of the scale there may be informations which are deficient in some minor particular, a misdescription of premises or date, where there could be no prejudice and where no amendment or further particulars are required at all. In between there are informations which are perfectly good as informations, albeit deficient, and can be cured not merely by a formal amendment,

but by the delivery of particulars to supplement their contents."

Outside South Australia there is no such thing as the "pith and substance" test. Assuming that the draftsman of the complaint can be seen to be at least attempting to allege some offence known to law, the question is whether an amendment can be made without undue prejudice to the defendant if necessary upon terms as to an adjournment.

The cardinal sin of the "pith and substance" test is that it ignores the purpose for which Jervis sought to confer a power of amendment, that is to avoid a miscarriage of justice. There is for example no evil necessarily involved in permitting an amendment from the allegation of one offence to another; often there is only a hair's breadth between saying a particular offence is stated in the alternative in a particular section or saying that a particular section contains two separate offences. Thus if offences are cognate to each other, then in the absence of injustice to the defendant, an amendment may be made on terms as to an adjournment if necessary.
Kennett v Holt (1974) VR 644.
Mitchell v Meyers (1955) 57 WALR 49.
Higgon v O'Dea (1962) WAR 140.

So also if an application is made to amend a complaint out of time, the proper approach is as stated in R v Newcastle-on-Tyne Justice (supra) and not according to the "pith and substance" test as applied in Fred Wakefield v Dowd and Robbins v Horton (supra). c.f. Hackwill v Kaye (1960) VR 632.

Cases such as Tregilgas v Howie and Davies v Andrews ought to serve as a reminder how lamentably Jervis's amendments

of 1848 have been misunderstood. Today it is generally appreciated (except in South Australia) that the guiding principle as to whether an amendment should be made or not depends esentially upon the question whether it can be effected without injustice. A considerable degree of discretion is thus necessarily vested in a court of summary jurisdiction. But Jervis intended more. The question is not merely a question of justice between two parties, but a question of justice for all the parties before the court. The remarks of the Court in Regina v Newcastle-upon-Tyne Justices (supra) are a refreshing reminder that Jervis intended the disposal of all summary offences within six months after their alleged commission. In the abstract an amendment may be made and an adjournment granted without causing injustice. Sometimes, however, it may be apparent that a prolonged squabble over a matter of criminal pleading may have been avoided with reasonable care. Prejudice to the parties may not exist but there may be grave prejudice to the witnesses, to other litigants, before the Court and the public generally. The criminal system at the level of summary jurisdiction is open ended; there is no limit as to the number of people who may be charged and brought before the Court. Therefore, it is entirely fitting that the Court ought to be able to exercise its discretion with regard to the amendment of complaints so as to require a standard of pleading consistent with the due disposal of business before it and the estimates of court time previously given by the parties.

The procedural reforms introduced by Jervis with regard to time limitation and the amendment of defective charges were designed to secure the speedy disposal of charges and eliminate undue technicality in the statement of charges and the particulars relating to them. Today the second

objective has been attained but the first objective has yet to be attained. Part of the reason is the obscure drafting of Jervis's provision. It has only recently been appreciated in England that Jervis did intend the disposal of all summary charges within six months after their alleged commission. See the comments of the court in Regina v Newcastle-upon-Tyne Justices (supra). See too Brentford Justices ex parte Wong (1981) R.T.R. 206 and 1982 Criminal Law Review p 593.

But there are deeper reasons. The legal profession and perhaps the community generally has always looked upon the exercise of summary jurisdiction over crime as an intrusion upon the right of trial by jury. There has been little understanding even by the legal profession that the extension of summary jurisdiction over crime in recent years has served to save the right of trial by jury. The delay in the hearing and disposal of criminal charges heard by juries in Australia would by now have become intolerable if it had not been for the extension in summary jurisdiction over crime everywhere in Australia. These extensions have been conceded reluctantly by the legal profession. They have not come about as part of a planned campaign to reduce delay in the courts. They have occurred as a last resort because no other alternative was available. These accretions to summary jurisdictions are continuing; if the institution of trial by jury is to be saved it is probably inevitable that summary jurisdiction over crime will continue to expand. See the Proceedings of a Seminar on Problems of Delay in Criminal Proceedings published by the Institute of Criminology Sydney University Law School in 1980. See too my review of the proceedings published in the Australian and New Zealand Journal of Criminology December 1981.

In spite of the fact that the basis of summary

jurisdiction rests upon statute, a bold judicial approach could have justified an interpretation of the powers of courts of summary jurisdiction to prevent an abuse of process. In particular this could have meant the recognition many years ago by judges of the superior Australian courts that courts of summary jurisdiction had power to strike out or dismiss complaints for summary offences which were so stale that they amounted to an abuse of the process of the court. However even today in every capital city in Australia the police may be found prosecuting complaints for offences several years or more old. Sometimes the delay has occurred because of deceit or obstruction by a defendant. Sometimes the delay has occurred because of faults in administration by the prosecution. The police like to "clear their books". What is still lacking is an authoritative judicial pronouncement in Australia that there is an implied power by courts of summary jurisdiction to treat cases of undue and unjustified delay as an abuse of process and act accordingly. There is a recent decision to the effect that every court has an implied power to act in accordance with the principles of natural justice: see McLachlan v Pilgrim (1980) 2 N.S.W. L.R. 422 at p 435. See too Connelly v Director of Public Prosecutions (1964) AC 1254 at p 1301 per Lord Morris, Ward & Kelly Summary Justice at p 623.

However since the courts have apparently been unable to understand the vision displayed by Jervis in 1848 it would be unrealistic to expect the courts, by a process of judicial interpretation, to devise a doctrine of time limitation for the institution of criminal process based upon the acknowledged power of any court to prevent an abuse of its own process. Only the legislature can fill the gap and create a coherent and workable system for limiting the time within which criminal proceedings should be instituted or terminated.

Until quite recently it could truthfully be said that none of the Australian Law Reform Commissions appeared to have devoted any of their attention to the problem of delay in criminal proceedings. However the year 1982 marked the long overdue formation of an Australian Institute of Judicial Administration. It is already clear that the Institute will give its early attention to the problem of delay in criminal proceedings and overcome the neglect of more than a century.

The framework of magisterial jurisdiction was built in England in the last century; chiefly by Sir John Jervis. It was copied in Australia. Today this English legislation of the last century still awaits critical appraisal in Australia.

COMMITTAL PROCEEDINGS

A. HISTORICAL INTRODUCTION.

The common law confers no right upon a person accused of a criminal offence to know what the evidence is against him before his trial begins. He has no right to inspect written evidence or witnesses' statements in the possession of the prosecutor. He has no right to inspect material exhibits in the possession of the prosecutor. He has no right to be informed even of the names of the witnesses to be called against him. He has no right to a pre-trial conference of any kind with the prosecutor, the magistrate or the judge.
See Wigmore Evidence Vol. 6 1850 3rd Edition.

Thus such pre-trial rights which an accused person possesses today, so far as the evidence against him is concerned, are based entirely upon statute. As is well known, in cases of indictable offences, an accused person is entitled to committal proceedings in all Australian jurisdictions. That is, he is entitled to hear the evidence against him formally taken on oath from witnesses in the form of depositions before a magistrate before he is called upon to take his trial. The Crown may avoid committal proceedings by the filing of an ex officio indictment, but this power is rarely exercised without the consent of the accused. [c.f. Barton v The Queen and anor. (1980) 147 C.L.R. 75]

Committal proceedings (as they are now conveniently termed) have an ancient origin and may be traced to the office of coroner.

> "They (coroners) originated at least as early as the year 1194. They were first appointed partly to keep a check on the power of the sheriff and partly to assist in keeping the King's Peace in country districts. They were keepers of the pleas of the Crown (custodes placitorum coronae), and though they were the King's servants, they were originally elected in the ancient county courts. By the Statute of Westminster 13 Ed. 1.c.10 (1272), it was enacted that none but lawful and discreet knights should be chosen. They acted in an honorary capacity for centuries. They represent the first important example of the English custom of requiring the unpaid services of county gentlemen in the administration of local affairs."

Barton & Anor. v Walker & Anor. per O'Brien C.J. 1979 NSW Supreme Court (unreported) 3rd supplement p. 301.

The coroner's inquest seems to be the earliest example of what we now call a committal proceeding. The Statute De Officio Coronatoris of 1276 (4 Edw. 1 st.2) which is still partially in force in Australia recites as follows in one of its main provisions:-

> "A coroner of our court the King ought to inquire of these things if he be certified by the King's bailiffs or other honest men of the country; first he shall go to the places where any be slain, or suddenly dead, or wounded, or where houses are broken, or where treasure is said to be found, and shall forthwith command four of the next towns, or five, or six, (i.e. the reeve and four men from each), to appear before him in such a place: when they are come thither the coroner upon the oath of them shall inquire in this manner, that is, to wit, if they know where the person was slain, whether it was in any house, field, bed, tavern, or company, and who they were.
>
> Likewise it is to be inquired who were culpable either of the act or of the force, and who were present, either men or women, and of what age soever they be, if they can speak or have any discretion, and how many soever be found culpable in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to gaol."

Justices of the Peace were appointed in the next century and, as Stephen remarks, it is singular that they also were not expressly appointed to inquire into the circumstances of the accusations of serious crime which came before them. However Stephen says it is likely that justices did in fact make a preliminary inquiry of some kind before they took steps to arrest or bail a suspected offender.
Stephen: History of the Criminal Law of England Vol. 1 p.219.

Thus Stephen suggests that the statute of 1554 which is the direct ancestor of committal proceedings (1 & 2 P.M. C. 13) was passed partly in order to regularise a practice which had grown up among justices without express statutory authority. The statute of 1554 also required coroners to put into writing the effect of the evidence given before them, transmit the evidence to the court of trial, and bind over the witnesses to appear at the court of trial.

Therefore in part at least the 1554 statute of Phillip and Mary may be seen as providing an orderly procedure whereby witnesses could be bound over upon their own recognizance in order to secure their attendance at the trial, and also a procedure whereby their evidence could be taken on oath and their depositions be transmitted to the place of trial. [Stephen (op.cit. p.219)] Clearly however the main purpose of the 1554 statute was to check abuse by justices of their power to grant bail. The preamble to the Act recites that justices

> "hath often times by sinister labour and means set at large the greatest and most notable offenders such as not be replevisable (bailable) by the laws of this realm; and yet the rather to hide their affections in that behalf have signed the cause of their apprehension to be but only for suspicion of felony whereby the said offenders have escaped punishment."

Justices failing in their duty to forward the depositions of witnesses to the place of trial were to be fined. Because the Act did not apply to London and other great towns where the risk of magisterial collusion with the accused was smaller; Stephen regards it as showing that the main purpose of the statute was to guard against magisterial abuse of bail. Also, the statute of 1554 was restricted to cases where bail was granted by justices; but since, (presumably), it was found to be an administrative success, it was followed in the succeeding year by 2 3 P & M C. 10 which applied to persons accused of crime and remanded in custody, in which case justices were equally obliged to take the depositions of witnesses, and bind them over to give evidence at the place of trial. The existence of these statutes itself demonstrates how frail was the administrative grasp of the Crown over criminal matters. Essentially the task of bringing criminal offenders to justice was seen as the responsibility of the wronged party or the private citizen and the extent of administrative supervision by the Crown was meagre indeed.

There was no question of the accused having access to the depositions or even knowing the names of the witnesses against him before

his trial. Stephen says as follows:-

> "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warrant, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into Court to be tried.
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> This is set in a strong light by the provisions of (1709, St. 7 Anne, C. 21 S. 14 quoted post, allowing a list of witnesses in treason). . . . This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the State trials held under the Stuarts, it did not occur to the Legislature that if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of Parliament that trials for political offences should not be grossly unfair; but they were comparatively indifferent as to the fate of people accused of sheep-stealing or burglary or murder . . . . (The prisoner) was not allowed as a matter of right, but only as an occasional exceptional favour . . . to see his (own) witnesses or put their evidence in order. When he came into Court, he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him."

Stephen: History of the Criminal Law 1. 225, 398.

As late as 1824 it appears to have generally accepted that an accused person ought not to have access to the depositions. In the case of Thurtell tried for murder in England in 1824 it appears that part of the depositions were reported in the Times newspaper before trial. Mr. Justice Park is reported as having made the following observations to the grand jury:-

> "These depositions he understood (for he repeated he knew nothing

of the fact himself) had already appeared very copiously and even with notes and comments in the public press. Now it appeared to him that the first fault (and he had no doubt it was most unintended, and in noticing it he did not mean to wound the feelings of any individual) - it appeared to him that the first fault originated with the magistrates in allowing any persons to enter into their private apartments for the purpose of taking notes of their proceedings. He held there was a vast difference between the inquisitorial and the judicial power of the magistrates; where the magistrate was acting judicially his conduct was as open to the inspection and judgement of the public as that of himself and that of his learned brothers on the bench; to such publicity he had no objection, for he could wish everything he said as a judge to be heard and fairly canvassed by the public. He knew he erred sometimes, because he was human, and nothing that was human could escape without error. But when a magistrate was acting inquisitorially, when he was taking an inquisition for blood, were these proceedings fit to be known and published to the world? He was bound to investigate and inquire - ought his inquiries and investigations to be conducted in a private or public manner. The statute law of the land prescribed the course to be pursued upon such an occasion for more than 200 years (269 years). There was a statute of Phillip and Mary which stated that depositions before magistrates should be taken in writing in order that they might be transmitted to the judges who were to try the offence under the commission of oyer and terminer for the county. He appealed to the experience of every gentleman who heard him, and he knew what his own experience as judge had taught him, whether the constant course was not to transmit them to the judge, taking care that the accused should not have an opportunity of seeing them. The prosecutor or his solicitor might have access to them, but not the party accused. For what would be the consequence if the latter had access to them? why, that he would know everything which was to be produced in evidence against him - an advantage which it was never intended should be extended towards him."

Stephen op.cit. pp. 227, 228.

It was not until the enactment of the Prisoner's Counsel Act of 1836 (7 Will 4. C. 114) that it was provided that the accused should be entitled to inspect the depositions before trial. No doubt the establishment of a regular police force in 1829 had much to do with the

passing of this statute. It was not until 1848 when Jervis' Acts were passed, that it was provided that the accused should be entitled to have a copy of the depositions (11-12 Vic. C.42 S.27). Later still in 1867, the "Russell Gurney" Act, (30 and 31 Vict. C.35), provided a right for the first time for an accused person to adduce evidence by calling witnesses. Jervis' Acts and the later English amendments were dutifully copied in the Australian colonies, so that the law in each Australian State and Territory is still basically the same, despite some differences in recent years.

It is clear that for many centuries justices really acted as policemen when collecting evidence in committal proceedings. Indeed in several ways they still act as policemen, part of their function is still to collect the evidence together in an orderly manner, perpetuate it by means of sworn testimony, and if necessary bind the witnesses over to attend the court of trial. However since 1826 justices have had an additional function, the duty of weighing the strength of the evidence in order to determine whether it is sufficient to cause the accused to stand his trial. The preamble to the Criminal Law Act of 1826 (7 George 4. C. 64) states as follows:-

> "That where any person shall be taken on a charge of Felony or suspicion of Felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible Evidence of the Fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner hereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody, until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her

> committal, or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them in either of such cases, to be sufficient ground for judicial enquiry into his or her guilt, the person charged shall be admitted to bail by such two justices, in the manner herein mentioned: provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same."

At the Australian Stipendiary Magistrates conference in Melbourne in June 1980 a Victorian magistrate, John Milton Dugan, delivered a scholarly paper under the title "The Standard of Proof in Preliminary Proceedings". It was his original suggestion that the 1826 Act held the key towards understanding the modern provision in the Australian jurisdictions with regard to the standard of proof necessary in order to commit a person for trial. I entirely agree with his conclusions and since his paper is unpublished except in the booklet which contains the papers delivered at the convention I set out his argument with some added comments of my own.

Notice the 1826 Act sets out three different circumstances:-

1. If the evidence supporting the charge raises a strong or probable presumption of guilt then the accused person shall be committed to prison.

2. If there is only one justice present and the evidence does not warrant a dismissal of the charge, but also does not raise a strong and probable presumption of guilt, then the justice can order detention of the accused until he can be brought before two justices.

3. If the accused is brought before two justices and the evidence does not raise a strong or probable presumption of guilt but is suffi-

cient to put the accused upon his trial then the accused may be admitted to bail. Notice the discretion on the part of the justices to hear evidence adduced by the accused.

The professed aim of Sir John Jervis was to introduce legislation consolidating the law relating to justices. The first Act which he introduced in 1848 (11 and 12 Vict. C. 42) was entitled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to persons charged with indictable offences". Section 25 of the Act reads as follows:-

> "When all the evidence offered on the part of the prosecution against the accused party shall have been heard, if the justice or justices of the peace then present shall be of the opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justice or justices shall forthwith order such accused party if in custody, to be discharged as to the information then under inquiry; but if in the opinion of such justice or justices such evidence is sufficient to put the accused party upon his trial for an indictable offence; or if the evidence given raises a strong or probable presumption of guilt of such accused party, then such justice or justices shall by their warrant commit him to the common gaol or house of correction."

Jervis provided elsewhere in that Act for the power to grant bail following committal proceedings, but retained the double standard of proof required in order to commit a person for trial, that is "strong and probable presumption of guilt" or evidence "sufficient" to put the accused upon his trial. Today all the Australian jurisdictions retain the double standard of proof; but quite unnecessarily since there is a general discretion in all jurisdictions to grant bail to persons committed for trial, (with a few odd exceptions such as in the case of persons committed for trial for murder in Tasmania).

The law was rationalised in England as long ago as 1952 but by that time the Australian jurisdictions had lost the urge to copy faithfully legislation introduced in the mother country. Section 7 of the English

Magistrates Court Act of 1952 states as follows:-

> "Subject to the provisions of this or any other Act relating to summary trial of indictable offences, if a magistrate's court inquiring into an offence as examining justices is of the opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused upon trial by jury for an indictable offence, the court shall commit him for trial, and if it is not of that opinion it shall, if he is in custody for no other cause than the offence under inquiry, discharge him."

Dugan, in the paper referred to, suggests as a model for all Australian jurisdictions the following provision which would in fact do no more than restate the presently existing law in clearer terms. I agree with his suggestion and find it unnecessary to repeat his thorough examination of the case authorities.

> "In a case in which the accused person does not call evidence, when all the evidence offered on the part of the prosecution is tendered, if in the opinion of the magistrate the evidence adduced is sufficient to put the accused person on trial for any indictable offence, he shall commit him for trial, and if he is not of that opinion, he shall discharge him. If the evidence adduced is sufficient to place the accused person upon trial, the requisite caution shall be given, then the accused person may elect to adduce evidence on his behalf, and when all the evidence for the prosecution and of the defence has been taken, then, if in the opinion of the magistrate, the evidence adduced is sufficient to put the accused person on trial for any indictable offence, he shall commit him for trial; and if he is not of that opinion, he shall discharge him."

The key word is of course the word "sufficient". The end result is similar to but not the same as the well known test laid down by the High Court in May v O'Sullivan (1955) 92 CLR 654 for determining whether there is a case to answer in criminal proceedings, that is whether there is a "prima facie case" or sufficient evidence to call upon the defendant to make a reply.

I return to consider further the 1826 Act. Notice the clear inference that justices had the power to actually dismiss a charge of an indictable offence where the evidence in support was clearly insufficient. For centuries following the passage of the 1554 Act of Phillip and Mary it was assumed that justices had no power to dismiss a charge of felony even if the evidence was clearly wanting. I quote from the fifteenth edition of Burn's Justices of the Peace volume 1 under the title "Examinations". Burn was the leading text book during the eighteenth century on justices. The fifteenth edition was published in the year 1785.

> "If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty, yet the justice shall not discharge him, but he must either be bailed or committed; for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without further trial."

Burn quotes as authority a work of the commentator Dalton published in the reign of King James the first. This commonly accepted view of the law among justices indirectly had an effect upon the settlement of Australia for it led to the overcrowding of gaols and this was patently one of the causes of Australian settlement. The historian Eris O'Brien has noted the contribution made by county magistrates in committing multitudes of persons for trial. He records that in 1794 of 1,060 prisoners tried at the Old Bailey 567 were released and in 1795 of 1,894 prisoners tried at the same court 845 were acquitted or discharged. Between 1809 and 1816 of 47,522 committed only 29,361 were convicted. O'Brien The Foundation of Australia p.84.

It was not until the case of Cox v Coleridge 2 D. & R. 86 decided in 1822 that there was a clear judicial pronouncement that justices did in fact have a discretion whether or not to commit a person for trial. Sir John Bayley said as follows:-

"I differ from those authorities which say that the magistrate has no discretion and that he is not to judge of the probability of the case, and of the credit of the witnesses who are brought before him to support a charge of felony. I think the magistrate has a right to exercise his own discretion in such cases and that he is bound to do it, and he ought not as it seems to me, to commit the party unless he thinks there is a prima facie case made out by witnesses whom he may think entitled to a reasonable degree of credit. But when that is the case, it is his duty to commit."

However in spite of Cox v Coleridge and in spite of the 1826 Act, the 26th edition of Burn's Justice of the Peace published in 1831 reads as follows so far as the test for committal is concerned:-

"If he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed or if the fact charged as a felony be in truth no felony in point of law, the justice of the peace may discharge him; or if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered him, and such like, for which, though there may be cause to bind him over for trespass, the justice may discharge him as to felony, because it is not felony. But if there be an express charge of felony on oath, against the prisoner, though his guilt appear doubtful, the justice cannot wholly discharge him, but must bail or commit him; and it is said that if a person be killed by another, though it be per infortuniam or even se defendendo, which is not properly felony, yet the justice ought not to discharge him for he must undergo his trial, and therefore must be sent to prison or admitted to bail.

And in modern practice though exculpatory evidence is received at the instance of the prisoner, and certified with the other depositions, unless it appear in the clearest manner that the charge is malicious, as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be innocent. The same observations will, for the most part, apply as to a party discharging a person accused of misdemeanour."

Burn's comments illustrate how old fashioned ideas in the law tend to persist without statutory intervention. Even in 1831 it ought to have been obvious that it was mischievous to commit a person for trial where there was evidence of a sort in support of the charge but the

likelihood of conviction by a jury was too remote to justify committal. Irvine (Justices of the Peace 2nd Edition at pp. 41, 42) criticizes the dictum of Sir John Bayley in Cox v Coleridge, quoted above, as follows:-

> "But it is capable of being easily construed into meaning that whenever a prima facie case is made out the justice should commit. If this meaning be accepted as the rule, it would be useless to allow the prisoner to call witnesses, for supposing that even on very slender evidence a prima facie case was substantiated against the accused, the evidence of fifty or a hundred witnesses of the most impeachable character, proving the strongest defence should not, in that case influence the justice. But this is evidently not the intention of the legislature, which makes special provision for the discretion of the legislature to rest on something else."

Irvine has evidently overlooked that in 1822 the accused had no right to adduce evidence during committal proceedings, though no doubt as a matter of fairness the prosecutor did at times adduce evidence from his own witnesses which was in the favour of the accused. As I mentioned earlier it was not until the passing of Russell Gurney's Act in 1867 that the accused was given this right to adduce evidence from his own witnesses in reply.

During the last century the Australian colonies each copied the mother country by introducing paid police forces. Thus in 1848 when Sir John Jervis introduced his monumental Indictable Offences Act (11.12 Vic. C. 42) the need for committal proceedings so far as the Crown was concerned had partly disappeared. The police had taken over the task of receiving complaints, interviewing witnesses and interrogating the accused. No doubt Jervis was aware of this but he made no mention of it. His professed role was to consolidate the law and not to change it. Therefore without any apparent intention or discussion by the legislators the fundamental character of committal proceedings underwent a radical alteration in the last century in England. This fundamental change in the nature of committal proceedings was faithfully reflected in all the Australian colonial jurisdictions, also without apparent consideration or dis-

cussion by the colonial legislatures. The first change of any importance did not take place until 1963 - in Tasmania.

B. THE LAW TODAY

Legislation giving the defendant the option of avoiding committal proceedings was first introduced in Tasmania in 1963. Since then the Tasmanian example has been copied elsewhere. The Australian law has been carefully analysed by Dr. John Seymour in his research study under the title "Committal for Trial" published by the Australian Institute of Criminology in 1978. In this admirable study Dr. Seymour has analysed Australian legislation with regard to committal procedures and has compared the law in England, New Zealand, the United States of America and Scotland. The work is essential reading for any future projects of law reform in this field. It is unnecessary for me to cover the same ground as Dr. Seymour but there are some comments I wish to make drawn from my own experience as defence and Crown counsel and as a magistrate.

Until recently it was assumed that the Crown had always had the power of avoiding committal proceedings by the filing of an ex officio indictment. This assumption is reflected in the criminal codes of Queensland, Western Australia and Tasmania. [See Barton v Walker and Anor. per O'Brien C.J. 1979 NSW Supreme Court (unreported).] However the High Court of Australia has held in the case of Barton v Anor. v The Queen v Anor. that prima facie it is unfair for the Crown to proceed by way of ex officio indictment without committal proceedings, and in the last resort it is for the court of trial to say whether the charges should proceed or not. See (1980) 147 C.L.R. 75.

The Tasmanian Criminal Code expressly confers power upon a Crown law officer to avoid committal proceedings by the filing of an ex officio indictment. However the power would appear to have been rarely exercised in any jurisdiction without the consent of the defendant.

Some twenty-five years ago the practice of filing an ex officio indictment with the consent of the defendant arose in Tasmania. The reason as I recall was that counsel for the defendant wished to avoid the delay and expense involved in committal proceedings and yet also wished to avoid committing his client to a plea until he had the opportunity of reading the statements of witnesses for the Crown. With the sanction of the Solicitor General, these proofs of evidence were duly supplied, an ex officio indictment was filed, and the defendant was as he wished arraigned for plea before a judge of the Supreme Court as soon as possible. The same procedure was followed in other cases, particularly in cases involving the fraudulent misappropriation of trust funds involving voluminous evidence. Eventually, the Solicitor General, at the time the late D.M. Chambers Q.C. (later to become a judge of the Supreme Court) requested the preparation of legislation in order to regularise the practice which had grown up. The Tasmanian Justices Act was accordingly amended in 1963 (Act 33 of 1963). Since then the Tasmanian example has been copied elsewhere in Australia (except for New South Wales) though there are differences in detail. Many other jurisdictions derived from English law have copied the Tasmanian example; England has also done so though without any acknowledgement to Tasmania as the leader in this field. This is perhaps excusable after so much copying of English legislation in Tasmania since the first settlement.

This "hand up brief procedure" as it has come to be known does not accurately describe the Tasmanian procedure, nor indeed does it correctly summarise the essence of the new procedure anywhere else. It is essentially a procedure adopted with the consent of the defendant. The purpose is to save the expense inconvenience and delay of committal proceedings. Under the Tasmanian system a defendant chaged with an indictable offence is, on his first appearance, informed of his rights in detail by the presiding magistrate. There is a statutory requirement that he be informed of the nature of the charge, his right to an adjournment, and the other options available to him; including his right to dispense

with committal proceedings. A defendant will usually take advantage of his right to an adjournment, for say a week or two, in order to consider the exercise of his options; but he may, if he insists, plead guilty or not guilty at his first appearance. If he pleads guilty he will, without further ado, be committed for sentence to the Supreme Court, unless the charge is one with regard to which the defendant may be dealt with summarily at the defendant's option. If he pleads not guilty, the defendant has the right to exercise any option he may have for the case to be heard and determined summarily, at some future time. He also has the right to determine at once if he requires committal proceedings, or if he is content to be committed for trial to the Supreme Court forthwith; upon the undertaking of the Crown to supply him with written proofs of evidence in due course.

A defendant will, however, usually require an adjournment to consider his rights; and in order to assist him, the practice has arisen for the prosecution to supply the defendant, or his counsel, with proofs of evidence against him during the adjournment. Thus at the defendant's next appearance before the court he will have the choice of the following courses:-

1. Committal for trial forthwith without the need for committal proceedings.

2. Conventional committal proceedings retaining all rights including the right to submit that an order for committal for trial should not be made.

3. Requiring certain named persons to attend court, give evidence and be subject to cross-examination whilst not disputing that an order for committal should be made.

As counsel for the Crown for some years up to 1963 I was closely involved with the changes which took place and in fact assisted in

drafting the amending legislation. A previous Attorney-General for Tasmania (E.M. Bingham, Q.C.), who was then a Crown Prosecutor, was also directly involved. The main purpose was, and still is, to save the expense and delay of committal proceedings provided the defendant wishes to dispense with such proceedings. Although I am not aware that any accurate figures are kept, my estimate is that in the greater Hobart area over three quarters of defendants make an option to dispense with conventional committal proceedings. It seems appropriate to pause and ask why this is so.

I discard at once any suggestion that this is due to a lack of proper legal representation and advice. It is possibly true that a higher proportion of legally represented than unrepresented defendants choose committal proceedings. However most defendants are represented by counsel in cases of indictable crime. A high proportion of committal proceedings collapse at the last moment with the defendant's legal representative advising of a change of election for the supply of statements. The reason is often the late delivery of proofs of evidence of the witnesses prior to committal proceedings which presumably make it plain to counsel that committal proceedings are unnecessary.

In my opinion the most important reason for the lack of popularity of committal proceedings is that they do not offer the prospect of any particular advantage to a defendant. In jurisdictions such as New South Wales and Victoria the delay in disposing of criminal trials before a jury for defendants on bail is commonly between one and two years (measured from the date of the charge to the date of trial). In these jurisdictions the prospect of delay offered by committal proceedings must be very attractive to defendants, provided of course the defendant has secured bail. There is always an enhanced chance that essential witnesses will be unavailable at the trial if lengthy delays occur. Moreover even if a defendant is eventually convicted, his good behaviour in the intervening period will often make the administration

of a severe sentence by the judge peculiarly difficult. Experienced defendants and their counsel well understand this. On the other hand the existence of further, but as yet unproved, charges in the intervening period, will be regarded as irrelevant. Indeed it will be regarded as an impropriety by Crown counsel even to mention such charges. Moreover defence counsel may very properly take advantage of the law's delays by advising his client to plead not guilty even though his client privately admits his guilt to his legal advisers. It is completely proper and ethical for defence counsel to advise his client that he is entitled to put the Crown to proof. There is no obligation on the part of a guilty defendant to plead guilty.

Except on rare occasions there never have been delays in jury trials in Tasmania sufficiently great to make committal proceedings particularly attractive. "White collar" crime is probably a more popular subject of committal proceedings than other categories of crime but when these crimes do come before Tasmanian courts they appear to be of much less complexity and appear to be disposed of much more expeditiously than in the larger States. This is of course not surprising having regard to Tasmania's smaller population and isolation.

Criminal procedure and in particular committal proceedings have not been the subject of much attention by law reform commissions and committees of enquiry in Australia. However in 1975 the Criminal Law and Penal Methods Reform Committee of South Australia published a notable report which deserves to be better known. The Honourable Justice Roma Flinders Mitchell was chairwoman of a distinguished committee. I quote from pages 71, 72 and 73 of the Third Report relating to committal proceedings.

> "The purpose of committal proceedings is two-fold. Primarily, it vests in the justice hearing the committal proceedings the duty of deciding whether there is sufficient evidence against the accused to put him upon his trial; thus, the justice replaces the grand jury whose duty it formerly was to decide

whether there was a true bill presented against an accused person. Although the justice has the primary duty of deciding whether the person charged should be committed for trial, his decision is not binding upon the Attorney-General who may decline to prosecute if he is of the opinion that there is no reasonable ground for putting the person upon his trial for any offence whatsoever. In these circumstances he enters a nolle prosequi. On the other hand the Attorney-General may elect to prosecute someone whom the justice has not seen fit to commit for trial. It has come to be recognised as the second purpose of committal proceedings that they give to the accused full notice, not only of the charge against him but also of the evidence which will be called to support the charge. For both purposes it could be argued that there should be full cross-examination of any person whom the accused sees fit to cross-examine. The result is that sometimes witnesses are required to attend for lengthy periods of time both in the lower court upon the committal proceedings and in the higher court upon the trial of the accused. On the latter occasion they may be cross-examined in detail about minor discrepancies in what they have said in the lower and in the higher court, although the wise counsel realizes that the jury may not be impressed by concentration upon minor discrepancies.

The Public Interest

While it is axiomatic that no accused person should in any way be impeded in his proper defence, it is desirable that those who are called upon to give evidence in criminal proceedings will not be so harassed that they, and others to whom they relate their experience, may decide in future to turn a blind eye to any apparent breach of the criminal law. We think that, to some extent, the purpose of committal proceedings has become confused. Cross-examination to show that a material witness is lying or is mistaken, or that the evidence of several witnesses is so contradictory that no reliance can be placed upon them or any of them, may lead the Attorney-General to decide that there is not sufficient reliable evidence against an accused person to put him on his trial. The difficulty is to draw the line, which counsel may not be willing himself to draw, between what is essential cross-examination and what is merely a fishing expedition to hook sufficient red herrings to lay before the jury at a subsequent time. A justice certainly has a discretion to disallow cross-examination which may appear to him to be vexatious and not relevant or questions which affect only the credit of the witness. We think, however, that it might be preferable that the justice should have the right to decide,

> in the case of committal proceedings, firstly whether the witness shall attend for cross-examination, and secondly whether cross-examination should be limited to any particular issue or issues. Witnesses whose evidence is vital to the prosecution case should always be made available for cross-examination upon request, but in the case of a witness whose evidence is peripheral to the main issues the justice may require the defence to justify a request for his attendance for cross-examination.
>
> Recommmendation with Respect to Attendance of Witnesses at Committal Proceedings
>
> We recommend that no witness for the prosecution who has made a statement and sworn an affidavit verifying it shall be required to attend court upon the preliminary hearing of an indictable offence or to give evidence unless the presiding justice, in the exercise of his discretion, orders him to attend and give evidence."

The suggestion that the compelling of witnesses to attend committal proceedings should ultimately lie within the discretion of the presiding magistrate is clearly sound. A defendant should be required to show cause before minor witnesses are compelled to attend court. Moreover in some cases at least witnesses of major importance ought not to be compelled to attend court at all and give evidence in preliminary proceedings. In some jurisdictions, for example in Victoria, limitations have been placed upon the right to cross-examine complainants in cases of rape and attempted rape. Rape Offences (Proceedings) Act 1976. There is no logical reason why all alleged victims of sexual crime, and indeed all alleged victims of any crime, and all witnesses, ought not to be protected from the need to give evidence in appropriate cases. Moreover there never has been any legal requirement that the prosecution was bound to call all its witnesses at committal proceedings. The obligation of the prosecution is simply to furnish evidence at a committal "sufficient" to put the defendant on his trial. This principle was affirmed in the case of R v Epping and Harlow Justices Ex Parte Massaro (1973) 1 All E.R. 1011. That case was followed in South Australia in the case of Re Van Beelen (1974) 9 SASR 163 and in New South Wales in the case of Maddison

v Goldrick (1975) 1 N.S.W. L.R. 557. The issue would appear relatively well settled.

Notice that the South Australian committee drew attention to the practice of counsel cross-examining witnesses on matters of minor detail with the hope that eventually discrepancies can be demonstrated to the jury between the evidence of the witness at the trial and his deposition. This practice has at times distorted the process of jury trial. The practice at present in all jurisdictions is for the witnesses' evidence to be typed during committal proceedings by a court typist. Only rarely are questions and answers faithfully reproduced. In practice the typist will often edit the evidence of the witness by incorporating the question and answer together. An astute magistrate will no doubt do his best to see that the deposition is a faithful record; nevertheless in practice there are bound to be discrepancies of a minor nature between the later oral evidence of the witness at the trial and the evidence contained in his deposition. This state of affairs has distorted many a jury trial and still does. Much time today in Australian criminal jury trials is simply wasted owing to the endeavours of defence counsel to demonstrate discrepancies of a trivial nature between the evidence of the witness and his deposition. This is a distortion of the criminal trial process because since police forces were instituted in each jurisdiction, committal proceedings have become redundant as a means of perpetuating the evidence of a witness. The most reliable recollection of a witness as to an event is of course likely to be as soon after the event as possible. Similarly the most reliable written record of a witness's recollection of an event is likely to be the statement he made to the investigating police officer, and not his deposition, usually recorded months after the event. One beneficial and unexpected result of the Tasmanian 1963 amendments is the change which has taken place in jury trials. In cases where the defendant has elected to be supplied with statements, the attention of the court is necessarily confined to a written statement of the witness's evidence, which is usually a copy of the witness's state-

ment made to the police. This is clearly a much more reliable method of testing whether the recollection of the witness in court is accurate and reliable. The cause of justice can only be enhanced if defence counsel is encouraged to cross-examine on this statement rather than upon a stale deposition.

There is another reason, equally as important, for giving a witness's original statement made to the police special prominence at the trial. Most defended jury trials involve an attack on the police because in most defended cases the Crown is seeking to tender in evidence an alleged confession made by the accused to the police. Consider for example the most common crimes of burglary and stealing. Most such crimes are solved, (if they are solved at all), because of information received by the police from informers. If a confession is obtained from the suspect he is of course charged. As is well known many cases involving alleged confessions to the police are later hotly disputed. In fact cases involving alleged police confessions are the most prominent cause of delay and difficulty in the criminal trial process at the present time in any jurisdiction. If there is any prospect of arriving at the truth of the matter, it is ordinarily essential to ascertain what information as to the factual circumstances of the crime was in the possession of the interrogating police officers at the time of the alleged confession. Thus the original statements made by the witnesses to the police are often of crucial importance. Sometimes for example the complainant in a burglary case makes a mistake or omission in his original inventory of goods stolen from him. When the suspect is interviewed he may, and often does, correct the householder's mistaken inventory. The complainant will usually be prepared to correct his mistake when he gives evidence at the committal proceedings or at the trial. Naturally defence counsel is not in the least interested in throwing this kind of light on the alleged confessional evidence and indeed he has no obligation of any kind to assist the Crown in proving its case. In such circumstances the rules of evidence ought to facilitate counsel for the Crown fully exploring the

factual knowledge in the possession of the police at the time of the alleged interview. In practice the rules of evidence are not sufficiently flexible to permit the ready introduction of such evidence. Without embarking upon a technical exposition of the rules of evidence it is sufficient to state that a good deal depends upon the nature of the cross-examination by defending counsel. In practice the jury is usually unable to come to grips with the factual basis which underlies a dispute as to whether a police confession is genuine or not. It is probably fair to add that in cases where there are indications that the confession has been concocted, for example where the witnesses' mistakes are reproduced in the alleged confession, counsel for the defence has in practice a very much better opportunity of demonstrating this to the jury. Even so the existence of depositions will sometimes serve to conceal the original witnesses' statements. Defence counsel is usually loath to call for the production of original statements at the trial. The fact is that a prominent obstacle which impedes the determination of the truth of a charge at the trial is often the very fact that committal proceedings have taken place. Furthermore for the reasons I have suggested it is basically unsound to make the depositions of a witness the primary written source of his evidence at the trial.

C. SUGGESTIONS FOR FUTURE REFORM

Although all Australian jurisdictions (except for New South Wales) have given an accused person the right to dispense with committal proceedings the result has been a considerable variance from one jurisdiction to another. Basically it is desirable that the adversary system should remain the same everywhere throughout Australia.

My suggestion is that the recommendations of the South Australian Criminal Law and Penal Methods Reform Committe made in 1975 are basically sound. Provided a witness has made a statement on oath neither the Crown nor the defendant ought to have the right to examine a witness

on oath in preliminary proceedings. The parties should be required to show adequate cause and the decision should be within the discretion of a magistrate. He should if he sees fit have a discretion to cause any or all witnesses to be summoned, or alternatively either to discharge the defendant or commit him for trial on the written evidence before him. There ought to be a power conferred upon the magistrate to confine cross-examination particularly as to credit within proper limits. The introduction of such a procedure would help to ensure that the Crown case is substantially ready for trial when the defendant is committed for trial. It would in turn help to lessen the serious delays which are presently occurring in the disposal of trials before a judge and jury in many jurisdictions in Australia.

It has become popular for counsel to interrupt the course of committal proceedings by a resort to the prerogative writ. The remedy lies with the courts of superior jurisdiction in ensuring that such proceedings are disposed of expeditiously. Usually only wealthy defendants can afford such proceedings and secure the benefits of the delays in the administration of justice hitherto involved.

The decision of the High Court in Barton v The Queen (1980) 147 C.L.R. 75 has made it impossible to bypass committal proceedings in the Australian common law jurisdictions by the filing of an ex officio indictment. Even in the code jurisdictions the decision casts an element of doubt upon the power to file an ex officio indictment. With respect the decision was unduly conservative and unsound; in his dissenting judgment His Honour Mr. Justice Murphy expressed the better view. So too did His Honour Mr. Justice O'Brien in his monumental judgment in Barton v Walker in 1979 (unreported). This judgment is a mine of information for the legal scholar.

However, in the long run perhaps the conservative judgment of the High Court will provoke legislative amendment in the manner suggested.

That is where a defendant insists upon committal proceedings he should be denied the opportunity to waste public time and money by insisting that witnesses be called unnecessarily. Secondly magistrates should be given clear power to prevent lengthy or vexatious cross-examinations.

Finally, where multiple charges are concerned the magistrate ought to have power where necessary to "split" the charges to ensure orderly disposal and prevent undue delay. For example in the recent Greek conspiracy case (quite apart from the merits of the case) the Commonwealth prosecution plan would appear to have been quite unrealistic in terms of public time and money.

JUVENILE CRIME AND JUVENILE WELFARE

"I would there were no age between ten and three and twenty; or that youth would sleep out the rest, for there is nothing in the between but getting wenches with child, wronging the ancientry, stealing, fighting."

Shakespeare: A Winter's Tale, Act III.

INTRODUCTION

In recent years there has been a remarkable surge of public and official interest in the welfare of the young. Indeed, so many governmental enquiries have been instituted with regard to young people over the past decade that it has been said to have become a national industry. One notable report was the Australian Law Report Commission Report on Child Welfare (Report number 18) published in 1981. The Commissioner in charge of this outstanding report was Dr. Seymour. Although this report deals with the reform of the law in the Australian Capital Territory it is so thorough and comprehensive that it has a national significance. Dr. Seymour also convened a working party which prepared a paper on juvenile justice for the Sixth United Nations Congress on the prevention of crime and the treatment of offenders which was held at Caracas in 1980. This paper was published by the Australian Government Publishing Service in 1979. It contains an authoritative summary of the law in each Australian jurisdiction with regard to juvenile offenders and children in need of care and protection. There is an excellent bibliography providing much needed details of government enquiries and other published material in Australia relating to juvenile justice.

In December 1982 the Victorian Government set up the Child Welfare Practice and Legislation Review Committee. The chairman of the committee was Dr. Terry Carney. The committee was required to provide a blueprint for the development of child and family welfare services in Victoria and to draft the necessary

legislation. The report of the committee was published in 1984. This too is an outstanding report and deals with all the major problems relating to juvenile welfare.

I have had the advantage of visiting children's courts in all the Australian capital cities except Darwin. I have presided over children's courts in almost every locality in Tasmania during the last fourteen years. Several years ago I was a member of a committee set up by the Minister for Social Welfare to review the provisions of the Tasmanian Child Welfare Act 1960 which presently regulates proceedings in Tasmanian children's courts. Our report recommended changes in the law which have yet to be implemented. Incidentally, our report recommended that the children's court be renamed the children and young persons' court in order to stress the important difference between younger children and older youths.

There would seem to be little point in detailing the differences in the child welfare legislation in each Australian State or Territory. Rather it is proposed to address attention to what appear to be the main problems in this jurisdiction. Before doing so it is appropriate to record that the centenary year of the first children's court is approaching. South Australia set up its first children's court in 1889 and has some claim to the honour of having set up the first children's court in the world. In succeeding years other Australian States set up their own children's courts. The intention was undoubtedly that children should be dealt with more leniently than adult offenders. Lynne Foreman records (Children in Families published by the Australian Government Social Welfare Commission 1975, p 18) that in 1896 two children, aged five and seven years, were gaoled at Pentridge in Melbourne when their parents failed to pay a fine for their children's assault on another child. Children were still imprisoned in hulks moored off Williamstown at the time of the passing of the first Children's Court Act in Victoria in 1906. Lynne Foreman suggests (op.cit.

at p 19), that the legal basis of juvenile courts probably originated in the transplant of the doctrine of parens patriae from the English equity courts. However this seems an unnecessarily sophisticated explanation; the felt need then was (and still is) to separate offending children from adults and treat them with lenience and sympathy. The cost to each State was trifling. Until quite recent times honorary lay justices performed the bulk of the work in children's courts. The courts were (and still are) usually held in ordinary magistrates' courts. Originally the chief cost to the State was no doubt little more than the cost involved in setting up penal institutions and homes for young persons. Basically the children's court is the same as a magistrate's court which deals with adults; the law applied and the rules of evidence have always been basically the same.

What then is or should be the main distinguishing feature of the children's court?

A. The Family and Social Welfare Policy

It should not be forgotten that the children's court should be regarded as part of the general policy of the government towards the family. In our report to the Tasmanian Minister for Social Welfare several years ago we said as follows:-

> "The review has occurred at a time of substantial appraisal and re-assessment of social policy development and social welfare services in this country. This consciousness in 'social welfare' began with the Henderson Commission of Enquiry into Poverty and the number of reports which followed from that enquiry. There were a number of social policy initiatives at the national level including the establishment of the Australian Assistance Plan and regional councils for social development. Despite the later dismantling of the A.A.P. which included the Social Welfare Commission this enquiry and concern into social welfare has continued . . . . . In summary welfare services have been criticised regarding their failure to move away from an emphasis on remedial and institutional services to community based services which are

> aimed at preventing individual and family breakdown. Social welfare administrators are now endeavouring to provide facilities and services which enable people to promote their well being and enhance their development; they wish to provide facilities and services which enable people and children to maintain normal social functioning in a normal environment - in places where people live, work, and play, as distinct from providing them in institutions."

A good example for the need for an organised and integrated policy is the multi problem family. Dr. Cunningham Dax, an eminent authority of world renown, has conducted significant research in Tasmania into multi problem families.

> "Although multi problem families are well known to the welfare agencies they are more easily recognised than defined. They have in common a dependency upon the social services; they are 'at risk' because they have neither the abilities nor the resources to deal with social problems as they may arise. They are fringe members of the community and since few of their members manage to be assimilated they become socially handicapped. Nevertheless they show a heterogeneity which makes both their description and assessment difficult."
>
> Cunningham Dax: The Driving Records of Multi Problem Families Social Science and Medicine 1977 Vol.11, p 121.

The importance of the multi problem family may be appreciated when it is realised that this submerged tenth of the population (say, six to ten percent) absorbs between sixty to eighty percent of the social services available. (Cunningham Dax op.cit. p 124). And that may be merely the beginning of a picture which has yet to emerge. For example the multi problem family may deserve a significant share of the blame for the road accident toll.

The noted anthropologist Margaret Mead once remarked that no way had yet been discovered to produce responsible human beings except through the family. Today it would appear to be generally accepted that an offending child should only be removed from his family into an institution as a last resort. But even a generation ago this was not the accepted view and the committal

of offending children to institutions was much more common than it is today. Tasmania was more fortunate than other States in this regard. Due to its small size few institutions were available and the placing of children with foster families was more common than elsewhere. Even to this day there is no remand centre specifically for the confinement of young persons anywhere in Tasmania. When it is necessary to arrest and detain young persons it is also official policy to ensure their removal from gaol to the few institutions in the State available for their reception.

Of course the nature of the family unit is significantly different from what it was fifty years ago. Today it not only includes the nuclear family but also one parent families, extended kinship families, foster families and families formed without conventional marriage or marriage under different religious or social systems. There have been scientific advances enabling the generation of children by novel means. No doubt in the future new forms of family relationship will emerge which would be regarded as grotesque or abhorrent today. I suggest that the common factor necessary to define a family would appear to be a constant and affectionate relationship between an adult and a child which deserves to be identified as stable and which is conducive to the welfare and development of the child.

> "The family is most influential in terms of human relations, it is universal and found in sophisticated and primitive societies. Within the family the child learns about himself and the world outside, what it means to be a boy or a girl, what it means to love and be loved and what it is to be part of mankind. The family can be said to be the most influential socialising agent for the child but it is recognised whilst it can be the greatest source of benefit it can also do much harm - within family life may be found ignorance, neglect, depression, and outright cruelty."
>
> Royal Commission on Human Relationships: The Family Australian Government Printing Service 1977.

"Even a cursory study of the type of welfare services that were provided for children in the past confirms that these services related from highly moralistic and residualist notions of welfare. In general the child in need of welfare assistance was regarded as the victim of an immoral and socially inadequate family situation and the implementation of welfare policy usually resulted in the child being segregated from his family. This philosophy partly explains why child welfare services in this country were of a residential nature and continued to be so even though there was a growing awareness in the community that to place a child in an orphanage or some other institution did nothing to enhance the child's moral development. Some sporadic and minor exceptions to this policy along the lines of what we may now identify as a preventive approach took place but had no lasting effect. Children continued to be crowded into various residential establishments which in the early stages of the colony included prisons, before an alternative method, foster care, relieved a thoroughly bad situation."

Picton and Boss: Child Welfare in Australia 1981.

Of course the children's court cannot be made an agency for the dispensing of social welfare services. Nor can teachers be turned into policemen or policemen into social workers. But as Lynne Foreman maintains (op.cit. p 63), there has been too little communication between agencies responsible for the delivery of welfare services.

In Tasmania the main liaison between the children's court and welfare services has been the child welfare officer. In all but minor cases, or cases where it is considered unnecessary by the court, the practice has been for a report on the offending child to be tendered to the court by a child welfare officer. Moreover the practice has been for a child welfare officer to visit the family of an offending child before his first appearance in court. If the plea is to be guilty it has been customary for the officer to prepare a report and tender it to the court provided that the plea of guilty is maintained. The aim has of course been to dispose of a case upon a child's first appearance. This aim has been effectively achieved and it is suggested that the Tasmanian

model could be copied effectively elsewhere. The same procedure should apply if a probation officer's report is obtained in respect of an older child.

Possibly the most serious defect in the delivery of welfare services is the fragmentation and lack of co-ordination between state and federal services. The manner in which social service benefits are distributed by the federal government is a constant subject for criticism. A children's court has no power to make any order attaching such benefits so as to ensure for example the payment of a fine or the making of restitution.

The most pressing need is probably for the recipients of social service benefits to be readily identified so as to prevent waste and duplication of effort. The opponents of an identification system argue that this would be an unwarranted intrusion upon the liberty of the subject. Surely this view cannot continue to prevail. Adequate identification is probably the first effective step towards the rationalisation of both state and federal services.

B. The Family and the Law

Just as state and federal policy relating to the delivery of social welfare services to families is incoherent and fragmented so too the law relating to families reflects the fact that both state and federal governments have failed to agree upon an effective policy or forum for the exercise of jurisdiction over families. The so called federal family court is in reality not a family court at all. Because of constitutional limitations the federal court is limited to dealing with the dissolution of marriage, the division of property between the parties to a marriage and the custody of the children of a marriage following the dissolution of the marriage. The limits of federal jurisdiction have not yet been finally determined and jurisdictional disputes continue to bedevil the federal divorce court.

The ideal course would have been to continue to vest the federal matrimonial jurisdiction in the state system of courts. Quite apart from the expense involved in setting up a separate federal court and quite apart from the desirability of avoiding jurisdictional disputes, there were and still are sound reasons for retaining a unified court system so far as possible.

It may not be generally appreciated that Australia still has a unified family court system so far as children are concerned who are subject to neglect or abuse or who are detected offending against the law. The children's court has a much better claim to the title "family" court than the federal family court. Moreover it is regionally based so that the needs of small and isolated communities may be cheaply and effectively served. Again when violence occurs or is threatened within a family it is towards the courts of summary jurisdiction to which the members of a family turn through the police for a cheap and effective remedy. In summary the protection and the correction of the family is presently the principal responsibility of the state courts of summary jurisdiction, while the federal family court is merely concerned with the dissolution of marriages, the distribution of marriage property and the custody of the children of a marriage following a dissolution of a marriage. Where questions of protection and correction of family members arise under state legislation then state laws are paramount and the orders of state courts of summary jurisdiction override any relevant federal family court orders, for example those confiding the custody of a child to one spouse or another.

C. The Future

The attraction of the federal family court system to state governments was evidently the financial relief this afforded to the states. The logical corollary would be constitutional change in order to give the family court the necessary power to deal with

property and custody disputes following the dissolution of a family (in the extended sense) as distinct from power to deal with such disputes following the dissolution of a marriage. This would lead to much more substantial "demarcation" disputes between the state and federal court systems. This could be solved by returning to a unified system of courts, that is by vesting state jurisdictions in federal family courts and federal jurisdiction in state courts.

The reality is that consitutional change is unlikely; there is no financial inducement involved to the states to promote it. Eventually time will show that the concept of exclusive jurisdiction for federal courts was a dead end, but a return to a unified court system is unfortunately likely to be a long time away.

The Carney report recommends that the states refer to the federal government powers with regard to the custody, guardianship, maintenance and adoption of children (some four powers relating to the protection of children). This would of course require the enactment of appropriate state and federal legislation.

In my opinion the authors of the report are to be congratulated for suggesting the most practical step forward. It is noticeable that until the Carney report most children's court enquiries in other states hardly even mentioned the problem. The Carney report also recommends that the opportunity be taken to consolidate and rationalise the laws in each state relating to the guardianship, custody, maintenance and adoption of children with a view to making the law accessible and uniform. This is also a most appropriate suggestion, though of course a requirement of uniformity would effectively delay a referral by the states for many years to come. The basic problem is that state jurisdictions have never had a coherent policy towards the family - legislation affecting the family has been enacted "ad hoc" as the need was felt to arise.

Hence the task of merely consolidating the law in each state is formidable enough; the authors of the Carney report have provided a comprehensive review of the law in Victoria and the situation in other states and territories must be basically similar. On top of these problems is the need to deal with problems which have arisen in recent years in particular. That is legislation to establish filial and parent status; legislation with respect to the welfare and status of children born of donor gametes, guardianship and custody arrangements governing children found to be in need of protection.

Substantial financial benefits would undoubtedly be gained by a referral of state powers. For example criticisms are frequently and properly levelled at the inefficiency of the state systems for the collection of maintenance payments. The basic fault here is the lack of an effective identification system of Australian citizens coupled with tax and social welfare systems operated by the federal government. Where a family member is being supported by social welfare payments and by maintenance payments (as many deserted wives and children are), then payments of maintenance should be collected from those liable to pay it in the same manner as tax and duly forwarded to the recipient.

If (as seems likely) state powers with regard to the family are eventually referred to the federal family court, the need for magistrates' courts to retain power to act in cases of emergency and need should be borne in mind. Presently the magistrates' courts everywhere in Australia are by far the best equipped to deal with domestic violence and child abuse or neglect. Hitherto this indispensable role of the magistrates' courts has perhaps been overlooked by spokesmen for the federal family court. There will always be a need for the federal family court and the magistrates' courts to work together in harmony and without jealousy or jurisdictional disputes.

It is suggested that the need for a national approach to family law problems which would follow a referral of state powers can hardly be disputed. The real area of dispute is political, that is the financial adjustment which might be required between the state and federal governments if the states agreed to refer their powers to the federal government.

D. Specific Problems in the Children's Court Jurisdiction

(i) Funding of Children's Courts and Services

Even in capital cities children's courts throughout Australia are usually shabby in appearance. Often they lack amenities and essential support services.

The children's court complex in Adelaide is a welcome exception and worth a visit by those who argue that comfortable surroundings for children and their parents are an unnecessary indulgence. The truth is that the physical appearance and construction of the courts can enhance the respect of parents and their children for the law and for themselves. If the sentences applied by the courts are to work effectively it is essential to gain the confidence of parents and their children. It is difficult to gain this confidence in shabby surroundings amid a general air that the State has by neglect allowed the system to become run down.

That is not to say that the magistrates who presently preside over the courts or the police prosecutors warrant special criticism. Nor is it true to say that the child welfare officers or other persons who provide support services warrant particular criticism. Fundamentally the present system is sound. Within its limitations the children's courts' system works well and the magistrates and officials in general do their best, sometimes with con-

spicuous success. However, often the general impression gained by a spectator in a children's court would probably be of earnest officials doing their best with inadequate resources in an unacceptably crowded and shabby environment. Certainly some improvements have taken place in recent years - for example, increased legal aid (which has not always by any means been a benefit to either the court or defendants). However, the children's court is still basically the same as it was a generation or even two generations ago - housed in the same buildings and equipped with the same services. Almost every area of the court and its administration requires review and change. Thus for example children and their parents summoned to attend court should at least be given an explanatory leaflet explaining what is required of them. When they attend court they should have access to a receptionist who can help them and discreetly inform them when their case is due to be heard (rather than have their names shouted outside the court door). Similarly after their case has been heard they should have ready access to assistance. These are essentially administrative matters and not matters for legislation except perhaps that a specific amount of money be appropriated for children's courts so that children's courts can be properly serviced and maintained. It is no accident that in South Australia the general appearance of the children's court (in Adelaide) and the services provided to the public are superior to those elsewhere in Australia. The reason is that there is a separate children's court administration led by children's court judges. Elsewhere in Australia the difficulty involved in bringing children's courts up to an acceptable standard is that they are merely part of the general lower court system with no special claim for priority for the allocation of funds or staff.

In recent years every State in Australia has instituted enquiries with regard to its system of children's courts. So far (in my opinion) only in Adelaide has the court and its services

been brought up to an acceptable standard. While there are encouraging signs that other Australian jurisdictions are attempting to follow South Australia's example no other jurisdiction has yet succeeded. The right solution may be to create a separate children's court system and registry with administrative support without necessarily creating full tiume professional children's court judges or magistrates.

(ii) Professional Children's Court Judges or Magistrates

In my opinion the question whether full time children's court judges or magistrates should be permanently appointed is highly debatable. A similar problem is the question whether there should be specialist federal family court judges or indeed whether there should be specialist judges or magistrates at all.

Few would quarrel with the proposition that ideally every judge or magistrate should be equipped to deal with every jurisdiction. Questions of law and questions of fact are basically the same in every jurisdiction and an understanding of the family or the child can be just as critical in a matter of criminal law as it may be in the children's court or the family court. In general lawyers receive little training in the social sciences. No doubt their expertise as lawyers would be enhanced if they did, but this is not precisely the point. Until recently Australia had a basically unitary system of courts with non-specialist judges and magistrates who appeared to manage very well. Why should the system be altered?

There is an important difference, in my opinion, between the larger and smaller Australian jurisdictions. In Tasmania, for example, the children's court work is shared equally among all the magistrates. This is easily managed. There are three magisterial groupings; the North-West, North and South, centred around

Burnie, Launceston and Hobart respectively. According to my observations no-one could confidently claim that any of Tasmania's magistrates (presently thirteen) was superior in competence to any other in his conduct of his court. Certainly each magistrate to some degree conducts his court differently, it would be odd if any two courts were run in precisely the same manner. But allowing for the difficulty in measuring and assessing competence it is probably true that the effectiveness of each magistrate in hearing cases and punishing or correcting offenders is much the same. It is of course conceded that this is a personal opinion and strict proof is not possible even if a wealth of statistical data were available. However my opinion is based upon an extensive observation of children's courts throughout Tasmania and in other Australian capital cities.

Understandably in Victoria, New South Wales and Queensland children's court magistrates have traditionally been appointed for a term of years. In the larger states it would not have been possible to share children's court work equally among magistrates. Equal sharing of work is, I suggest, the ideal,(always supposing that the magistrates were competent to be appointed to handle such work in the first place). Thus in Melbourne, Sydney and Brisbane children's courts in general are conducted by magistrates specifically appointed to perform such work for a term of years. In country areas in the larger states children's court work is in general, (I understand), performed by magistrates not specifically appointed as children's court magistrates. Judging from my conversations with magistrates and chief magistrates, in particular, it is felt to be undesirable to appoint permanent children's court magistrates. On the one hand it seems to me there is no such magic in the running of a children's court that it takes years to acquire the art, though for administrative reasons it is convenient to make an appointment for a term of years. On the other hand a lifelong appointment as a children's court magistrate would probably

be felt by most magistrates as stifling and as a handicap to future experience and perhaps advancement to higher positions in the magistracy.

The Carney report recommends that a new children's court be created headed by a chief judge appointed for a term of seven years with the status of a county court judge. The court is proposed to be divided into two divisions, a family division and a criminal division dealing independently with children in need of protection and children who have committed criminal offences. The chief judge is to be appointed on the joint recommendation of the Minister for Community Services and the Attorney-General in consultation with the Chief Judge of the County Court. The chief judge would be responsible for the oversight and control of the administration of children's courts throughout the State and the provision of advice to the Minister on the appointment of other members of the children's court bench. In addition the chief judge would preside over the appeals court to be set up within the children's court system. The aim of the plan is to set up regional children's courts throughout Victoria presided over by members of the children's court bench specifically appointed for a term of five years.

The authors of the Carney report deserve commendation for what would appear to be a suitable model for the future development of the children's courts in the larger states. The appointment of a judge with administrative control would in itself effect a notable reform. Presently there would appear to be a lack of administrative control and financial resources by chief magistrates over facilities and services in children's courts. The long term aim ought to be to separate the children's courts both in time and in place from adult magistrates courts and provide them with adequate facilities and services. This aim is expressed in the Carney Report and is likely to be eventually achieved if the re-

forms suggested are adopted. A further aim is to confine the conduct of children's courts to specially selected judges or magistrates even in country areas. This aim can also be achieved if regional children's courts are set up and if the government is prepared to meet the travelling and other expenses of the parties involved. In the larger states of Queensland, New South Wales and Western Australia a comprehensive system of regional courts would not yet appear to be practicable.

A further advantage of the Carney plan would be greater consistency of decision between magistrates or judges of children's courts and a greater consistency between decisions on appeal.

To sum up, the creation of the professional children's court magistrate is not the primary aim for the future. The primary aim is the creation of a children's court system with adequate amenities properly separated from the adult system of courts. Of course the overriding need is for every children's court to have access to the support services and sentencing tools essential to impose a proper sentence. The most able and professional children's court judge or magistrate can only be as good as the sentencing tools he is given to work with. Thus the future course of progress for the children's court is a centralised administrative control with access to adequate funds and the ability to effect progressive improvements. The structure of reform proposed by the Carney Report would appear to achieve this aim and therefore be an effective model for the bigger Australian jurisdiction.

(iii) A Civil and Criminal Children's Court

The Carney Report recommends the creation of two separate courts; the civil jurisdiction dealing with children in need of care and the criminal jurisdiction. As a matter of law there are

already two separate jurisdictions throughout Australia. However, as a matter of fact children who are alleged to be neglected or uncontrollable or in need of care because of cruel treatment are dealt with all too often at the same place and about the same time as children charged with criminal offences. However, in country courts throughout Australia child offenders and children in need of care or control are likely to be dealt with in the ordinary adult magistrate's court, although usually some attempt will be made to segregate them from adult offenders. This situation ought now to be regarded as unacceptable. One major difficulty is that care applications in respect of children are likely to be emergency applications and for administrative reasons it is very convenient to have these applications heard in a children's court in order to save magisterial time. This is perhaps the crux of the problem and the reason why a separate children's court registry and system has been recommended. Considerations of magisterial time and administrative convenience will probably continue to prevail unless it is made clear that the civil children's court jurisdiction is to be kept strictly separate from the criminal jurisdiction.

(iv) Diversion of Child Offenders from the Children's Court

A spectator in a children's court would probably quickly identify two distinct groups of offenders; the first offender and the repeating offender or recidivist. There are of course other significant divisions which can be made, particularly between the younger child and the older youth for example. Probably most of the first offenders are discharged without conviction and with a warning not to offend again. This leads to the conclusion that such offenders might have been better handled if they had not been summoned to court at all. This would have saved expense and inconvenience to the child and his parents and saved the time of the court. The stigma of a court appearance would have been avoided.

There is no doubt that this line of reasoning is justified by practical experience. The only question is how diversion can best be achieved.

It is conceded in all jurisdictions that diversion should begin with a police warning system. The system works much better in some states than in others. Some police officers seem reluctant to issue a warning and prefer to let the case "go to court". Their decision should be checked and if necessary corrected by a superior police officer.

The next level of diversion should take place as a result of consultation between officers of the police force and community welfare service specially designated for the particular region where the case arose. This was the proposal made by the Tasmanian Committee of Review into the Child Welfare Act 1960 to the Minister for State Social Welfare Services in 1981. We did not envisage vesting the "screening committee", as we called it, with any compulsory powers. We expected that the screening committee would notify its decision not to proceed either by letter or arranging a meeting with the child and the parents. We did however recommend that consideration by the screening committee should be a condition precedent to the institution of a prosecution for any offence (other than a traffic offence). In case of disagreement by members of the screening committee we recommended that the prosecution should proceed.

We rejected the system of "juvenile aid panels" instituted for example in South Australia. We felt there were two unacceptable flaws. First they seemed to involve an element of coercion to admit guilt to avoid being dealt with by a court with heavier sentencing powers. Second, we felt that the panels did in fact use coercive measures (despite their disavowals); for example, sometimes requiring offenders to sign contracts imposing limita-

tions upon their behaviour. My own further reservation is based upon the dislike I feel for all tribunals exercising a very restricted range of jurisdiction involving coercive powers in family affairs particularly if exercised by laymen. It is basically unhealthy and unsound.

Fortunately it would seem that the South Australian system of juvenile aid panels is unlikely to be adopted elsewhere in Australia and I will not discuss it further. It is likely always to remain a problem to reduce the work load in children's courts. The cases which ought to come to the children's court are almost invariably difficult and require time and thought, and perhaps repeated appearances by the child and his parents. This process can be disrupted by a flood of trivial offenders who are all too often unnecessarily brought to court.

(v) Time Limitation upon Children's Court Proceedings

The reality is that only a small proportion of offenders in any category are detected and brought to justice. Therefore there should be no public alarm about any measures taken to present offenders before the court efficiently and expeditiously. The efficiency of the criminal justice system is rightfully seen by the general public as being the main deterrent to offenders in the sense that once it is put into operation it should be seen to operate openly, efficiently and fairly. Thus there is no harm necessarily involved in letting off the young first offender shoplifter with a warning letter. What is important is that he should see that his case has not been neglected following his detection. In practise the shock of detection is sufficient to deter most shoplifters.

It is also particularly important that young offenders

be dealt with in court, (if they are to be dealt with in court at all), reasonably quickly. Court proceedings cannot be equated with the admonitory smack a parent may administer to a naughty child. For obvious reasons delay is inevitable. In order to alleviate the harm which is apt to be caused by delay an expedient which has successfully stood the test of time in Tasmania has been a visit by a child welfare officer to the offender's family before the offender's first appearance in court. This was mentioned earlier.

It can readily be imagined that the child and his parents will often be in a state of some shock following a charge of a serious offence. A visit by a welfare officer can ensure that any immediate needs of the family or child are met. The family may be in need of welfare assistance or an urgent application may need to be made in respect of care for this child. Second, if the parents and the child are agreeable the welfare officer can set about preparing a report in respect of the child in case there is an eventual plea of guilty. This course has attracted some criticisms in South Australia on the basis of a possible infringement of the civil liberties of the child. I have yet to see or hear of a case of unfairness to a child resulting from this practise in Tasmania. If a criticism can be made it would be that the overworked child welfare officers should be providing reports in more cases so as to save the unnecessary adjournment of proceedings. If of course the child pleads not guilty the report is not placed before the court until and unless his guilt is proven. In any case a report seldom contains material bearing upon the guilt of a child in relation to a particular offence.

Another measure which ought to eliminate unreasonable delay in children's court proceedings is the imposition of a time limit upon the institution of criminal proceedings.

As I have pointed out elsewhere time does not run against

the Crown so far as the institution of criminal proceedings is concerned. This doctrine of the common law really belongs to a bygone age when the detection and punishment of criminal offenders was a great deal more uncertain than it is today. So far as serious criminal offences is concerned no doubt it is still appropriate that there should be no time limitation for the institution of criminal proceedings. However, so far as simple summary offences and the range of indictable offences dealt with summarily is concerned, a strong case can be made out for the limitation of proceedings both on practical and historical grounds. In the Tasmanian Commentary to Ward and Kelly's Summary Justice (Law Book Company 1985) I discussed in detail the six months time limitation on summary proceedings introduced by the Imperial Summary Jurisdiction Act of 1848. This Act was copied in all the Australian colonies and but for an unfortunate defect in the drafting of the Imperial Act would have effectively introduced a time limitation of six months for the institution and termination of summary proceedings within six months.

In our Report to the Minister the Committee of Review into the Child Welfare Act 1960 recommended a provision as follows:-

> "14.2 (a) In a case of a simple offence, not being an indictable offence or of a breach of duty alleged to have been committed by a young person, unless some lesser time is limited for making complaint by the law relating to the particular case, complaint must be made within six months from the time when the matter of complaint arose.
>
> (b) No summons based upon a complaint referred to in subsection (a) shall issue to any person referred to in sub-section (a) unless such summons requires such person to appear to answer the complaint within a period of six months from the time when the matter of complaint arose.
>
> (c) No warrant shall be issued based upon a complaint referred to in subsection (a) unless such warrant

is issued within a period of six months from the time when the matter of complaint arose.

(d) Upon application at any time made to a Magistrate by a complainant who has duly laid a complaint in accordance with subsection (a) such Magistrate may in his discretion and for good and sufficient cause shown by the complainant issue a summons or warrant otherwise than as required by subsections (b) and (c). An application under this subsection may be made ex parte on a written application by the complainant in accordance with the form prescribed in the Rules. On the hearing of such application a Magistrate shall not be bound by strict rules of evidence and may hear such evidence or accept such statements as he thinks fit."

It would appear that the Tasmanian Committee of Enquiry was the first to recommend an effective time limitation period. The authors of the Carney Report have also recommended a time limitation period for instituting proceedings against children but it would not appear to have been as effectively drafted as the Tasmanian provision.

In my view the long term plan should be to limit the institution of proceedings against children to three months. Further, a time limitation of six months should apply to indictable offences against children tried summarily.

(vi) Age Limits in Children's Courts

The bigger children's court jurisdictions in Australia could no doubt supply statistics which would demonstrate that it is hardly worth while dealing with children charged with criminal offences under the age of 12. No doubt heinous offences can be committed by children under 12. The Tasmanian Committee of Review took the view that such children could best be dealt with on an application that such children were in need of care and control with evidence in support of the fact that an offence had been committed being adduced in support of the application if necessary.

At the other end of the scale the Committee suggested the age of 18 as being the upper limit of the jurisdiction of a children's court. As mentioned earlier, one very palpable problem involved in dealing with children from the one philosophical point of view is the distinct difference between the pre adolescent and the post adolescent offender. Another difficulty is the need to give the prevention of traffic accidents priority over any particular claim a youthful traffic offender may have to be treated more leniently than an adult traffic offender. The primary responsibility of the young male traffic offender for the road accident toll raises at times difficult (and disputed) sentencing problems. However, we felt that 18 was a desirable upper limit.

(vii) Civil Liberties in the Children's Courts

Several decades ago it was claimed, particularly in America, that children were getting the worst of both worlds, that is all the harshness of sentencing applied in the adult courts together with a denial of their basic liberties in the children's courts. In general this claim can hardly be made about the way children's courts are run in Australia today, according to my observation. However, there is an undoubted need to guard against the possibility of abuse. For example, in Tasmania in theory at least a child may be declared a ward of the state and received into the care of the State for a trivial offence. In practise, according to my observations, children's courts throughout Australia do limit the reception of children into custody to cases where this is obviously required. However, a review of the sentencing appellate procedures in children's courts is undoubtedly needed and should be regularly undertaken. It should be borne in mind too that there have been some notable absurdities in the field of civil liberties, for example the mandatory requirement that children should be interviewed in the presence of their parents

in New South Wales introduced as law several years ago. This rigid statutory requirement was understandably repealed and replaced by a flexible provision. Proponents of inflexible legislation of this type should remember that in the end they do nothing more than provide their equally irrational opponents with ammunition to fire against justified reforms.

Complaint is sometimes made that parents and their children are failing to understand what is going on in a children's court. According to my observations of proceedings in children's courts around Australia parents and children did appear to be understanding the proceedings and in particular the sentences administered. A survey conducted in the middle of 1985 into the way children's courts are run in Tasmania would appear to confirm that children and parents do in general appear to understand the way the courts are run (Children's Court Enquiry 1985 Briscoe and Warner).

Of course it does not follow that parents and their children do not need the extra assistance they could and should be given with regard to understanding children's court procedures and sentences. Only a limited amount can be explained in court.

(viii) Statistics

I have suggested elsewhere the overriding need for the collection of reliable statistics so far as the operations of the courts is concerned. One of the most noticeable features about children's court reports in Australia is the lack of communication between one jurisdiction and another. One primary reason is the lack of information. When an equiry is conducted in a state the first serious limiting factor is the absence of reliable statistical information. Hitherto children's court enquiries and reports

have been based on speculation and hearsay - at best shrewd and well judged guesses by persons competent and experienced in the field. To some degree this will always be so because some questions are not capable of resolution except by an intuitive guess. But many questions, for example the desirable age limits in a children's court, can only be satisfactorily answered by means of statistical evidence. The absence of such evidence is yet another example of the general air of neglect with regard to children's court administration is most Australian jurisdictions.

(ix) Uniformity among Australian Children's Court Jurisdictions

Because the jurisdictions are basically so similar there is undoubtedly a great deal to be gained by consultation between the Australian jurisdictions. For example, there may hopefully be a reconstruction of children's court premises in Australian jurisdictions in the next few years. The ideal design for a children's court complex is probably capable of specific definition and ought not to be left for the design architects to decide. In particular the housing and facilities for the support services to the court is a crucial issue; not for the comfort of the officers involved but for the quality of the community service which the children's court may be legitimately expected to fulfil. There is a need for much greater communication between the Australian children's court jurisdictions in order to avoid mistakes and achieve uniformity. However, the need for uniformity is not indispensable, the different jurisdictions can function efficiently even though there are differences. The common source of the law in the Australian jurisdictions and the basic homogeneity of the Australian population is likely to ensure that the differences between the jurisdictions always remain relatively minor.

THE MAGISTRACY IN AUSTRALIA - TODAY AND IN THE FUTURE

INTRODUCTION

As I have attempted to show in preceding chapters the institution of the professional magistracy was a fortunate choice for Australia. Today few criminal cases of any importance are heard and determined by lay justices even in Western Australia, South Australia and Queensland. By the end of the century Australia should have a professional lower court system with courts presided over by properly trained and qualified lawyers. That is not to say that the services of the lay justice of the peace ought to be dispensed with altogether. Apart from the ministerial or administrative tasks which the voluntary justice of the peace performs in the community today, there will no doubt always be a need for the services of a lay justice of the peace in circumstances of emergency or isolation from a professional magistrate - for example to hear a bail application or be present during a police interview with a suspect. The lay justice of the peace has an honoured place in Australian history despite some dishonourable episodes in early colonial history. However, the Australian public has come to expect that its lower courts will be presided over by a properly trained and professional magistracy. This state of affairs has almost been achieved.

I have also sought to illustrate that the police and the magistracy are in effect the main law enforcement tools of Australian legislatures.

In the early days of Australian settlement the magistrate constituted not only the head of the police force and lower court system but the head of the public service system as well. To this day the great advantage of the magistrate is his close connection with each Australian region of local government. The second great advantage is the flexibility of his jurisdiction. If his jurisdiction is to be varied or added to, often only a fairly simple statutory amendment is required or an even simpler amendment to a regulation. The drafting is simple and the common law is rarely a com-

plicating factor because the jurisdiction is statutory in origin. The complications of federalism have been avoided because the jurisdiction is unitary. Both Commonwealth and State Parliaments have made lower courts their principal agency for enforcing their laws. Because the courts are regionally based, cases which come before them are disposed of with reasonable efficiency and speed in most cases. According to my observation of lower courts throughout Australian capital cities there is no great cause for concern with regard to delay in lower court proceedings.

Nevertheless there is some cause for concern as to the future and I propose to discuss some specific matters; not perhaps in order of importance.

A. PLANNING FOR THE FUTURE - THE COMPUTER

The magistracy was an English inheritance, Australian legislatures merely took advantage of a cheap and convenient instrument for executing its will. Clearly the time has arrived when each Australian jurisdiction has an obligation to make comprehensive plans about the future of the lower court system. Although the Australian Institute of Judicial Administration will no doubt take part in this planning, the responsibility is primarily that of the Law Department of each State and Territory.

In the near future each Australian lower court jurisdiction will be introducing the computer into its administrative system. Several years ago I prepared a report for the Tasmanian Attorney-General with regard to the introduction of the computer into the Tasmanian lower court system. A test trial has already been successfully conducted. The introduction of the computer into all the Tasmanian lower court justice system is obviously imminent. There can be no doubt that the information which will be furnished by a computerised system will enable profound and effective changes

to be made. The administrative systems regulating the lower courts in Australia are often woefully outmoded and would not be tolerated in any modern business enterprise. The wonder is that these modern improvements designed to save expense and make more efficient use of magisterial time have been delayed for so long.

It appears to me that the lower court system is at the hub of the whole system of administration of criminal justice. All the other agencies such as police, prisons and probation and even the higher of criminal courts radiate inwards and outwards from the hub of the lower court system like spokes on a wheel. Hitherto each agency has been geared towards retrieving the name of a particular person and his ultimate disposal. Traditionally each agency has kept its own manual system of records. This has not only meant unnecessary duplication but has also made it difficult to procure meaningful information about the working of the criminal justice system.

The ideal would be to record essential data in relation to each defendant from the time he is first proceeded against until the time he is discharged from the criminal justice system either by way of discharge from prison, payment of fine or otherwise. It ought to be possible, as it were, to retrieve a moving picture of a defendant from the time of his reception into the system until his discharge at a moment's notice. As it happens this is a major administrative difficulty at present. If a particular need arises to trace a defendant in the system which is out of routine a major exercise in shuffling paper and locating the file may be required. This is one important area where the introduction of the computer can result in a substantial improvement in efficiency and saving of labour.

Whenever a person is proceeded against for a criminal offence either by way of arrest or the service of a summons, the

necessary documents must be lodged in the court of summary jurisdiction whose jurisdiction is invoked. This is the commencing point of all criminal proceedings even though the proceedings may eventually be terminated in a higher court. Almost all criminal proceedings are of course initiated by the police force but all commence in the lower court and over ninety-five percent are terminated there. The mass of documents presently generated in the lower court system can be readily imagined. The sheer volume of transactions recorded and their repetitive nature are of course eminently suitable for computerisation. Everywhere in Australia where I inspected the lower courts I was impressed by the great administrative advantages which will be gained by the introduction of the computer.

However, the prospective advantages are far greater. Most pieces of legislation which are passed have a specific objective which can be measured. One of the most important measures which can be made of the effectiveness of a particular law is its enforcement in the courts. For practical purposes the most important legislation enforced in the lower courts is probably traffic legislation. The majority of police effort and lower court time is probably spent on traffic matters. Hitherto there has been no effective monitoring of this tremendous expenditure of public time and resources. I propose to make some comments about traffic legislation later. At present only New South Wales and South Australia have public offices set up devoted to criminal statistics and research.

If the value of the introduction of the computer is to be fully realised it would seem clearly desirable for each Australian jurisdiction to set up its own office of criminal research. Naturally there is a limit to the amount of information which can be collected. It therefore becomes very important to ensure that such information as is gathered will be gathered objectively and in order to fulfil the most important needs. At first the primary need will be administrative efficiency. After some debate and con-

sideration it seemed clear to myself and others who planned the introduction of the computer into the lower court system, that this ought to be the primary objective. There will however be other needs to meet and there is a danger of improper use, for example ministerial interference for political motives. Eventually it would appear to me that there will be a need for a responsible and objective authority responsible, say, to the Attorney-General, to evaluate demands for the collection of information and determine which should be given priority. Clearly the public and the government and the departments of the public service need to have access to reliable information. The lower courts and magistrates have a need for reliable data, sentencing statistics could and should be available to ensure as much uniformity as reasonably possible. The lack of success of the enquiry of the Australian Law Reform Commission into sentencing some years ago is largely attributable to the fact that it had no adequate statistical information available to it.

In the last resort the kind of information which is gathered and the use which is made of it can only be decided by the government and by parliament. However, if each Australian jurisdiction were to set up an office of crime statistics and research much needed expert advice would always be available to the government. In Tasmania alone the savings which the introduction of the computer will entail would easily pay for the expense involved in setting up and staffing such an office. It is only necessary to read a daily newspaper to be aware of the deep public interest in matters of law and order. The answer to many (though not unfortunately all) questions raised depends upon the appropriate collection of information and correct evaluation.

There can be no doubt that the introduction of the computer into Australian lower court systems will provide the opportunity not only to plan these systems to operate in an efficient manner, but also to monitor and evaluate the legislation which they are called upon to enforce.

A COURT MANAGEMENT PROGRAM

In December 1983 the Victorian Government appointed Mr. John King as Deputy Secretary for Courts with instructions to prepare plans for the improvement of the Victorian Court system. Mr. King established a Courts Management Change Program which contains eight projects. Each is led by a steering committee of interested parties. The majority of these committees are chaired by the Chief Justice for Victoria (Sir John McI. Young) and consist of judges, magistrates, members of the legal profession, the law faculty of Victorian Universities and representatives of the public service. A paper with the title "The Future Organisation and Operation of Courts in Victoria" was made available to the public for discussion in May 1985.

The report is a model for other Australian jurisdictions to follow. It is proposed briefly to discuss some of the proposals made in this admirable paper.

THE OBJECTIVE OF THE COURT SYSTEM

The clear purpose of the court system is to provide a forum in which impartial justice is administered according to the law both in civil and criminal matters. The court system exists to provide Victorians with the benefit of an orderly and secure society wherein relationships are governed impartially according to the rule of law. The objective may seem obvious but it is worth restating. Indeed lawyers are fond of restating the objective frequently as though it were a charter for conservatism (which it is not). The fact is that in all Australian jurisdictions administrative tribunals have been proliferating on the well justified assumption that the courts are too slow and expensive to handle, say, small claims and tenancy disputes. But magistrates courts can if

necessary be equipped with power to exclude lawyers, to refuse costs, to dispense with ordinary rules of evidence and to schedule early hearings without offending against the rule of law. What is important to appreciate is that the courts do not exist to preserve the adversary system and the laws of evidence unchanged. Still less do they exist to perpetuate the conservative prejudices of judges, magistrates and the legal profession in general. The report discusses the administration of the courts under a number of different headings:-

(a) Jurisdiction

The report makes the point that the growth of administrative tribunals is attributable to their being equipped with power to resolve disputes quickly and cheaply. However, the duplication of dispute resolution systems is wasteful of community resources and the tribunals have no regional organisation to make their services available to the rural community. Planning has been lacking and is clearly needed so as to utilise existing courts and avoid wasteful duplication.

(b) Welfare Role

Victorian magistrates courts administer a system of emergency cash relief called the "Poor Box Fund". This is unique in Australia but nevertheless serves to emphasize the important role which the magistrates courts ought to have in monitoring social welfare. The point was made earlier in the chapter dealing with children's courts, for example, but it is seldom appreciated how closely the lower court system needs to be associated with the system of social relief if it is to be effective. The modern regional court or complex of courts needs a social worker, certainly in part to prevent flagrant dishonesty and abuse, but mainly to provide the necessary co-ordination and assistance to individuals using

the court system who are often unable to help themselves. At the time of writing the problem of reconciling payments of maintenance between spouses with social welfare payments is a matter of public discussion. The courts do not exist to promote social welfare but the objective of social welfare clearly is part of the objective of law and order. One of the ultimate objectives ought to be to have a proper system of identification of members of the public.

(c) Scheduling

"There is a lack of court control over case hearing scheduling", the report states. Hitherto in Victoria cases have been listed for hearing in a haphazard manner resulting in much expense and waste of time. A court mention system is advocated according to which the courts keep control of their lists by setting down cases for hearing after mention and request by the parties. A successful trial run is claimed for the new system.

This system has in fact been in operation in Tasmania for a number of years. Whether a defendant appears in court following arrest or in obedience to the service of a summons, the charge must be first explained to him and he must be informed of his right to plead guilty, not guilty or have an adjournment. If he wishes to have the case disposed of by a plea of guilty there and then he has that right. An adjournment date or a hearing date necessitates the attendance of the diary clerk, following which the defendant is either released on bail (or without bail in cases of minor offences). The system has worked well and saved considerable expense. The wonder is that Victoria has delayed for so long. Here again the lack of planning or even a desire to plan has been clearly evident everywhere in Australia in the past.

(d) Access

"The court system is not sufficiently accessible to the

community", states the report.

> "The geographic location of Victoria's court houses reflects a combination of the transport modes of the 19th century and the political and social pressures of the 20th century. No master plan was developed, nor were there criteria for determining the location of court houses and facilities. The result is that in some areas court houses are surplus to requirements, whilst in other areas there exists a demand for new or additional court facilities."

Of course the magistrates' courts do not merely provide a forum for hearings. They are required to provide a range of administrative and legal information services.

(e) Systems

"Court administrative systems operate in isolation from one another", the report states. The computer is rightly seen as an indispensable administrative aid. As mentioned earlier, the future importance of the computer can hardly be exaggerated but it must begin its career as an administrative tool.

(f) Personnel

The recently secured independence of the magistracy in Victoria has severed the customary line of promotion between clerks of courts and the magistracy. The criterion for promotion is now as it is in most of the rest of Australia, that is the legally qualified person best suited for the position regardless of whether he has experience as a clerk of court or not. This is the criterion which should apply if the professional magistracy is to secure public respect. But the independence of the magistracy has raised problems with regard to control of staff and personnel.

(g) Buildings

In most of Australia, particularly rural Australia, magistrates' courts present a shabby and neglected appearance. Services and facilities are often inadequate. However, during the last decade or so magisterial court complexes have appeared, particularly in urban areas. Undoubtedly this has been a desirable development, the motor car has long since eroded local attachments and the need for the small suburban or rural court house each tied to a small municipality. This has been a matter of some regret; some small court houses have a distinguished place in Australian history. Sometimes the local court house and the local police force have had a real and effective place in a small community and their passing has been marked as a loss. Certainly this has been so in some rural areas in Tasmania. However, the saving in magisterial time and administrative expense in building regional court complexes is indisputable. The pity is perhaps that many complexes which have been built do not provide the range of services to the public which they could reasonably be expected to provide. Certainly the waiting rooms and toilets are there but all too often the probation officer, the social welfare worker, the child welfare officer and representatives of other services are absent. The magistrates' courts have long passed the stage when the only options open were fine or imprisonment when exercising state criminal jurisdiction. At the time of writing it is appropriate to characterise as shameful the situation that where a magistrate exercises invested Commonwealth criminal jurisdiction his sentencing tools still belong to the dark ages. Reform in this area has now been sought for many years and the lack of concern by the Commonwealth for the magistracy is all too apparent.

The public have a right to a court complex that is not merely built to save money but also built to improve the criminal

system and civil process, (not to mention providing the visiting public as well as the court staff with a place to park the motor vehicles they now need to get to court).

Once again proper planning is the key. The Victorian initiative in securing the active participation of interested parties or steering parties is commendable and is an appropriate model for other Australian jurisdictions to follow. The problem of appropriate planning is clearly beyond the resources of the Law Department in any particular state. No doubt in Victoria it will be a long time before even the first effective results are achieved. However, the first step has been taken in Victoria.

TRAFFIC

So many people are killed and injured on the roads that the road crash toll is rightly regarded as one of the most serious problems in the community. Probably the majority of police and court time and resources throughout Australia is devoted to dealing with breaches of traffic laws. There is no question that the horrendous road toll justifies this expenditure of resources. However, the real question is whether the traffic laws work effectively.

The policy of the law is of course not strictly a matter for magistrates to criticise. However, when an offender is sentenced it is necessary to take into account the policy and objective of the legislation according to which the offender is being punished. Therefore it is inevitable that the success or failure of any particular piece of legislation to achieve its objective is under constant scrutiny by the courts. This is as it should be; the measure of the efficiency of the lower court system is not how quickly it disposes of cases but how effectively it deters offenders from offending against the objects of the legislation in question.

All would agree that the primary objective of traffic legislation is to prevent road crashes. The primary objective is not to augment the revenue by the imposition of traffic fines nor is the primary objective to catch the drink driver if this is not reflected in road casualty rates.

I propose to discuss briefly the laws relating to traffic regulations and the drink driver.

TRAFFIC REGULATIONS

The system in Tasmania is typical; at the discretion of the intercepting police officer the offending driver is given an "infringement notice". If the offender chooses to pay the fine and possibly incur demerit points against his licence to drive he may avoid court proceedings altogether. Most offenders take this course; if they did not the courts would be swamped with business. If he chooses not to pay, then a court summons will probably issue. A defendant will then have the option of defending the charge or pleading guilty in the normal manner. If he fails to attend court the case will be dealt with in his absence. In view of the mass of business dealt with by the courts the penalties imposed are, to say the least, fairly standard.

Basically the same system is in force throughout Australia. As is well known the volume of traffic charges in Australia is immense and the fines imposed have come to be regarded as an important contribution to the public purse. Due to the increasing volume of cases, efforts are constantly being made to speed the processing of offenders through the courts. See for example a paper published by the Law Department of Victoria under the title "Penalty Enforcement by Registration of Infringement Notice" (May 1985).

The objective of the system is to weed out the bad drivers and deter traffic breaches by a highly visible police presence on the roads.

According to my observations the defect of the present system is that there is apparently no program of research or monitoring conducted by police worthy of the name in any jurisdiction. If there is, the figures are not released to the general public. To take a random example, when the Hobart bridge was rebuilt several years ago a number of traffic police were released for general patrol duty in the Hobart area. There was apparently no alteration in casualty rates in the Hobart area. Undoubtedly a police presence on the roads has an effect on casualty rates. The real question is what is the optimum level of police effort in any particular area. Perhaps the question cannot be satisfactorily determined, if not the court lists will always be liable to disruption as the result of a sudden campaign by traffic police on the roads. Hopefully this is an area for future research with computer assistance.

In Tasmania traffic pleas of not guilty are heard up to a year after the alleged offence. The delay is barely tolerable. However, in the bigger states delays of several years are common place. That is intolerable and results frequently in unsatisfactory hearings.

DRINKING DRIVERS

The centre piece of the road safety campaign in Australia is no doubt the campaign against the drink driver. About one half of the road fatalities and about one quarter of the road injuries are claimed to be attributable to the effects of alcohol. It is also noticeable that the young are the main victims and the main culprits in road smashes, so much so that road crashes can almost be said to be a recreational disease of the young male driver on

two learning curves; learning to control his vehicle and learning to control his intake of alcohol.

Many older members of the community will remember drink drive legislation as it used to be. The classic model of the law made it an offence to drive a motor vehicle under the influence of intoxicating liquor. Many will remember the long and tedious hours spent in court on the hearing of such charges based upon the observations of the driver's physical behaviour.

It was because of defects in the classic model that Norway and Sweden introduced a different criteria in 1936 and 1941 based upon blood alcohol concentration. Heavy penalties including mandatory terms of imprisonment were introduced in the belief that drinkers would be deterred from driving. Unfortunately there was no proper evaluation of the Scandinavian model. In America Ross has within recent years carried out an exhaustive study for the Federal Department of Transport. His conclusion is as follows:-

> "There is no adequate proof for the proposition that the Scandinavian per se laws deter people from drinking or driving. Belief that such proof exists can be termed the 'Scandinavian myth'. The real basis for the belief is primarily folk lore and anecdote . . . . . ."

Ross has suggested that the imprisonment of thousands of people on the basis of a scientifically unfounded belief should be considered dubious social policy and that for humanitarian as well as scientific reasons the Scandinavian countries ought to give consideration to moderating their drink drive penalties together with a carefully controlled program of evaluation.

Ross: Deterrence of the Drinking Driver U.S. Department of Transport 1981.

Among the first of the countries to adopt the Scandinavian

model was Britain, the model has since been copied everywhere in Australia and in most of the Western world. The goading force behind the British legislation of 1967 was the British Medical Association. The legislation was hotly contested as an invasion of civil liberties; originally random testing was proposed, then unknown even in Norway and Sweden. This proposal was defeated but the main constituent of the Scandinavian model - the blood alcohol test and criteria of guilt - was successfully introduced (.08/100 ml). The British Government spent a large sum on a publicity campaign.

There is no doubt that the British driver at first responded favourably. Road casualties fell dramatically. British statistical data with regard to road casualties was and is of high quality. The impact of the legislation was carefully measured. Unfortunately it would seem clear that casualty figures crept back to what would appear to have been their old level after a few years. The reason would appear to have been that the driving public gradually became aware that the risk of apprehension for a drink driving offence, having regard to the number of police patrols, was in fact negligible. The same pattern was observed in casualty figures after a campaign against the drink driver in Cheshire in 1975 called the "Cheshire blitz". The phenomenon should now be a generally appreciated feature of road safety campaigns. The core of the problem is that it is the perceived risk of apprehension which deters the drinking driver rather than the severity of the penalty.

In Australia the breath analysis test was introduced between the years 1966 and 1974. In Victoria the breathalyser was used on a trial basis in 1960. From 1961 breathalyser evidence became admissible in evidence in support of a charge of driving under the influence of liquor. On the 20th December 1966 the offence of driving above a prescribed blood alcohol limit was proclaimed and ever since the use of the breathalyser has become part of routine police procedure. Western Australia was actually the first Australian

jurisdiction to introduce the breathalyser test on a regular basis in September 1966 but the distinction of leading the field in matters of road safety legislation must be conceded to belong to Victoria. The Report of the House of Representatives Standing Committee on Road Safety for May 1980 contains a useful table showing (at page 129) the comparative dates among the Australian jurisdictions for the introduction of the preliminary breath screening test, the breath analysis, and the blood analysis.

Unfortunately there has been no evaluation published of the introduction of the breathalyser in any Australian jurisdiction (with the exception of the Australian Capital Territory). No doubt the road safety authority in each Australian State and Territory has kept some figures; if so, they are apparently not available to the general public. There is no reference to any such evaluation in An Analysis of Australian Drink Driving Research (published by Hore & West 1980). The road casualty statistics published by the Australian Bureau of Statistics are available but these figures fall far short of showing what the impact of the breathalyser was upon the Australian driving public.

This lack of statistical information is a great pity; Australia with its six States and two Territories had a unique opportunity to evaluate and compare the impact of the breathalyser upon road casualties. The opportunity has probably now been lost. As the leader in the field some of the responsibility for this lost opportunity must belong to Victoria. However, up to the present time none of the Australian jurisdictions has made available for public information adequate statistical information with regard to the success of their road safety measures. The preparation of a proper programme of evaluation is of course not an easy matter. The most important complicating factor was the introduction of the seat belt in all Australian jurisdictions between 1970 and 1972. This measure undoubtedly had a significant impact upon crash rates;

there is good reason to suspect that it may have been the most successful road safety measure ever introduced. Victoria has the credit for pioneering this measure; but unfortunately it would not now seem possible to evaluate accurately the impact of the breathalyser upon road casualty rates throughout Australia.

In Australia probably the most important studies which have been conducted with regard to the deterrent effect of penalties on drink drivers have been conducted in New South Wales by Ross Homel. Research overseas has almost uniformly indicated that the severity of penalties has no effect upon casualty rates. However, Homel has found a correlation between the severity of penalties and reconviction rates for drivers in New South Wales. His major finding would seem to be that twenty to twenty-five percent of convicted drink drivers are reconvicted within the next five or six years. Thus it is arguable that the convicted drivers not reconvicted are deterred from offending again.
Homel: Penalties and the Drink Driver A Study of One Thousand Australian Offenders School of Behavioural Sciences, Macquarie University, N.S.W. 1980.

In its 1980 report on Alcohol Drugs and Road Safety the House of Representatives Standing Committee on Road Safety commented that the mere fact of being charged and convicted was likely to have some deterrent effect on this majority of persons not reconvicted. Homel's findings have been criticised as surprising and out of line with evidence accumulated in Australia and overseas. See Engleberg, Mangioni and Wozniczka: Finding Solutions to Drink Driving: The Lessons of Research September 1982 Australian and New Zealand Journal of Criminology p 170.

Certainly Homel's studies fall far short of justifying an argument for harsh penalties. Homel has not attempted to make any correlation between penalties and casualty rates.

> "In short further and more rigorous investigation of Homel's data is certain to be of great interest, but it seems that at this time the data can only be categorised as interesting but uninterpretable."
>
> Engleberg, Mangioni and Wozniczka (op.cit. at p 174)

Homel's work should be seen in perspective. The great bulk of research overseas indicates that harsh penalties do not have any significant impact upon road casualty rates. They do not have a general or specific deterrent effect sufficient to affect road accidents, that is for the material purpose of preventing road casualties they do not deter drinking drivers in the community generally nor do they specifically act as a deterrent on the convicted drink driver.

Many of the main references to research overseas are referred to by Homel himself in his study referred to above. Homel deserves considerable credit for breaking new ground in Australia; his work on the deterrent effect of penalties is virtually the first in the field. No doubt he would be the first to concede that far more remains to be done and that his work by no means justifies the indiscriminate application of harsh or minimum penalties upon drink drive offenders.

MAGISTERIAL INDEPENDENCE

I have reserved my comments about magisterial independence till the last because it seems to me that the integrity of the magistracy is in the end more important than the computer or problems of court management.

Tasmania became independent of the public service in 1969, the Australian Capital Territory in 1977, Western Australia in 1979,

New South Wales in 1982, South Australia in 1983 and Victoria in 1984. Only in Queensland are magistrates still members of the public service.

There can be no doubt that the independence of the Australian magistracy from the public service is the most important development of the magisterial system in recent times. Sir Laurence Street, the Chief Justice of New South Wales, expressed this view in a paper he delivered in June 1982 in relation to the proposed independence of the magistracy in New South Wales.

> "The recognition of the magistracy as judicial officers in the fullest sense will mark a culmination of a development which has extended over many decades. In many respects the achievement of this will be a milestone in the progress of social and political maturity within our society."

It would be pleasant to be able to claim that Tasmania led the way and others followed suit. The real reasons are probably varied; for instance judicial criticism of the subservience of the magistracy in South Australia - see Fingleton v Christian Ivanoff Pty. Ltd. /1976/ 14 S.A.S.R. 530. The well publicised scandals involving the magistracy in New South Wales leading to the conviction on a criminal charge of a former chief stipendiary magistrate (Mr. M. Farquhar) no doubt led to the changes in New South Wales.

Granting the need for the independence of the magistracy from the public service, the move in a way only accentuates their vulnerability. The need in the last century was for a public service to guard against the nepotism of government ministers when public servants were appointed. The public service by and large did guard against government corruption so far as appointments to the magistracy were concerned. The removal of the magistracy from the public service does not appear to have heralded a return to the possibility

of government nepotism. In the first place the new appointment systems which have replaced the old do contain significant safeguards. Then again the judiciary in general is appointed by the executive government without (in general) public criticism. In the second place the appointment of a magistrate does not give the executive government the possibility of any real power to influence future events because he does not have the power of choosing which cases he will hear.

This is a power which the chief magistrate in each State does possess. It renders him particularly vulnerable to attempts to influence the way he allocates cases for hearing. As is well known, the improper exercise of this power led to a Royal Commission of Enquiry in New South Wales conducted by the Chief Justice of New South Wales and the eventual conviction of a former chief stipendiary magistrate (Mr. M. Farquhar) on a criminal charge and a sentence of imprisonment.

I have had the opportunity of discussing the problem with my colleague chief magistrates during the time I was acting chief magistrate for Tasmania. At the risk of appearing to boast about the virtues of the Tasmanian system, I propose to describe briefly the system which prevails in Tasmania. I hasten to add that I cannot claim that the Tasmanian system has yet been adopted elsewhere in Australia or approved by any of my colleagues outside Tasmania.

In Tasmania each magistrate has his own personal clerk, much as a judge has his own associate. A magistrate's clerk accompanies him into court and in effect performs his clerical duties leaving him free to take such notes as he may wish. Proceedings are tape recorded but only rarely transcribed. Hearing dates and mention dates are almost all allocated in arrest or lock-up courts. A diary clerk attends such courts and makes the appropriate appointments in open court under the direction of the magistrate in con-

sultation with the parties. The chief magistrate rarely interferes with the listing of cases and then only when specifically consulted.

Thus in Tasmania the possibility of corrupt interference with the listing process is greatly minimised. It must of course be conceded that the possibility of improper interference with the diary clerk is certainly open. Sometimes indeed it is suggested that certain cases may be going before magistrates more leniently disposed to the commission of particular offences than others. In practise, however, the criticisms when examined are of no great practical consequence. The mere fact that they are made occasionally is an indication that the listing process is important and subject to scrutiny by many persons employed in the magisterial system. This constant scrutiny and discussion and the public system of listing cases is in fact a powerful safeguard against impropriety. In my opinion for their own protection and for the protection of their colleagues, chief magistrates in other Australian jurisdictions should give careful consideration to their listing system. No doubt of course they already have but recent events in New South Wales perhaps justify the comments I have made.

In the future we anticipate that the diary will be displayed where necessary on a video display unit in court. This too will require care, for example to prevent counsel from attempting to pick their own magistrate. But these clerical functions should be performed under the supervision of a magistrate rather than by him personally. I recall with some wonder my first visit to Sydney years ago to commence this project. The chief magistrate (Mr. M. Farquhar) introduced me to his deputy (Mr. Lewer) who invited me to sit with him on the bench in an arrest court as an observer. Mr. Lewer conducted his court with great distinction and competence. He seemed unhampered by the multitude of clerical duties he had to perform and the constant thudding of stamps he was called upon to affix. It seemed to me then as it seems to me now that a magistrate should

be called upon to devote all his skill to adjudication. The state should not be too mean to provide clerical assistance; indeed the time of any judicial officer is too precious to devote to clerical tasks.

All criminal business in Australia flows through the hands of magistrates though the cases may be eventually tried elsewhere. Perhaps the failure by governments in the past to appreciate the pivotal role of the magistrate in the judicial system lies at the heart of the tragic blow struck at the integrity of the magistracy and the judiciary generally in New South Wales in recent times.

Finally, it should be appreciated that freeing magistrates from the shackles of the public service is only the first step to independence. So long as the purse strings belong with the executive government pressure, discreet or otherwise, can always be brought to bear upon the magistracy. Of course they are now in the same boat as the rest of the judiciary in this respect. The whole subject has been explored in a paper by His Honour Sir Guy Green the Chief Justice of Tasmania. The subject of judicial independence is presently under review by the Australian Institute of Judicial Administration. Certainly the judiciary can never hope for complete financial autonomy. However, it is reasonable to hope that the magistracy can progressively in the future achieve some degree of autonomy and freedom from interference or threats of interference by the executive government. It is the possibility of clandestine interference which causes most concern.

There is every reason to hope that the lessons from the past will be heeded and the Australian magistracy will earn even greater public respect and importance than it has enjoyed in the past.

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