Police Summary Prosecutions in Australia and New Zealand: Some Comparisons

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A comparison of the role of the police in summary criminal proceedings in New Zealand and Australia reveals a number of significant similarities. Most notably, Australia and New Zealand are the only two countries in the common law world where members of the police force conduct the vast majority of criminal prosecutions in the lower courts. In the United States, Canada, Scotland and England, for example, summary criminal prosecutions are conducted by independent public prosecution authorities, similar to the system operating in most continental countries.[1] Of particular note is the decision of the British government in 1985 to transfer the conduct of summary prosecutions in England from the police to the newly created Crown Prosecution Service (CPS). The precise reasons why each of these countries has developed independent public prosecution systems vary between each jurisdiction but, as a general proposition, the prohibition on the police conducting criminal prosecutions is based on the ideological and operational need to separate criminal investigative functions from prosecutorial functions to ensure, *inter alia*, independence and impartiality in prosecution decision-making. This immediately raises the question of why is it that New Zealand and Australia (apart from one jurisdiction) have retained this aspect of public prosecutions whilst other jurisdictions have explicitly rejected this role for the police?

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1 For a general overview see N Osnow and A Quinn, *Criminal Justice Systems in Other Jurisdictions* Research Paper prepared for the Runciman *Royal Commission on Criminal Justice* (1993). For Canada see P Bloos, 'The Public Prosecutions Model from Upper Canada' in (1989) 32 *Criminal Law Quarterly* 69-84.

This question is made more pertinent by the fact that the prosecutorial role of the police in Australia and New Zealand has been seriously questioned and scrutinised in recent years with a plethora of official reports in Australia recommending that police should no longer conduct prosecutions. To date, no government (apart from the Australian Capital Territory) has been prepared to introduce any fundamental reforms.

The purpose of this article is to explore, from both empirical and theoretical perspectives, why Australia and New Zealand have retained the police prosecution role. The justification for this analysis is two-fold. First, a review of the relevant legal, historical and criminological literature in Australia and New Zealand shows that whilst there exists a growing body of historical analysis of policing, the role of the police in the overall public prosecution apparatus has generally been neglected. In particular, there is a paucity of historical material and any critical analysis relating to when and why the police appropriated the role of public prosecutor in the lower courts.[2] There simply is no equivalent of the type of analysis provided by Douglas Hay and Francis Snyder in relation to this aspect of criminal justice administration in England in the eighteenth and nineteenth centuries.[3]

A second justification for this article is that understanding the police role in summary prosecutions helps to illuminate broader relationships between the State, the police and citizens. An exploration of the police prosecution role is a window into the changing nature of social structures and distribution of authority between public and private agencies. Specifically, this article explores the shift that occurred during the nineteenth century whereby public police officers replaced private citizens as the principal prosecutors in the lower courts. The argument presented in this article is that as a matter of principle, the police should not conduct prosecutions and that New Zealand and Australia are 'out of step' with the rest of the common law world. However, there are indications in both countries that a reform process is under way, whereby greater independence and enhanced con-

[2] McGonigle has provided an excellent analysis of the contemporary prosecutorial role of the police in New Zealand, arguing that the police should not conduct such prosecutions: see S McGonigle, 'Public Accountability for Police Prosecution' (1996) *Auckland Law Review* 163. Stace has also discussed the contemporary prosecutorial role of the police in New Zealand, focussing on the gap between the rhetoric of a balance in criminal justice administration and the realities of summary practice, see M Stace, 'The Police as Prosecutors' in Cameron and Young (eds) *Policing at the Cross-Roads* (1986) 134-154.

[3] D Hay and F Snyder (eds), *Policing and Prosecution in Britain 1750-1850* (1989).

sistency in summary prosecution decision-making is being achieved, although the driving forces behind this process vary considerably between the two countries.

Given that New Zealand and Australia were both colonised by England, a useful, and arguably necessary, starting point is a brief description of the prosecutorial role of the police in England at the time each country was colonised, since the prevailing English legal mechanisms, traditions and concepts of criminal justice administration formed the ideological and administrative foundation for the respective colonies. One difference, however, is that New Zealand became an English colony in 1840, some fifty-two years after Governor Phillip founded the colony of New South Wales (NSW) in 1788. More importantly, NSW was colonised essentially as a penal establishment and this obviously affected governmental and social arrangements. Whatever lessons the English government learnt from the experience in NSW influenced its approach in New Zealand, although the socio-economic (and geographic) conditions in each colony presented different challenges for the respective representatives of the English government.

The English system of Prosecution and the Role of the Police in the 18th and 19th Centuries

For the purposes of this article, the 'story' of the public prosecution system in England can be broadly divided into pre-1829 and post-1829. In 1829 the English parliament passed the *London Metropolitan Police Act* which established for the first time in the common law world a fully professional, paid police force which was to form the blueprint for the subsequent establishment of police forces in other common law societies including Australia and New Zealand.[4] In many ways this piece of legislation marked the commencement of the systematic appropriation of the prosecution function by the police in England. It is crucial to note, however, that by 1829, various types of police forces had been operating in the Australian colonies for some forty-one years and therefore it may be useful to first turn to policing and prosecutions in England in the 18th and early 19th centuries to understand the system introduced in the colonies.

[4] For the emergence of the 'new police' in England see R Reiner, *The Politics of the Police* (1992) Ch 1; and D Hay and F Snyder, 'Using the Criminal Law, 1750-1850 Policing Private Prosecutions and the State' in Hay and Snyder (eds), ibid 9-16.

Prior to 1829, and indeed for some time after that date, the English system of criminal prosecutions was essentially based on the ideological principle that any citizen could prosecute any other citizen for any crime at any time.[5] This idea was partly based on a long-held communal sense of responsibility for crime control, but perhaps more importantly, was also perceived by the general populace and higher echelons in society as a *constitutional right*, a power that the ordinary citizen possessed over and above the authority of the State. According to Williams:

> [P]rosecution by private people was frequent and important before the advent of the modern police forces, in a period when it could be asserted that prosecuting for criminal offences was the patriotic duty of all citizens.[6]

Moreover, there is strong evidence of a widespread opposition to any alternative 'state-based' system at this time.[7] This fear of the State exceeding and abusing its powers through social control apparatus, was one of the reasons for intense opposition to the creation of a police force in England. Thus, prior to 1829, responsibility for investigating and prosecuting crimes rested mainly upon the victim of the crime (or his or her clan).

The control of crime was very much a communal responsibility, originating with the system of `watch' as the major protection. The key public officials were the parish constable, who might be able to assist the victim with information or perhaps arresting the offender, and the Justice of the Peace (JP) to whom the offender and any evidence would be presented by the victim or, if the victim could afford it, counsel for the victim. The offices of 'constable' and JP were of ancient origin from at least the 16th century.[8] The petty constable was appointed by the local parish or village and was an unpaid community representative whose basic role was to maintain the local peace by overseeing all men sworn to arms and to organise the watch system. Later, the position of 'high constable' emerged as a supervisor of the petty constables. As an 'assistant' to the JP, the constable had a loose but continuing association with the courts, but was more a

5 A Phillips, 'Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760-1860' in Hay and Snyder, ibid 113-170; and N Williams, 'Prosecution, Discretion and the Accountability of the Police' in R Hood (ed), *Crime Criminology and Public Policy* (1974) 166.

6 N Williams, ibid.

7 See for example, Hay and Snyder, above n 4, 34.

8 J Macfarlane, *The Justice and the Mare's Ale: Law and Disorder in seventeenth century England* (1981).

representative of the local community than a state official. Prior to the middle of the 18th Century, the JP played a central role in the administration of criminal justice, for it was the JP who was mainly responsible for the investigation of criminal offences, including the calling and examination of witnesses at a preliminary hearing which was to be the forerunner of the committal procedure. Prior to 1829, the constables did not play a key role in public prosecutions. Occasionally, the constable may have been 'bound over' to the local court to prosecute an offence, but the bulk of all prosecutions remained the responsibility of the citizen victim. Private prosecutions could however be an expensive and time consuming exercise and, from at least the 1690's, various 'Associations for the Prosecution of Felons' were established to spread the costs of private prosecutions between the constituent members of the Association.[9] These associations would also arrange for a lawyer to conduct the prosecution on behalf of the victim. It appears that these associations were an important mechanism of crime control for at least two hundred years from the late 1600s, with hundreds in existence at any one time and estimates of up to 4000 in total throughout this period.[10]

After the formation of the 'new police' in 1829, the role of private prosecutions gradually declined as the role of the police as prosecutors increased. It is difficult to state precisely when this transition occurred, but it seems clear that by 1850, the police already dominated summary prosecutions in London and no doubt, in other districts throughout England.[11] This occurred despite the fact that Sir Robert Peel (the founder of the new police) and the parliament specifically rejected a prosecutorial role for the police, given the centuries old constitutional protections offered by the old system of private citizen prosecutions. However this did not exclude the possibility of the new police laying a charge and prosecuting the matter, in the same way that any other citizen could do so. According to Hay:

> Although prosecutions were suits in the name of the Crown, they were viewed in political ideology as well as in law, as adversarial proceedings between private citizens. Even associations for the prosecution of felons were sometimes criticised for the possible abuses inherent in more col-

9 H King, 'Prosecution Associations and Their Impact in Eighteenth Century Essex' in Hay and Snyder (eds), above n 3, 171-210.

10 Phillips, above n 5, 120.

11 Hay and Snyder, above n 4, 46.

> lective decisions. In these circumstances it was simply unthinkable that the new police should be designated public prosecutors.[12]

Yet by the 1850s, in London the police had appropriated the role of public prosecutor and by the end of the nineteenth century, dominated summary prosecutions throughout England, 'it was these who, by default and not by a deliberate political decision, filled the void'.[13] It is suggested that this apparent contradiction between the clear intention of the creators of the new police and what became routine practice, is explicable in terms of the very nature of the initial role of the police as peace-keepers and law enforcers. Specifically, part of the police duties was to take defendants before the court to be dealt with by the JP or magistrate. If the constable were also the complainant then he would be bound over to personally prosecute the case, not on behalf of the Crown, but as a private citizen commencing a proceeding against another private citizen. Alternatively, the constable could take a defendant before the court on behalf of the citizen-victim, who would then be bound over to prosecute. This role of the constable was neither new nor inconsistent with traditional English practices, but what did become new was the regularity and continuity of the police appearing before the courts in this way.

As the surveillance and law enforcement capacities of the police increased, their appearance in court became routinised and ultimately institutionalised. It was a natural progression for the constable or sergeant to conduct the prosecution on behalf of another police officer and once the courts accepted this, the process was complete. In 1848 the *Indictable Offences Act* introduced major changes to the conduct of these preliminary hearings. The accused was now permitted to attend, to cross-examine, and to give evidence. More importantly for the purposes of this article, the investigatory role of the JP was abolished and the only function of the JP was to determine if the evidence presented was sufficient to justify placing the accused on trial in the higher courts.[14] These changes increased the investigatory and prosecutorial role of the police. The emergence of the police as permanent summary prosecutors was, it is suggested, connected to their expanding role in social control. This is not say that the developing dominance of the new police as prosecutors was not questioned. As

[12] Ibid 35.

[13] Williams, above n 5, 170.

[14] D Brereton and J Willis, *The Committal in Australia* (1990) 5. For a detailed historical account of the committal proceeding, see *Grassby v R* [1989] 87 ALR 618, 624ff.

early as the 1830s, criticisms were made that police prosecutors were, *inter alia*, open to corruption.[15] In the 1854-55 *Select Committee on Public Prosecution*, the Attorney-General scathingly criticised the police for assuming the role of prosecutor:

> I must say that I think it is a great scandal (to use no milder term) to see a case brought into court by one of the inferior ministers of the law such as a policeman. I do not think it is consistent with the proper administration of public justice in a great country such as this that you should have a subordinate officer, who is merely the keeper of the prisoner, clothing himself with the function of public prosecutor.[16]

Australia and New Zealand: Historical Background

Against this background it is not surprising that when Captain Phillip colonised New South Wales in 1788, he brought with him the 18th Century models of policing based on the traditional offices of constable, watch, JP and magistrates. The idea of a centralised, bureaucratically structured, professional civilian police force was unknown. The question of how to police the new civil society in the Colony was probably of minimal significance for Phillip. He was more concerned with how to police a penal society including the construction of such basics as housing and the supply of food. As the marine troops refused to act as policers of the convicts, the first 'police' in the Australian Colony were appointed by the Governor from the ranks of the convicts and given the title of 'constable'.[17] In his first Commission, Phillip was authorised to appoint justices and magistrates and within the first few weeks of the Colony, benches of two or more magistrates were sitting to hear the more minor offences.[18] In the first decade of the Colony, the local magistrates exercised significant powers, hearing and determining most offences committed by convicts, and ordering lashes. Later, in the more remote areas, magistrates heard and determined all crimes, except the most serious, such as murder. In these areas, the summary disposition of crimes was considered more expeditious in view of the uncertainties for witnesses travelling to Sydney, as well as the significant time losses involved. It appears that the bulk of summary cases were initiated and prosecuted by private citizens, not the constables. In particular, most of the offences against

15 Hay and Snyder, above n 4, 41.

16 Ibid 42-43.

17 K Milte and T Weber, *Police in Australia* (1977) 22; B Swanston, *The Police of Sydney 1788-1862* (1984) 2.

18 A Castles, *An Australian Legal History* (1982) 69.

convicts were brought by the overseer or master.[19] At the time there was nothing unusual about this practice which had been the norm for many centuries beforehand in England.

In Sydney, the Judge Advocate's Bench also heard summary matters. Prior to 1823 the Court of Criminal Jurisdiction heard the most serious charges. This court was chaired by the Judge-Advocate (based on the military office) who sat with six military officers. The Judge Advocate acted as prosecutor as well as adjudicator, a practice that was to become the cause of much complaint. In 1824 the Courts of Quarter Sessions were created, incorporating the use of lay juries in place of the aforementioned six military members and the Supreme Court of Criminal Jurisdiction replaced the original Court of Criminal Jurisdiction, with the Attorney-General acting as prosecutor.

Over time, constables were appointed and controlled by the magistrates and ad-hoc police organisations were established within the Colonies.[20] Similar to the pattern in England, the notion of 'policing' in the Colonies encapsulated a broad range of services and responsibilities, not just criminal investigations. The early colonial police were, for example, responsible for enforcement of regulations relating to health, sale of goods (in particular, alcohol), and general public order. These broad functions no doubt resulted in the constables appearing in summary courts as complainants. In Sydney, and the developing outlying urban areas, the traditional police beat system was used with specific localities assigned to particular constables. This reflected the policy of preventive, or proactive, policing upon which the 1829 Peelers were based. By the 1850s, the disparate police forces in most of the Colonies were centralised into one force.[21] The establishment of single centralised police forces had taken over sixty years in most of the Colonies. Although there is little historical evidence, it seems clear that the police in the Colonies of Australia assumed the role of public prosecutor in the lower courts through the same process that occurred in England. That is, by firstly taking defendants before the courts and prosecuting their own cases, then the local sergeant acting as prosecutor for other police, and finally the establish-

19 P Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (1993) 19-72.

20 H King, 'Some Aspects of Police Administration in New South Wales 1825-1851' (1966) 42 *Royal Historical Society Journal and Proceedings* 205.

21 In New South Wales the first centralised police force was established in 1862, in Victoria in 1853, South Australia in 1844, Western Australia in 1861, Queensland in 1863, and Tasmania in 1898, see C Edwards, *Changing Police Theories for 21st Century Societies* (1999) 31.

ment of permanent prosecution departments within police forces as specialist units. As early as 1856 in Victoria, for example, the first *Police Regulations* include functions relating to the prosecution role of the police.[22] In Victoria no statute expressly stated that one of the functions of the police was to conduct summary prosecutions. Finally, the writer is not aware of any evidence that associations for the prosecution of felons, operating in England, existed in the colonies.

Prior to the formal colonisation of New Zealand in 1840, 'policing' of the country was based on ad-hoc, unstructured arrangements.[23] The English government, via the Colony in New South Wales, was interested in New Zealand essentially for economic reasons with its valuable resources in timber, flax, fishing and whaling. By 1840 significant numbers of free settlers had established various trading centres in New Zealand and were keen to receive protection from Maori attacks. However, England could not financially afford to send over any significant number of troops to provide social order.[24] Although various Governors in New South Wales had sent a number of persons to New Zealand to act as JPs and magistrates, these were ineffectual given the absence of any persons capable of enforcing the law as 'constables'.[25] The government also experimented with investing local Maori chiefs with 'power and authority' to assist the magistrate but this model also failed for various reasons: the government could not afford to properly reward the chiefs, the magistrate had few resources to deal with any apprehended offenders, and there were doubts about the legality of the appointment. Thus, the earliest forms of policing were organised by the pakeha settlers themselves, often using Maori as protectors.

In the first few years after 1840, policing in New Zealand was based on the New South Wales model of a local magistrate controlling a number of constables but according to Hill the early magistrates were somewhat of a failure:

> Their [magistrates] relative weakness in a newly occupied 'savage' territory embodied and symbolised the fact that in the first half dozen years of the colony, control mechanisms lay in the main closer towards the

22 *Manual of Police Regulation 1856*, 66. I am indebted to Spt Bob Haldane of the Victoria Police Force for this information.

23 The most detailed account is R Hill, *The History of Policing in New Zealand Volume One Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867, Part One* (1986).

24 Ibid 349.

25 Ibid 37.

> non-overt sector rather than the repressive extreme of the continuum of coercive social control.[26]

It seems clear, however, that what was to become New Zealand's ultimate form of policing was based on the deliberate decision of Governor Gipps (in NSW) and Hobson (the first Lieutenant Governor of New Zealand) to use the hybridised version of the 'new police' that was operating in New South Wales at the time, 'an urban beat system under the control of Police Magistrates'.[27] Thus, the notion of 'preventive policing', upon which the London Metropolitan police was based, was transplanted to New Zealand at the beginning of its colonisation. According to the New Zealand Law Commission:

> There are however few records of the development of police prosecutions in New Zealand. It seems that the duty to bring arrested persons before a justice (also sometimes called a magistrate) ensured the involvement of police in summary, ie minor cases. By 1864 the police were also expected to act as prosecutors in indictable cases, up to and including the justices' preliminary examination.[28]

However, identical to the situation in London, Victoria, and New South Wales, no statute in New Zealand has specifically authorised or endorsed this prosecutorial role of the police.[29]

It was to take another 27 years before a single, centralised national police force was to emerge, and from the 1840s to the 1860s, there were different models of policing operating in New Zealand as the socio-economic conditions varied not just throughout the country but also over time.[30] What is clear, however, is that policing in New Zealand in the 19th century was based on the model operating in New South Wales, which in turn was based on the London Metropolitan model. The idea of the constable prosecuting his own case and later, prosecuting cases on behalf of other constables, evolved as a natural and expected police duty. Perhaps what does distinguish New Zealand from New South Wales historically is that the financial constraints under which policing was emerging was much greater in the Colony of New Zealand compared to NSW. In the first few years from 1840, the English (and New South Wales) government was

26 Ibid 92.

27 Ibid 93.

28 Law Commission, *Preliminary Paper No 28 Criminal Prosecution; A Discussion paper* (1997) 24 citing the *Constabulary Force Ordinance* published in the *New Zealand Gazette*, 8 March 1864.

29 Ibid 26.

30 The first single national police force in New Zealand was created in 1867.

simply not prepared to provide any significant funds for the creation of the basic offices of JP, magistrate, or constable in New Zealand. In these circumstances it was, it is suggested, inconceivable that the government would fund the creation of an autonomous prosecution agency independent of the police to conduct summary prosecutions in New Zealand. Such an agency was unknown in England until 1879, but by then the prosecution role of the police in Australia and New Zealand was firmly in place.

Contemporary Role of the Police in Prosecutions

A comparison between Australia and New Zealand reveals two obvious, but important, differences. First, the office of Director of Public Prosecutions (DPP) has not been established in New Zealand whereas in all jurisdictions in Australia the office of DPP has been established.[31] Second, the police force in New Zealand is a single, national body whereas in Australia, apart from each State and Territory having its own police force, a federal police body (the Australian Federal Police) also operates, resulting in nine separate police forces. What the two countries have in common, however, is the historical and contemporary dominance of the police in summary prosecutions.

In all Australian jurisdictions, apart from the Australian Capital Territory (ACT), the police conduct the bulk of summary criminal prosecutions. In the ACT, both summary and indictable prosecutions are conducted by either the Commonwealth or the Territory DPP. The Australian Capital Territory Police Force used to conduct summary prosecutions in the ACT, but this responsibility was transferred from the police to the Deputy Crown Solicitor in 1973[32]and then to the Commonwealth DPP in 1984, and finally, shared with the ACT DPP in 1991. Thus, in the ACT the DPP conducts all summary prosecutions, including committals. In all the other jurisdictions in Australia the inter-relationship between the police and the DPP varies with respect to summary prosecutions. In some states (Victoria, WA and NSW) the DPP conducts all committals while in other jurisdictions the DPP conducts only some committals (Qld, Tas, NT).

31 *Director of Public Prosecutions Act 1982* (Vic); *Director of Public Prosecutions Act 198* (Cth); *Director of Public Prosecutions Act 1984* (Qld); *Director of Public Prosecutions Ac 1986* (NSW); *Director of Public Prosecutions Act 1990* (ACT); *Director of Publi Prosecutions Act 1990* (NT); *Director of Public Prosecutions Act 1991* (SA); *Director o Public Prosecutions Act 1991* (WA); and in Tasmania the office of DPP wa established by the *Crown Advocate Amendment Act 1986* No 42 (Tas).

32 J Bishop, *Prosecution Without Trial* (1989) 55-56.

In Western Australia the DPP has no statutory authority to conduct summary prosecutions, which, accordingly, must be conducted by the police.[33] In all other jurisdictions, the police can request the DPP to conduct a summary prosecution where, for example, the matter is complex or the defendant is a police officer. Private prosecutions in Australia are rare and, in relation to indictable cases, the DPP has the power to take over the private prosecution following committal. However, the police are responsible for the overwhelming number of summary prosecutions. In all jurisdictions a specific specialist prosecution department has been established within the police force.[34] Police prosecutors usually hold the rank of sergeant or senior constable and in most jurisdictions undertake specific prosecution training, the duration and intensity of which varies significantly between jurisdictions.

In New Zealand the police conduct the bulk of all summary prosecutions. The only exceptions are prosecutions by regulatory agencies, private prosecutions and cases conducted by the Crown Solicitor.[35] It appears that in New Zealand a private prosecution for an indictable matter is theoretically possible but, in practice, virtually unknown.[36] The absence of a DPP in New Zealand probably explains this difference from the Australian practice. Police prosecutors receive some in-house training and usually hold the rank of sergeant.[37] There is some evidence that the function of police prosecutions has not been held in particularly high regard within the police force and is seen as a stepping stone for higher and more meaningful positions and roles for the police.[38] There is evidence of similar attitudes within the police in some jurisdictions in Australia.[39]

33 *Director of Public Prosecutions Act 1991* (WA) s 12.

34 It is perhaps surprising that in some jurisdictions the prosecution department within the police force was not established until relatively recently, eg the 1980s in Victoria and the 1940s in NSW.

35 Law Commission, above n 28, 32.

36 Ibid ch 20.

37 McGonigle, above n 2, 166.

38 Law Commission, above n 28, 27.

39 For example in Western Australia see Western Australian Police; *Professional Standards Portfolio; Management Audit Unit, Investigative Practices Review, Final Report Innovative Solutions for a new Millennium* (1998) 121. In NSW significant numbers of police prosecutors have left the prosecution department over the last few years; information provided by Kym Manitta of the NSW Police Association.

Matters of concern

In New Zealand and Australia the role of the police as prosecutors has been seriously questioned and in some jurisdictions in Australia, police prosecutions restructured. The driving forces behind these growing concerns and reform processes in the two countries are not, however, identical.

New Zealand

As part of its review into 'the law, structure and practices governing procedure in criminal cases', the New Zealand Law Commission issued a Preliminary Paper on 'Criminal Prosecution' in March 1997. In this paper the Commission raised the issue of whether the police should continue to be responsible for the conduct of summary prosecutions. The Commission cited the results of surveys that showed judicial dissatisfaction with the standard of prosecutions conducted by the police 'particularly in relation to sufficiency and presentation of evidence, advocacy and knowledge of the law'.[40] Other concerns raised by the Commission included a lack of confidence by many Maori in the criminal justice system in general and the prosecution system in particular.[41]

One basic criticism was that Pakeha make all prosecution decisions. The Commission recommended that police prosecutors should be trained in tikanga Maori and more Maori should be recruited as police and specifically as police prosecutors.[42] The Commission also canvassed some sixteen other weaknesses of the prosecution system.[43] For the purposes of this article, the most important concern discussed was that existing prosecutions were carried out by the same agency responsible for the investigation; 'This, while convenient, does not present the appearance of objectivity in prosecution decision-making'.[44] The Commission concluded:

> The Commission suggests that the existing prosecution system does not fully meet many of its objectives and believes that it is less efficient than it might be. There is reason to believe that cases unnecessarily go to trial; some cases go further through the process than they might; some are unnecessarily prosecuted; others are less well prepared than they should be ... The merging of investigation, arrest and prosecution functions in

40 Law Commission, above n 28, 27.

41 Ibid 76.

42 Ibid 77.

43 Ibid 98-100.

44 Ibid 98.

> the police, and the fact that the police conduct almost all summary prosecution, can give the appearance of unfairness. So too can the relative indifference of the process towards victims of offences. Partly because of the system's high degree of decentralisation there is inconsistency in decisions. Lines of accountability are uncertain and the mechanisms for control and oversight inadequate ... In the Commission's view it is not enough to deal with these faults by piecemeal change. The prosecution system needs to be considered as a whole and reformed according to coherent principles.[45]

It is suggested that this evaluation represents the most scathing criticism of New Zealand's public prosecution system since its establishment in 1840. However, in its discussion of reform proposals, the Commission's preferred option in relation to the role of the police was less than radical. The Commission accepted that it was important to separate investigation and prosecution functions and noted three options to achieve this goal: privatisation of prosecutions; an independent Crown prosecution service; or adapting the present structure.[46]

The Commission rejected the first two options and recommended the third, including retaining police as prosecutors. The Commission rejected the establishment of a Crown Prosecution Service (or DPP) on the grounds that the role performed by the Crown solicitors in New Zealand has prevented the sort of problems which existed in England prior to the creation of the Crown Prosecution Service.[47] Given that New Zealand does not have the office of DPP, the adoption of a CPS for New Zealand would, according to the Commission, be more 'radical' than what it was in England. The Commission also had reservations as to whether the potential efficiencies resulting from the establishment of a CPS could justify the considerable financial costs involved in setting it up. The preferred model envisaged by the Commission was:

> An autonomous and career oriented national police prosecution service would replace the current police prosecution service, and would be administratively distinct from the criminal investigation and uniform branches of the police. Its creation would address present problems while avoiding large costs and upheavals and would provide more independent prosecution decisions by the police. There should be an express rule in

[45] Ibid 101.
[46] Ibid 105.
[47] Ibid 107.

> the Prosecution Guidelines ... stating that officers in charge of the case cannot conduct the prosecution.[48]

Thus, the police would continue to conduct summary prosecutions but the prosecution department would be *administratively* separate from the rest of the police force. Police prosecutors should also be 'encouraged' to acquire legal qualifications. In its Final Report the Commission confirmed its recommendation that

> the police and other prosecuting agencies should retain the prosecution of summary offences, subject to appropriate guidelines and mechanisms being put in place as recommended by the report. The Commission does not recommend that summary prosecutions (or any class of them) be taken over by crown solicitors.[49]

As a result of these recommendations, the Police National Prosecution Service was formally established on 1 July 1999. In brief, the major features of the new Service are:

- the Service is administratively separate from the investigation arm of the police.
- to provide advocacy services in criminal prosecutions in summary courts.
- decisions relating to selection of charges are to remain with the police informant.
- all prosecutors will be responsible to the head of the Prosecution service who has operational control over all summary prosecutions in New Zealand 'as an agent of the Commissioner of Police prosecuting on behalf of the Attorney-General and Solicitor-General'.[50]
- the prosecutor in court is empowered to withdraw charges or modify briefs in order to comply with Guidelines (to be produced).
- the prosecution structure will be based around regional offices.

According to the police, the prosecution service will consist of a mix of qualified lawyers, who may or may not be police officers, and police without legal qualifications, but with specialised training.

A number of comments can be made about this reform. First, it is not clear how the police would be able to formally appear to prosecute on behalf of the Attorney-General and Solicitor General given that at common law, and in the absence of any legislation, the police prose-

48 Ibid 110.

49 Law Commission *Criminal Prosecutions*, Report 66, 41.

50 Draft *Final Report* para 50.

cute in their own name, not in the name of the Crown or Attorney-General. Second, the employment of civilian lawyers to assist the police to prosecute will be a unique development. The only other jurisdiction where civilian lawyers assist the police prosecutors is the Northern Territory (discussed below) but even there, the lawyers are seconded from the Office of DPP which is not dissimilar to the practice of DPP lawyers conducting summary prosecutions upon request from the police in other jurisdictions. Finally, although the reforms in New Zealand should provide more consistency throughout all the lower courts, the fundamental problem remains that the police force will still be responsible for all summary prosecutions. Administrative separation is sound in principle, but whether accused persons, magistrates, and the general public will perceive any changes in practice, remain to be seen.

Australia

In Australia the topic of police prosecutors has been examined by four Royal Commissions,[51] two Commissions of Inquiry,[52] and several other bodies.[53] However, in *all* these cases, the role of the police as prosecutors has been raised as part of broader terms of reference, rather than as the discrete subject matter of the inquiry. It is also important to note that all of these Commissions and other bodies specifically recommended that the police should no longer conduct any prosecutions. Space does not permit a detailed discussion of all of these official reports and recommendations. Rather, a brief summary of the four most important inquiries will be provided.

The first major analysis of police prosecutions in Australia was provided by Mr Justice Lusher in his major *Commission of Inquiry into the Administration of the NSW Police Administration* (1981). After canvassing the strengths and weaknesses of the use of police as prosecutors, His Honour concluded that conducting prosecutions was not a proper function of the police because there was a lack of independence, the public's confidence in the administration of impartial justice

[51] Stewart *Royal Commission Into Drug Trafficking* (1983) 258; the Street *Royal Commission into certain Committal proceedings against K E Humphrey* (1983) 99; the Fitzgerald *Royal Commission of Inquiry* (Qld) (1989) 235-238 (Fitzgerald Report); and the Wood *Royal Commission of Inquiry* (NSW) (1997) 316 (Wood Report).

[52] *Commission to Inquire into the New South Wales Police Administration* (the Lusher Report) (1981) 258; the NSW Independent Commission Against Corruption, *Report* (1994) 53 (ICAC Report).

[53] St Johnston *Report* (Vic) (1971); South Australia *Criminal Law and Penal Methods Reform Committee* (1974).

was undermined, and the police cannot provide adequate advice because they are not legally qualified.[54] The Lusher report recommended that this role of the police be transferred to an independent agency. The government of the day, and subsequent governments, in NSW did not act on these recommendations.

In 1989 the report of the *Royal Commission of Inquiry into the Queensland Police Service* also raised the issue of police prosecutions. The Commissioner, Mr Tony Fitzgerald QC, referring back to the views of Mr Justice Lusher, also recommended that the prosecution role of the police be abolished on the basis that there existed a perception of bias, there exists a lack of independence, it is not one of the 'core functions' of the police, the police are not legally qualified and the system is generally inefficient.[55] No government in Queensland has implemented the reforms proposed.

Five years later in NSW, the issue again arose as part of the NSW Independent Commission Against Corruption as part of its inquiry into the relationship between the police and criminals (1994). The Commission referred to the potential for corruption of police prosecutors, a perception of bias, and the dangers in having legally unqualified prosecutors. Rather than specifically recommending the abolition of this role, the Commission recommended a pilot program to test empirically whether summary prosecutions could be more effectively conducted by an independent agency.[56] This particular recommendation was not implemented at the time.

The most recent body to consider the issue was the NSW Royal Commission into the New South Wales Police Service. This Royal Commission was headed by Mr Justice Woods and began its inquiries in 1994. During the life of the Commission, the NSW DPP, Mr Nicholas Cowdery QC, made a number of written submissions to the Wood Royal Commission urging that the Commission add the topic of police prosecutions to the scope of its inquiries and strongly recommending that police summary prosecutions should be transferred to his office of DPP in a staged transition.[57] At the suggestion of Mr Justice Wood QC, two pilot projects were conducted to compare the performance of the police with DPP lawyers in summary prosecutions. Following the completion of the pilot projects, the Wood

54 Lusher Report, above n 52, 53.

55 Fitzgerald Report, above n 51, 235-238 and 381.

56 ICAC Report, above n 52, 53.

57 Written submissions, dated 18 April 1995 and 17 July 1995 to the Commission.

Royal Commission specifically recommended that police prosecutions be transferred to the office of DPP in a staged implementation.[58] The New South Wales Police Association subsequently embarked on an intense political campaign opposing such a transfer.[59] To date no government in NSW has implemented the recommendations of the Wood Royal Commission. The writer was advised by the Director of the Criminal Law Review Division in the NSW Attorney-General's Department that 'I am unaware of any current policy or plans of the Government to transfer the responsibility for summary prosecutions from the Police to the Office of DPP'.[60] Further, the NSW Office of the DPP has advised the writer that the NSW government has never advised the DPP as to why the relevant recommendation of the Wood Royal Commission have not been implemented.[61] However, it appears that during 2000 significant restructuring of the NSW prosecutions department has been undertaken in order to separate the prosecution functions from the investigative functions. The position of 'General Manager' has been created within the NSW Police Service to act as an independent authority with the power to discontinue proceedings. Guidelines produced by the NSW DPP are applied.[62]

Developments in other Australian jurisdictions

Space does not permit a detailed description of developments in every Australian jurisdiction. Rather, a summary is provided of events in those jurisdictions where significant developments have occurred in relation to the issue of police prosecutions.

Northern Territory

In the Northern Territory, prior to 1998, the police conducted all summary prosecutions. However, from the inception of the office of DPP in 1991, concerns about police prosecutions have been expressed. Specifically, many members of the Magistracy have made repeated submissions to the office of DPP that the DPP take over

58 *Final Report, Vol II, Corruption* (1997) 316-318.

59 Information provided to the writer by Ms Kym Manitta of the NSW Police Association. The Association for example, sent a letter to every member of cabinet and the Opposition on 1 August 1997 setting out its concerns with the proposal to transfer prosecutions to the DPP.

60 Mr Andrew Haesler, 29 June 1999.

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

62 Correspondence dated 21 December 2000 from Mr Michael Homes, General Manager, Court and Legal Services, NSW Police Service.

police prosecutions.[63] The concerns related to the quality of advocacy and preparation of the prosecution case. The second NT DPP, Mr Rex Wild QC, initially addressed the problem in 1996 by appointing three solicitors to assist the police in conducting summary prosecutions. In the meantime, the revelations of the Wood Royal Commission in NSW in 1997 no doubt forced all prosecution authorities in Australia to reconsider the appropriateness of current prosecution arrangements.

A more radical reform occurred on 11 February 1998 in the Northern Territory with the signing of a Memorandum of Understanding between the DPP and the Commissioner of the Northern Territory Police. Under this MOU, the day-to-day supervision and control over the former police prosecution department came under the office of DPP and the department was renamed 'Summary Prosecutions' (thus taking the 'police' out of prosecutions in one fell swoop!). Existing police members are now 'attached' to the office of DPP and work alongside DPP solicitors conducting summary prosecutions, and non-core functions of police prosecutions have been transferred elsewhere. Training of police prosecutors has also been upgraded. In Alice Springs the Summary prosecutions Unit is directly responsible to the Assistant Director of the Office of the DPP. Police members continue to prosecute in remote areas, but increasingly under the supervision of the DPP. Thus in the Northern Territory, an 'integrated' model of summary prosecutions has emerged whereby police continue to prosecute but under close supervision of the DPP and alongside civilian solicitors. This unique model has only been possible because of a high degree of cooperation between the DPP and the police, and what could be described as a growing 'crisis' within summary prosecutions in that jurisdiction. Perhaps the key to the success of this model is that it developed outside the political arena and arose out of a common sense approach by the key players themselves rather than politicians or the Executive. The Northern Territory Attorney-General's Department has advised the writer 'This Department has no policy on the issue'.[64]

63 Discussions by the writer on June 1999 with Superintendant Peter Thomas, the senior officer in charge of the prosecutions department and also the President of the Northern Territory Police Association.

64 Letter dated 23 June 1999.

Western Australia

Prior to 1991, police conducted all summary prosecutions throughout Western Australia. Although an office of the DPP was established in 1991, s 12 of the *Director of Public Prosecutions Act 1991* (WA) prohibits the DPP from conducting any summary prosecutions. This statutory prohibition was the result of intense lobbying by the WA Police Association attempting to restrict the powers of the DPP and conversely, to retain this traditional role or 'turf' of the police. This is the only jurisdiction in Australia where this prohibition exists. The police prosecution department was restructured towards the end of the 1980s and early 1990s when the WA Police Service implemented merit-based promotion with a heavy emphasis on 'human relations' and management skills as paramount skills for the police officer of the 1990s. Many members of the prosecution department subsequently failed in applications for promotion and left the Police Service. The prosecution department was further marginalised under 'Operation Delta', introduced by Commissioner Bob Falconer. Under Delta, the prosecution department became decentralised and was no longer classified as a specialist department. This re-categorisation was part of a broader refining of 'core' police functions. By this time (the early 1990s), the quality of prosecutions had seriously declined in terms of brief preparation, training and advocacy.[65]

The first suggestion for reforming police summary prosecutions appears to have been in March 1994 when the then DPP (Mr John McKechnie QC) wrote to the Attorney-General proposing that the office of DPP take over all police summary prosecutions.[66] This proposal was strongly opposed by the WA Police Association. In October 1997, a major review into the entire investigative and prosecutorial practices of the WA Police Service was undertaken by two specialist police officers from Strathclyde Police Force.[67] The report contained a scathing criticism of the quality of prosecution processes and practices. Specifically the report highlighted the lack of supervision, lack of credible evidence in briefs, lack of training and experience of police prosecutors. The report drew parallels with the findings of the Wood

[65] Based on the writer's interviews during 1999 with existing and former police prosecutors, and former detectives of the WA Police Force.

[66] Letter dated 15 September 1994 from Police Commissioner Falconer to the Minister for Police. I am indebted to Acting Spt Robin Moore for access to this documentation.

[67] Professional Standards Portfolio, Management Audit Unit, Investigation Practices Review, *Final Report* (1998).

Royal Commission in NSW, and blamed the prosecution system for many of the cases withdrawn, subject to a *nolle prosequi*, or dismissed.

The issue of police prosecutions resurfaced again in December 1997 when the DPP and the police Commissioner forwarded a joint submission to the government proposing that the office of DPP take over police prosecutions.[68] In June 1998, a Working Party was established by the government to fully research the feasibility and desirability of such a proposal. The Working Party did not receive any submissions opposing the proposal and in April 1999, the final report of the Working Party was submitted to Cabinet. Cabinet accepted in principle the desirability of the transfer but, due to a lack of funding, postponed the idea for the near future.[69] To date the government in WA has not made any public statement relating to this issue. In summary, in WA there is a clear movement for the DPP to take over police summary prosecutions emerging from a gradual decline in the quality of prosecution decision-making and resources from the early 1980s, and a redefining of the 'core functions' of the police. Initial opposition from the WA police appears to have been replaced with an acceptance that a transfer to the Office of the DPP will simply result in a superior quality of prosecution service delivery.

Victoria

As indicated earlier, from at least the 1850s, members of the Victoria Police have conducted summary prosecutions in Victoria. Gradually it became the practice for the local sergeant to prosecute summary cases on behalf of other police, but it was not until 1981 that the prosecution department was formally established within the Victoria Police Force.

The only significant report into the topic of police as prosecutors was a report in 1971 by Colonel Sir Eric St Johnston, who recommended that police should not conduct prosecutions on the basis that this was not part of the police function and involved the creation of conflicts of interests and there existed a lack of independence. In 1995 the Victorian Government appointed KPMG, a major accounting firm, to conduct a massive inquiry into the operation of the entire system of criminal justice administration in Victoria. The Inquiry was named 'Operation Pathfinder'. In its initial report the Inquiry stated:

68 Information provided to the writer by Mr Bruce Carrol, Project Manager Public Sector Review WA Ministry of Justice. The assistance of Mr Carrol is greatly appreciated.

69 Ibid.

> It is envisaged that there would be a single prosecutorial body for criminal matters. This body would be responsible for the prosecutorial role currently performed by police, Correctional Services officers and the office of Public Prosecutions ... the roles of police, corrections, and the prosecution would take on a very different philosophy, police and corrections focussing solely on the gathering of evidence and the prosecution body focussing on the preparation of the case itself.[70]

However the subsequent reports of Operation Pathfinder did not specifically recommend that police prosecutions be transferred to the DPP; rather, the report simply stated this was a matter for government. The Victoria Police Association oppose any such transfer.[71] In summary there is no firm indication that the present government in Victoria intends to remove summary prosecutions from the police function.

Arguments against Police as Prosecutors

It is submitted that ideally, the police should not conduct any prosecutions and that function should be transferred to the office of DPP in all jurisdictions in Australia by way of a staged and careful transition. From the preceding discussion, some eight separate but related concerns can now be identified:

(a) The primary argument in support of this submission is the requirement of independence and impartiality in prosecutorial decision-making. This was the key reason for the establishment of the office of DPP in Australia and the Crown Prosecution Service in England.[72] There exists a fundamental conflict of interest where the same agency is responsible for both the investigation and prosecution of the same criminal matter. This actual or potential conflict is most pertinent in the case of defendants belonging to minority groups such as aboriginals or Maori.

(b) Apart from this issue of principle, concerns have been expressed about the quality and standard of prosecutions conducted by some police in Australia and New Zealand, particularly if the prosecutor does not have a law degree. In all Australian jurisdictions only a small percentage of police prosecutors have a law degree. This must have

70 Department of Justice, *Operation Pathfinder*, vol 1.

71 Interview on 23 June 1999 by the writer of Mr Graeme Kent, Secretary Victoria Police Association.

72 Discussed by the UK Royal Comission on Criminal Procedure, *Report Cmnd 8092* (1981) para 381; St Johnson Report (1971), above n 53, 178; Lusher Report (1981), above n 52, 246 and also see *Price v Ferris* (1994) Aust Crim R 127, 130.

an impact on the capacity of the police to make informed and appropriate decisions. Poor legal training can result in high rates of acquittals that can also undermine community confidence in the administration of justice, particularly from the perspective of the victims.

(c) In addition, police prosecutors are less accountable than their DPP counterparts. Accountability of police prosecutors is essentially regulated by relevant police organisational rules, Standing Orders, or Police Manuals, combined with whatever training the police receive in-house.

(d) In terms of efficiency, the broad issue is whether conducting prosecutions should be a function of the police at all. In some jurisdictions (eg WA), a process is under way of the police redefining their core functions with more than a hint that prosecutions is simply not a matter appropriate for the police. The other aspect of 'efficiency' is concerns in some jurisdictions that police prosecutions result in unacceptably high rates of acquittal. The WA Investigative Review (1997) and the WA Review of Committals (1998) for example, confirmed this pattern.

(e) There is an argument that key criminal justice decision-making should be made on a consistent basis. In the case of prosecutions, this means that ideally the same prosecution criteria and policy should be used by all prosecutors within the one jurisdiction and ideally, nationally. At present this is not the case with disparities between police and DPP prosecution policies.

(f) Arguably, transferring prosecutions to the DPP will improve access by some members of the community. There is evidence that some members of minority groups are reluctant to lodge a complaint (eg concerning alleged police brutality) with a police prosecutor but are more willing to approach an independent, autonomous person or agency.

(g) As discussed above, conducting summary prosecutions was not part of the original police function and not formally authorised by parliaments. The police simply filled a void. However, now that the office of DPP has been established throughout Australia, prosecutions need not necessarily remain as a core function of the police.

(h) Admittedly, there is little if any evidence of police corruption in prosecutions. However, in his report Mr Justice Wood stated 'In many instances, however, an astute and fair-minded prosecutor migh

well have been expected to entertain a suspicion that all was not above board, to the point of initiating an internal investigation'.[73]

Discussion

From the above comparison of New Zealand and Australia a number of considerations can be suggested. First, the reason why the police emerged as the prosecutors in summary courts in both countries is essentially because the foundation policing model adopted by each country was based on the ancient English common law system of constables assisting the JP and local magistrates, and the practice of constables prosecuting their own cases. Ideologically, the idea of any citizen, including constables, being able to prosecute another citizen was seen as an important constitutional right and protection against abuses by the State. Although the model of an independent prosecution authority was widespread in Europe, there was no English precedent for such a model when New South Wales and New Zealand were colonised. Arguably, the financial resources required to establish an independent prosecution arm of government were simply prohibitive, particularly in the case of New Zealand where the English government was experiencing major financial difficulties in the second half of the nineteenth century.

In England, Australia, and New Zealand, the role of the police as prosecutors has emerged through a process of *accretion* rather than any specific political decision of any government or legislature. It is suggested that, whilst the historical processes underlying this function can be understood, and indeed, prima facie, may appear to be obvious, it is nevertheless quite remarkable that the State in all three countries has never attempted to check, constrain, or even question the right of the police to perform this role. In this sense the State has acquiesced in the police appropriation of the power to prosecute. It has simply been administratively and politically easier to turn a blind eye to the matters of principle discussed above.

Although there have probably always been some concerns expressed about the quality of police prosecutions (as there have about policing in general) from the time of colonisation, there has not been any major 'crisis' of confidence in the prosecution system in either country until the 1980s with the recommendations of the Royal Commissions and other Inquiries discussed above. In New Zealand, the Northern Territory and Western Australia, the problems have been considered serious enough to justify either restructuring of the police prosecu-

[73] Wood Report, above n 51, 109.

tion function or, a major governmental inquiry into the issue with reform proposals going before Cabinet (WA): but in no jurisdiction have any legislative reforms been introduced.

The failure or refusal of any government to introduce reforms to police prosecutions requires brief comment. In Australia and New Zealand it is reasonable to assume that governments want the criminal justice system to operate effectively and to be seen by the community as possessing integrity. Aspects of criminal justice administration can be important in political terms to the success or failure of a government. In Australia, governments have evidenced their concerns to have independence in criminal justice decision-making by the creation of the office of DPP in every jurisdiction.[74] Thus, in relation to indictable prosecutions in the higher courts, governments have accepted the need to establish an autonomous and independent prosecution agency; yet, in relation to summary prosecutions, the same ideological commitment of governments is missing. Similarly, in New Zealand, the requirement of independence in summary prosecutions has been clearly accepted by the Law Commission, but not the need for the creation of a fully autonomous prosecution agency. Why is it then that, despite the flurry of reform recommendations discussed in this article, the traditional police summary prosecution model has persisted for so long and apparently will probably continue to persist in the near future in most jurisdictions in Australia and New Zealand?

There is no single factor to explain the apparent contradiction but a number of contextual realities can be briefly mentioned.[75] First, summary prosecutions are simply not high on the agenda of any political party and have little political 'purchase'. No government is under any significant electoral or other pressure to address the issues raised by the plethora of Commissions of Inquiry and others described in this article. From the community's (or consumer's) perspective, apart from a limited number of specific interest group

[74] The requirement of independence in decision-making is not limited to systems of public prosecutions. The notion of judicial independence appears to be attracting increased attention not only within the judiciary but also in terms of media and academic analyses; see for example, R Douglas, 'The Independence of the Judiciary' (1997) 15 *Law in Context* 1. The requirement of independence in jury decision-making can also be seen in recent controversies surrounding media disclosure of jury decision-making.

[75] Prior to the creation of Offices of the DPP (from 1983) it would have been difficult for governments in Australia to transfer summary prosecutions to the then Crown Law Departments as these Departments were under-resourced and often unable to deal with their own regular workloads, let alone taking over all summary prosecutions.

submissions to the Wood Royal Commission, there is little, if any, evidence that the general populace is aware of the issues raised by the police acting as prosecutors. This persistence of police prosecutions is no doubt linked to what McBarnett refers to as the 'ideology of triviality' that surrounds summary proceedings.[76] That is, a generally held perception that the lower courts only deal with relatively minor matters on a routine basis, having no significant impact on the lives of defendants and is thus a jurisdiction where the Rule of Law does not apply as it does in the higher courts. In reality, the lower courts in Australia, England, New Zealand and other Western countries not only deal with more criminal cases than the higher courts, but the jurisdiction of the lower courts has been radically increased over the last decade, empowering magistrates to hear and determine serious charges which previously could only be heard by a judge and jury.[77]

The low public profile of the issue of police prosecutions is also explicable in terms of the absence of any (public) 'crisis' or major controversy surrounding police summary prosecutions. There is no clear evidence of, for example, systemic corruption in any police prosecution department. Indeed, police submissions to the various Inquiries have emphasised the benefits of the status quo in terms of police having lengthy experience in prosecutions, superior liaison skills with other police and an ability to process large numbers of cases on a routine basis.[78] By comparison, in England the conduct of summary prosecutions had attracted very considerable criticisms culminating in the recommendation of the Royal Commission on Criminal Procedure (the 'Philips Report') in 1981 that an independent prosecution authority be created. [79]

A further factor concerns the role and power of Police Associations. There is of course little argument that the police, as an institution, are a very powerful body and have been able to influence government policy, particularly in a 'Law and Order' climate. In general, the police tend to guard what they perceive as their 'turf' or 'territory', whether it be threatened encroachment by another state law en-

76 D McBarnett, *Conviction: Law, the State and the Construction of Justice* (1981).

77 See P Darbyshire, 'The Importance of the Magistracy' [1997] *Criminal Law Review* 627; J Willis, 'The Processing of Cases in the Criminal Justice System' in P Wilson and D Chappell (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 137.

78 See Police Association of NSW, *Recommendation 64 of the Royal Commission into the NSW Police Service: Documents supporting the retention of Police Prosecutors*, (1997) (unpublished).

79 See C Walker and K Starmer, *Justice in Error* (1993) 7.

forcement agency or by the private sector. However, in Australia the attitude of Police Associations to the issue of summary prosecutions is problematic and it is dangerous to generalise. In some jurisdictions, the police are firmly against the transfer of summary prosecutions to the DPP whilst in other jurisdictions, the police are less concerned with this proposal. For example, in New South Wales, the Police Association appears to have been successful in its political campaign opposing the transfer of summary prosecutions to the DPP. In Western Australia the Police Association was initially vehemently opposed to the transfer but appears to have gradually agreed to the proposition and in the Northern Territory, the Police Association have actively worked with the Office of DPP to effect such reform.

Another factor is that, apart from questions of principle, governments have no doubt been concerned about the financial implications of a transfer to the DPP. Admittedly it is not entirely clear whether the total amount spent on prosecutions would increase or decrease if a transfer was implemented. It is not simply a matter of deducting the 'prosecution' component from the total police budget and adding that amount to the budget of the DPP because, following the transfer, greater efficiencies could be expected with having the one agency conduct all public prosecutions. Specifically, there would be less duplication of documentation with a single prosecution agency. In those jurisdictions where the DPP has taken over committal proceedings, increased rates of guilty pleas (and at an earlier stage in proceedings) have also resulted.[80] These savings would have to be counterbalanced by the costs involved in recruiting additional DPP prosecutors and refurbishment of new offices separate from the police. One of the few empirical studies into this costing issue has been a progress report by the NSW Premier's Department into a Pilot Study, estimating that a wholesale transfer of summary prosecutions to the DPP would cost $15.24 million per year which represents a saving of nearly $5 million per annum.[81]

In Tasmania the Treasury Department initiated an 'Output Study' in 1997 to determine the financial implications of transferring police prosecutions to the DPP, a proposal supported by the then DPP Mi

[80] G Overman *A Review of the Role of the Director of Public Prosecutions in the Perth Court of Petty Sessions 1997* (1998); D Brereton and J Willis, *The Committal in Australia* (1990) 65ff.

[81] NSW Premier's Department, *Prosecuting Summary Offences: Options and Implications: Second Progress report on the Evaluation of the DPP Summary Prosecution Pilot* (1997).

Damian Bugg QC, but opposed by the Tasmanian Police Association.[82] The Justice Department took the view that for such a transfer to be viable, resources would have to be taken from the Police budget in order to provide the necessary additional funding. The government at the time was not prepared to reduce police resources or police numbers, particularly in a sensitive 'Law and Order' climate and a Police Association actively campaigning for increased resources. For these reasons, no change was viable and it appears that no change can be expected in the near future. The issue of police prosecutions was thus linked to the broader political context and economic rationalist concerns.

The way in which the issue of police prosecutions has arisen from the 1980s, and been addressed in each jurisdiction, has varied significantly. In New Zealand and the Northern Territory, the major catalyst for change has been the concerns expressed by the judiciary and magistracy regarding the standard of police prosecutions. In Western Australia, the same concerns have been expressed initially by the then DPP and Attorney-General, and later, by a specially commissioned governmental Working Party. In NSW the impetus for change has come from the DPP although subsequent submissions from the magistracy and others to the Wood Royal Commission support a transfer of summary prosecutions to the DPP. In Victoria there is no evidence of any campaign by a DPP for such a transfer. Instead, the proposal appears to have originated in the context of broader governmental concerns with creating a more economically rational criminal justice system including the 'streamlining' of all prosecutions, to be conducted by a single agency.

The Future

It is difficult, if not impossible to predict likely reforms in criminal justice administration in any of the jurisdictions discussed in this article. In this area, law reform is very much connected to the 'law 'n' order' policies of the political party in power and in particular, policies regarding the importance of broader economic considerations relative to accepted principles of criminal justice. Reform initiatives will also be affected by media portrayals of justice issues, and to a lesser extent, by the activities of specific interest lobby groups such as Police Associations. In the absence of any sensationalist incident, police summary

[82] Information provided by Mr Richard Bingham of the Tasmanian Justice Department to whom I am indebted.

prosecutions is not a topic likely to reach the headlines of the newspapers or the top of political agendas. Governments and administrators usually have more things to worry about in the administration of criminal justice (eg management of prisons, sentencing and police resources).

It may be that the high public and political profile of these other aspects of criminal justice administration has deflected attention away from the more fundamental issue of whether police should continue to conduct prosecutions. In Australia, as a result of the factors described above, the issue has been suppressed from general public debate and it appears no government is yet prepared to engage in any wholesale reforms. All the findings and recommendations of respected Commissions of Inquiry and other authorities have simply been ignored by governments. Where some informal reform has taken place, it has been through the initiative of individuals, such as the DPP in the Northern Territory, in the context of specific local administrative arrangements. In New Zealand, the restructuring of the prosecution service has been a response to forceful recommendations of the Law Commission which threatened that if the police did not engage in the type of prosecution restructuring suggested by the Commission, then it would 'favourably reconsider the idea of a Crown Prosecution Service'.[83] In the face of this prospect, it is not surprising that the New Zealand Police Force have been enthusiastic to implement the required reforms. It is therefore most unlikely that the Office of DPP will be created in New Zealand in the foreseeable future. In New Zealand, whilst the restructuring of the prosecution department is a welcome development, police prosecutions should ideally be transferred to an independent agency, such as the Crown Solicitors, although the creation of a fully independent body such as the office of DPP would be preferable.

In terms of future options for governments, there appears to be three basic strategies. First, to retain the status quo of police conducting the majority of all summary prosecutions. The problem here is that all of the above concerns and objections remain. The second choice is some form of restructuring within the police force (without any transfer to the DPP) to create more autonomy and separation between the investigative arm of the police and the prosecution arm. Restructuring may or may not include the use of civilian lawyers to work alongside the police prosecutors. Where this partnership does occur, this strat

[83] Law Commission, *Preliminary Paper*, above n 28, para 95.

egy could be described as an 'integrated model'. This is the direction of reform in the Northern Territory and New Zealand. The difficulty with this option is simply the argument that the police should never prosecute. The third option is a wholesale transfer of summary prosecutions to the DPP. It has been argued in this article that this is the most appropriate long-term option for governments in Australia. There have been no major difficulties with transferring committal proceedings to the DPP and most probably, the police have welcomed this reform where it has occurred.

Conclusion

The above discussion suggests there have been three general stages in the development of systems of summary prosecutions in Australia, with similar patterns in New Zealand. First, the initial period from 1788 to approximately the 1850s, where summary prosecutions were dominated by private citizens acting as informants and prosecutors, alongside ad-hoc police forces with some police conducting their prosecutions. This replicated the model that had been used in England for many centuries beforehand with minimal state intervention. No permanent police prosecutions departments existed. The second stage was from the 1850s to about the 1980s when the previous ad-hoc arrangements were replaced with more permanent and routine prosecutions by the police and the development of specialised police prosecutors by the middle of the twentieth century. The 1990s mark the third and current stage of developments characterised by a questioning of the traditional police prosecution model and in some jurisdictions, experimental new arrangements to deal with local concerns. The way in which the police, Offices of DPP, and governments in each jurisdiction deal with these issues has varied considerably between jurisdictions depending upon the local political, social and geographic conditions, all of which constitute the policing 'milieu'.

In some jurisdictions it may not be reasonable to expect a wholesale and immediate transfer of summary prosecutions to the DPP. In Queensland and Western Australia, for example, the vast distances within those jurisdictions raise special physical and administrative difficulties and all that can be expected in the short term is increased supervision of police prosecutions by the relevant office of the DPP in order to achieve greater consistencies, efficiencies, and levels of competence. Indeed, it may take some time before any wholesale transfer of summary prosecutions takes place in any jurisdiction but, it is submitted, the driving forces behind such a reform are so compelling that sooner or later, a single system of summary prosecutions

will emerge. Some time in the not too distant future, the police, governments and the general community will look back at this era of police prosecutors and observe it to be an historical aberration. When this last step occurs, the traditional role of the police as summary prosecutors will be seen for what it always has been: a temporary measure to meet the practical and administrative need of societies in transition.