CRIMINAL PROSECUTIONS IN WESTERN AUSTRALIA: A VIEW FROM THE NINETEENTH CENTURY

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Many scholars have analysed the differences between criminal trials in common and civil law systems. The adversarial trial in England, Australia and elsewhere provides a contrast with the inquisitorial process found in continental Europe and other civil law countries. Legal history adds another dimension. The common law criminal trial was once less adversarial and more like the civil law model than is generally appreciated. Lawyers came late to the prosecution process: the accused was not permitted to be defended by counsel, and so it was rare for counsel to appear for the prosecution. This meant that the judge took the lead in questioning the accused and the witnesses. Counsel were finally permitted to appear in the early 18th century, and this was the key factor in the evolution of the modern adversarial trial.

One of the elements in this story is that in England, for many years, prosecution was primarily carried out by lawyers in private practice. It was not until 1985 that the Crown Prosecution Service was established. It is here that the Australian experience has been rather different. In Australia, from the early days of settlement, public officers were appointed to undertake criminal prosecutions. In part, this was due to the special circumstances prevailing in the early years of colonial settlement, when very few lawyers were available. It was also due to difficulties with transplanting fundamental aspects of English criminal procedure such as the grand jury: in Western Australia, when the grand jury was abolished, the Advocate-General and the Crown Solicitor assumed full responsibility for prosecutions. The Western Australian experience also shows the extent to which English rules and practices were perpetuated or adapted in a small colony on the other side of the world.

I INTRODUCTION

The contrasts between criminal procedure and criminal trials in common law and civil law systems are well known, and have been frequently analysed by scholars.[1]

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1 See eg Peter Stein, *Legal Institutions: The Development of Dispute Settlement*

The adversarial system of the common law lends itself to depiction in movies and TV dramas.[2] Counsel for the prosecution and the defence argue opposing cases before the judge and the jury, the judge directs the jury, and the jury considers its verdict. The trial is preceded by a process of investigation, carried out by the police, leading to the charging of the suspect. Even though there may be a preliminary hearing, everything looks forward to the trial, when all the evidence is put before the court. It has been said that the whole process resembles a theatrical performance and the rehearsals for it.[3]

Aficionados of crime dramas set in continental Europe, from *Maigret* to *Wallander*, will know that the process there is rather different. Whereas in common law systems investigation is in the hands of the police, in Europe it is carried out under judicial supervision.[4] The process focuses on the collection of all the facts and the evidence, which is compiled in the form of a dossier that is ultimately placed before the court. The court consists of a bench of judges,[5] all of whom will be well versed in the contents of the dossier by the time the trial takes place. At the trial, the court examines the witnesses – though it is not always necessary to go through all the evidence in court – and counsel for the prosecution and the defence play only minor roles. There is none of the drama of examination and cross-examination found in the common law. Instead of the analogy of the theatrical performance, it has been said that the process resembles a train proceeding from stop to stop until it arrives at its ultimate destination.[6]

History adds another dimension to this comparison. A leading legal historian and comparative law scholar, Professor John Langbein, has shown that the adversarial criminal trial is not something that has existed from time immemorial, but is a much more recent creation than is generally suspected. This is because counsel were latecomers to the prosecution process: for many years, the accused was not permitted to be defended by counsel, and so it was rare for counsel to appear for the prosecution. This meant that the judge conducted proceedings, taking the lead in examining the witnesses and asking questions. It was not until the early 18th century, when the accused was finally permitted to be represented by counsel, and counsel began to appear for the prosecution, that the adversarial trial as we

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(Butterworths, 1984) chs 3-5.

2 See eg Kathy Laster, *The Drama of the Courtroom* (Federation Press, 2000).

3 EJ Cohn (ed), *Manual of German Law* (Oceana, 2nd ed 1971) vol 2, 174 (Cohn). In this article I examine trials for indictable (serious) offences before a judge and jury. Trials of summary offences in magistrates' courts, where there is no jury, are somewhat different. The great majority of criminal offences are tried in magistrates' courts.

4 In France, the investigation is supervised by the *juge d'instruction*, in Germany by the *Staatsanwalt* (the state attorney).

5 In France, the most serious offences are tried by a *Cour d'assize* consisting of three professionally qualified judges and nine lay judges; other serious offences are tried by a *Tribunal correctionnel* consisting of a bench of three professionally qualified judges. In Germany, serious offences are tried by a court (usually the criminal chamber of the *Landgericht*) consisting of three professionally qualified judges and two lay judges.

6 Cohn, above n 3, 174 (although here Cohn was referring primarily to civil proceedings).

know it today began to evolve, with counsel dominating proceedings and the judge assuming the role of umpire. All this suggests that criminal procedure in the English common law courts was once much more like continental criminal procedure than is generally realised.

However, there have always been important differences between the common law and civil law models. One is that in the continental European systems, prosecution has always been seen as a public function, to be exercised on behalf of the state, with appropriate resources devoted to it. In England, by contrast, the system was essentially private, in that it was assumed that the prosecutor – the victim of the crime, or the victim's relatives in cases of homicide – would take the initiative in reporting the crime and providing the evidence. Although there were earlier initiatives, such as the Bow Street Runners in London,[7] it was not until the 19th century that police forces became established,[8] and even then no institutional support was provided for the prosecution process.[9] Some police forces appointed a police solicitor, others referred cases to private firms of solicitors; the solicitors then briefed counsel in general practice. It was only in 1985 that a state agency staffed by lawyers who were made responsible for conducting prosecutions – the Crown Prosecution Service – was established.[10]

This is where the Australian experience – the principal subject of this article – has been very different.[11] In Western Australia, shortly after the establishment of the colony, it was thought necessary to appoint a public officer – the Advocate-General – to take responsibility for prosecuting criminal cases. There was really no alternative, since there were hardly any lawyers available in the colony at that very early stage, so there could be no question of briefing someone in private practice. Another factor was the difficulties experienced in transplanting one of the established institutions of the English criminal trial, the grand jury, whose

7 See John Beattie, *The First English Detectives: The Bow Street Runners and the Policing of London, 1750-1840* (Oxford UP, 2012).

8 In 1856, police forces were made compulsory in every county in England and Wales: *County and Borough Police Act 1856* (UK), 19 & 20 Vict c 69.

9 On the situation in England in the 19th century, see Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State' in Douglas Hay and Francis Snyder (eds), *Policing and Prosecution in Britain 1750-1850* (Clarendon Press, Oxford, 1989) 3 (Hay and Snyder, *Policing and Prosecution*). For an account of the legislative attempts to introduce a public prosecution system, see Philip B Kurland and DMW Waters, 'Public Prosecutions in England 1854-79: An Essay in English Legislative History' [1959] *Duke LJ* 493.

10 By the *Prosecution of Offences Act 1985* (UK).

11 The same seems to be true elsewhere. The American colonies had public prosecutors by the time of the Revolution, and Upper Canada (later part of Ontario) by the early 1800s: see Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State' in Hay and Snyder, *Policing and Prosecution*, above n 9, 29-31. In Ireland, public officers were appointed to conduct prosecutions soon after the Act of Union of 1800: see John McEldowney, 'Crown Prosecutions in Nineteenth-Century Ireland' in Hay and Snyder, *Policing and Prosecution*, above n 9, 427, 429. Both these sources also refer to the much older Scottish system of prosecutions conducted by the Lord Advocate and Procurators-Fiscal.

function was to review bills of indictment submitted to it and certify that the case could go to trial. The grand jury only survived in Western Australia until 1855, and when it was abolished[12] its functions devolved upon the Advocate-General as public prosecutor. The story in the other colonies was not dissimilar. In each jurisdiction, from the outset, public officers were tasked with the responsibility of conducting criminal prosecutions. In South Australia, the only other colony established as a free settlement, grand juries were abolished at round about the same time as in Western Australia,[13] and in the convict colony of New South Wales (and therefore in Tasmania, Victoria and Queensland, when they became separate colonies) grand juries were never used.

After briefly sketching the English background, this article concentrates on the Western Australian experience. It concludes with a comparison of the position in the other states.

II CRIMINAL TRIALS IN ENGLAND

Whereas the civil court system was London-based, with the three common law courts sitting in Westminster Hall and the Court of Chancery also sitting there or in places such as Lincoln's Inn, the criminal court system was prevailingly provincial. From the 1200s onwards, cases of serious crime (indictable offences) were tried at the assizes, held twice a year in every major town or city.[14] There were no permanent assize judges. Twice a year, when the courts were not sitting in London, the judges of the common law courts would "go on circuit": operating under commissions of oyer and terminer (to hear and determine) and general gaol delivery, they would travel one of the six (later, seven) circuits into which the country was divided, going from one location to another trying the cases that were awaiting trial. This system proved remarkably durable,[15] surviving until the mid-20th century when it was finally replaced by the modern system of Crown Courts[16] recommended by a Royal Commission chaired by Dr Beeching,[17] entrusted with this task following his achievement in reforming the railways. As from the 14th century, the assize system was supplemented by courts of quarter sessions, held four times a year (as the name suggests) in each county and borough. Quarter sessions, like the assizes, tried indictable offences, though the most serious cases were reserved for the assizes. Courts of quarter sessions were constituted by the justices of the peace (JPs) for the county or borough in question, sitting as a group. The JPs were not lawyers, but simply a group of local gentlemen. These

12 By the *Grand Juries Ordinance 1855* (WA) 18 Vict No 5.
13 By the *Grand Juries Act 1852* (SA), No 10 of 1852.
14 However, the Old Bailey, the London equivalent of the assize courts, sat eight times a year: John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford UP, 2003) 17.
15 See Sir Basil Nield, *Farewell to the Assizes: the Sixty-one Towns* (Garnstone Press, 1972).
16 Set up by the *Courts Act 1971* (UK).
17 United Kingdom, Royal Commission on Assizes and Quarter Sessions 1966-69, *Report*, Cmnd 4153 (1969).

judicial functions were conferred by a statute of 1361.[18] The JPs proved so useful that they were later given powers to sit out of sessions to deal with cases of petty crime. Though in later times barristers were appointed as part-time recorders to chair borough courts of quarter sessions, in the counties lay JPs continued to try indictable offences. Like the assizes, courts of quarter sessions survived until the reforms of the mid-20th century.

Both at the assizes and in courts of quarter sessions, trial involved the use of grand and petty juries. The grand jury was the jury of presentment. It consisted of at least 13 laymen, drawn from the locality, and its task was to review bills of indictment submitted to it to determine whether there was a case to be tried. If it was satisfied, it certified that there was a "true bill" and the trial proceeded. The petty jury of 12 was in essence the modern trial jury, which determined whether the accused was guilty or innocent. The grand jury was established in its definitive form by the Assize of Clarendon (1166);[19] the petty jury appeared a little later, after the abandonment of trial by ordeal following the church's refusal to continue to participate in such proceedings after the Lateran Council of 1215.

Our knowledge of the history of criminal trials in England owes much to the ground-breaking research of Professor John Langbein of Yale University, going back over many years.[20] Langbein concentrated on cases of serious crime, and in particular trials for felony, tried before a judge and jury.[21] He showed how the "altercation trial" of the 16th century as described by Sir Thomas Smith[22] – one in which lawyers are generally absent, and "the victim and accusing witnesses engage the defendant in a confrontational dialogue about the circumstances of the alleged offense"[23] before a judge who takes an active role in the proceedings – was gradually transformed into the adversarial trial at which lawyers present the case for the prosecution and defence, the accused is generally silent and the judge plays a largely passive role. At the time at which Smith wrote, the medieval conception of the trial process had largely broken down. Both the grand and petty juries were originally supposed to make use of their own local knowledge in deciding

18 *Justices of the Peace Act 1361*, 34 Edw 3 c 1.

19 An early form of statute – not to be confused with the assizes as a court.

20 Definitively summarised in John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford UP, 2003) (Langbein, *Origins*). See also John H Langbein, 'The Criminal Trial before the Lawyers' (1978) 45 U Chi L Rev 263; John H Langbein, 'Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources' (1983) 50 *U Chi L Rev* 1; John H Langbein, 'The Historical Foundations of the Law of Evidence: A View from the Ryder Sources' (1996) 96 *Col L Rev* 1168; John H Langbein, 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' [1999] *Camb LJ* 314.

21 Langbein, *Origins* above n 20, 2-3. For the rather different history of summary trial before magistrates, see eg Bruce P Smith, 'The Presumption of Guilt and the English Law of Theft, 1750-1850' (2005) 23 *Law and History Review* 133; Bruce P Smith, 'The Myth of Private Prosecution in England, 1750-1850' in Markus D Dubber and Lindsay Farmer, *Modern Histories of Crime and Punishment* (Stanford UP, 2007) 151.

22 *De Republica Anglorum* (c 1565).

23 Langbein, *Origins*, above n 20, 13.

the case, hence the requirement that they be summoned from the immediate neighbourhood. This gradually ceased to be the case, perhaps as a consequence of the social changes resulting from the Black Death of 1348-1349. As Langbein noted, by Smith's time, the grand and petty juries at assizes were drawn not from the neighbourhood but from the whole county, and so were no longer able to bring their own knowledge to the process of decision-making. As a result, much more emphasis was now placed on the information produced to the court; eventually, it became accepted practice that juries should decide according to the evidence presented in court and should not be possessed of any other knowledge.[24]

The grand jury typically made its decision only shortly before the court hearing, generally on the first day of the assizes, before the trials began. If they were no longer self-informing, another means was needed whereby evidence could be gathered and placed before the court. The solution adopted was (once again) to entrust this function to the local JPs. Under the "Marian statute" of 1555,[25] local JPs were empowered to examine the accused and the witnesses, issue search and arrest warrants, and commit the accused to prison pending trial. The results of their investigations would be made available to the trial court, and sometimes the JP would testify in person at the trial. However, the JP was not an impartial recorder of events. His job was to assemble the evidence for the prosecution, and he was not required to investigate more widely. This was not in any way a court proceeding, but an investigation that might take place over days or weeks and in various different locations.[26] Langbein documented the work of the investigating magistrate by making use of some novel sources, notably early 17th century "chap-books" that were written by non-lawyers for sale to the general public.[27]

24 The grand and petty juries were empanelled for the assizes as a whole. Originally the petty jury would hear a number of cases and then retire to consider them while another jury heard further cases: Langbein, *Origins*, above n 20, 21.

25 *Criminal Law Act* 1555, 2 & 3 Ph & M c 10, so named because it was enacted in the reign of Queen Mary. A companion statute gave JPs powers to grant bail: *Criminal Law Act 1554*, 1 & 2 Ph & M c 13.

26 Langbein, *Origins*, above n 20, 40-8; John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 *AJLH* 313; John H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard, 1974) Part I.

27 John H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard, 1974) 45-54. For another example of the pretrial work of the local JP, see Sir Thomas Overbury's *True and Perfect Account* of the examination and trial of John, Joan and Richard Perry for the murder of William Harrison at Chipping Campden, Gloucestershire, in 1660. Following the disappearance of William Harrison, steward to the lady of the manor, John Perry confessed that he had murdered him, and that he had been assisted by his mother and brother. He later recanted, but despite this, and notwithstanding the absence of a body, all three were tried before Hyde J at the Gloucester Assizes in 1661, convicted and hanged. Two years later, William Harrison reappeared, telling the improbable story that he had been kidnapped and taken to Turkey as a slave. It seems clear that Overbury acted as the investigating magistrate: he provided a detailed account of his examination of the accused and the witnesses. The document, written in 1676, takes the form of a letter to his relative Dr Thomas Shirley (who occupies a niche in legal history as the plaintiff in *Shirley v Fagg* (1675) 6 St Tr 1121, which established that the House of Lords could hear appeals from the equitable jurisdiction of the Court of Chancery on a writ of error).

Langbein's later work on the transformation of the criminal trial again made use of novel sources; conventional law reports of criminal trials for the period in question are few and far between and give very little information about ordinary trials for felony. Chief among these new sources were the Old Bailey Sessions Papers, a series of pamphlet accounts of trials at the Old Bailey, commencing in the 1670s and surviving until just before the First World War, published for popular consumption. These were not widely known or available in the 1970s when Langbein commenced this research, but they have now been digitised and made available on the internet.[28] Langbein also made use of the shorthand notes compiled by Sir Dudley Ryder, who as Chief Justice of the King's Bench sat as a judge at the Old Bailey from 1754 to 1756. These notes provide a detailed account of the testimony given in the cases on which Ryder sat.

Langbein showed how the 17th century criminal trial was "a relatively unstructured 'altercation' between accusers and accused",[29] the main purpose of which was to allow the accused to reply to the charges and speak to the evidence against him or her. The accused was not permitted to have counsel, because answering the charges in person was thought to be the most beneficial form of defence, one that would result in the truth being brought to light.[30] However, these assumptions became questionable in the light of a series of treason trials in the late 17th century, commencing with the Popish Plot of 1678-1680[31] and culminating in the Bloody Assizes of 1685,[32] which resulted in the passing of the *Treason Act 1695*, 7 & 8 Will 3 c 3 allowing defendants accused of treason to have the assistance of counsel at trial and pretrial.[33] This set in motion a process that by the 1730s caused the judges to begin to allow the defence to be represented by counsel in ordinary felony trials. One factor was the growing practice of employing solicitors to help prepare the case for the prosecution, with the result that solicitors began to brief counsel to conduct the case in court, the division of the profession in England having the consequence that the right of audience was confined to the bar.[34] Other influences included "reward statutes" enacted from 1692 onwards to encourage the reporting of information about crimes, and the "crown witness" system whereby immunity was granted to offenders who were willing to testify against

Overbury's account was published several times in pamphlet form; see also (1700-1708) 14 St Tr 1312. Overbury's account is reproduced, together with other material on the case, including contributions by Andrew Lang and Lord Maugham, in Sir George Clark (ed), *The Campden Wonder* (Oxford UP, 1959).

28 See https://www.oldbaileyonline.org.

29 Langbein, *Origins*, above n 20, 2.

30 Langbein, *Origins*, above n 20, ch 1.

31 An alleged Catholic conspiracy to murder Charles II and organise a foreign invasion, stemming initially from statements made by Titus Oates, which led to a number of treason trials between 1678 and 1680. Oates was eventually convicted of perjury in 1685.

32 The special assize commission in the West Country presided over by Jeffreys CJ following the quashing of the attempted rebellion led by the Duke of Monmouth, which resulted in over 200 executions.

33 Langbein, *Origins*, above n 20, ch 2.

34 Barristers had the sole right of audience at the assizes, and eventually gained the sole right of audience at quarter sessions also: Langbein, *Origins*, above n 20, 36.

their accomplices – both of which were likely to encourage unreliable testimony. Such factors, it was thought, put the accused in a position of disadvantage: the balance could be redressed by allowing the accused to have counsel. There was one important limitation, however; because it was thought important to preserve the practice of requiring the accused to speak to the charges in person, the role of counsel was limited to the examination and cross-examination of witnesses. Counsel were not to be permitted to address the court.[35]

Though these reforms attempted to preserve the desirability of the accused speaking in his or her own defence, in this they were ultimately unsuccessful. As counsel took over, the accused was effectively silenced. Once defence counsel were permitted, and prosecution counsel became increasingly common, the unstructured trial gradually assumed its present-day form as the case for the prosecution followed by the case for the defence. Accordingly, the purpose of the proceedings shifted: formerly a means of getting the accused to answer the charges made against him or her, they became a process for testing the prosecution case. The rules as to burden of proof gradually took shape, and counsel might argue that the prosecution had not discharged the burden of adducing sufficient evidence, or raise other legal points. There was still a theoretical imbalance, in that while prosecution counsel could address the court, defence counsel could not; but defence counsel managed to evade this restriction, for example by arguing matters of fact in the guise of addressing points of law, or turning a cross-examination into an address to the jury.[36] As counsel assumed a dominant role, judges gradually abandoned their former role in examining witnesses, and by 1820, in the words of a French observer, during this process the trial judge "remains almost a stranger to what is going on".[37] The role of the jury also assumed its modern form: in former times they had joined the conversation, volunteering information, questioning witnesses or asking for further witnesses to be called, but now they became silent. In 1836 Parliament recognised the development that had taken place over the preceding century by removing the restrictions on defence counsel. The *Trials for Felony Act 1836* (UK), 6 & 7 Will 4 c 114 gave them full rights of representation, including the right to address the court. The criminal trial had assumed its modern form. At the end of the 19th century, the changed role of the accused was confirmed by another reform that allowed the accused to give sworn evidence like any other witness:[38] previously, the accused had testified unsworn. Other important developments altered the nature of the pretrial proceedings.

35 Langbein, *Origins*, above n 20, ch 3. Langbein also discussed the other important safeguards for the defence created by the 18th century judges: the rules excluding certain kinds of evidence in criminal cases, notably evidence of bad character, out-of-court confessions and hearsay, and the rule requiring corroboration of accomplice testimony: Langbein, *Origins*, above n 20, ch 4.

36 Langbein, above n 20, *Origins*, ch 5.

37 Charles Cottu, *On the Administration of Criminal Justice in England* (1822) 88, quoted by Langbein, *Origins*, above n 20, 6. Langbein also quoted Cottu's comment on the role of the accused: 'his hat stuck on a pole might without inconvenience be his substitute at the trial': Cottu, 105.

38 *Criminal Evidence Act 1898* (UK), 61 & 62 Vict c 36.

The JPs who conducted preliminary investigations, especially those in London, assumed powers to dismiss weak cases, and the process became more like a courtroom hearing, the purpose of which was to gather evidence that would prove the accused's guilt at trial. The *Indictable Offences Act 1848* (UK), 11 & 12 Vict c 42,[39] one of the "Jervis Acts", finally converted the process into the modern preliminary hearing.[40] This effectively made the grand jury redundant, though grand juries were not finally abolished until the 20th century.[41]

Drawing together the threads in this story in which we are principally interested, prosecution counsel was originally absent from felony trials, except in rare cases (though common in treason trials[42] and, perhaps surprisingly, in misdemeanour cases[43]). The 18th century developments that led to counsel being allowed to appear for the defence were in part brought about by the increasing use of solicitors, and therefore of counsel, for the prosecution. However, this did not mean that prosecution thereby became a state responsibility: far from it. As Langbein showed, though some prosecutions were initiated by the Treasury, or government or public agencies such as the Mint or the Bank of England, others were the result of initiatives by private persons, or groups of individuals who had clubbed together to create associations for the prosecution of felons.[44] Langbein's account effectively ends with the legislation of 1836, but he made some comments on the 19th century position in a recent Selden Society lecture in Adelaide.[45] When organised police forces made their appearance in the 19th century, prosecutions began to be managed by the police. Because there were separate police forces for each area, this appears to have been a piecemeal process. Police generally prosecuted straightforward cases themselves, but where lawyers were required, in some areas police forces employed staff solicitors, and in others they briefed private firms – in London, two particular firms were regularly used. Because rights of audience were limited to the bar, the solicitors (in house or in private practice) had to brief counsel practising at the bar.[46] This continued well into the

39 Note also *Summary Jurisdiction Act 1848* (UK), 11 & 12 Vict c 43 and *Justices Protection Act 1848*, 11 & 12 Vict c 44. They were piloted through Parliament by Attorney General Sir John Jervis (afterwards Chief Justice of the Court of Common Pleas, 1850-1856).

40 Some illogicalities remained. At the time of the attempted prosecution of Edward Eyre for murder allegedly committed while putting down a rebellion in Jamaica, *The Times* commented on the anomaly that a prosecution of national importance could not be commenced without the consent of the justices of Market Drayton: *The Times*, 18 April 1867. See Peter Handford, 'Edward John Eyre and the Conflict of Laws' (2008) 32 *MULR* 822, 842. *The Times* urged the need for a public prosecuting authority, but it was more than a century before this came about.

41 They were abolished save for a few purposes by the *Administration of Justice (Miscellaneous Provisions) Act 1933* (UK), 23 & 24 Geo 5 c 36 and finally abolished by the *Criminal Justice Act 1948* (UK), 11 & 12 Geo 6 c 58.

42 Langbein, *Origins*, above n 20, 84.

43 Langbein, *Origins*, above n 20, 36.

44 Langbein, *Origins*, above n 20, ch 3.

45 See Wilfrid Prest, 'Yale Professor Explores English Legal History at SA Selden Society Event' (2017) 39(4) *Bulletin* (Law Society of South Australia) 26.

46 See also the evidence given to the *Report on Public Prosecution 1856* as summarised by Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850: Policing, Private

20th century with very little change.[47] The Director of Public Prosecutions, first appointed in 1880, only handled very serious cases: he would brief the Treasury Solicitor, who would brief counsel. In all other cases, arrangements for conducting prosecutions were left to each police force. As time went on, the number of police forces employing their own solicitors increased. The Metropolitan Police set up a Solicitor's Department in 1935 (the "Yard Solicitor"), and by 1978 similar departments had been established by 32 of the 43 police forces in England and Wales, including Liverpool, Manchester and most of the other borough forces.[48] Police forces that continued to use private firms generally used a number of different firms in each town, so that no one firm was identified with the police, but there was something of an exception in Birmingham where in the 1970s a dedicated firm of solicitors was set up to do the prosecution work for the West Midlands Police Force.[49]

It was only very recently that all this changed. It appears that it was finally recognised that these semi-private arrangements were out of date, and that it was necessary for prosecutions to be conducted by some sort of public body with accountability to the general public. The reform process nonetheless took more than twenty years to happen. In 1962 a Royal Commission recommended that police forces set up independent prosecution departments,[50] but this was not uniformly adopted. In 1981 a second Royal Commission recommended that there should be a single uniform Crown Prosecution Service with responsibility for all public prosecutions in England and Wales.[51] This was followed by a White Paper in 1983, and finally by the *Prosecution of Offences Act 1985* (UK), which established the Crown Prosecution Service under the Direction of the Director of Public Prosecutions. Crown Prosecutors now provide advice to investigators and take charging decisions, and Crown Advocates present prosecution cases in court.

Prosecution and the State' in Hay and Snyder, *Policing and Prosecution*, above n 9, 39.

47 For an account of the position in the mid-1960s, see RM Jackson, *The Machinery of Justice in England* (Cambridge UP, 4th ed, 1964) 119-30.

48 See Mollie Weatheritt, *The Prosecution System: Survey of Prosecuting Solicitors' Departments*, Royal Commission on Criminal Procedure, Research Study No 11 (HMSO, 1980); David R Kaye, *The Prosecution System: Organisational Implications of Change*, Royal Commission on Criminal Procedure, Research Study No 12 (HMSO, 1980) Appendix P.

49 Some of the information in this paragraph was provided by Lord Hughes of Ombersley JSC and Sir David Clarke, a former Recorder of Liverpool and High Court judge. I am greatly indebted to them for their kind assistance.

50 United Kingdom, Royal Commission on the Police 1962, *Final Report*, Cmnd 1728 (1962).

51 United Kingdom, Royal Commission on Criminal Procedure 1978-1981, *Report*, Cmnd 8092 (1981).

III CRIMINAL TRIALS IN WESTERN AUSTRALIA

Western Australia was officially founded on 1 June 1829.[52] Captain James Stirling, the first Governor, had been invested with such legislative, administrative and judicial powers as were considered necessary for the formation of the colony, but his official Commission was not received in Perth until 1831: in a letter to the Parliamentary Under-Secretary for the Colonies, he observed that "I believe that I am the first Governor who ever founded a Settlement without Commission, Laws, Instructions, or salary".[53] The institutions of government could not be formally set up in the absence of a Commission, and Captain Stirling made no move to establish a civil court until it arrived. The first Act passed by the newly created Legislative Council in 1832 set up a court to be called the Civil Court of Western Australia, to be held before a single judge with the title of Commissioner.[54] However, criminal justice was a problem that was too urgent to await the arrival of the Commission. In December 1829 Captain Stirling appointed eight JPs, who were empowered to exercise all the functions of justices in England. This meant that two or more JPs could sit as a Court of Quarter Sessions to deal with indictable offences, with JPs sitting alone or in pairs as a Court of Petty Sessions to deal with minor crimes. Later, resident magistrates were appointed for areas outside Perth. This system proved so satisfactory that no major changes were made when the Court of Quarter Sessions was formally established in 1832.[55] The Court of Quarter Sessions continued in existence until 1861, when the Civil Court and the Court of Quarter Sessions were replaced by the Supreme Court of Western Australia, which had both civil and criminal jurisdiction. The *Supreme Court Ordinance 1861* (WA), 24 Vict No 15, by providing that the court should be a court of oyer and terminer and general gaol delivery,[56] gave it a jurisdiction equivalent to the English assize courts.[57]

52 This was the date officially chosen. What actually happened on 1 June 1829 was that the *Parmelia*, carrying the first settlers, having arrived at the mouth of the Swan River in Fremantle, became stuck on a sandbank.

53 Quoted by Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia, 1980) 12 (Russell). Russell is the main source for the biographical and general information contained in this section of the article; see also G Bolton and G Byrne, *May It Please Your Honour: A History of the Supreme Court of Western Australia 1861-2005* (Supreme Court of Western Australia, 2005) (Bolton & Byrne).

54 *Court of Civil Judicature Act 1832* (WA), 2 Will 4 No 1.

55 *Court of Quarter Sessions Act 1832* (WA), 2 Will 4 No 4.

56 S 4. The early statutes were called Acts, but from 1844 to 1870 the term 'Ordinance' was used instead. Some statutes of this era did not have short titles.

57 There were periods when some categories of defendants did not appear before the Court of Quarter Sessions because they were subject exclusively to summary jurisdiction. This was the case with Aborigines before 1837, and for some years from 1848 onwards: see Ann Hunter, *A Different Kind of 'Subject': Colonial Law in Aboriginal-European Relations in Nineteenth Century Western Australia 1829-61* (Australian Scholarly Publishing, 2012) ch 10 (Hunter). When convicts arrived in Western Australia in 1850, they were initially subject to the jurisdiction of justices: see eg 16 Vict No 18 (1853), s 2, providing that the Court of Quarter Sessions could deal in a summary way with indictable offences committed by convicts that were not punishable with death; see Russell, above n 53, 141.

The first Chairman of Quarter Sessions was William Henry Mackie, who gained his early legal experience in England, at the Inner Temple and elsewhere (though never called to the English bar),[58] and the first Clerk of the Court was Alfred Hawes Stone, an English solicitor.[59] These were the only two JPs who had received any form of legal training: there were very few lawyers in Western Australia in the early years. George Fletcher Moore, an Irish barrister, who arrived in 1830, was appointed Commissioner of the Civil Court in 1832, but in 1834, because of the insistence of the Colonial Office that for reasons of economy the positions of Commissioner of the Civil Court and Chairman of Quarter Sessions should be held by the same person, Mackie was appointed Commissioner and Moore became the first Advocate-General.[60] Mackie thus became the sole Judge in Western Australia, remaining in office until 1857, when he retired as a result of illness. His reputation ensured a generally smooth administration of justice over the first 30 years of the colony's existence. The next appointment was rather different. Mackie was replaced by Alfred McFarland, another Irish barrister, who very quickly became unpopular through creating controversy on all sorts of issues, notably through refusing to hear cases in equity because he took the view that the Civil Court lacked jurisdiction to hear such matters.[61] McFarland was forced to resign in 1859, and he was replaced by Archibald Paull Burt, an English barrister who had spent most of his career in the West Indies. When Burt made it clear that he also took the view that the Civil Court had limited equity jurisdiction, it was decided to create a Supreme Court and give it the full jurisdiction of all the English courts. Burt became the first Chief Justice of the new Supreme Court and provided the new court with a long period of stability, serving until 1879 when he died in office. More controversy lay ahead under the next two Chief Justices,[62] but with the appointment of the first locally trained Chief Justice, Edward Albert Stone,[63] in 1901 the court entered a more stable period. Already, in 1884, the court had been enlarged by Stone's appointment as the first puisne justice.[64]

58 See Bob Nicholson, 'Judicial Pioneer: William Henry Mackie' (2013) 14 *Early Days: Journal of the Royal Western Australian Historical Society* 240 (Nicholson).

59 See Jacqueline O'Brien and Pamela Statham-Drew, *Court & Camera: The Life and Times of AH Stone* (2012).

60 See JMR Cameron (ed), *The Millendon Memoirs: George Fletcher Moore's Western Australian Diaries and Letters, 1830-1841* (Hesperian Press, 2006). Moore was critical of the decision to relieve him of the office of Commissioner and instead appoint him Advocate-General: 328-9, 344-7, 352; see also Nicholson, above n 58, 249-52.

61 The Civil Court had been given the jurisdiction of the three English common law courts, but not that of the Court of Chancery, apparently because it was thought inadvisable to saddle it with problems of the 19th-century Court of Chancery of the kind later portrayed in Charles Dickens' *Bleak House* (1853): Russell, above n 53, 108. During Mackie's time as Commissioner, he exercised equity jurisdiction based on the equitable jurisdiction of the Court of Exchequer: Russell, above n 53, 147.

62 Henry Thomas Wrenfordsley (1880-1883, plus a period as Acting Chief Justice 1890-1891); Alexander Campbell Onslow (1892-1901).

63 Nephew of AH Stone.

64 On the early judges see Russell, above n 53, chs 8, 20; Bolton & Byrne, above n 53, chs 1-4; JM Bennett, *Sir Archibald Burt, First Chief Justice of Western Australia 1861-1879* (Federation Press, 2002); JM Bennett, *Sir Henry Wrenfordsley, Second Chief Justice of Western Australia 1880-1883* (Federation Press, 2004); JM Bennett, 'Sir Henry Wrenfordsley: A Journeyman Judge' (1977-1978) 13 *UWA L Rev* 25.

Until 1837 the Court of Quarter Sessions sat in Fremantle, because there was no suitable building in Perth. By January 1837, the new Court House designed by Henry Reveley was complete, and Quarter Sessions was held there for the first time on 2 January 1837. This building, located in Stirling Gardens and now known as the Old Court House, is Perth's oldest remaining building, and currently houses a law museum. In 1857 the court moved to premises in the new gaol and court house near Beaufort St. However, because of shortage of space, the Supreme Court, as it had by then become, returned to the Old Court House in 1863 and remained there until 1880, when it moved into the converted Commissariat Store nearby. The Old Court House was reconditioned and used as a second court from 1896 until the new Supreme Court Building opened in 1903.

The Court of Quarter Sessions was held four times a year, in January, April, July and October. Detailed records of its proceedings were reported in the newspapers from 1833 onwards.[65] Mackie sat as Chairman of the Court, together with a number of JPs, usually two or three but on occasions as many as six or seven;[66] the JPs are sometimes named in the reports. After the Supreme Court superseded the Court of Quarter Sessions, the Chief Justice sat alone. From the first, there was a grand jury to decide whether to certify a true bill, and a petty jury to determine guilt or innocence – in each case, empanelled for the whole sessions. It seems that the grand and petty juries that sat in Fremantle in 1830 were the first properly constituted grand and petty juries to sit in any Australian colony.[67] Grand and petty juries were formally provided for by legislation in 1832: petty juries were to consist of 12 members, and grand juries of not more than 24 or less than 13.[68]

65 Principally the *Perth Gazette*, commencing 1833, which became the *Western Australian Times* in 1874 and *The West Australian* in 1879. For the period under discussion (the 19th century) this newspaper contains full reports of many cases and brief summaries of others. Other newspapers, such as *The Inquirer* (which commenced in 1840) also contain full reports of many cases. The reports in the *Perth Gazette* contain occasional editorial comments, but concentrate on reporting matters of fact. I have not studied the official criminal record files. Among the records held by the State Records Office of Western Australia are the Criminal Record Books 1830-1982 (Series No 49) and the Criminal Indictment Files 1830-1974 (Series 122): see https://prosecutionproject.griffth.edu.au. These data do not include the names of counsel appearing. An early but unsuccessful attempt to use these resources was described in Andrew W Gill, *Crime and Society in Western Australia, 1829-1914: a report on research completed between January 1980 and November 1983 with the aid of grants from the ARGC and the Criminology Research Council* (Perth, 1983), a report to the Australian Institute of Criminology.

66 Six: *Perth Gazette*, 27 February 1841 (special sessions); 8 April 1853; seven: *Perth Gazette*, 3 Oct 1840.

67 Russell, above n 53, 15. In 1824, an attempt was made to empanel grand and petty juries for the trial of free settlers before the New South Wales Court of Quarter Sessions. A writ of mandamus was obtained directing magistrates to empanel such juries: *R v Magistrates of Sydney* (1824). This decision was overturned by the *Australian Courts Act 1828* (UK), 9 Geo 4 c 83, but between 1824 and 1828 grand juries operated in Sydney and some other centres. See Alex C Castles, *An Australian Legal History* (Law Book Co, 1982) 177, 185-6, 203 (Castles); JM Bennett, *Sir Francis Forbes, First Chief Justice of New South Wales 1824-1837* (Federation Press, 2001), 117-20.

68 *Juries Act 1832* (WA), 2 Will 4 No 3. In the Old Court House, the grand jury met in a room above the Judge's Chambers. The steps were steep, and one member of the grand

Russell noted that the procedure adopted by the grand jury differed from English practice in that depositions and examinations taken by the committing magistrate were placed before it. According to Mackie, this enabled the evidence to be laid out before them in a "marshalled" form, with events and witnesses being set out in order, so that the jury could obtain a general knowledge of the case and select points to be explored in a subsequent oral examination of witnesses. [69]

The problems of implementing the English jury system in a colony with a small population soon became evident. Rules setting out qualifications for serving on a jury were drawn up in 1830,[70] and became statutory in 1832.[71] The Act provided that jurors had to be male, aged between 21 and 60, and own real estate worth £50 or personal estate worth £100, but court officers, civil servants, clergy, legal practitioners, medical men, aliens, criminals, JPs and various other groups were excluded. This meant that the same persons were repeatedly called upon, as confirmed on those occasions when the newspaper reports gave the names of those who served on the grand and petty juries.[72] It seems clear that jurors must often have had personal knowledge of the cases, a throwback to the situation of the medieval English jury.[73] In the report of a case at the January 1833 Quarter Sessions, it was noted that "several of the jurymen here repeated what they knew of the transaction", and the reporter commented that this was highly improper and would have met with a reproof had it reached the ear of the bench, continuing:

> "We will allow it is extremely difficult in so small a Community as our own to select a Jury unacquainted with the circumstances of a Case, previously to their entering the Box, or to divest themselves of the impression this knowledge has left upon their minds; but there cannot be much difficulty in refraining from a public declaration of it."[74]

jury (Captain H Byrne) fell down the steps in July 1837: *Perth Gazette*, 8 July 1837. Sir Edward Stone (Chief Justice 1901-1906) recalled: 'There was ... a grand jury, occupying a little attic room up an almost perpendicular flight of steps. As a child I used to attend the Courts regularly with my father, and I recollect that ... the foreman would appear in a little gallery about 3 ft square just above the head of the Chairman – a place evidently used as a pulpit when the Courthouse served as a place of worship. The foreman had a billiard cue, at the end of which he would place the Bill, fastened in a little clip which was attached to the cue, and then hand it over the head of the judge to the registrar of the Court.' (Sir Edward Stone, *Reminiscences* (Fraser & Morphet, 1918).

69 Russell, above n 53, 138, citing Colonial Secretary's inward correspondence, 6 September 1842.

70 See AH Stone's *Records* (vol 2), a notebook that forms part of the collection at the Old Court House Law Museum (AH Stone's *Records*).

71 *Juries Act 1832* (WA), 2 Will 4 No 3.

72 Andrew Gill's research on the lists of jurors held in the Quarter Sessions depositions in the State Record Office showed that jurors were summoned according to an alphabetical system, so the same names were repeatedly called, but not to every session. Jurors were usually drawn from those who lived locally, from the Swan River valley area from Guildford to Fremantle, rather than from outlying districts, presumably to avoid having to pay travel payments as well as the attendance fee: Andrew Gill, personal communication.

73 As described by Langbein, *Origins*, above n 20, 64.

74 *R v Velvick*, 1 January 1833 (Perth Gazette, 5 January 1833).

The fear that jury members would know the accused was voiced by a letter writer the following year.[75]

Another problem was securing sufficient attendance by members of the grand jury. This generally consisted of the minimum number of 13 members,[76] but on occasions some of them failed to turn up.[77] In January 1839 only five attended,[78] and in April 1842 it was noted that it had been necessary from time to time for the Sheriff to press some of the bystanders into service to fill up the numbers.[79] In 1851 (by which time the court had started holding sittings in places such as Albany) the grand jury in remote districts was reduced to not less than 5.[80] The need for regular attendance was the subject of comment as early as April 1839,[81] and in January 1854, before Mackie addressed the grand jury, the foreman made a statement to the court on the need for some steps to be taken to enforce more punctual attendance.[82] It was clear that those who turned up thought they were being called upon too often. Mackie's addressed to the grand jury foreshadowed possible alterations to the *Juries Act*,[83] and grand juries were duly abolished by an Ordinance of 1855.[84] At the time, this did not occasion much controversy, at least in the *Perth Gazette*, which was devoting most of its attention to the Crimean War.[85] The report of the July 1855 Quarter Sessions noted that the abolition of

75 *Perth Gazette*, 11 October 1834.

76 'State of Crime in Western Australia', *Perth Gazette*, 18 June 1836 (Report of a Committee on the present state of the Colony of Western Australia up to 1835).

77 In the early years, the grand jury occasionally included some of the local lawyers, in spite of the prohibition on legal practitioners serving on a jury: AH Stone's *Records*, above n 70, show that WN Clark (admitted 1836) served on the grand jury in April 1837; WJ Lawrence (admitted May 1837) was a member of the grand jury in July 1837 (see also *Perth Gazette*, 8 July 1837); and Lawrence and WT Graham (admitted 1836) both served in October 1837. it was also suggested that JPs should be allowed to sit on the grand jury: *Perth* Gazette, 13 April 1839.

78 *Perth Gazette*, 12 January 1839.

79 *Perth Gazette*, 2 April 1842.

80 14 Vict no 21, 1850 (WA). Provision had been made for holding regular sittings of the Court in Albany and other remote districts in 1845: 9 Vic No 4 (1845). *The Inquirer* had drawn attention to the need for court sittings in Albany to deal with prisoners awaiting trial, rather than making them wait for months until a ship was available to take them to Perth: *The Inquirer*, 4 September 1844. The unacceptable conditions in the Albany jail were the subject of a report by the Albany grand jury to Quarter Sessions in 1854: *The Inquirer*, 21 June 1854.

81 *Perth Gazette*, 13 April 1839.

82 *Perth Gazette*, 6 January 1854; see also *The Inquirer*, 11 January 1854.

83 *Perth Gazette*, 6 January 1854.

84 *Grand Juries Ordinance 1855* (WA), 18 Vict No 5, s 1.

85 Note, however, an editorial in the *Commercial News*, 8 March 1855 protesting against abolition, and letters taking the opposite view in *The Inquirer*, 28 March 1855 and 4 April 1855. Andrew Gill, who provided some of these references, suggests that the reasons for abolition of the grand jury may include the appointment in 1854 of a new Advocate-General, Richard Birnie, who wanted to improve the efficiency of the prosecution process by providing the Advocate-General with professional and clerical assistance and the services of a detective, citing correspondence dated 26 September 1854 (301 Colonial Secretary's Office 147). Another factor may have been the increasing caseload: in July 1854 Mackie noted that there were 26 bills to be sent to the grand jury, 'the heaviest calendar of offences

the grand jury effected a "saving of time, expense, and trouble".[86] Until this time, Quarter Sessions had commenced with an address to the grand jury by the Chairman, following which the jury retired to determine the cases in which they were prepared to issue a true bill. Once this became unnecessary, trials could commence immediately.[87]

By the time the West Australian Court of Quarter Sessions commenced hearing cases, the fundamental procedural shift to adversary criminal trial described by Langbein had already taken place, and so, as the newspaper reports make clear, trials were structured proceedings consisting of the case for the prosecution followed by the case for the defence. Again, however, there were some interesting echoes of older customs. As was only to be expected, the accused was often unrepresented, and in such cases had to conduct his or her own defence and cross-examine the prosecution witnesses. Often, it was reported that witnesses had also been questioned by the judge. What was more unusual was that it was also reported that from time to time witnesses had been questioned by members of the jury. Examples of this occur as late as 1883.[88] Another interesting divergence from English practice can be observed in the role played by defence counsel. As has been discussed earlier, in England defence counsel were not permitted to address the court until this was permitted by statute in 1836. This legislation was not formally adopted in Western Australia until 30 May 1844.[89] However, the newspaper reports record that on a number of occasions prior to this date defence counsel addressed the jury.[90] Russell suggested that it must have been assumed that the English Act applied in Western Australia as a general Act applying to colonies.[91] On other occasions, issues arose that had no parallel back home. One

we have ever known': *Perth Gazette*, 7 July 1854. Andrew Gill suggests that the increase may in part be due to the decision to accept convicts: the first convicts arrived in 1850 and by 1854 some convicts with a ticket-of-leave would have received a conditional pardon and so would be entitled to demand jury trial at Quarter Sessions. For the terms under which convicts sent to Western Australia became entitled to a ticket-of-leave and then a conditional pardon, see eg JS Battye, *Western Australia*: *A History from its Discovery to the Inauguration of the Commonwealth* (Clarendon Press, Oxford, 1924) appendix III.

86 *Perth Gazette*, 6 July 1855.

87 However, at the first quarter sessions following abolition of the grand jury the proceedings, though scheduled to begin at 9.00 am, were delayed until 2.00 pm because of the late arrival of the Advocate-General: *Perth Gazette*, 6 July 1855.

88 *R v Cole* (The West Australian, 12 January 1883).

89 *Imperial Acts Adopting Act 1844* (WA), 7 Vict No 13.

90 *R v Gallop* (Perth Gazette, 7 April 1838); *R v Lovett and Sommerland* (Perth Gazette, 4 January 1840); *R v Green* (Perth Gazette, 3 October 1840); *R v Neeme* (Perth Gazette, 7 January 1843); *R v Gaven* (Perth Gazette, 6 April 1844). It is also recorded that Rev Dr Louis Giustiniani, a missionary, addressed the court in *R v Cogatt* (Perth Gazette, 7 October 1837), a case where an Aboriginal had been charged with stealing 15 pounds of butter, arguing against the application of English law to Aboriginal natives. The report shows the hostility of the reporter to this argument. In another case where an Aboriginal had been charged with spearing an 11-year-old European settler, Dr Giustiniani 'came forward to address the jury on behalf of the native' and cross-examined a witness: *R v Buoy-een* (Perth Gazette, 6 January 1838).

91 Russell, above n 53, 136. It seems that the rule limiting the role of defence counsel was also not followed in parts of British North America: Langbein, *Origins*, above n 20, 40.

was the difficulty of Aboriginal witnesses giving evidence when they were unable to be sworn: this was addressed by legislation in the 1840s allowing them to give unsworn evidence.[92] The reports often noted that Aboriginal witnesses gave evidence via an interpreter, usually a Mr Francis Armstrong.[93]

There is also some evidence of adherence to earlier practices in relation to pretrial proceedings. In the days before the creation of an organised police force (a process completed in 1861[94]) the JPs had to take the lead. A good example is the case of John Gaven, a 15 year old boy who became the first European to be hanged for murder, in 1844. The murder took place on a property near Pinjarra, about 50 miles away from Perth. The resident magistrate was sent for, and he carried out an investigation. The depositions of the magistrate were then made available to the Advocate-General who carried out the prosecution.[95] On a number of occasions, it is recorded that evidence given to the investigating JP was read out in court.[96] Even more interestingly, on other occasions, the investigating JP gave evidence.[97] The Jervis Acts were adopted in Western Australia in 1850,[98] and as a result the pretrial process became more judicial and less investigatory. In Western Australia, as elsewhere in Australia, paid stipendiary magistrates began to be appointed instead of lay justices of the peace , though in Western Australia it is still possible for lay justices to sit in remote areas.

The above paragraphs have explored various aspects of criminal procedure in Western Australian courts in the 19th century, concentrating in particular on some of the interesting parallels to be observed when compared with the English experience. However, it is the prosecution process that probably reveals the greatest difference from English practice. Whereas in England, in the 19th century,

92 Legislation was enacted in Western Australia in 1840 and again in 1841: 4 Vict No 8, 1840 (WA); 4 & 5 Vict No 22, 1841 (WA). Both Acts were disallowed by the Colonial Office. A further Act was passed in 1843: 7 Vict No 7, 1843 (WA), and later the same year an Imperial Act authorised colonial legislatures to enact their own legislation: *Colonies (Evidence) Act 1843* (UK), 6 & 7 Vict c 22. See generally Hunter, above n 57, ch 6.

93 See eg *R v Battup* (Perth Gazette, 5 October 1849): 'This last case was remarkable for an aboriginal appearing in the witness box, and undergoing examination through the Public Interpreter'.

94 See Russell, above n 53, 186-187.

95 *R v Gaven* (Perth Gazette, 6 April 1844). For a fictionalised account of the case that adheres closely to the facts, see D Hutchinson, *Many Years a Thief* (Wakefield Press, 2007).

96 *R v Johnson and Woods* (Perth Gazette, 12 April 1833; *R v Warren* (Perth Gazette, 9 April 1852); *R v Dagg* (Perth Gazette, 7 July 1854); *R v Rysie* (Perth Gazette, 12 January 1855); *R v Joombar and Jacob* (Perth Gazette, 6 April 1855).

97 *R v Lovett and Sommerland* (Perth Gazette, 4 January 1840) (the JP, Mr RMB Brown, was also one of the bench of JPs sitting on the case); *R v Coorail, Melancholy, Paddy and Capt Rock* (Perth Gazette, 8 October 1842); *R v Youal and Dorbit* (Perth Gazette, 7 January 1843); *R v Gaven* (Perth Gazette, 6 April 1844); *R v Petty* (Perth Gazette, 7 April 1849); *R v Kungin, Mongean and Ngolangwert* (Perth Gazette, 12 April 1850); *R v Dagg* (Perth Gazette, 7 July 1854); *R v Beale* (Western Australian Times, 6 October 1876); *R v Hickey* (Western Australian Times, 10 April 1877).

98 *Indictable Offences Ordinance 1850* (WA), 14 Vict No 4; *Justices Ordinance 1850* (WA), 14 Vict No 5.

prosecutions were managed locally by the police, employing solicitors or using solicitors in private practice, who briefed counsel practising at the bar, in Western Australia (and indeed elsewhere in Australia also, as will appear) prosecution was always a public function, entrusted to public officers. This was almost certainly a product of the very different circumstances prevailing in a young colony, where there was no established legal profession and indeed hardly any lawyers at all: appointing a dedicated prosecutor was probably the only available alternative.[99] These officers took on added responsibilities following the abolition of grand juries.

It is not clear who was prosecuting cases before 1834, when George Fletcher Moore was appointed Advocate-General. It cannot have been Moore, because until then he was acting as Commissioner of the Civil Court. When Mackie's appointment as Chairman of Quarter Sessions was confirmed in 1831, he was officially given the title of Advocate-General,[100] but it seems hard to see how he can have simultaneously prosecuted and sat in judgment on the case – unless what was envisaged was something like the pre-18th century English situation where there was no prosecution counsel and the judge took the lead in running the proceedings and questioning the accused and the witnesses. Alfred Hawes Stone as Clerk of the Peace compiled official records that in cases where the accused pleaded not guilty recorded that he "puts himself upon the country and Alfred Hawes Stone Clerk of the Peace for the said Colony ... prosecutes for our Lord the King in this behalf ...",[101] but this form of words continued to be used after the appointment of Moore as Advocate-General, and it has been suggested that the formulation meant no more than that he was the Clerk of the Peace in charge of the clerical side of the trial.[102] It may well be that victims of crime had to prosecute in person.[103]

Whatever the situation prior to 1834, it is clear that from 1834 onwards, prosecutions were the responsibility of the Advocate-General. In a dispatch of 28 July 1833, the duties of the Advocate-General were stated to be to prosecute offenders and conduct all Crown cases.[104] The newspaper reports of the proceedings of the Court

99 It may be that the authorities in England also had in mind the examples of other colonies that had entrusted the responsibility of prosecutions to public officers: see n 11 above.

100 Russell, above n 53, 80.

101 AH Stone's Records, above n 70.

102 Letter FM Robinson to Miss M Medcalf, Principal Librarian of the Battye Library, dated 23 March 1981, copy on file in the Old Court House Law Museum. Robinson cites this as the view of Paul Nichols. Robinson and Nichols jointly edited Enid Russell's *History*.

103 Andrew Gill noted that until 1834 the names of prosecutors were entered in the Criminal Record Book and these names in most cases match the names attached to recognizance to prosecute in the deposition bundles for each Quarter Sessions sitting. Note also the position in the Civil Court before 1836: the original Rules of Court drawn up in 1832 made no mention of professional advocates, but merely provided that parties could appear in person or by a duly authorised agent: Russell, above n 53, 67. It was not until 1836 that the revised Rules made provision for granting licences to legal practitioners to appear before the Court.

104 Russell, above n 53, 90.

of Quarter Sessions regularly mentioned that the Advocate-General appeared for the prosecution.[105] From 1834 to 1852 Moore was Advocate-General, though he was on leave of absence between 1841 and 1846 and Richard West Nash, an Irish barrister who arrived in Western Australia in 1839, became Acting Advocate-General. It appears that Nash sometimes did a less than satisfactory job. In 1842 the *Perth Gazette* commented that "Mr Nash can be guilty of oversight" and that "[i]t will be a happy day for the colony when GF Moore Esq returns to relieve us of this incubus".[106] Moore took leave of absence again in 1852 and did not return. He was replaced in 1854 by Richard Birnie, who was succeeded in 1859 by George Frederick Stone.[107]

In 1838 a second law officer was appointed, since the government had found it necessary "to provide for the performance of that description of business usually entrusted to Crown Solicitors in other places".[108] The Crown Solicitor's duties were laid down in detail in 1841. They included the preparation of all matters for the opinion of the Advocate-General and the preparation of his briefs.[109] The first Crown Solicitor was William John Lawrence, an English solicitor who had been admitted to practice in Western Australia in 1837. He held office until he resigned and returned to South Australia in 1849.[110] The subsequent holders of this office were Bartholemew Urban Vigors (1849-1851, afterwards Acting Advocate-General until 1854), George Frederick Stone (1852-1859, who was then appointed Advocate-General) and George Walpole Leake (1859-1879). It seems likely that the duties of the Crown Solicitor were not originally envisaged as involving court work, but from the 1850s onwards there are occasional examples of the Crown Solicitor acting as prosecutor in the absence of the Advocate-General.[111]

The abolition of the grand jury in 1855 added an extra dimension to the role of the Advocate-General. The Ordinance[112] provided that criminal proceedings

105 Although the first such mention does not occur until the Quarter Sessions of 2 October 1837: *Perth Gazette*, 7 October 1837. Moore's diary makes little or no mention of prosecutions in the Court of Petty Sessions before this time. There is a reference on 28 July 1835 to the prosecution of a settler for the murder of an Aboriginal youth: Cameron, above n 60, 382. Clearly, Moore could not have attended the Quarter Sessions of 3 October 1836 because he was on an expedition to explore unknown country east of Perth: Cameron, above n 60, 411.

106 *R v Heal* (Perth Gazette, 2 July 1842).

107 Brother of AH Stone and father of EA Stone.

108 Government Gazette, 30 November 1838, quoted by Russell, 94-95; *Perth Gazette*, 1 December 1838. Andrew Gill suggests that the appointment of a Crown Solicitor may have had something to do with the increased amount of advice required by Governor Hutt after he succeeded Captain Stirling as Governor in 1839 (see eg Cameron, above n 60, 462, 465, 481) and the unwillingness of Moore (an Irish barrister accustomed to the traditions of a divided legal profession) to do non-court work.

109 Minutes of the Executive Council, 26 January 1841, quoted by Russell, above n 53, 95.

110 Not England, as suggested by Russell, above n 53, 95: see Andrew Gill, 'Bartholemew Urban Vigors (1817-1853): A Biographical Note' (2001) 9(3) *The Journal* (Publications of the Australian-Irish Heritage Association) 8, 16 (Gill, *Vigors*).

111 Eg *R v Monahan* (Perth Gazette, 9 July 1852); *R v Taylor* (Perth Gazette, 6 January 1854).

112 *Grand Juries Ordinance 1855* (WA), 18 Vict No 5.

should in future be instituted upon information laid by a magistrate in lieu of a bill of indictment (s 2). It went on to appoint the Advocate-General or Crown Solicitor, or either of them, as Public Prosecutor (ss 6-7). The Public Prosecutor was authorised to exercise the function of the grand jury in Perth (s 6); in outlying areas that were proclaimed as places of sitting of the Court of Quarter Sessions, the functions of the grand jury were to be exercised by the Chairman of the court (s 7). From this point onwards, the Advocate-General not only prosecuted in court but was also responsible for the prior step of determining that there was enough evidence to put the accused on trial. Some saw this as a retrograde move. When McFarland took over from Mackie as Commissioner and Chairman, he made an intemperate speech in the Legislative Council criticising the abolition of the safeguard provided by the grand jury, saying that "the sacred palladium of liberty had been destroyed by the abolition of grand juries".[113] The same view was expressed in letters and editorial comment in the period 1858 to 1860,[114] and occasionally thereafter.[115] In 1872 a bill to restore the grand jury was introduced into the Legislative Council by Mr WL Brockman, but it was lost by 9 votes to 7,[116] and after this, arguments in favour of restoring the grand jury faded out.[117]

In 1861 the Court of Quarter Sessions was superseded by the Supreme Court, but as far as its criminal business was concerned nothing much changed. The criminal sittings of the court were still held four times a year, in January (later brought forward to December), April, July and October. The *Supreme Court*

113 *Perth Gazette,* 10 September 1858. Note also his comments in the Court of Quarter Sessions: *Perth Gazette*, 9 April 1858; *Inquirer*, 11 May 1858.

114 Letters: *Perth Gazette*, 30 March 1860, 18 May 1860 ('Senex'), 20 April 1860, 18 May 1860, 25 May 1860 ('Justitia'). Editorial comment: *Inquirer*, 15 April 1858, 8 September 1858, 11 May 1859; 14 November 1860.

115 *Inquirer*, 4 June 1862; *Perth Gazette*, 31 August 1866; *Inquirer*, 27 January 1869; *Inquirer*, 24 February 1869; *Fremantle Herald*, 25 September 1869 (letter written by lawyer Nathaniel Howell).

116 *Perth Gazette*, 23 August 1872, 30 August 1872. See also letter from 'Pro Bono Publico' advocating the restoration of the grand jury: *Perth Gazette*, 11 October 1872. The *Perth Gazette* had previously commented on instances where the Attorney-General had exercised the powers vested in him as both Attorney-General and grand jury by laying an information and then taking it upon himself to alter the counts and put the accused on trial for a heavier count: *Perth Gazette*, 19 July 1872. Another subject of controversy at this time was the failure of magistrate EW Landor to commit Lockier Clere Burges for trial for shooting an Aborigine. Brockman, another of the magistrates on the bench on this occasion, resigned in consequence: *Fremantle Herald*, 16 August 1872. However, he stated during the debate on the bill that this case had nothing to do with his decision to introduce the bill for the reintroduction of the grand jury: *Perth Gazette*, 23 August 1872. On the Landor-Burges affair, see Jeanine Williams, 'Governor Weld and the Landor-Burges affair: a consideration' (1972) 3 *Anthropological Forum* 157.

117 In 1899, the commission inquiring into the penal system noted that the grand jury's function of rejecting bills where there was inadequate evidence to prosecute had been assigned to the Attorney-General, and said: 'In Western Australia this part of the functions of the Grand Jury is too rarely exercised. The result is that, as compared with other countries, an unusual proportion of prisoners is sent up for trial against whom there never was any substantial case': *Report of the Commission appointed to inquire into the Penal System of the Colony* (Perth, Government Printer, 1899) 23.

Ordinance1861 (WA), 24 Vict No 15[118] provided that the Advocate-General was henceforth to be designated the Attorney-General, and the Attorney-General continued to conduct the majority of prosecutions. However, over the next three decades, the Crown Solicitor began to play a greater part in the prosecuting process. This may have had something to do with the capabilities of those who held the office of Crown Solicitor. Following GF Stone's long tenure of the office between 1859 and 1870, eight others held the position of Attorney-General between 1870 and 1890. In contrast, there were only three Crown Solicitors between 1859, when GF Stone gave up the position to become Advocate-General, and 1894: George Walpole Leake, Edward Albert Stone and George Leake.[119] GW Leake and EA Stone both clearly did quite a lot of court work. Leake was elevated from Crown Solicitor to Attorney-General in 1879, and had become a QC by 1880, and Stone was still Crown Solicitor in 1884 when he was appointed direct to the Supreme Court. Sometimes the Crown Solicitor prosecuted because the Attorney-General was absent for one reason or another;[120] at other times – for example, when there was a heavy caseload – the Attorney-General and the Crown Solicitor shared the prosecution duties.[121] In a few instances other lawyers, such as Stephen Henry Parker (later Chief Justice, 1906-1913), assisted with prosecutions. [122]

In the 1890s, the Crown Solicitor assumed full responsibility for prosecutions, and the Attorney-General ceased to be involved. One reason for this must have been the coming of responsible government in 1890. From this point on, the office of Attorney-General ceased to be an administrative appointment made from London and instead became a political appointment made by the government of the day, and the Attorney-General was a member of Parliament and of the Cabinet.[123] The first Attorney-General after responsible government was Septimus Burt, son of the old Chief Justice. He was an experienced legal practitioner (admitted 1871) and a QC, and had already held the office of Attorney-General for a few months in 1886. As Attorney-General between 1890 and 1897, he appeared as prosecution counsel in a number of cases between 1891 and 1894, but not thereafter. In nearly all cases, the prosecution was in the hands of the Crown Solicitor. Until 1894

118 S 14.

119 Son of GW Leake.

120 Eg *R v Fletcher* (Perth Gazette, 5 October 1866); *R v Parkinson* (Perth Gazette, 7 July 1876); *R v Docherty and Ferron* (Western Australian Times, 5 April 1878); *R v Simpson* (Western Australian Times, 5 July 1878). The Crown Solicitor conducted the prosecution at the Criminal Sittings held on 2 and 3 April 1879 (Western Australian Times, 9 April 1879), 1 October 1879 (Western Australian Times, 3 October 1879), 7 January 1880 (West Australian, 14 January 1880), 5 January 1881 (West Australian, 7 January 1881) and 4 January 1883 (West Australian, 5 January 1883).

121 Eg the Criminal Sittings held on 5 January 1876 (Western Australian Times, 7 January 1876); 5 October 1876 (Western Australian Times, 11 October 1876), 5 and 6 April 1877 (Western Australian Times, 10 April 1877), 4 January 1882 (West Australian, 6 January 1882), 3 January 1884 (West Australian, 5 January 1884) and 7 January 1885 (West Australian, 8 January 1885).

122 Eg SH Parker: *R v Ah Kett* (West Australian, 9 January 1883); *R v Collins* (West Australian, 19 January 1883) (held at Albany).

123 Russell, above n 53, 217.

this was George Leake junior, but when he left office in that year to go into Parliament (eventually becoming Premier), in his place Robert Bruce Burnside was appointed Crown Solicitor. By 1894 Burnside had 18 years' experience of practice, and as Crown Solicitor he prosecuted nearly every case that came before the Supreme Court. Like Stone before him, in 1902 he was appointed direct to the Supreme Court bench and served until 1929. He was recognised as a great master of the criminal law: according to Michael Lavan QC, he was the greatest criminal judge Western Australia had ever had up to the time of his retirement.[124] By Burnside's time, there was a government legal department called the Crown Law Department, employing at least six lawyers in addition to Burnside.[125]

Looking forward from Burnside's time, the Crown Solicitor continued to act as the chief prosecutor in the early years of the 20th century. The West Australian Law Reports commenced in 1899 and a check of the first forty volumes, covering the period 1899-1938, shows that until about 1920 the Crown was represented by the Crown Solicitor in almost all cases. However, as from about 1921, the Crown Prosecutor took over responsibility for criminal prosecutions and the Crown Solicitor ceased to be involved.[126] As time went on and the Crown Law Department increased in size, there were further appointments, such as Assistant Crown Prosecutor and Crown Counsel.[127] In 1992 the Crown Law Department was split up and prosecutions became the responsibility of the Office of the Director of Public Prosecutions, headed by the Director of Public Prosecutions. Today the State Solicitor's Office, which handles civil work (including litigation) and other agencies such as the Office of Parliamentary Counsel are part of the Department of the Justice.

It remains to say something about defence counsel. In those cases (the minority)

124 MG Lavan KC, 'Reminiscences of Law and Lawyers' (1930) 14 *Magistrate* 67, quoted by Bolton & Byrne, above n 53, 106.

125 A photograph of a group of Crown Law Department officers taken in 1894 shows 15 individuals (not including Burnside): Bolton & Byrne, above n 53, 106. Six of them were admitted legal practitioners.

126 Though the first mention of a Crown Prosecutor appearing to prosecute occurs in vol 14 (1912), it appears that the change took place at or around the time HSW Parker was appointed as Crown Prosecutor (c 1921). The last Crown Solicitor to appear regularly in criminal cases was Dr FL Stow (Crown Solicitor 1912-1926). The Crown Solicitor continued to appear in court from time to time in other matters: eg JL Walker, Crown Solicitor 1926-1935, appeared before McMillan CJ and the Full Court in *Clarke v R* (1927) 29 WALR 102, the well-known contract case on whether a person involved in the murder of two police officers was able to claim the reward offered by the Crown. The Full Court held that the petitioner was entitled to claim the reward, but this decision was reversed on appeal to the High Court: *R v Clarke* (1927) 40 CLR 227.

127 Eg, Sir Ronald Wilson, who became the first Western Australian judge of the High Court of Australia in 1979, was admitted to practice in 1951 after doing his articles at the Crown Law Department, and became Assistant Crown Prosecutor in 1954, Chief Crown Prosecutor in 1959, Crown Counsel in 1961, and Solicitor General in 1969. For his career, see A Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of WA Press, 2007). In 1950 the Crown Law Department was still comparatively small: there were only six solicitors, headed by the Solicitor-General: Buti, 43.

where the accused was legally represented, the newspaper reports of the 19th century almost always give the name of counsel for the defence. In the early days, when the profession was very small, the same names appear with great regularity: the only defence lawyers to appear before the Court of Quarter Sessions more than once or twice were William Nairne Clark (admitted 1836), William Temple Graham (admitted 1836), Edward Wilson Landor (admitted 1841), George Walpole Leake (admitted 1852) and Nathaniel Howell (admitted 1854), plus Richard West Nash and John Schoales, Irish barristers (and brothers-in-law): those who had been called to the English, Scottish or Irish bar could practise without formal admission.[128] In the second half of the century, the leading defence counsel were Howell, who continued in practice until the 1870s, Stephen Henry Parker and Septimus Burt. This underlines the very small size of the profession in Western Australia in the 19th century. Between 1836 and 1880 (in which year George Leake junior was admitted to practice) only 24 men are recorded on the admission roll, and only 47 more were admitted between 1881 and 1893. It appears that in the 1850s there were so few legal practitioners that it was difficult to find counsel and solicitors for each side in an action.[129] In 1860, according to the editor of *The Inquirer*, "Our bar is small, without power and without influence. It is composed of four members. Of these, two hold official appointments and a third is in partnership with the Advocate-General."[130] The early Advocates-General and Crown Solicitors usually had the right to engage in private practice,[131] and as late as 1877 GW Leake, during his time as Crown Solicitor, had to appear for the defence because all other available members of the bar had been engaged in the prosecution before the magistrate.[132] In the last years of the century, the legal profession began to increase in numbers, no doubt due to the discovery of gold in Western Australia and the consequent increase in business and general prosperity, and the legal profession expanded: there were a further 136 admissions between 1893 and 1900.[133]

128 Russell, above n 53, 68.

129 Russell, above n 53, 69. By 1850, of the seven practitioners admitted before that date, only Graham, Wells, Lawson and Vigors remained; Clark and Lawrence had left the state, as had Landor, though he later returned. Nash had also left Western Australia, and Schoales had died. Charles Lawson was a solicitor, and Richard Wells had been admitted to practice in 1836 though not admitted elsewhere. Neither is known to have appeared in Quarter Sessions.

130 *The Inquirer*, 14 November 1860 (quoted, Russell, above n 53, 69).

131 For example, Lawrence when Crown Solicitor between 1838 and 1849 continued in private practice, as from 1842 in partnership with Vigors, his eventual successor: Gill, *Vigors*, above n 110, 10; George Frederick Stone had the right of private practice while Advocate-General from 1859 to 1870: Russell, above n 53, 93.

132 *R v Chadburn* (Perth Gazette, 5 January 1877).

133 The first case I have noted where two counsel appeared on each side is *R v Richardson, Watson and Whitmore* (West Australian, 15 April 1896), where the accused were charged with robbing the shop of Mr BV Lindell, a jeweller in Hay St. Burnside and WM Purkiss appeared for the Crown, JH Browne for Richardson and Watson, and FW Moorhead for Whitmore. The case was the subject of considerable press comment: see eg *The West Australian*, 9 January 1896: 'Daring Jewellery Robbery. A Jeweller's Shop Looted in Daylight. £500 Worth Stolen. Skeleton Keys Used. Perhaps the most daring jewellery robbery on record in this colony ...'

IV THE OTHER COLONIES: A COMPARISON

As can be seen, the evidence shows that in Western Australia prosecutions have always been undertaken by state officers appointed for this purpose – initially the Advocate-General, after 1861 theAttorney-General and, by the end of the 19th century, the Crown Solicitor. In the conditions prevailing during the early years following settlement, there was really no alternative because of the shortage of lawyers and the lack of an organised legal profession. In so far as the appointment of public officers to prosecute is concerned, the story in the other Australian states was very similar.

A South Australia

South Australia was, and always remained, a free settlement. This meant that grand and petty juries on the English model were automatically introduced when the colony was founded.[134] The Supreme Court was established in 1837[135] and the first grand jury was convened in that year.[136] In 1837 also, the Court of General or Quarter Sessions was created to try crimes not punishable by death, though it did not ultimately have a wide criminal jurisdiction,[137] and Courts of Petty Sessions were set up for the trial of summary offences. [138] The Jervis reforms were introduced in 1849 and 1850.[139]

Grand juries were clearly subject to the same problems as in Western Australia. They were abolished sometime after 1842 for the purpose of the jurisdiction of the Court of General or Quarter Sessions, but the British authorities disallowed the Act because prosecutions were not being made on the recommendations of grand juries.[140] Grand juries continued to be used in the Supreme Court until their abolition in 1852.

It seems clear that prosecutions were conducted by public officers from an early point in time. Sometime before 1840, appointments were made to the positions of Advocate-General, Crown Solicitor and Public Prosecutor: originally, these offices were held by the same person. The *Adelaide Chronicle* for 31 March 1840 referred to the resignation by the Hon Robert Bernard of the offices of Advocate-General, Crown Solicitor and Public Prosecutor, and the appointment of William Smillie to replace him. Some newspaper references show the Crown Solicitor

134 Castles, above n 67, 313.
135 *Supreme Court Act 1837* (SA), 7 Will 4 No 5.
136 Castles, above n 67, 314.
137 Castles, above n 67, 315.
138 *Courts of General and Petty Sessions Act 1837* (SA), 7 Will 4 No 1.
139 *Indictable Offences Ordinance 1849* (SA), No 15 of 1849; *Justices Ordinance 1850* (SA), No 6 of 1850.
140 Castles, above n 67, 322.

prosecuting cases in court, just as in Western Australia.[141] There are newspaper references to the assistant crown solicitor as early as 1842.[142]

B New South Wales

In the early years, the court system in New South Wales reflected the colony's origins as a convict settlement. The first criminal court was the Court of Criminal Jurisdiction, which operated from 1788 to 1823.[143] The judge was a Judge-Advocate, sitting with six army officers. The court could reach a decision by majority. [144] There was no jury system. The court initially sat only in Sydney, despite the fact that the territory of New South Wales originally covered the whole of eastern Australia, including Tasmania: it was not until 1821 that the Court of Criminal Jurisdiction first went to Tasmania on circuit.[145] JPs were appointed on the English model,[146] which meant that they heard trials of minor (and in more remote areas, not-so-minor) criminal offences,[147] and played a role in bringing those accused of serious crime before the Court of Criminal Jurisdiction. The first stipendiary magistrate was appointed in 1810.[148] The practice of appointing paid legally qualified magistrates to exercise minor criminal jurisdiction spread much more quickly in Australia than in England,[149] and lay justices now sit only very rarely.[150]

In 1823, the court system was reformed. By this time New South Wales was becoming much less like a convict settlement and more like a normal colony, with many free settlers, plus the first generation of Australian-born citizens. The *New South Wales Act 1823* (UK), 4 Geo 4 c 96 established a system of courts on the English model.[151] There were three levels of jurisdiction. At the top was the Supreme Court with both civil and criminal jurisdiction based on the model of

141 Eg *South Australian Register* 20 March 1850. An interesting reference in the *South Australian Register* for 29 June 1850 shows the Crown Solicitor proceeding with the posse comitatus to effect a forcible entry of the new court building after the contractor had refused to admit officials connected with the administration of justice. In medieval England, the posse comitatus was a body of local men summoned by the sheriff to assist him in enforcing the law. From England, it made its way to the Wild West.

142 Eg *Adelaide Chronicle* 23 February 1842.

143 For leading works on criminal law in early New South Wales, see Castles, above n 67, chs 4-5; D Neal, *The Rule of Law in a Penal Colony: Law and Power in early New South Wales* (Cambridge UP, 1991) ('Neal'); P Byrne, *Criminal Law and Colonial Subject: New South Wales 1810-1830* (Cambridge UP, 1993); D Philips and S Davies (ed), *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (Melbourne UP, 1994); B Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995).

144 Castles, above n 67, 47.

145 Castles, above n 67, 52.

146 Under the First Charter of Justice: Castles, above n 67, 67.

147 Castles, above n 67, 69.

148 Castles, above n 67, 72.

149 Castles, above n 67, 210-11, see also 284-5.

150 See J Crawford and B Opeskin, *Australian Courts of Law* (Oxford UP, 4th ed, 2004) 91.

151 See Castles, above n 67, ch 7.

the English courts;[152] next came the Court of Quarter Sessions, which had limited jurisdiction to hear trials of indictable offences;[153] and finally the Courts of Petty Sessions, which exercised summary jurisdiction over minor offences.[154] These courts had their civil equivalents. The Jervis Acts were adopted in 1850.[155]

However, the British authorities remained unwilling to grant the right of trial by jury. Instead, the 1823 Act continued the system of military juries,[156] and the question of jury trial was a matter of great controversy over the next twenty years.[157] In 1828 the New South Wales legislature was given authority to determine its own policies on jury trial,[158] and eventually, trial by jury was adopted by local, rather than British, legislation.[159]

The grand jury system was also not introduced in 1823,[160] and grand juries never took firm root in New South Wales[161] (except for their short-lived adoption in the Court of Quarter Sessions between 1823 and 1828).[162] Instead, the Act recognised that the Attorney-General could proceed against accused persons by way of information.[163] Even after the introduction of trial juries, no official steps were taken to alter the method of bringing serious criminal charges before the courts, it seems because of the difficulty of finding enough men to serve on the grand jury, in addition to the petty jury, especially in rural areas.[164]

The first Attorney-General to be appointed for New South Wales was Saxe Bannister, an English barrister, in 1824. His duties included conducting all criminal prosecutions in the Supreme Court and acting for the Crown in other matters in

152 As to its criminal jurisdiction, see Castles, above n 67, 135.

153 Castles, above n 67, 146. Courts of Quarter Sessions were later created for various centres outside Sydney, such as Port Phillip (Melbourne): Castles, 206-207. In 1858, Courts of Quarter Sessions were replaced by District Courts, which had both criminal and civil jurisdiction: Castles, above n 67, 210.

154 Castles, above n 67, 149.

155 *Justices Act 1850* (NSW), 14 Vict No 43: Castles, 214-15.

156 Castles, above n 67, 144-5.

157 See eg Neal, above n 143, ch 7.

158 *Australian Courts Act 1828* (UK), 9 Geo 4 c 83, s 10; Castles, 154. Pursuant to this section, a British Order in Council authorised the New South Wales Legislative Council to adopt the traditional English jury system: Castles, 203, citing JM Bennett, 'The Establishment of Jury Trial in New South Wales' (1959-1961) 3 *Sydney LR* 463, 473.

159 Civilian juries finally came into full operation when the *Juries Act 1839* (NSW), 3 Vict No 11 abolished military juries. For earlier, more limited legislation, see *Juries Act 1832* (NSW), 2 Will 4 No 3; *Juries Act 1833* (NSW), 4 Will 4 No 12: Castles, above n 67, 203-4.

160 Castles, above n 67, 145.

161 Castles, above n 67, 177. Castles contrasts the regular use of grand juries in Canada.

162 see n 67 above, also Castles, above n 67, 177.

163 *New South Wales Act 1823* (UK), 4 Geo 4 c 96, s 4; JM Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, 1974) 71 (Bennett, *History of the Supreme Court*); Castles, above n 67, 145, 177, 204. 'As a consequence, an administrative official, without security of tenure, became the ultimate repository of considerable discretionary powers relating to criminal prosecutions without any inbuilt checks on this authority like those which could still be provided through grand juries': Castles, above n 67, 177-8.

164 Castles, above n 67, 177.

which its interests were involved. He had the right to engage in private practice.[165] The first appointment to the position of Solicitor-General, John Stephen, was also made in 1824.[166] However, the Attorney-General's role in criminal prosecutions became increasingly nominal as responsibility tended to be delegated to others. Sometimes informations were filed by the Solicitor-General.[167]

A check of the criminal cases in Legge's Reports, covering New South Wales cases decided between 1825 and 1862, reveals that either the Attorney-General or the Solicitor-General, or both, prosecuted in the majority of cases in which counsel's names are given (18 out of 33).[168] In the others, it appears that barristers in private practice were briefed to appear for the Crown: some of those mentioned also appear for the defence in other cases. In *R v Lang*,[169] the right of the Attorney-General to prosecute in what was originally a private prosecution for libel was challenged but upheld. The report summarises the judgment of Stephen CJ, including the following:

"[U]p to the time of the defendant's committal by the police bench, Mr Berry [the private prosecutor, represented here by Isaacs] was unquestionably the prosecutor, and in the ordinary course of practice – in England, certainly – would have prosecuted the case to its conclusion. But the proceedings came from the Police Court to the Attorney-General in the same manner as in England they would have gone to a Grand Jury. The Attorney-General, however, exercised both the functions of a grand jury and of a public prosecutor, and having found the bill in the former capacity, conceived it to be his duty to prosecute the case in the latter. It was a highly important question, and one which was very debatable elsewhere, whether it was conducive to the ends of justice to take cases of this nature wholly out of the hands of private prosecutors, but upon this he should give no opinion. What he was asked to do was to take the prosecution out of the hands of the Attorney-General, and to place it in those of Mr Berry. This he was most clearly of opinion he had no power to do. ... The learned Chief Justice pointed out in detail the variance between the modes of initiating and prosecuting charges here and in England."

In 1817, Thomas Wylde was appointed as the first Crown Solicitor for New South Wales. Though there were earlier lawyers who were promised money for doing the work of the Crown, there were no official duties: Thomas Wylde was the first properly appointed Crown Solicitor, in that he was a qualified official

165 JM Bennett, *A History of the New South Wales Bar* (Law Book Co, 1969) 33-34 (Bennett, *History of the Bar*).

166 Bennett, *History of the Bar*, above n 165, 34. On the incompetence of the early Crown Law Officers, see JM Bennett, *Sir James Dowling, Second Chief Justice of New South Wales 1837-1844* (Federation Press, 2001), 50-8.

167 Bennett, *History of the Supreme Court*, above n 163, 70-1.

168 Cases beginning 'R v' were assumed to be criminal cases for the purpose of this exercise, unless they were clearly not so, eg writs of quo warranto.

169 (1859) 2 Legge 1133.

retained to do the legal work of the colonial government.[170] In 1827 the post was left vacant,[171] but in 1829 the vacancy was filled because the Attorney-General could not cope with all the work required of him.[172] In 1836 the Crown Solicitor's responsibilities were divided between two officers, one responsible for criminal prosecutions, one for civil business,[173] but the roles were reunited in 1859.[174]

A Crown Prosecutor for the Court of Quarter Sessions was appointed in 1837.[175] Until 1858, even though the Court of Quarter Sessions sat in various different centres, there was a single Crown Prosecutor for the whole of the colony.[176] On the establishment of District Courts in 1858, the colony was divided into five districts, with a Crown Prosecutor for each.[177]

C Tasmania, Victoria, Queensland

The *New South Wales Act 1823* (UK), 4 Geo 4 c 96 set up a court system for Tasmania similar to that for New South Wales. Tasmania became an independent colony in 1825.[178] Similar court systems were set up in Victoria and Queensland when they became independent colonies in 1851 and 1859 respectively.[179] Even before separation courts had been established in Port Phillip (Melbourne) and Moreton Bay (Queensland).[180] However, three tiers of criminal courts were not required in the smaller colonies. Quarter Sessions was abolished in Tasmania in 1845, and in Queensland in 1895;[181] Queensland only reverted to a three-tier system in 1958, and Tasmania still has only two tiers. The Jervis Acts were introduced in Tasmania in 1855.[182] Victoria and Queensland inherited these reforms when they

170 JM Bennett, *A History of Solicitors in New South Wales* (Legal Books, Sydney, 1984) 309-10 (Bennett, *History of Solicitors*).

171 Bennett, *History of Solicitors*, above n 170, 312.

172 Bennett, *History of the Supreme Court*, above n 163, 70-1;Bennett, *History of Solicitors*, above n 170, 312.

173 Bennett, *History of the Supreme Court*, above n 163, 71; Bennett, *History of Solicitors*, above n 170, 313-14.

174 Bennett, *History of the Supreme Court*, above n 163, 71; Bennett, *History of Solicitors*, above n 170, 316.

175 Bennett, *History of the Supreme Court*, above n 163, ch 4 n 118.

176 A Dowling (ed), *Reminiscences of a Colonial Judge* (Federation Press, 1996) 91 (Dowling). John Sheen Dowling was appointed Crown Prosecutor in 1857: Dowling, 86. When the District Courts were established in 1858, he became a District Court Judge: Dowling, 92.

177 Dowling, above n 176, 112. The first reference to a Crown Prosecutor noted in Legge occurs in *R v Hornary* (1861) 2 Legge 1465.

178 Castles, above n 67, 132.

179 Castles, above n 67, 151.

180 A Court of Quarter Sessions was established in Port Phillip (Melbourne) in 1839: JL Forde, *The Story of the Bar of Victoria* (Whitcombe & Tombs, c 1941), 23 (Forde). There was a resident judge of the Supreme Court of New South Wales in Port Phillip from 1840 onwards: Forde, 53; Castles, above n 67, 23; and in Moreton Bay (Queensland) from 1857 onwards: Castles, above n 67, 227.

181 The criminal jurisdiction of the Queensland Court of Quarter Sessions was transferred to District Courts, but these were abolished in 1921.

182 *Justices Act 1855* (Tas), 19 Vict No 8; *Indictable Offences Act 1855* (Tas), 19 Vict No 9.

became separate colonies.[183]

The criminal jury was finally adopted in Tasmania in 1841.[184] Grand juries were advocated but never introduced,[185] and so the Attorney-General proceeded against accused persons by way of information, as in New South Wales.[186] When Victoria and Queensland became separate colonies, they inherited the system of jury trial, and also the practice of criminal proceedings being initiated by the Attorney-General, proceeding by way of information.[187]

These colonies also appear to have followed the practice established in New South Wales of appointing lawyers to act for the Crown in criminal cases. In 1824, an Attorney-General was appointed for Tasmania. He had the right to engage in private practice, like the similar appointment made in New South Wales at the same time. [188] When the first Court of Quarter Sessions was established in Port Phillip (Melbourne) in 1839, a Crown Prosecutor was also appointed.[189] When Victoria became an independent colony, an Attorney-General and a Solicitor-General were appointed.[190]

V CONCLUSION

As this account has tried to show, the history of criminal prosecutions in Western Australia has in general mirrored the system inherited from England in the early 19th century, but in one material particular – the use of public officers to prosecute – the experience has been rather different. In that regard, Western Australia's experience has been the same as that of the other states. For those interested in the history of our local legal institutions, the story offers a fascinating glimpse into a very different world from the one we live in today. The full accounts of trials in the newspaper reports help to make this kind of investigation possible – they compare very favourably with the more abbreviated accounts found in today's press reports and the limited issues covered in formal law reports. They make it possible to build up a detailed picture of a young colony striving to apply English institutions and practices to the rather different conditions prevailing on the other side of the world.

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183 Castles, above n 67, 214-215.

184 *Jury Act 1840* (Tas), 4 Vict No 33. For earlier more limited legislation see *Jury Act 1834* (Tas), 5 Will 4 No 11. See Castles, above n 67, 273-5.

185 Pedder CJ in *R v Magistrates of Hobart Town* (1825) reached a decision opposite to that of Forbes CJ in *R v Magistrates of Sydney* (1824) (see n 67 above): Castles, 186.

186 Castles, 275-6. Alfred Stephen, later Chief Justice of Tasmania, expressed concern that the Attorney General would not be free from outside influences: Castles, above n 67, 178, 181, 275-6.

187 Victoria inherited legislation passed in New South Wales between 1828 and 1851, and Queensland inherited New South Wales legislation enacted between 1828 and 1857: Law Reform Commission of Western Australia, *Report on United Kingdom Statutes in Force in Western Australia* (Project No 75, 1994), Appendix II paras 3, 7.

188 Bennett, *History of the Bar*, above n 165, 33-4.

189 Forde, above n 180, 23.

190 See references to the first holders of these offices in JM Bennett, *Sir William a'Beckett, First Chief Justice of Victoria 1852-1857* (Federation Press, 2001), 45-6.