Fairness and Efficiency in Summary Prosecutions:

The Independent Prosecutor’s Dilemma
in a ‘Law and Order’ Environment.

Tony Krone

A thesis submitted in accordance with the requirements for the award of the Degree of Doctor of Philosophy, Faculty of Law, University of New South Wales

2002
Abstract 350 words maximum:

This thesis critically examines the claim that replacing police prosecutors with independent prosecutors will provide independence, fairness and impartiality. The context in which policing takes place is examined, with particular reference to widening police powers of control and surveillance, aggressive street policing, and increasingly punitive responses to perceived disorder. The combination of process differences between the two tiers of the summary and trial courts and the discretion exercised by the police officer, the prosecutor and the court, leads to a complex dynamic in the prosecution of police summary cases in which the police officer's threshold discretion is pivotal. The dilemma presented is what can the independent prosecutor do about the over-representation of marginalised communities in statistics for police summary cases. A hurdle for the prosecutor is to be able to assess, and respond appropriately to, the manner of policing whilst allowing for the conflicting perceptions of the police and of those being policed. The prosecutor must also deal with the paradox of the simultaneous over-policing of offences against police and the under-policing of violent offences within Aboriginal communities.

Two broad themes of fairness and efficiency are explored in relation to the processing of police summary cases and this thesis analyses the extent of institutional and personal discretion exercised within the Police Service and the Office of the DPP. A survey of DPP prosecutors in New South Wales, Victoria and Western Australia was conducted in 2001 to determine individual prosecutor attitudes to key issues in relation to summary prosecutions. The survey was informed by an analysis of studies, models and practices from other jurisdictions. The thesis also includes a study of DPP records for cases considered for discontinuance during the Summary Prosecution Pilot (conducted in 1996 at Campbelltown and Dubbo Local Courts), a review of newspaper references to the DPP for the period from 1 July 1997 to 30 June 2001 and a review of international writing on the role of the prosecutor in common law countries.

Ultimately the importance of independent prosecution of police summary cases lies in providing a check and balance on the discretion afforded to police officers and in opening up the prosecution process to transparency and accountability. To achieve these results, the independent prosecutor must be prepared to expose the nature of police and prosecution decision-making and implement systems for institutional and individual prosecutor openness and accountability.

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Abstract

This thesis critically examines the claim that replacing police prosecutors with independent prosecutors will provide independence, fairness and impartiality. Ultimately the importance of independent prosecution of police summary cases lies in providing a check and balance on the discretion afforded to police officers and in opening up the prosecution process to transparency and accountability. To achieve these results, the independent prosecutor must be prepared to expose the nature of police and prosecution decision-making and implement systems for institutional and individual prosecutor openness and accountability.

The context in which policing takes place is examined, with particular reference to widening police powers of control and surveillance, aggressive street policing, and increasingly punitive responses to perceived disorder. The combination of process differences between the two tiers of the summary and trial courts and the discretion exercised by the police officer, the prosecutor and the court, leads to a complex dynamic in the prosecution of police summary cases in which the police officer’s threshold discretion is pivotal. The dilemma presented is what can the independent prosecutor do about the over-representation of marginalised communities in statistics for police summary cases. A hurdle for the prosecutor is to be able to assess, and respond appropriately to, the manner of policing whilst allowing for the conflicting perceptions of the police and of those being policed. The prosecutor must also deal with the paradox of the simultaneous over-policing of offences against police and the under-policing of violent offences within Aboriginal communities.

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<td>Description</td>
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<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
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<tr>
<td>ASC</td>
<td>Australian Securities Commission</td>
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<tr>
<td>AVO</td>
<td>Apprehended Personal Violence Order</td>
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<tr>
<td>CLD</td>
<td>Common Law Division</td>
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<td>CPS</td>
<td>Crown Prosecution Service</td>
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<tr>
<td>Cth</td>
<td>Commonwealth of Australia</td>
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<tr>
<td>DCJ</td>
<td>District Court Judge</td>
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<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<tr>
<td>LCM</td>
<td>Local Court Magistrate</td>
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<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>NT</td>
<td>Northern Territory of Australia</td>
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<tr>
<td>NZ</td>
<td>New Zealand</td>
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<tr>
<td>ODPP</td>
<td>Office of the Director of Public Prosecutions</td>
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<tr>
<td>OIC</td>
<td>Officer in Charge</td>
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<tr>
<td>PACE</td>
<td>Police and Criminal Evidence Act 1984 (UK)</td>
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<tr>
<td>PCA</td>
<td>Drive with the prescribed concentration of alcohol</td>
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<tr>
<td>QC</td>
<td>Queen’s Counsel</td>
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<tr>
<td>Qld</td>
<td>Queensland</td>
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<tr>
<td>RSPCA</td>
<td>Royal Society for the Prevention of Cruelty to Animals</td>
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<td>SA</td>
<td>South Australia</td>
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<tr>
<td>SPOD</td>
<td>Special Projects and Operations Division (NSW Premier’s Department)</td>
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<td>Vic</td>
<td>Victoria</td>
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<td>WA</td>
<td>Western Australia</td>
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<tr>
<td>RCIADIC</td>
<td>Royal Commission into Aboriginal Deaths in Custody 1991</td>
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<td>RCPS</td>
<td>Royal Commission into the New South Wales Police Service 1997</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>USA</td>
<td>United States of America</td>
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Personal note

'It's true that I have knocked on the doors of [Aboriginal] people who don't know me, and the doors have not been opened. 'Wadjila' (a white person), 'Wadjila,' the voices on the other side of the door say. And you can't trust wadjilas. The experience, both sides of that door, tells me something about the damage that has been done.

An elder, Aunty Hazel Brown said to me 'You let people know you're Noongar. Be proud of yourself. We're proud of you.'

I've been in shops where people keep their eyes on us. Had police pull up our car. I've heard what people say, I know most of the lines; that people claim an Aboriginal identity to get on the gravy train leading to all the supposedly massive financial benefits of being Aboriginal. It's a fashion. And just how much Aboriginal have you got in you anyway?\(^1\)

I worked as a solicitor for the Western Aboriginal Legal Service in western New South Wales during the early 1990s. I practised largely in the Local Courts representing Aboriginal defendants. When I commenced this work it was the first time I had been in direct contact with Aboriginal people in New South Wales. The cases brought against my clients covered the full range of the criminal law, from the most appalling violence within the Aboriginal community to general offences of violence and dishonesty. These offences contrasted with the very many public order offences that arose out of the interaction of police and Aboriginal people on the street. It was hard to believe that Aboriginal people were subjected to such intense surveillance, interference and control at the hands of the police. And although at times the prosecution of public order offences by the police seemed reasonable (even restrained) the overwhelming sense was that instances of unreasonable police behaviour contaminated all other Aboriginal-police interactions.

A striking experience for me was to visit the homes of Aboriginal people, either socially or to interview clients, and to be told that one or other of the occupants was extremely

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uncomfortable having a ‘gubber’\(^2\) at their door. On one such visit, in Brewarrina, the woman whose house it was, had been ‘removed’ from her Aboriginal family in the 1930’s, only to escape and make the journey of many hundred miles back to them and then to be moved with her family away from their traditional country to a ‘Native Reserve’ in Brewarrina. Another senior woman in Bourke shouted and screamed when I visited, she did not allow white men in her house. Personally I had no experience of life that could compare with that endured by Aboriginal people. This thesis raises the issue of how just one aspect of the criminal justice system can be changed to address the ways in which those on the margins of society live under the ‘rule of law’.

1 CHAPTER ONE - INTRODUCTION

1.A Prosecuting police summary cases

A significant feature of police summary prosecutions in New South Wales (NSW) is the use of police officers to prosecute summary criminal charges brought by other police officers. Indeed, as is discussed in Chapter Two, in each Australian State, in nearly every summary case commenced by a State police officer, the defendant will find the case prosecuted at the Magistrates' Court by a police officer. In this way, both the primary decision whether to commence criminal proceedings and the secondary decision to continue or discontinue charges before the court are made within the same agency. There was a time when 'every task from the arrest, delivery in custody to the dock, prosecution, cross-examination, presentation of antecedents and delivery to prison was the work of a police officer.' However, uniformed police have progressively been relieved of minor Local Court responsibilities as court custodial officers and attendants. And yet, when the Local Courts Act 1982 (NSW) was enacted to significantly reform the court of summary jurisdiction, the removal of police prosecutors was not implemented despite earlier recommendations to that effect. This pivotal characteristic of the old 'Police Court' or Court of Petty Sessions has therefore

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1 In New South Wales, police prosecutors present summary criminal cases on behalf of NSW police officers in the court of summary jurisdiction known as the Local Court. While some of the police prosecutors are legally qualified, it is not necessary for them to have legal qualifications to appear in court on behalf of police informants, as they appear by leave of the magistrate presiding in each court. See Royal Commission into the New South Wales Police Service, 'Final Report', Sydney, 1997.

4 St.John, R. J. B., 'The Role of the Police in Courts', First Australian Convention of Councils for Civil Liberties, Sydney, 1968. At p. 1, quoting from the English Law Society Journal on the roles assumed by police in the summary courts in the 1960s. In both England and Australia, there were basically three separate positions that were filled by police officers: these were court custodian, court custody officer, and police prosecutor.

5 Following the creation of the Local Court the position of court constable was replaced by a civilian employee of the Attorney General’s Department. Later, following the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), officers of the Department of Corrective Services became responsible for the custody of prisoners in police remand facilities and before the courts in most centres.

6 The courts of summary jurisdiction deal with summary offences and committal hearings for indictable offences. In New South Wales, the court is now known as the Local Court, which is constituted by a single magistrate. See Local Courts Act 1982 (NSW). The District Court and Supreme Court are the criminal trial courts in New South Wales and each of these has a limited summary jurisdiction. For a history of the Local Court see Golder, H., High and Responsible Office: A History of the NSW Magistracy, Sydney University Press, Sydney, 1991.

7 Listed in 1B below.

8 St. John notes that the stone entry to the Liverpool Street Magistrates' Court in Sydney had carved in it the words 'Police Court.' This can still be seen today and the name is also carved into the
survived in the evolution of the Local Court. Should this final bastion of police involvement in the operation of the Local Court be abolished? And if so, who should replace police prosecutors? An obvious reform option is to replace police prosecutors with prosecutors from the Office of the Director of Public Prosecutions (DPP).  

1.B Calls for a transfer of responsibility

Over the last thirty years, there have been a number of calls for the transfer of responsibility for summary prosecutions from the police to an independent prosecution agency in NSW. The following list highlights some of the markers in the developing argument for reform in this area from NSW and elsewhere:

1968 St. John Paper presented at First Australian Convention of the Councils for Civil Liberties,

1973 Office of the Crown Advocate established in Tasmania for the prosecution of indictable cases,

1974 Task Force into Policing, Ontario, Canada, recommends that within three years police should not be allowed to serve as prosecutors,
1974 In the Australian Capital Territory, summary prosecutions are transferred from police to the Crown Solicitor’s Office,\textsuperscript{13}

1974 South Australian Mitchell Committee Report on Criminal Law Reform,\textsuperscript{14}

1981 Philips Royal Commission on Criminal Procedure in England and Wales,\textsuperscript{15}

1981 Lusher Inquiry into the Administration of the New South Wales Police Service,\textsuperscript{16}

1983 New South Wales Royal Commission into Certain Committal Proceedings against K. E. Humphries,\textsuperscript{17}

1983 Stewart Royal Commission report,\textsuperscript{18}


\textsuperscript{15} Royal Commission on Criminal Procedure, ‘Royal Commission on Criminal Procedure Report’, HMSO, Cmnd 8092-1, London, 1981. See recommendation 9.2 at p. 186. The Report stated ‘We recommend that there should be no delay in establishing a statutorily based prosecution service for every police force area.’

\textsuperscript{16} Commission to Inquire into New South Wales Police Administration, ‘Report by Mr Justice Lusher of the Commission to Inquire into New South Wales Police Administration’, Government Printer, Sydney, 1981. In his Report, Lusher recommended ‘that the Prosecutor’s Branch be phased out as soon as possible and within five years its personnel cease to act as prosecutors in Courts of Petty Sessions and of summary jurisdiction and in Coroners Courts and other Courts where they presently appear in that role, other than in remote areas and in respect of minor matters. That immediate steps be taken to replace them with an appropriate Prosecuting Department through the Attorney General or other appropriate officer and comprised of person[s] admitted as barristers and solicitors. That this should commence with the conduct of committal proceedings of serious charges considered likely to proceed to trial, and be extended as soon as possible to all prosecutions. That in the meantime, steps be taken immediately to enable the Clerk of the Peace to take over and conduct the committal proceedings of such complex and lengthy prosecutions as he thinks fit with a view to preventing unnecessary delays and duplication and expense in the preparation and presentation of such matters as may be likely to go to trial.’ at p. 258.

\textsuperscript{17} After the Local Courts Act 1982 (NSW) was enacted, NSW Chief Justice Street linked the reform of the Magistrates’ Courts with the possible removal of police prosecutors in his report on the committal of K E Humphries, in 1983: ‘The restructuring of the Magistrates’ Courts will bring under examination again the question of the role of the police as prosecutors in Magistrates’ Courts. This question was considered by Mr Justice Lusher in his recent Inquiry into the New South Wales Police Administration ... Without addressing myself to the details of those recommendations, I commend to the Government the recognition and adoption of the conclusion that underlies them, namely that prosecutions should be handled by a Prosecuting Department under the Ministerial authority of the Attorney General in place of the present system of their being handled by a branch of the police force. Royal Commission of Inquiry into Certain Committal Proceedings against K E Humphries, ‘Report by Chief Justice Street of the Commission into Certain Committal Proceedings against K E Humphries’, Sydney, 1983, At p. 99.

\textsuperscript{18} Royal Commission of Inquiry into Drug Trafficking, ‘Final Report’, Australian Government Publishing Service, Canberra, 1983. At p. 620. ‘It is desirable that police prosecutions before magistrates be phased out. The conduct of prosecutions in court where the State is involved as prosecutor is the responsibility of the department administered by the Attorney General and the Minister for Justice and not
1982 Victorian DPP established.
1986 New South Wales DPP established.
1989 Queensland Fitzgerald Commission Report,\(^{19}\)
1991 NSW DPP takes over responsibility for committals in the Local Court,\(^{20}\)
1994 New South Wales ICAC Investigation into the Relationship Between Police and Criminals - Second Report,\(^{21}\)
1994 Decision in *Price v Ferris*\(^{22}\)
1997 Royal Commission into the New South Wales Police Service,\(^{24}\)
1998 Transfer of Northern Territory police prosecution personnel to the staff of the NT DPP,\(^{25}\) and


\(^{19}\) Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, ‘Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct’, Brisbane, 1989. At p. 238. Fitzgerald reported: ‘The employment of experienced police officers as Police Prosecutors absorbs resources which might be better employed on other essential policing duties. It is undesirable that the courts be seen as having to rely upon the Police Force to exercise important discretions in bringing and pursuing charges. That is made worse by any public perception that the Police have special standing or influence in the prosecution process. Independent, legally qualified people could be employed by the Director of Public Prosecutions to conduct prosecutions. This course of action may involve increased initial costs, but they must be balanced against the ability to recruit staff with specialised skills, the cost of training and employing approximately 100 police exclusively on prosecution duties and the other costs of present practices. Independent, legally qualified prosecution staff will in all likelihood bring about efficiencies and reductions in the caseload of prosecutions. Defective cases can be identified and either remitted for further investigation or, if the defect is incurable be dropped. Better prepared cases from which avoidable legal flaws have been eliminated will result in fewer contests with savings in time and resources.’


\(^{21}\) Independent Commission Against Corruption, ‘Investigation into the Relationship between Police and Criminals, Second Report’, Independent Commission Against Corruption, Sydney, 1994. This Report recommended a trial be conducted for the conduct of summary prosecutions by the DPP.

\(^{22}\) (1994) 34 NSWLR 704. Kirby P., at pp. 707-708 said: ‘What is the object of having a Director of Public Prosecutions? ... Analyses by law reform and other bodies have demonstrated conclusively how vital are the decisions made by prosecutors ... Decisions to commence, not to commence or to terminate a prosecution are made independently of the courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Director of Public Prosecutions Act was passed by Parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.’


None of the inquiries listed above was specifically set up to examine the independent prosecution of police summary cases and the recommendations made reflect the scope of the inquiry involved. Nevertheless, the arguments for the establishment of an independent prosecutor tend to be divided between those based on principle and those based on efficiency. For example, the Lusher Report was concerned with the management of the police service and argued that prosecuting was ‘not a police function.’ The focus of the Street Commission was the conduct of committal proceedings brought against K E Humphries and yet it recommended that all prosecutions be transferred from the police to the Attorney General’s Department. The Fitzgerald Report was broader ranging and combined the arguments of efficiency, freeing up police resources, and avoiding the appearance of preferential treatment for police in the summary court. The ICAC was concerned with the possibility of corruption. The Project Pathfinder Report in Victoria was directed at structural efficiency gains and recommended that there be a single prosecution agency for all criminal matters in that State.

Whilst various State DPPs have stated that it would be appropriate for their office to assume responsibility for the conduct of all prosecutions before the summary courts,

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26 KPMG Management Consulting Pty Ltd, ‘Project Pathfinder: Re-Engineering the Criminal Justice System - Stage 2 - Design’, Department of Justice, Melbourne, 1998. The Project Pathfinder report recommended that a single prosecutorial body be set up to conduct all criminal prosecutions and that the police cease to prosecute summary offences. At p. 56.
28 As the Department with prosecution responsibility prior to the introduction of the DPP.
29 The Report emphasised the potential economies of scale from a single prosecution agency. It was said that an essential outcome would be ‘the consistent ownership of the prosecution brief as it passes through the various stages of hearings.’ KPMG Management Consulting Pty Ltd, ‘Project Pathfinder: Re-Engineering the Criminal Justice System - Stage 1 - Redesign Opportunities’, Department of Justice, Melbourne, 1996. At p. 57.
30 The Victorian DPP stated in his 1996-97 Annual Report at p. 24: ‘It seems to be … beyond argument that it is desirable in principle that [summary prosecutions] should be carried out by an independent authority … It is the core business of the prosecutor rather than the investigator. It does seem right that we are ultimately the appropriate body.’ Similarly, the South Australian DPP has stated that the taking over of summary prosecution from the police is being considered and that a Steering Committee has been established to examine the matter. DPP Annual Report (SA) (1997-98), p. 1.
the only real progress has been in taking over the conduct of committal proceedings from the police on the grounds of efficiency. Initially each State DPP continued to rely on police prosecutors to run committal hearings in the Local Court. The New South Wales Director of Public Prosecutions (DPP) had been established in 1986 to prosecute criminal charges on indictment in the District and Supreme Courts. It was expressly stated at the time, that the DPP would not take over summary prosecutions from the police. Later, as part of a rationalisation of the prosecution of indictable offences in NSW, the DPP took over the conduct of all committals in the Local Court in 1994.

Nicholas Cowdery QC, as NSW DPP has argued that his office should be allocated responsibility for the conduct of police summary prosecutions. In 1995, during the early stages of the Royal Commission into the NSW Police Service, (RCPS) Cowdery wrote to the Royal Commissioner advocating such a transfer of summary prosecutions. The Royal Commissioner approved of the plan for a Pilot saying:

31 When each State DPP was first established, committal proceedings remained the responsibility of the police.
32 However, the DPP has taken on responsibility for some summary cases such as those involving police defendants and certain offences such as summary prosecutions involving allegations of child sexual assault.
33 The NSW DPP has assumed control of all police initiated committal proceedings. See footnote 20 and accompanying text. Not long after, the DPPs in other States increased their role in the conduct of committals.

In 1997 the WA DPP was involved in a trial project in which officers from the DPP had the conduct of all committal proceedings in the Perth Court of Petty Sessions other than committals for sentence. The Report on the trial project stated: ‘Statistics indicate that the involvement of the DPP in the Perth Court of Petty Sessions has contributed to a significant saving in court time, with 47% of listed preliminary hearings being resolved on the hearing date. The average time taken for preliminary hearings involving the calling of evidence was only 54% of the listed time allocated by the court. Figures also show that 28% of indictable matters dealt with by the Crown Prosecutors in the Perth Court of Petty Sessions reached finality without adding to the expense and demands for a trial in the District or Supreme Courts.’ See Overman, G. M., ‘A Review of the Role of the Director of Public Prosecutions in the Perth Court of Petty Sessions 1997’, Office of the Director of Public Prosecutions Western Australia, Perth, 1998.

The Queensland DPP commenced a similar trial project at the Ipswich Magistrates Court in 1994. The success of the trial led to an extension to the Brisbane Central Magistrates Court in 1995. In 1998 the Director reported that the committals project led to an overall net benefit of $826,000 to the criminal justice system. See Director of Public Prosecutions (Qld), Annual Report, 1997-98, at p. 20-21.

The South Australian DPP also established a committal unit in 1998, to conduct all committal proceedings in certain Magistrates’ Courts, including Adelaide Magistrates’ Court. (see Director of Public Prosecutions (SA), Annual Report, 1997-98, pp. 8-9).

It seems a very sensible way of testing the possible approach. We can have an idea of how it works, if there are any problems and how it develops.\textsuperscript{36} However, the Royal Commissioner said that it was ultimately a matter for government and the DPP, but that ‘we need [to] seriously look at this, because it is an area where certainly there is a high potential for things going wrong.’\textsuperscript{37} As a result, in 1996, the DPP took part in the Summary Prosecution Pilot at Campbelltown Local Court and Dubbo Local Court\textsuperscript{38} and an independent review made a favourable report.\textsuperscript{39} The Summary Prosecution Pilot was assessed formally in terms of quantitative measures that excluded an analysis of qualitative outcomes. Emphasis was therefore placed on the projected procedural efficiency to be gained by DPP involvement at the expense of an assessment in qualitative terms.

The Final Report of the RCPS recommended that the DPP coordinate the progressive transfer to it of responsibility for all prosecutions.\textsuperscript{40} In the absence of any findings of corruption relating to police prosecutors,\textsuperscript{41} the recommendation was based on ‘the principles of independence and impartiality.’ The report highlighted problems arising from the use of police as prosecutors in that they are subject to a chain of command and they do not have the same duty to the court, nor the code of behaviour or professional discipline, as do members of the legal profession.\textsuperscript{42} Furthermore, the Commission said that ‘in the minds of the public they are inevitably associated with the interests and

\textsuperscript{37} ibid. At p. 21374.
\textsuperscript{38} The Summary Prosecution Pilot (the Pilot) took place at a Sydney suburban Local Court at Campbelltown and at a country NSW Local Court at Dubbo between 1 July 1996 and 31 December 1996. The Pilot involved the transfer of prosecution responsibility from police prosecutors to the DPP for summary criminal charges commenced by police (police summary cases). For an outline of the Pilot, see Appendix B – The Survey Of Summary Prosecution Pilot Discontinuances.
\textsuperscript{41} ibid. At p. 316. Whilst the RCPS had not uncovered corrupt conduct by any police prosecutors, it noted 1) that the Independent Commission Against Corruption (ICAC) had expressed concern (particularly concerning lack of accountability in record keeping), and that, 2) there were anecdotal reports of problems in the past. See Independent Commission Against Corruption, ‘Investigation into the Relationship between Police and Criminals, Second Report’, Independent Commission Against Corruption, Sydney, 1994. At p. 49. See also the reference to the Cessna Milner affair at footnote 297.
values of the service.\textsuperscript{43} It was said that they ‘often give the impression of protecting witnesses “on their team” with excessive zeal.’\textsuperscript{44} Whilst many of the Royal Commission Recommendations have been implemented, the government has not made a public commitment to the transfer of responsibility for police prosecutions.\textsuperscript{45}

Up until the Pilot, DPP prosecutors had not routinely run police summary cases.\textsuperscript{46} In the Pilot, DPP prosecutors were exposed to a range of offences and procedures that are unique to the conduct of summary prosecutions. Perhaps more importantly, the Pilot brought together DPP prosecutors and general duty police officers into a close working relationship as prosecutor and informant. Not surprisingly, there was some conflict noted in the relationship between the police and the DPP.\textsuperscript{47} This conflict reflects both philosophical and logistical matters and includes a degree of institutional rivalry over the question of who should present police summary cases.\textsuperscript{48} There was however, a fundamental level of conflict concerning the role of the prosecutor, which is evidenced in the following conversation, which took place during the Pilot at Dubbo:

\begin{quote}
\it{Police officer: 'Every matter I put up, you people try to knock on the head. You have no right to do that. You have an obligation to put matters before the court; you're supposed to be representing us, you're a prosecutor.'

\it{DPP lawyer: 'I am a solicitor of the Supreme Court first.'}
\end{quote}

\textsuperscript{43} ibid. At p. 316.

\textsuperscript{44} ibid. At p. 317. The independent prosecutor is not immune from the desire to ‘push’ the prosecution case. Importantly the prosecutor’s action can be the focus of an appeal and earn the prosecutor a rebuke from the appeal court. See Anderson v R (1991) 53 A Crim R 421. In the results of the Survey of DPP Prosecutors, examined in Chapter Six, a number of respondents praised the way the police prosecutors operate.


\textsuperscript{46} The DPP used prosecutors who had experience in the conduct of committals in the Local Court to staff the Summary Prosecution Pilot.


\textsuperscript{48} While the Pilot was still in operation, the Independent Commission Against Corruption reported on a complaint filed by police concerning an appeal case that was withdrawn at Lismore District Court by a DPP prosecutor. See footnotes 301 and 773. The Commissioner commented on the potential rivalry between the DPP and the Police Service over summary prosecutions, noting an increase in complaints against the DPP co-extensive with the Pilot. Independent Commission Against Corruption, ‘Investigation Reports: Circumstances Surrounding the Offering of No Evidence by the NSW DPP on an All Grounds Appeal at the Lismore District Court on 25 May 1995’, Independent Commission Against Corruption, Sydney, 1997. At p. 41.
Police officer: ‘No you are not, you are a prosecutor, look, look, it is written on the door.’

DPP lawyer: ‘I am a solicitor of the Supreme Court first.’

Embedded in this short exchange are very different views of how the prosecutor should handle police summary cases. The immediate dispute is whether the prosecutor is obliged to present all cases initiated by police. The police officer then merges the question of prosecuting police summary cases with that of representing police. There are two distinct propositions being put forward by the police officer: the first is that the prosecutor has a narrow duty to present cases begun by police and the second is that the prosecutor has a duty to represent the police. In response, the prosecutor claims to have a separate and wide responsibility to the court as a solicitor. The prosecutor’s justification may be important, but by itself, appears to be an inadequate claim to legitimacy. The assertions of each reflect very different understandings of the prosecution process and neither the police officer nor the prosecutor addresses the central issue of the limits of police and prosecution discretion. Whilst the primary focus of this thesis is on the prosecutor, the discussion that follows draws in a number of interconnected concerns within the criminal justice system; such as the role of the police, the purpose and use of summary offences, accountability mechanisms for

49 Notes of a conversation between a DPP prosecutor assigned to the Summary Prosecution Pilot and a police officer at the Dubbo Local Court during the Pilot. The conversation took place outside the door to the police prosecutor’s office at the Dubbo Courthouse. The DPP was given the use of this office during the Pilot. Davies, R., ‘Summary Prosecution Pilot Notes’, 1996. note 26/11/96. See footnote 810 and accompanying text.

50 For a similar view of the prosecutor’s role to protect the interests of police, see Oldroyd, A. J., et al., ‘Summary of a Paper Prepared by Mr A. Oldroyd’, The Second Symposium on Law and Justice in the Australian Capital Territory. Canberra, 1977. See footnote 266 and accompanying text. Intuitively it seems probable that the police would see the maintenance of police summary cases as being in their interest. That is not to say that these issues are always neatly joined. It is possible to consider other circumstances in which ‘representing the police’ may involve discontinuing a prosecution, for instance, to protect a police officer from expected criticism.

51 This comment suggests that the prosecutor is bound by a ‘legality’ model to prosecute every case, rather than the ‘expediency’ or ‘opportunity’ model that allows the prosecutor to choose which cases to prosecute. The police officer interprets the prosecutor’s duty as being to present all cases. On the difference between the duty to prosecute all cases and the flexibility to choose which cases to prosecute, see the discussion of the ‘legality’ and ‘opportunity’ models of prosecution at footnote 108 and accompanying text.

52 The police officer’s statement therefore defines the prosecutor’s responsibility in relation to two sources of legitimating authority that are external to the DPP, being the judicial function of the court and the executive function of the police.

53 In Chapter Six, the relationship between the prosecutor’s duty to the court and the Prosecution Policy and Guidelines issued by the DPP is examined.
criminal justice system officials, and the legitimating principles that guide the police officer, the prosecutor, and the judicial officer.

This thesis draws on a number of sources to analyse the possible role of the independent prosecutor in police summary cases, including studies and literature relating to summary prosecutions primarily in Australia and England and Wales. Whilst there is undoubtedly value in comparative studies between various models and systems, the overseas studies have to be carefully scrutinised according to the circumstances of each jurisdiction. The usefulness of such comparative analysis is also limited to the extent that there is currently a lack of information publicly available on the conduct of police prosecutions, and the work of the Director of Public Prosecutions. As Sherman argues, the police (and for that matter the prosecutor) 'may not have an interest in the generation of data, particularly as it may result in challenges to dominant and self-

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54 In New South Wales, the role of the DPP has been defined in the rhetoric of 'finding the truth'. In 2000, the Deputy Director stated this position in these terms; 'Moreover the attainment of the truth is one of the primary responsibilities of a prosecutor.' Blackmore, M., 'Equality of Arms in an Adversary System', International Association of Prosecutors, Annual Conference, Cape Town, South Africa, 2000. (at p. 3). That the goal of adversarial criminal procedure is to attain the truth must be seriously doubted.

For a discussion of the role of the prosecutor in the adversarial system see Blake, M., et al., 'Some Ethical Issues in Prosecuting and Defending Criminal Cases' (1998) Criminal Law Review 16-34. The authors refer to the concept of the prosecutor as 'minister of justice' and go on to say 'The concept of legal guilt is important; it is not a search for truth that should motivate the prosecutor, so much as a search for guilt or innocence according to the law, which includes such matters as not seeking to rely on inadmissible evidence.' At p. 17.

For a critique of the use of the phrase 'minister of justice' see Bresler, K., 'Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice' (1996) 9 Georgetown Journal of Legal Ethics 1301-1305.

55 Material was also sourced from other jurisdictions and this is referred to where appropriate.

56 In some instances, for example the size of the jurisdiction needs to be considered carefully as is the case with the USA where there are more than 13,000 separate local police departments and District Attorneys are often elected officials. Department of Justice, Justice Department Information, <www.ojp.usdoj.gov/bjs> 8 February 2002. In other instances, it is the overall state or national political environment that exerts a strong influence - for example, in Northern Ireland there is a focus on the role of the DPP regarding the prosecution of police and military officials involved in the deaths of civilians. See The Pat Finucane Centre for Human Rights and Social Change, A Briefing Paper on the Office of the Director of Public Prosecutions for Northern Ireland, (2000), The Pat Finucane Centre for Human Rights and Social Change, <http://wwwserve.com/pfc/dpp> 30 June 2001. A key component of the Northern Ireland Peace process is to establish a prosecution service that both the Loyalist and the Nationalist communities can trust. See Northern Ireland Office, 'Main Report', Northern Ireland Office, 2000.

57 This thesis draws on the information that is available, noting that the lack of information provided by both the police and the prosecutor reflects the current lack of accountability of both.

58 The NSW DPP produced statistics on the reasons for withdrawing cases in its Annual Reports up until 1994-1995. See Krone, A., 'The Prosecution Policy of the DPP - Making Effective No-Bill Applications', Criminal Law Conference, Orange, Legal Aid Commission of New South Wales, 1996. However, these figures are no longer produced.
serving attitudes'. A result is the lack of co-ordinated criminal justice policy development.

1.C The prosecutor’s dilemma

As the above quoted exchange between the police officer and DPP prosecutor during the Pilot suggests, prosecuting occupies an ill-defined conceptual space between policing and adjudication. This thesis maps the territory between the police officer and the prosecutor in police summary cases and examines some of the complex issues raised by the prospect of the DPP taking over from police prosecutors. In reality the prosecutor is called upon to decide issues that are readily politicised and must develop a principled basis for action as well as be seen to be acting independently. Herein lies a dilemma for the independent prosecutor: how and when to act in the face of countervailing pressures to proceed with, or to withdraw, a police charge, for example because of the targeting of members of marginalised communities in the enforcement of public order laws. Does the DPP proceed, and expose police practices to public scrutiny? This would allow the court to resolve disputed issues, and if necessary, to criticise improper behaviour and to develop appropriate legal principles. Or, should the DPP withdraw the charge(s), in order to avoid unfairness to the accused or potential abuse of court process?

In relation to Aboriginal people and public order offences, the dilemma for the independent prosecutor is what to do about the enforcement of widely drafted and easily proven offences that effectively give to the police officer the power to determine when marginal anti-social behaviour becomes criminal, in circumstances where that power is both an important police tool of control or authority and notions of ‘law and order’ are aligned with police conceptions of deviance. Furthermore, the prosecutor in summary matters has very little information about the case unless a brief is prepared following a plea of not guilty and the applicable law is vague and open-textured. In these circumstances the legitimacy accorded to prosecution discretion is ultimately a political

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question that is affected by actual and potential conflict between the police and the prosecutor.

It is part of this thesis that the DPP will bring benefits such as fairness, independence, and impartiality \(^{62}\) as well as efficiency \(^{63}\) into the prosecution of summary offences:

- The notion of ‘independence’ is based on the structural position of the DPP in relation to other apparatus of the state and is considered in terms of political and institutional independence. \(^{64}\) According to Corns, this value is relatively well established in terms of criminal prosecutions currently conducted by the DPP. \(^{65}\)
- The concept of ‘fairness’ is more subjective and has two distinct aspects, being: 1) the processes applied by the DPP to the consideration of cases, and 2) the outcomes effected by DPP decision-making. Overall, both aspects of ‘fairness’ are relatively well established in relation to those offences currently prosecuted in Australia by a DPP \(^{66}\) as these are largely offences revealed by reactive policing. \(^{67}\)
- ‘Impartiality’ is a value that is derived from a combination of the structural position of the DPP and the processes and outcomes given effect to by the DPP.

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\(^{62}\) The values achieved by independent prosecutions are listed by Corns as impartiality, legal training, accountability, efficiency, consistency, corruption prevention, and improved access for victims and witnesses to the prosecutor. Corns also argues that prosecutions are a ‘core function’ for the DPP but not for the police, whose job it is to investigate offences. See Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, *History of Crime, Policing and Punishment*, Canberra, Australian Institute of Criminology, 1999. Perhaps, the most important value of the independent prosecution of police summary cases is the transparency brought to these prosecutions, provided that the DPP is itself open and accountable.


\(^{64}\) For a discussion of the various models for the independent prosecution of criminal offences see Chapter Two (at 2E) and regarding models for accountability see Chapter Six.


\(^{66}\) See for example, Corns, ibid.

\(^{67}\) In reactive policing the police investigate crimes and are not directly involved as victims or direct witnesses to the alleged offence. On the two basic models of reactive and proactive policing see Chapter 1F below. Reactive policing occurs when the police respond to the allegation that a crime has been committed, for example, where police investigate a robbery or murder. Such a crime is unlikely to be witnessed by a police officer and the police rely on people other than police officers for primary evidence of the offence. An example of pro-active policing is where the police are engaged in enforcing street offences, such as for offensive behaviour, during a street patrol. In pro-active policing, the police officer may be the witness to, and sometimes the formal ‘victim’ of, an offence. The Commonwealth DPP is responsible for the prosecution of all Commonwealth offences on behalf of the Australian Federal Police (AFP), whether summary or indictable. However, given the limited jurisdiction of the Commonwealth the AFP has very limited involvement in offences revealed by pro-active policing.
Again, Corns argues that this value is delivered by the DPP to its existing work. 68 However, there has been little discussion of what these values might mean in the way in which the DPP would prosecute police summary cases. Should the DPP be engaged in the prosecution of summary offences these values need to be carefully assessed and defined.

This thesis focuses on police summary offences and in particular, charges of offensive language and behaviour. It does so, because these offences typify a unique aspect of the summary jurisdiction, namely loosely defined offences with the police formally depicted as ‘victims’. 69 An important question for consideration is what part the independent prosecutor might play in addressing the problem of over-representation of Aboriginal people in police summary prosecutions for public order offences. 70 The causes of this over-representation are varied. 71 This thesis addresses those causes associated with the negative exercise of police discretion to the detriment of marginalised members of society and challenges to police authority by marginalised members of society.

The dominance of the police in the decision to initiate criminal proceedings creates a potential for conflict between the police and the prosecutor. For this reason, it may be that the independent prosecutor will have no real effect on the problem of over-representation and may serve only to perpetuate existing negative practices. Alternatively, the independent prosecutor may play a pivotal role in addressing this problem to an extent that cannot be expected of either the police or of the courts. One way for the independent prosecutor to do this, is to adopt an overview and implement common standards across the State. In this way, fairness in terms of formal process

68 Corns, ibid.
69 Of course the summary jurisdiction involves many more offences of varying seriousness. It is useful to consider the whole of the jurisdiction in terms of three basic categories of offence, being offences revealed by reactive and proactive policing and regulatory offences such as traffic and parking infringements. Offences involving the police are the focus of this thesis. The arguments in favour of independent prosecution of offences revealed by reactive policing are the same between the indictable and summary jurisdictions. The procedure to be adopted for the prosecution of 'regulatory offences' is not considered in detail in this thesis.
70 In this thesis I concentrate on public order offences revealed by pro-active policing such as charges of using offensive language or offensive behaviour (s. 4 Summary Offences Act 1988 (NSW)).
consistency in the prosecution of these cases may be extended to consider overall consistency of enforcement across the jurisdiction. Alternatively, fairness in relation to results might be extended to an evaluation of the quality of each expected outcome. Ultimately, a combination of these two strategies is probably required. Either way, the involvement of the independent prosecutor in considering these issues would mark a significant departure from the current situation where the police control all aspects of the conduct of summary prosecutions. Importantly, how ‘fairness’ is to be achieved is an important and urgent issue to be considered by the independent prosecutor in police summary cases. It is also an issue that involves a high degree of subjectivity and will in each case be determined at the threshold of prosecution decision-making by individual prosecutors.

However, within the ‘law and order’ environment where police are given fairly free reign, the pursuit of ‘fairness’ or consistency across the jurisdiction may lead to unproductive conflict with the police and the explicit politicisation of the prosecution process. Indeed, as Findlay points out, the very review of police action may be perceived by police as unduly penalising them and this aspect alone could overshadow any positive aspects of accountability:

> The jealous protection of their discretion by police has tended to generate suspicion about any process which requires its regulation. And if accountability is viewed as the other side of police discretion, penalising its improper exercise, then this punitive dimension will be considered a

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71 See the discussion in Chapter Four.
72 However, as indicated in Chapter Seven there is scope to argue that localised policing strategies affecting marginalised communities should be accommodated where these genuinely represent the wishes and involvement of the marginalised community.
73 As discussed in this thesis, this may require the consideration of conflicting narratives that may be embedded in confrontations between police and defendants.
74 It is also possible to adopt a risk-assessment based strategy using the typology of police-defendant interactions discussed in Chapter Four, coupled with exception reporting in relation to 1) particular geographical problem areas and 2) individual officers who have high rates of arrest for particular public order offences (for the latter in another context of the NSW Ombudsman monitoring complaints against police, see footnote 983).
75 At least in the State jurisdictions as the Commonwealth DPP prosecutes all matters.
76 See, for example, Hogg, R., et al., Rethinking Law and Order, Pluto Press, Sydney, 1998.
77 There is no guarantee that the DPP would wish to interfere with locally determined policing priorities. It may also be that certain crimes are more likely to be location specific and so differences in enforcement may not be the result of unequal treatment of potential defendants. DPP prosecutors may distinguish between different levels of law enforcement by police in the one incident versus across the State.
threat to individual police practice. Such an interpretation ignores the positive consequences which flow from fair demands for accountability, and assumes that accountability mechanisms must be confrontational in a police setting.\textsuperscript{79} It is this potential for conflict, in addition to cost and resources issues, that strongly militates against a transfer of responsibility for police summary cases from the police to an independent prosecutor. However it might be measured, ‘fairness’ requires time and careful consideration of individual cases. This presents an enormous challenge for the independent prosecutor seeking to achieve fairness and efficiency at the same time. This thesis therefore develops a typology of cases and of police defendant interactions. It is suggested that this provides a framework for efficiently assessing cases.

The influence of the prosecutor on the possible fairness of criminal proceedings has been neglected as an area of criminal justice policy development. For example, at the conclusion of a major inquiry into Aborigines and the criminal justice system the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) made no substantial mention of the role of the prosecutor in the processing of police summary cases.\textsuperscript{80} It is not within the scope of this thesis to fill in all the gaps in our empirical knowledge of the operation of police and DPP prosecution discretion. High levels of co-operation on the part of the police and the prosecutor are required to undertake that work. The aim of this thesis is therefore to evaluate the promise that the independent prosecution of police summary cases will deliver higher standards of fairness and efficiency and to establish a framework for further study. Three studies were specifically undertaken for this thesis.

1. In the period of August-October 2001 a survey of DPP prosecutors was conducted concerning their attitudes to possible DPP prosecution of police summary cases. The survey was administered in the Northern Territory, Western Australia, Victoria and New South Wales.\textsuperscript{81} Results of this survey from New

\textsuperscript{79} ibid. At p. 236.
\textsuperscript{80} The RCIADIC made recommendations in relation to the inappropriateness of police prosecutors assisting in Coroner’s Court inquiries and also in Children’s Court prosecutions. See Royal Commission into Aboriginal Deaths in Custody, ‘Regional Report of Inquiry into Underlying Issues in Western Australia’, Australian Government Publishing Service, Canberra, 1991d.
\textsuperscript{81} The conditions initially imposed by the NSW DPP for the conduct of the survey prevented a randomised sample survey being conducted. The initial aim was to obtain a national overview, providing a baseline for further research. However, the discussion in this thesis focuses on the position in NSW.
South Wales, Victoria and Western Australia are included in this thesis. This material is used to provide evidence of opinions and attitudes and as a basis for further research. Further details of the 2001 DPP Prosecutor Survey are given in Appendix A.

2. In December 1996 and January 1997, a review was conducted of the DPP records kept for cases considered for withdrawal during the Summary Prosecution Pilot. This review is used to provide anecdotal evidence of the types of issues that may arise from the transfer of responsibility for the prosecution of police summary cases to an independent prosecutor. Further details are given in Chapter Three and Appendix B.

3. A review of press reports referring to the DPP was conducted using the following Sydney newspapers: the *Sydney Morning Herald*, the *Daily Telegraph*, and the *Sunday Telegraph* covering a four-year period since the Pilot, from 1 July 1997 to 30 June 2001. This material has been drawn upon to inform the discussion in this thesis.

1.D What do DPP prosecutors think about the DPP taking over police summary cases?

In a submission to the RCPS, the current NSW DPP, Mr Cowdery QC was an enthusiastic advocate for his Office taking over the prosecution of police summary cases.

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82 The experience of prosecutors in the Northern Territory deserves close study as this is a dispersed jurisdiction where the DPP has recently taken over responsibility for summary prosecutions in a co-operative arrangement with the police. See footnote 269 and accompanying text. Unfortunately the low response rate to the 2001 DPP Prosecution Survey in the Northern Territory meant that the responses provided could not be included in the overall results. Further study of the Northern Territory ‘experiment’ is called for and perhaps the most appropriate way of proceeding would be by way of interview using a semi-structured questionnaire. See also, footnote 1042 and accompanying text.

83 In particular, study of the work of police prosecutors is called for.

84 All matters during the Pilot were screened by a DPP solicitor. A number of cases were identified during this screening as problematic for evidential or public interest reasons. The police and defence representatives also approached the DPP in some cases seeking a withdrawal of the prosecution. All such cases were reviewed by two solicitors at Campbelltown (one solicitor at Dubbo) who then reported to the solicitor in charge of the Pilot at each court. If the police agreed to a withdrawal, the solicitor in charge could direct the withdrawal of a charge or charges. If the police disagreed with a recommendation to withdraw a charge or charges, then the matter was referred to the Director’s Office for decision. See Appendix B and Figure 5 The prosecution decision-making hierarchy for the Summary Prosecution Pilot and accompanying text.
cases. The Directors of Public Prosecutions for Western Australia and Victoria have also advocated for the transfer of responsibility for these prosecutions to their Offices.\footnote{See Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, \textit{History of Crime, Policing and Punishment}, Canberra, Australian Institute of Criminology, 1999.}

As part of the survey of DPP prosecutors administered in New South Wales, Victoria and Western Australia, between September and October 2001,\footnote{See Appendix A.} individual prosecutors were asked about their attitude to the take-over of police summary cases. This question gauges support for DPP prosecution of these cases as a matter of principle by asking whether the DPP should prosecute police summary cases (except parking and minor traffic cases). The results are shown in Table 1. Of the respondents from the three State DPP offices, 61.5% agreed that the DPP should prosecute police summary cases, (32% strongly agreed with that proposition). The percentage that disagreed with the proposition was 23.5%, (with 10.5% strongly disagreeing).

At least in NSW a number of developments are likely to have affected DPP prosecutor attitudes to the DPP conduct of police summary prosecutions in that State including: a) the conduct of the RCPS and the making of its recommendation for the transfer of prosecutions, b) the advocacy by the Director, Mr Cowdery, that his office should conduct summary prosecutions, c) the conduct of the Summary Prosecution Pilot in 1997, and d) the experience gained by DPP prosecutors overall from the DPP involvement in committals in all Local Courts since 1991.
Table 1 The extent to which DPP prosecutors agree that the DPP should prosecute police summary cases

<table>
<thead>
<tr>
<th>NSW, VIC and WA</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly agree</td>
<td>55</td>
<td>32.0</td>
</tr>
<tr>
<td>Agree</td>
<td>51</td>
<td>29.5</td>
</tr>
<tr>
<td>Neutral</td>
<td>26</td>
<td>15.0</td>
</tr>
<tr>
<td>Disagree</td>
<td>23</td>
<td>13.0</td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>18</td>
<td>10.5</td>
</tr>
<tr>
<td>Total</td>
<td>173</td>
<td>100</td>
</tr>
</tbody>
</table>

Whilst as a matter of principle, a majority of respondents (61.5%) supported DPP prosecution of police summary cases, there were a number of logistical concerns shown in the way respondents viewed various practical issues in relation to DPP prosecution of summary cases, as shown in Table 2 Whether DPP prosecutors feel optimistic or pessimistic about certain issues concerning DPP prosecution of summary cases. As can be seen, among the respondents to the survey, the greatest sense of pessimism was felt in relation to the resources given to the DPP to do the job, with 86.4% of respondents expressing pessimism. A majority of respondents (68%) also expressed pessimism about the volume of work to be processed. The majority of respondents felt either neutral or optimistic about career opportunities, job satisfaction and training to do the job, with a slightly greater level of optimism about career opportunities than job

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87 Except parking and minor traffic cases.
88 2001 DPP Prosecutor Survey Question 1: To what extent do you agree with the proposition that the DPP should prosecute all police summary cases (except parking and minor traffic cases)?
satisfaction. It is reasonable to assume that optimism concerning career opportunities would be related to the prospects of more junior employees, as one respondent put it:

Having worked as a prosecutor with both the CPS in England and the DPP in NSW, I feel that the DPP prosecuting police summary cases would be a very positive change, especially in terms of it providing excellent early experience for DPP lawyers … 89

For some respondents their concern was based on the nature of the work involved in police summary cases. For example, a number of respondents referred to the potential tedium of conducting summary prosecutions:

The types of cases, which are prosecuted summarily, are such as not to require the experience of lawyers to conduct them. It would be a waste of resources and tedious for those allocated to do them. The present system whereby any serious/complicated summary matters are prosecuted by the DPP is far more preferable. That said, I think an acceptable alternative is to make the Police Prosecutors and the DPP operations work more closely together to eliminate confusion and doubling up. 90

Other respondents were more specific and said they were particularly concerned about the prosecution of apprehended personal violence orders: 91

Prosecuting summary cases would be a good starter for new prosecutors/graduates rather than being thrown in the deep end, which is what occurs now. However, I do not think that the community will be best served by having DPP lawyers spend significant amounts of time prosecuting AVO matters or minor assault matters, which seem to take up a great part of the Local Court list. It would perhaps be preferable for the DPP to take over all summary matters in relation to any person that the DPP is prosecuting for more serious matters rather than have DPP simply prosecute all summary matters. 92

89 2001 DPP Prosecutor Survey response.
90 2001 DPP Prosecutor Survey response.
91 Being applications for a restraining order against another person made under Part 15A of the Crimes Act 1900 (NSW). The test for making an order is based on the civil standard of 'the balance of probabilities' and whilst essentially civil in nature, the breach of an order is a criminal offence, see section 562B.
92 2001 DPP Prosecutor Survey response.
Table 2 Whether DPP prosecutors feel optimistic or pessimistic about certain issues concerning DPP prosecution of summary cases

<table>
<thead>
<tr>
<th>NSW, VIC and WA⁹³</th>
<th>The resources given to the DPP to do the job</th>
<th>The volume of work to be processed</th>
<th>Training to do the job</th>
<th>Job satisfaction</th>
<th>Career opportunities</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>Optimistic</td>
<td>11</td>
<td>6.8</td>
<td>8</td>
<td>5.0</td>
<td>43</td>
</tr>
<tr>
<td>Neutral</td>
<td>11</td>
<td>6.8</td>
<td>44</td>
<td>27.0</td>
<td>66</td>
</tr>
<tr>
<td>Pessimistic</td>
<td>140</td>
<td>86.4</td>
<td>110</td>
<td>68.0</td>
<td>52</td>
</tr>
<tr>
<td>Total</td>
<td>162</td>
<td>100</td>
<td>162</td>
<td>100</td>
<td>161</td>
</tr>
</tbody>
</table>

⁹³ 2001 DPP Prosecutor Survey Question 4: Do you feel optimistic, neutral or pessimistic about how the following issues (as shown in the table) affecting the DPP prosecution of police summary cases will be dealt with?
1.E Theme One – Fairness

Keith’s life illustrates another lack of compassion and (I would say) commonsense in the society. This is not a matter which relates only to Aborigines. Keith had some 450 convictions – an endless and useless procession of convictions for alcohol-related offences. Putting aside altogether what that meant for him and his parents, the waste is phenomenal. His convictions would represent thousands of hours out of the time of police officers for arresting and reporting, watch-house keepers, prosecutors and other police personnel; magistrates, justices of the peace, clerks of court, clerical workers in the court system who filed, recorded and issued warrants; other police officers who executed the warrants, those who supervised Keith in custody: and this is to leave aside the cost of the hospitalisation and medical treatment for alcohol-related health problems which afflicted Keith.

The themes of fairness and efficiency are contradictory in nature. Fairness imports the notions that the prosecutor only proceeds where there is a case against an individual defendant and that the law is applied equally. Assessing the prosecution case necessarily requires that the prosecutor is provided with the information necessary to do so and has the time to evaluate this material. Equality of law enforcement raises a more difficult matter to quantify, and that is the comparison of police decisions not to charge with those cases presented for prosecution. Consideration of either issue would require a substantial departure from the streamlined processes of the Local Court, which are discussed below. In this way, delivering a higher standard of fairness is likely to come at the expense of current notions of efficiency in the Local Court.

The DPP prosecutor who is used to dealing with indictable offences may have higher expectations of the way in which cases can be processed than is possible in the Local court:

[The answer is] always "get a brief first" - how can one decide what to do, or take any view on a brief without the evidence? This would only be based on the alleged facts or what the OIC told you. There is an enormous amount of police prosecution work which would require vast resources to do at the standard that the DPP currently co-operates - we evaluate the evidence carefully, research law, conference witnesses before the hearing - none of this is done by police

94 See also Chapter Four, where the impact of public order policing affecting Aboriginal communities is canvassed in detail.
and thus it would need much more resources than the police currently use to take over police prosecutions. The DPP is hard up getting the resources necessary to do what we do now without increasing the demands for more money. This will lead to low service, low morale, etc.96

Implicitly this quote also accepts that the current manner of processing police summary cases is carried out at a qualitatively lower level than it might if conducted by the DPP and affirms that summary cases are not important enough to warrant the application of the higher standards of the DPP.

1.E.i  The importance of context and narrative in assessing cases

It is also important to bear in mind the use of the criminal law to control those with substance abuse problems, psychiatric disorders or functional impairment.

1.E.i.a  A case study of conflicting narratives

‘A’ was an Aboriginal man who lived in Bourke, a small town of approximately 3500 people, in outback New South Wales.97 ‘A’ was developmentally delayed and in his adult life was a chronic alcoholic. In public, A would use the words ‘cunt’ and ‘fuck’ (and its derivatives) freely and frequently in conversation. When he was drunk, these words were used loudly. ‘A’ also had a very long history of minor offences prosecuted by the police.98 The charges related to language or behaviour, being drunk,99 and failing to quit licensed premises. He was a persistent repeat offender. The ‘dominant cultural narrative’100 cast A as a troublemaker, and a threat to social order. In some respects locking up A was seen not only as necessary to punish offending behaviour but also as a way of getting him to ‘dry out’ and the imposition of gaol sentences for minor offending

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96 2001 DPP Prosecutor Survey response.
97 The case study is taken from Bourke in New South Wales and shows the importance of the processes of the criminal law in establishing the narrative understanding of the police, the defendant and the prosecution.
98 Most of these had to do with offences committed while ‘A’ was intoxicated. A’s alcohol problem was severe. At one stage he consented to being scheduled as an inebriate under section 12 of the Inebriates Act 1912 (NSW), as a consequence of which, he spent some three months at Bloomfield Hospital in Orange.
could be rationalised on the basis that given his lifestyle, he was better off in custody. Two incidents stand out in the life of A.

Incident 1 - Shot by the publican and left in the gutter.

In the first, in 1987, A was ejected from the Central Australian Hotel in Bourke and when outside, he began abusing the publican. The publican shot at A, inflicting a bullet wound to the chest and A was left bleeding in the gutter. ‘A’ survived, and the publican was tried and acquitted on a charge of attempted murder.  

This incident shows A as a victim of crime, although some may think that A brought what happened upon himself. The narrative understanding from the publican’s point of view is that A presented some threat and that this justified shooting him. From A’s perspective the shooting is another example of mistreatment by a white man in a position of authority. From the police point of view the use of the gun and the injury to A no doubt played a significant role in the decision to prosecute the publican.

101 An initial report of this case can be found in the Sydney Morning Herald of 23 July 1987.
The second incident involved the police ‘blackened faces’ video or ‘Eromanga tape’ recorded in 1989 and shown on ABC television in 1992.102 In the video, two police officers from Bourke have their faces blackened and they each have a length of rope fashioned into a noose around their necks. They turn to the camera, hold up the loose end of rope, and say the names ‘Boney!’ Lloyd Boney and David Gundy were Aboriginal men and both died in police custody before the video was made. Their deaths were examined in the Royal Commission into Aboriginal Deaths in Custody. ‘A’ was still living in Bourke at the time the video was made.

The Eromanga tape highlights the importance of police-citizen interactions in police labelling of a person, through an aspect of their behaviour, as criminally deviant. This deviant status perpetuates negative attitudes to that person quite apart from the initial point of interaction. From the perspective of A, being cast as a deviant meant that he was unlikely to be shown any tolerance by the police. From the police point of view, A (like Keith Karpany103) was a nuisance and a problem. In particular, A’s level of functioning and his personally destructive lifestyle made the use of the criminal law against him all the more pointless and the cycle of negative interactions with the police continued throughout his life. A’s case shows how some of the problems that the police are expected to handle cannot be solved simply by the imposition of criminal sanctions. The police reaction to A fits within the practice of the personalised targeting of a suspect according to deviant status derived from racial or ethnic identity.104 By repeat processing as a criminal he is de-humanised and converted into a one-dimensional

103 See footnote 95 and accompanying text.
104 This is an important aspect in distinguishing police practices that take place in a highly urbanised context and practices in smaller communities where the police and the local population are well known to each other. This is a characteristic of policing in rural communities with significant Aboriginal populations.
problem. In this regard A's story is like that of many other Aboriginal people as was noted in the RCIADIC National Report highlighting the case of Keith Karpany.  

The 1987 shooting of A by the publican should have underscored the vulnerable status of A and yet the two police officers in the blackened faces video appear hostile, reckless and callous. There is a strong inference that the 'joke' for the police was that A would be next in a series of Aboriginal deaths in custody. The mocking of A mocks deaths like that of Keith Karpany described by the RCIADIC and the repeated processing of those living on the margins of society either has little utility or is destructive at a number of levels. In particular the futility of police intervention fuels a lack of empathy on the part of police, for whom the life of A, and others like him, is de-valued. Perhaps more importantly, the police behaviour went unnoticed and did not attract adverse comment in the community in which it took place. Only when the tape was exposed nationally were adverse comments made publicly. Within the social setting where this behaviour took place the 'joke' was appreciated. It could be said that there was a high degree of conformity between the attitude being expressed by these police officers and others present at the function and they were sharing a common narrative understanding. The narrative understanding was not however, being shared more widely. Indeed, the very idea of police publicly lampooning deaths in custody at the time would have been too incredible to be believed. The video shows how narrative understandings can be specific to a social group and maintained and reinforced within that group. The tape is important because while police attitudes may be strongly held, they are rarely so explicitly and

105 See footnote 95 and accompanying text.
106 The response of the Police Service was to transfer the police involved to other service areas and require them to undertake cultural awareness training. See Cornwall, D., 'Anger over Transfer of Racist Police', The Sydney Morning Herald, 24 April 1992, Sydney.

However, the identification of individual officers does not address the systemic causes of institutional racism. See, for example, See, Jackson, H., 'Policing Remote Aboriginal Communities: Wiluna 1994' (1995) 7 (1) Current Issues in Criminal Justice 88-92. Jackson says: 'It might be thought that to a large extent the problems in Wiluna were the product of a combination of system defects and a small number of police personnel influencing local practices. Such an issue might be thought of by some as essentially local and readily rectified by personnel transfer. The problem however of system defect remains.' Referring to claims of abuse of Aboriginals by police in Roebourne, Jackson continues that the Report into policing in Wiluna 'highlights extreme social issues in a tiny and remote community but the issues go much wider, as the Roebourne allegations, although different, illustrate.' At p. 92. Jackson was commenting on an article on policing in Wiluna in Leicester, S., 'Policing in Wiluna' (1995) 20 (1) Alternative Law Journal 16-20.
publicly revealed although they may possibly be inferred from the disproportionate representation of Aboriginal people in crime statistics.\textsuperscript{107}

The Eromanga tape is described here to illustrate how narrative understandings can be both deeply rooted and strongly held, but do not necessarily come to general attention. Not all minority group and dominant group narratives involve such extremes. Nevertheless, the dominant social narratives generally serve to legitimise and rationalise the reality of police and prosecution behaviour. In so doing, they often conflict with the principles of the criminal justice system and its rhetorical promises. They also absolve us from having to be concerned about the motives and attitudes that underpin the exercise of police discretion in the laying of criminal charges.

1.E.\textsuperscript{ii} Discretion in criminal prosecutions

Broadly speaking, there are two basic models for commencing the prosecution of criminal charges in terms of whether or not there is a strict requirement to charge for a known offence.\textsuperscript{108} On the one hand, is the 'opportunity model',\textsuperscript{109} where there is discretion whether a charge should be laid, and a case should be prosecuted. On the other hand, there is the legality model with no discretion in the laying of charges and


\textsuperscript{108} The juxtaposition of the two overarching models raises the question whether there is any appreciable difference between the two in expenditure on policing, prosecutions and the courts and in overall expenditure and in criminal justice system outcomes. It is beyond the scope of this thesis to explore the difference between the legality and opportunity models. This is however, a rich field for investigation particularly as the simplicity of the two contrasting models appears to dissolve on closer examination. See, for example, Sigler, J. A., ‘The Prosecutor: A Comparative Functional Analysis’, in W. McDonald (Ed.) \textit{The Prosecutor}, Sage Publications, Beverly Hills, 1979, 53-74. It may be that discretion is hidden within the legality model and the discretion exercised within the opportunity model may be simply more explicit. See Tombs, J., ‘Independent Prosecution Systems’, in G. Zdenkowski et al (Eds.), \textit{The Criminal Injustice System: Volume Two}, Pluto Press, Sydney, 1987, 90-110.

proceeding to prosecution. The opportunity model of prosecutions applies in Australia and it is explicitly recognised that not all criminal cases can or ought be prosecuted. As a result, various decisions have to be made to sort cases entering the system and progressing through it. The opportunity model applies to decisions that precede the decision to charge, as well as the decision to charge itself, and includes such pre-charge matters as deciding which matters to investigate, how to perform the functions of control and surveillance, and ultimately to decide whether to commence proceedings and then to continue to prosecute them. These functions potentially involve many decision-making steps. The allocation of responsibility for deciding what to do at each step is of crucial significance to the operation of the criminal justice system.

1.E.ii.a Defining discretion

Each decision in the criminal justice process involves some form of choice. Sometimes that choice is guided by decisions made by others, or is affected by the actions of others. Sometimes, decisions are taken by individuals who have discretion to make choices. In such cases, the decision is influenced by the discretion of the decision-makers. The discretion refers to the authority or power to make a decision within a defined range of options. The discretion is often bounded by rules, guidelines, or legal frameworks that constrain the decision-makers within specific limits.

110 Even in systems that subscribe to a non-discretionary regime of prosecutions, discretionary judgments are being made continuously. See, for example, the discussion of the legality principle in Austrian criminal law in Brienan, M., et al., Victims of Crime in 22 European Justice Systems, (2000), International Victimology Website, <http://www.victimology.nl/onlpub/Brienenhoege/BH.html> 5 June 2001. Chapter 3, Austria at p. 61, headed '2 General remarks and basic principles.' The authors note that whilst the legality principle is formally adhered to in Austria, the system allows for minor offences to be decriminalised in certain circumstances. For example, in January 2000 changes to the law came into effect allowing for diversionary programs for adults (there already being such a system in place for juveniles).

111 See Director of Public Prosecutions, 'Prosecution Policy and Guidelines', Office of the Director of Public Prosecutions, Sydney, 1998. reproduced in part at Appendix C. The guidelines refer to Sir Hartley Shawcross's often quoted speech as Attorney General to the English Parliament where he said: 'It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution.'

112 It is not possible to know of every offence. In the first place, not all crimes are detected. Secondly, not all detected crimes are reported to the police. Nor do we have the resources to prosecute every offence that is detected and reported to police. We do not have the resources to investigate every offence that is reported. We do not have the resources to prosecute every offence that is detected or investigated. On the extent of attrition in the criminal justice system in England and Wales, see Crown Prosecution Service, Digest 4 - Chapter 4 - Pre-Court and Court Action, (1999), Crown Prosecution Service, At p. 29.

113 See the discussion in Chapter Five in relation to the police and Chapter Six in relation to the prosecutor. The operation of the criminal justice system can also be weighted in different ways so that discretionary power can be transferred as decisions at one level circumscribe the discretion of other decision-makers. An example is the transfer of sentencing power under mandatory sentencing from the judge to the police officer or prosecutor who selects the charge to proceed on, thus avoiding or invoking mandatory sentencing provisions that bind the judge. See Misner, R. L., 'Recasting Prosecutorial Discretion' (1996) 86 (No. 3) The Journal of Criminal Law and Criminology 717-777.
another decision-maker. Essentially, the system of criminal regulation involves a series of social and individual choices. With choice comes discretion, which may exist in a number of different forms. Discretion is well recognised as a ubiquitous aspect of the criminal justice system and careful scrutiny must be given to its nature, the way in which it is exercised, and the manner in which its exercise is perceived, as these factors are critical to the legitimacy accorded to the relevant decision-maker. For example, on occasions the prosecution of police summary cases is incorrectly portrayed as though there is an obligation on the police to charge and that once a police charge is laid, that it ought to be prosecuted before the court.

However, defining discretion in the criminal justice setting is not a simple task and we should be mindful of the various ways in which discretion can be interpreted. For example, in a study of judicial discretion and criminal litigation, Pattenden drew a distinction between discretion in terms of the quality of decision-making and in terms of the mechanics of decision-making. Pattenden noted that, on the one hand, discretion sometimes refers to prudence and circumspection, which describes the quality of the decision-making. While the overall quality of decision-making by a police officer, prosecutor, or judicial officer in relation to criminal offences may be assessed against

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116 On occasions the notion of a duty to uphold the law is equated with a duty to prosecute all cases. For example, see footnote 670 and accompanying text.


The discretion exercised by a police officer is analogous to a form of legislative discretion as described by Hart. The independent prosecutor is called on to act differently and to display legal reasoning that is analogous to that described by Dworkin. In this way, the subjective nature of decision-making by the police officer is preserved whilst giving the appearance of objectivity whereas the subjectivity of the independent prosecutor is denied and prosecution decision-making is supposed to conform to ‘objective’ criteria. In reality, both police and prosecution decision-making is just as likely to include elements of subjectivity.
such standards of ‘prudence and circumspection’, these are necessarily subjective qualities affected by the value judgments of the assessor. As such this really is a value-dependent and meaningless standard. On the other hand, discretion can be considered in terms of the mechanism of decision-making, where the decision (whilst still subjective) can be analysed in relation to whether the decision-maker uses one or other of the following mechanisms:119

a) choosing between alternate courses of action,120
b) evaluating options in terms of set standards,121
c) making findings of fact that determine what actions should follow,122
d) deciding what to do where there is no clear rule to apply,123 and
e) making decisions that are not subject to appeal.124

This thesis is concerned with both the quality and mechanisms of discretionary decision-making, where it resides, how it is used, and by whom it is used. There may be a choice of alternate courses of action in the decision to charge or the decision to prosecute. Sometimes operational guidelines will provide a constraint on decision-making by the police officer. The officer’s discretion will be limited to the extent that any such law, rule or guideline is followed. Police officers can be expected to act in accordance with the precepts of their organisational culture so that it is not possible to say that they act entirely on the basis of personal choice.125 The police officer is also engaged in the task of evaluating circumstances and facts in deciding whether to act126 and often the police officer will have to make a finding of fact before acting.

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118 This analysis of discretion applies to criminal justice systems based on the opportunity model for prosecution as opposed to the legality model.
120 A choice of alternate options is labelled as ‘strong’ or ‘overt’ discretion. ibid. At p. 1.
121 The ‘evaluation’ discretion is sometimes described as ‘concealed’ and involves the application of standards, which must be interpreted and may often be vague. ibid. At p. 2.
122 ‘Fact’ discretion involves the exercise of judgment in determining the facts in issue. ibid. At p. 3.
123 Where there is no clear rule to apply, this may be referred to as ‘legislative discretion.’ ibid. At p. 3.
124 Making an unappealable decision, is said to be the exercise of a ‘weak’ discretion, as opposed to the choice of alternate courses of action in paragraph a). ibid. At p. 2.
126 Uviller argues that part of the evaluation of circumstances involves the police officer assessing the extent to which the victim is a credible witness. See Uviller, H. R., ‘The Unworthy Victim:
Discretion in the criminal justice system is exercised in a complex and multi-dimensional interplay between the police, the prosecutor and the courts. Importantly, the operation of discretion can be usefully analysed by distinguishing between decisions that are open to review and those that are effectively beyond review. Items d) and e) above are the types of decisions where review is prevented or inhibited. For example, with item d), there simply may be no clear rule to apply, as is very often the case with the police decisions to arrest and charge. In these circumstances, whatever decision is made by the police officer, there is little scope for an appeal by either the defendant if a charge is laid, or by a victim if no charge is laid.

1.E.ii.b Discretion and criminal charges

In criminal cases, the charging discretion is of crucial importance and power is increasingly concentrated in the criminal justice system among those who decide whether to charge or not. Misner attributes this to the ‘many overlapping provisions’ that pass to the person responsible for charging ‘the choice of how to characterize conduct as criminal’. Referring to the USA, Misner argues that the high level of dependence upon plea bargaining, and the effect of the development of sentencing guidelines and mandatory minimum sentences has been to increase ‘the importance of the charging decision since the charging decision determines the range of sentences available to the court.’

Importantly, an essential aspect of discretionary power is its mediation through individual decision-makers. The diffusion of discretionary power and the importance of the many individual discretionary decision-makers was emphasised in 1933, by Baker:

The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals, each acting largely for himself [sic]. How it is applied outweighs in importance its enactment or its interpretation.

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Fielding in 1991, referring to the work of Goldstein in the 1960s, highlighted the diffusion of police discretion, its breadth, and its virtual invisibility.\textsuperscript{129}

Goldstein ... established that police are nearly alone among bureaucracies in that the degree of discretion is greatest at the lowest level, and that decisions by police officers in contact with the public are marked by 'low visibility', thus being invisible to superiors and effectively 'unreviewable'. This is especially true when they have decided not to arrest. ... Subject to the broad restraint on civil and criminal liability (e.g. having to refuse bribes and not assaulting people without lawful reason) they act within an almost infinite range of lawful possibilities.\textsuperscript{130}

The exercise of police power has come to lie ‘beneath the threshold of public scrutiny and concern.’\textsuperscript{131} Hogg refers to McBarnet’s work and the ‘assessment’ that offences handled by police are trivial and also points to the rationalisation that police power is ‘preliminary to the important processes of adjudication and sentencing, carried out by the courts’:

It is largely assumed that the decisions of consequence are taken by the courts. It is the courts that are formally empowered to seriously penalise citizens, often by depriving them of their liberty for lengthy periods of time. Thus, it is appropriate that various formalities – procedural safeguards, forms of record taking, publicity and legal representation – should come into play when defendants are placed before the court. Processes such as arrest, bail or remand in custody are simply the means by which individuals are to be brought before the courts.

Because these are mechanical or procedural decisions of a less consequential and final nature, the legal standard and safeguards which are to apply can afford to be much less strict and demanding. Moreover, it is assumed that the processes of adjudication are to one degree or another equipped to correct the mistakes and injustices which may occur in the pre-trial process.

\textsuperscript{717-777. Misner states: ‘In the past thirty years, the diffusion of responsibility has begun to abate and power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system. The centralization of authority in the prosecution is a development necessary for a coordinated and responsive criminal justice system in which the prosecutor will ultimately be held accountable to the voters for the successes and failures of the system’ At p. 718.}

Of course, in Australia the prosecutor is not elected to that office (nor, for that matter, are all USA prosecutors) and so the prosecutor is not directly accountable to the political process. Nevertheless, there has been a similar concentration of power in the prosecutor’s office through similar case processing attributes. Note however, that there is a diffusion of prosecution discretion among the prosecutors within the prosecutor’s office as discussed in Chapter Six.


The fact that defendants must be brought before an open and impartial court operates as a check on officials such as the police.132

In contrast to this view, Hogg goes on to argue that the police use the law in ways for which they are not held accountable and, as a result, Aboriginal people are treated as though they are ‘police property’:

[M]uch of the criminal law with which the police are concerned on a day to day basis, coupled with the modern operation of criminal courts, secures a certain domain of autonomous police power. If the law does not determine what the police do, then what does?133

In Hogg’s analysis it is therefore necessary to distinguish between ‘law as prohibitions on certain specified forms of conduct (offences) from forms of governance directed at the control of certain types or categories of person.’134

Another way of analysing discretion is to consider whether the mechanisms by which it is controlled are ‘external, internal or both’.135 Fletcher links the legitimacy of discretionary decision making to accountability for its use and argues that the exercise of discretion lacks legitimacy where it involves ‘the exercise of power without effective control over the person exercising that power.’136 The example given of an external control on a trial judge is ‘an appellate court (reversing) an erroneous decision by a trial judge’. The example given of an ‘internal control is the extent that a trial judge tries conscientiously to apply appropriate legal norms.’137 Fletcher’s concept of external and internal controls provides a useful insight into notions of reviewability and unreviewability of the exercise of discretion by pointing out that even the unreviewable exercise of discretion is shaped by internal controls. However, a difficulty with Fletcher’s analysis is the problem of determining when an internal control has been exceeded because of the very subjectivity of that control.

132 ibid. At p. 55.
133 The metaphor of Aborigines as police property is all the more striking considering the routine tasks on arrest of photographing and fingerprinting those in custody.
136 ibid. At p. 642.
137 ibid. At p. 643.
The number of separate decision-makers and the variable demands of the decision-making environment create the conditions for fluidity in decision-making. One way of ensuring some consistency among prosecutors is to have policy guidelines. Writing in the USA in 1969, Stein accepted the need for fluidity in law enforcement while at the same time he argued for controls on the manner of its exercise. Stein noted that the lack of uniformity in enforcement is not always the result of intentional abuse of discretion and that courts are reluctant to act against discretionary law enforcement for fear of disrupting law enforcement generally and overwhelming the court with litigation. According to Stein, prosecution guidelines are an essential safeguard in the pre-acusation and prosecution stages of the criminal system and in particular, regarding unequal enforcement of the law:

Judicial reluctance to declare unintentional discriminatory enforcement unconstitutional has been based primarily upon practical considerations. It is undeniable that declaring unconstitutional all discriminatory enforcement of criminal laws, even if unintentional, would disrupt effective law enforcement. Further, it would be difficult for the courts to handle many cases that could raise the issue. Nonetheless, allowing unequal application of the criminal law, because the District Attorney has not developed sufficient internal policy guidelines, would seem to defeat the constitutional value of equal justice.

Today, each DPP in Australia has published prosecution policies and guidelines. Even so, the exercise of discretion inevitably requires individual decision-makers to relate the policies and guidelines to unique factual circumstances calling for the exercise of discretion. Importantly, factual situations arise that are not contemplated by law or by procedures set out for decision-makers, and the decision-makers are left to exercise their discretion whether or not to act, and if action is taken, to choose the manner of acting. So that another way of analysing discretion in the prosecution process is to look at the

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138 See, for example, Willis, J., 'Reflections on Nolles', Prosecutorial Discretion, Canberra, Australian Institute of Criminology, 1984.
139 These same reasons were relied on by the United States Supreme Court in the decision of Atwater et al v City of Lago Vista et al. 532 U.S. (2001).
141 ibid. At p. 543-544.
142 See Bugg, D., 'The Role of the DPP in the 20th Century', Judicial Conference of Australia, Melbourne, 1999. An extract from the Prosecution Policy and Guidelines of the NSW DPP is reproduced at Appendix C. It was claimed before the RCPS that the NSW Police Prosecution Branch, as it then was, followed the DPP's Prosecution Policy and Guidelines. However, the Police Prosecutors are not able to charge bargain. See footnote 281 and accompanying text.
various factors affecting the opportunity to exercise discretion and then at the manner in which that discretion is, in fact, exercised. The opportunity to exercise discretion can be considered in terms of the factual, legal, and procedural conditions that give rise to the possible exercise of discretion. Within the institution of the Police Service, and the DPP, various mechanisms, processes and guidelines set the formal parameters for the exercise of discretion that is invested in individual decision-makers (role authority). The relationship between role and circumstantial discretion is shown in Figure 1 "Generic model for 'role authority' and 'circumstantial discretion'" below.

*Figure 1 Generic model for 'role authority' and 'circumstantial discretion'*
The limits placed on the discretion of a decision-maker by the restrictions of ‘role authority’ are derived from the law, deployment decisions, guidelines and practice. The law establishes the framework for the exercise of discretion. Once the individual police officer or prosecutor is invested with this ‘role authority’ the opportunity to exercise discretion attached to that role depends on practical rather than legal considerations, including the extent to which they are placed in a position to exercise that discretionary power. Deployment practices establish the opportunity for discretion to be exercised, and guidelines, personal attitudes and institutional expectations govern its exercise.

‘Circumstantial discretion’ is, at least in part, bounded by the physical opportunity to exercise discretionary authority and by various controls on the manner in which that discretion may be exercised. The opportunity to exercise circumstantial discretion depends on the way in which decision-makers are deployed. This is a combination of, on the one hand, presence and the resources available to decision-makers (which determines their capacity to respond), and on the other hand, the level of ostensible authority with which the decision-makers are invested. Within these boundaries, the decision-maker may be given a considerable degree of autonomy. Paradoxically, this autonomy may create the conditions in which the police officer or prosecutor may exercise their discretion in excess of their original role authority. 143 The exercise of


See in England and Wales the House of Lords decision of Attorney General’s Reference No 3 of 1999 [2001] 2 WLR 56 regarding the Police and Criminal Evidence Act 1984 (UK) (PACE). Their Lordships confirmed the trial judge’s discretion to admit evidence derived from the use of a forensic sample in an investigation where the forensic sample was otherwise required to be destroyed. Even though PACE states the sample ‘shall not be used...for the purposes of any investigation of an offence’. Their Lordships held that a court had a discretion to admit such evidence on the basis that PACE did not specifically state that such material must not be admitted in evidence by a court.

The point made by McBarnet is that illegality may in fact have no direct impact on the effect of the decision taken. See McBarnet, D., Conviction-Law, the State and the Construction of Justice, McMillan, London, 1981. See also Leng et al. who criticise McBarnet for taking attention ‘away from police practices ... towards an examination of what the law permits’. See Leng, R., et al., ‘Researching the
discretion in excess of the original authority may then be less readily subjected to judicial review, either because it is difficult to detect, because of reluctance to interfere (in ways which might inhibit the proper exercise of discretion in other, as yet unforeseen circumstances), or because in the instant case the consequence of limiting discretion may be to allow the 'factually guilty' to escape punishment.

The links between the discretion of the police officer, the prosecutor and the court are represented in Figure 2 The chain of prosecution discretion. Because of the width of both the role and circumstantial discretion of the police officer, the officer's discretion is the least amenable to institutional central control. The confines of role authority proscribe more definite limits on the prosecutor's discretion, but even so, the individual prosecutor has broad circumstantial discretion within that role authority.

Figure 2 The chain of prosecution discretion

KEY:
1 - Induction of suspect by police, 2 - No action or diversion, 3 - Withdrawal of charge, 4 - Diversion of prosecution, 5 - Court result.

A - File transfer from police to prosecutor, B - Prosecution of case.
1.F Theme Two – Efficiency

1.F.i Styles of policing and summary cases

The summary jurisdiction deals with crimes revealed by both reactive and pro-active policing. In the summary prosecution of offences revealed by reactive policing a brief of evidence is not required as a matter of course, and yet there may be a brief of evidence, which documents the investigation that has taken place. Very often though, the information leading to an arrest and charge will be contained in police notebook entries and will not be in a format suitable to be submitted in evidence. In addition certain aspects of the investigation will be incomplete (such as the interviewing of civilian witnesses or the verification of background facts). Whether this information is followed up or recorded, is a matter of discretion for the police officer involved.

The jurisdiction of the Local Court is far broader than that of the trial courts including committals for indictable offences,\(^{144}\) indictable offences that are dealt with summarily,\(^{145}\) purely summary offences,\(^{146}\) and non-offence matters such as apprehended personal violence orders.\(^{147}\) The summary criminal jurisdiction is not only diverse, it is also growing on a number of fronts.\(^{148}\) This means that the importance of the courts of summary jurisdiction in hearing criminal cases is likely to continue to expand.\(^{149}\) Unsurprisingly, the growth of public order street offences has resulted in a

\(^{144}\) See footnote 257 and accompanying text.

\(^{145}\) There is a range of offences that are able to be dealt with either on indictment or summarily. For some of these the decision is up to the prosecutor or the defendant. For some the decision is up to the prosecutor. See footnote 150 and accompanying text.

\(^{146}\) The range of purely summary cases is comprised of those cases that are not defined as indictable offences.

\(^{147}\) There is a range of non-offence matters dealt with in the Local Court including various licencing matters and licencing appeals.


\(^{149}\) See Gleeson, C. J., ‘The Future State of the Judicature’, Colloquium on the Courts and the Future, Surfers Paradise, The Judicial Conference of Australia, 1998. At p. 6. The Chief Justice stated that ‘Governments will continue to respond to the tension between ever increasing demands for access to justice and the unsustainable cost of justice by increasing the role of summary justice, administered by magistrates or equivalent judicial officers. A greater proportion of criminal offences will be dealt with
greater number of prosecutions. A second area of growth is the enlarged jurisdiction of the court whereby the summary court is absorbing a range of more serious offences that once could only be prosecuted on indictment.¹⁵⁰ In many respects these prosecutions share similar features to prosecutions on indictment in the higher courts in terms of the nature of offences, their investigation, and the evidence required for prosecution. However, the very obvious difference is that the summary processes of the Local Court are applied to the hearing of these charges when they are dealt with in that court. A third area of growth has been in apprehended personal violence orders and related breach proceedings. As applications for protective orders, these proceedings do not directly involve offences. In these matters there is a tension between the wishes of the ‘victim’ whose co-operation may be critical to prosecution and police policy to apply for orders and to pro-actively intervene in domestic violence cases.

Each of these three areas of growth tends to be dominated by one or other of the reactive and pro-active styles of policing which present particular challenges for the prosecutor. The formerly indictable charges usually involve reactive policing where the police investigate offences. The reliance in these cases on methods of investigation tends to raise issues about the manner in which the police investigation has been conducted. To the extent that offences revealed by reactive policing also depend on the testimony of a victim or witness, these cases also raise issues of the willingness of the victim or witness to assist the prosecution. Public order offences usually involve pro-active or street policing where the police are directly engaged in the maintenance of order.

¹⁵⁰ Two changes to the law have enlarged the jurisdiction of the Local Court in relation to indictable offences. The first has been to expand the range of cases that can be dealt with summarily, the second was to take away from the magistrate the power to decide whether cases may be heard summarily or on indictment. For ‘Table 1 Offences’, (under the Criminal Procedure Act 1986 (NSW)) it is up to the defence or prosecution to elect trial on indictment. For Table 2 Offences it is up to the prosecutor whether there should be a trial on indictment. This development generally reflects a bureaucratic efficiency imperative. See footnote 332 and accompanying text. The exclusion of various categories of crime from the jurisdiction of the trial courts is criticised as a removal of the ‘right to jury trial.’ On the other hand, when these crimes are dealt with in the Local Court a lower penalty range is available. Further research is required to determine the consequences of the enlarged jurisdiction of the Local Court on sentencing patterns within that Court and in particular, whether there has been any pressure to increase penalties within the limits of the jurisdiction.
1.F.i.a Assessing the manner of policing

The issue is national in scope and reaches people all across this country. For too many people, especially in minority communities the trust that is so essential to effective policing does not exist because residents believe that police have used excessive force, that law enforcement is too aggressive, that law enforcement is biased, disrespectful and unfair.151

The relationship between the pro-active police activities of control and surveillance and detection are shown in Figure 3 The Modes of Policing – Policing Styles and the Sources of Evidence, as are the reactive policing activities of ‘investigation at large’ and ‘focused investigation’.

**Figure 3 The Modes of Policing – Policing Styles and the Sources of Evidence**152

<table>
<thead>
<tr>
<th>Reactive policing (non-police evidence)</th>
<th>Pro-active policing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigation at large</td>
<td>Control and surveillance</td>
</tr>
<tr>
<td>Focused investigation</td>
<td>Detection</td>
</tr>
</tbody>
</table>


152 The horizontal division distinguishes between reactive and pro-active policing. The vertical division represents the transition from cases where no charge is available to cases where an identifiable charge is available against an identifiable accused or defendant.

153 Within the models of reactive policing and pro-active policing there is a point of transition from an investigation at large to a focused investigation and from control and surveillance to detection. The label ‘no charge’ is used to indicate that there is not sufficient evidence to establish a case against a suspect in an investigation at large for reactive policing and in relation to pro-active policing the police are engaged in control and surveillance but have not at that stage identified an offence. In NSW the police
1.F.i.b Reactive Policing

Offences prosecuted in the trial court are largely revealed by reactive policing methods. This generally means that the police respond to a complaint and investigate an offence with a view to presenting a case against a particular accused. In reactive policing the police decision to initiate proceedings ordinarily follows a process of investigation. The need to investigate offences introduces an element of deliberation in police decision-making and it is the quality of deliberation that characterises this style of policing.

1.F.i.c Case construction

It might be thought that the more serious the offence the more likely it is for the police to exercise deliberation. However, the deliberation exercised by the police may be illusory, corrupted or inadequate. The miscarriage of justice cases in Australia and England show that deliberation does not guarantee a proper or balanced investigation. The process of investigation can become corrupted in a number of ways, for example by way of case construction on the part of the police and subsequently by over zealous prosecutors. The fact that police act with deliberation will not perfect their inquiries if those inquiries happen to be based on a flawed premise. An example is the case of Harry Blackburn where the police were prepared to act without adequate evidence and where the police case was constructed in accordance with a flawed case theory developed by investigating police. In the inquiry into the charging of Blackburn, the
Royal Commissioner, Mr Justice Lee, ominously warned that the problem of case
construction may be difficult to identify and in some instances that it may only be
revealed by way of a Royal Commission. Despite this last note of pessimism, the
process features of the trial courts assist in the evaluation of the prosecution case.

Nevertheless, the problem of case construction is well recognised and is seen to be
instrumental in many miscarriage of justice cases. To the extent that independent
prosecutors presented these cases in the trial courts, independent prosecutors and trial
processes have been found to be inadequate barriers to miscarriages of justice taking
place. The method of processing summary charges can only make it more difficult for
the prosecutor to avoid the danger of case construction.

1.F.i.d Illegality or impropriety in investigation

The process of police investigation can also be affected by illegal or improper police
conduct. Where the illegality or impropriety relates to the method of gathering evidence
there arises a conflict between the perceived public interest in convicting the factually
guilty and the public interest in ensuring that the police do not adopt illegal or improper
means to go about their work. Illegality in reactive policing methods usually leads to a
balancing of the interest in using real evidence implicating an accused against the
interests of the accused and of society generally in the regulation of improper police

common theme in relation to miscarriage of justice cases. See, Whitty, N., et al., Civil Liberties Law: The
Human Rights Act Era, Butterworths, London, 2001. The supposed investigator-prosecutor divide is also
no obstacle to the prosecutor getting caught up in this process. See Chapter Six.

159 Lee, J. A., ‘Report of the Royal Commission of Inquiry into the Arrest, Charging and
Withdrawal of Charges against Harold James Blackburn and Matters Associated Therewith’, Blackburn
then Inspector Clive Small of evidence pointing to a perpetrator other than Blackburn, that Blackburn
could well have been committed for trial and because of the pre-trial publicity ‘there may well have been
a reluctance on the part of the Attorney General [sic] to no-bill the proceedings.’ At p. 26.


161 See, for example, Anderson v R (1991) 53 A Crim R 421. The NSW Council for Civil
Liberties, whilst supporting DPP prosecution of police summary cases, submitted to the RCPS that the
DPP needed to be more independent: ‘There are indeed questions that the DPP’s office is open to blame
for today’s procedures or faulty outcomes. We are not suggesting that that indicates on the part of the
DPP any conspiracy with police or, alternatively, gross negligence. We are suggesting a more
independent prosecuting role should be adopted by the DPP. We only have to look at some of the findings
of your Royal Commission, Sir, to question some of the behaviour, lies and verbals that have occurred
and have been able to do so via the independence of the DPP.’
behaviour. In this situation the tainted police behaviour is distinct from the accused’s involvement in the revealed offence, and there is an argument that the police officer’s failing should not prevent the use of evidence of the guilt of the accused concerning a separate offence.

1. F.i.e Pro-active policing

In pro-active policing any illegality or impropriety of police behaviour is typically intrinsic to the interaction that gives rise to the offence itself, and whilst the law may ordinarily have no regard to the police behaviour that precedes the offence the two are inextricably linked. However, such illegality or impropriety may be difficult to define, given the recourse by police to ‘consent policing’ and the lack of certainty about police powers generally. The rhetoric of law and order serves to legitimate short-term police detention associated with the use of the power of arrest by making otherwise insignificant and minor incidents deserving of a strong police response.

Street policing is dominated by pro-active policing policies extending to strict law enforcement and aggressive street policing. Pro-active policing involves the police being present on the streets to ‘enforce the law.’ This police role has two distinct functional aspects. The first is the use of techniques of control and surveillance and the second is the detection of offences. There are obvious limits to the police being present

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163 This is in contrast to instances of police entrapment, or police involvement in some aspect of the commission of the offence, for the purpose of detecting offenders. See for example, Ridgeway v R (1995) 184 CLR 19. See also Choo, A. L. T., ‘Sloane’ (1991) 15 (3) Criminal Law Journal 220-222.


165 Except perhaps where this might lead to a defence in NSW of reasonable excuse. See also the case of Robinett v Police [2000] SASC 405 where the offence in question was precipitated by the action of the police. See footnote 714 and accompanying text.


On whether there is really a ‘law and order problem’ see Weatherburn, D., ‘Does Australia Have a Law and Order Problem?’ Public Lecture, University of New South Wales, 2002.
when offending occurs. Through control and surveillance on the street the police can actively screen the population for evidence of other offences that have been committed or may be committed. An area of growth which relates to the focus of this thesis involves the range and use of minor public order offences, particularly laws that give the police wide powers of control and surveillance which have tended to be enlarged by ‘law and order’ responses of government despite other significant reforms to remove status and condition offences such as vagrancy and drunkenness. At the same time, there has been a shift toward the legitimisation of the street authority of police with new powers of control and surveillance that have not only created new offence categories, but underpin authoritarian police-citizen interactions. These control and surveillance powers and public order offences typically involve the police, both as direct observers, and as ‘victims.’

Pro-active policing has two distinct functional aspects. The first is the use of techniques of control and surveillance and the second is the detection of offences. Control and surveillance techniques consist of an array of powers and ways of interacting, including the use of powers to stop and search, to give directions and to undertake surveillance as well as the use of ‘field interrogations’ as described by Brown:

> The most important use of the broad powers of arrest the police possess are in police-initiated actions, usually field interrogations. Field interrogations are stops undertaken to determine if a crime has been committed, and they have to be distinguished from field actions which are preventative, for example, the dispersal of a group of juveniles standing on a street corner. Police-initiated field stops may have either goal or both; it is common for a patrolman to first interrogate a person on the street and then perhaps order him home. The purpose of aggressive patrol, the frequent use of field interrogations, is to keep would be felons off balance, and to

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167 The offences of vagrancy and drunkenness were repealed by the *Offences in Public Places Act 1979* (NSW). The same package of reform included the *Intoxicated Persons Act 1979* (NSW) which provided a non-criminal regime for the police to remove intoxicated persons from public places.

establish a reputation for tough, decisive action. This belief in the deterrent effect of aggressive patrol often takes precedence over other objectives.¹⁶⁹

There are obvious limits to the police being present when offending occurs. Through control and surveillance on the street the police can actively screen the population for evidence of other offences that have been committed or may be committed. An area of growth which relates to the focus of this thesis involves the range and use of minor public order offences, particularly laws that give the police wide powers of control and surveillance which have tended to be enlarged by ‘law and order’ responses of government despite other significant reforms to remove status and condition offences such as vagrancy and drunkenness.¹⁷⁰ At the same time, there has been a shift toward the legitimisation of the street authority of police with new powers of control and surveillance that have not only created new offence categories, but underpin authoritarian police-citizen interactions.¹⁷¹ These control and surveillance powers and public order offences typically involve the police, both as direct observers, and as ‘victims.’

The prosecution of summary cases depends initially on police exercising powers of control, surveillance, and detection. Relevant issues are the exercise of police powers of control and surveillance, of the power of arrest, whether to initiate criminal proceedings, and if so, whether by way of charge, or summons, or court attendance notice. The domestic violence matters combine aspects of police investigation and direct police intervention. These cases also depend on victim co-operation and police willingness initially to intervene and then to proceed. Pro-active policing is directly concerned with the control of minor offending and indirectly concerned with surveillance or the filtering

¹⁷⁰ The offences of vagrancy and drunkenness were repealed by the Offences in Public Places Act 1979 (NSW). The same package of reform included the Intoxicated Persons Act 1979 (NSW) which provided a non-criminal regime for the police to remove intoxicated persons from public places.
of the population to provide police with intelligence information - and occasionally to reveal more serious offending (usually to do with the possession of material that implicates the defendant in other crime) and to target suspected troublemakers.\textsuperscript{172} The area of control and surveillance activity in Figure 3 \textit{The Modes of Policing – Policing Styles and the Sources of Evidence} incorporates ‘consent policing’ activities, as well as the use of expanded powers to stop and search, move on, to question and to request identification.\textsuperscript{173} The overall pattern of police activity constitutes a form of filtering of the population. This ‘filtering’ takes place on the basis of indistinct legal concepts of ‘reasonable suspicion’ or ‘reasonable cause’ and even more ill-defined general notions of deviance and likelihood of offending. Overall, people are targeted according to four distinct criteria,\textsuperscript{174} they are:

1. Filtering which is largely based on the anonymous targeting of people using conceptions of deviance based on race, age, religion or ethnicity. The police may personally associate deviance with race or respond to the complaints of relatively more powerful sections of the community who associate race with deviance.

\textsuperscript{172} This may be referred to as ‘serendipity policing’ given that the justification for large-scale intrusive policing of the targeted community is to be found in the relatively few instances where an actual crime is detected. More importantly, the ‘crime’ may arise from the interaction between defendant and police officer or depend on the ‘legislative discretion’ of the police officer. In relation to both low levels of detection and the width of police discretion to find an offence to have been committed under NSW knife search and confiscation legislation see, NSW Ombudsman, ‘Policing Public Safety’, NSW Ombudsman, Sydney, 1999.


\textsuperscript{174} These practices can be summed up as targeting ‘by race’, ‘by face’ and ‘by place’. There is another form of targeting (‘by trace’) related to the acquisition of information in order to profile the suspect population and involves, either the use of arrest to acquire information about members of the marginalised community or the use of specific powers to take forensic samples under Part 10A of the \textit{Crimes Act} 1900 (NSW). By use of arrest the police obtain fingerprint and photographic information to build up a dossier of the suspect population.
2. The anonymous targeting of people in a certain place according to the association between particular places and deviance. The police may act on the basis of intelligence to do with the reporting of crime in a specific area.

3. Personalised targeting of people according to police labelling of that person as deviant. The police may personally attribute deviance to a person through their individual and collective dealings with that person.

4. There is an intrinsic value to police in the collection of information by which they may ‘trace’ people in the suspect population. The police may prefer intervention and arrest either consciously or unconsciously for the purpose of developing a profile of the population being policed by compiling, photographs, records of distinguishing marks, fingerprints, and more rarely, bodily samples (quite apart from the legislative regime for the collection of bodily samples from known suspects).

This style of policing impacts most strongly on the members of marginalised communities, who are targeted by the police and as a result, both collectively and individually bear the weight of this pro-active policing which is based on a complex mix of indistinct mainstream notions of deviance and of underlying rates of offending (often driven by socio-economic factors) within the marginalised community. This mix of influences has created a self-fulfilling cycle of apparent disorder, complaint, police action, defendant reaction, deviant labelling, and criminalisation. At the same time, there is an argument that members of marginalised communities require the protection of the law, which may be used to justify police targeting of other members of the same community. There are two aspects to the pro-active policing of the streets. The first is

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176 See the phenomenon of profiling a whole population ‘by consent’ in order to solve a specific crime in a small community as in the case of Stephen Boney in Wee Waa. For reports of the initial screening process undertaken see Kennedy, L., ‘Prime Suspect’, The Sydney Morning Herald, 15 July 2000, Sydney; Lagan, B., et al., ‘Test Case’, The Sydney Morning Herald, 22 April 2000, Sydney. It has been suggested that there should be restrictions placed on the use of this tactic by police. See Anonymous, ‘Police Face Curbs on Mass DNA Screening’, The Sydney Morning Herald, Sydney. See also footnote 174 and accompanying text.

the use of police powers of control and surveillance to observe, monitor and investigate the population. The second is the actual detection of public order offences.

In the prosecution of offences revealed by pro-active policing, generally there is not an investigative trail to go over, as the police directly enforce the law and usually can give direct evidence of the offence. In pro-active policing, the transition from 'control and surveillance' to 'detection' typically occurs because of the presence of the police officer or through the interaction of the police officer and the defendant.

Many summary offence provisions generally do not require that the prosecution prove any specific or general intention on the part of the offender. In fact, many summary offences either impose strict liability or, if volition must be proved, impose an 'objective' standard to assess the quality of behaviour. The combination of low-level criminality, highly discretionary enforcement, and the over-representation of minority group members as offenders places a question mark over the way in which the police enforce these laws. However, the legitimacy of the law itself does not come into question. The principle of parliamentary sovereignty allows the Parliament tomake laws as it sees fit within its general power and the absence of a Bill of Rights means that there is a limited opportunity to question the validity, interpretation or enforcement of such laws. As a consequence, the courts have limited options for restraining the use of

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Rates', NSW Bureau of Crime Statistics and Research, Canberra, 2001. There is also the problem of violent crime focused on Australians of Asian origin.

In the USA context see Livingston, D., 'Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing' (1997) 97 (No 3) Columbia Law Review 551-672. See also Blakey, G. R., 'Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion' (1995) 46 (April) Hastings Law Journal 1175-1251. In particular, on crime and public safety at pp. 1180-1189, and on the link between minority group members as victims and offenders at pp. 1188-1189. 'Non-whites are also disproportionately victimized by street crimes-with the exception of larceny. Both the criminal and his [sic] victim tend to be from a broken home, poor, uneducated, unemployed, and a member of a minority group.'


executive power by the police under these laws. In particular, the public order offences of behaving in an offensive manner and of using offensive language are low-threshold offences which can be used to capture behaviour that does not form any other offence but involves a person conducting himself or herself in an offensive manner or using offensive language in a public place. The commission of these offences may involve a degree of intoxication on the part of the defendant. They also demonstrate the three negative characteristics of minor offences described by McBarnet:

1. They involve the direct intervention of the State (where the police are the victims);
2. They label marginal behaviour as criminal; and
3. They are so open in nature that they allow post-hoc law-making.

Most importantly, the crucial determinate of whether an offence has been committed is the ability of the police to act on the many broadly defined offences to find criminal conduct in what could, in the circumstances, be characterised as merely anti-social (or political) behaviour. In contrast, in the pro-active policing of minor police offences in the summary jurisdiction there is an added definitional issue regarding the labelling of marginal behaviour as criminal. This labelling of marginal behaviour as criminal depends on the exercise of role authority (in terms of under-policing or over-policing, or policies of strict law enforcement or laxity in law enforcement) as well as the police officer’s discretion which is heavily influenced by notions of deviance that tend to focus on the most marginalised (and often most vulnerable) members of society. These offences are drawn simply and widely so that they include behaviour that is on the margins of criminality. Much is left to the interpretation of the police officer and in this way they exercise a legislative discretion to find that behaviour fits within a wide description (for the purposes at least of charging the defendant), with little scope for review other than by way of a magistrate proceeding to hear the charge against the defendant. In this way the offence provides an extensive inclusive discretion to the

180 Offensive behaviour had been tied to ‘the concept of “breach of the peace.”’ In 1908 this nexus was cut. See Brown, D., et al., Criminal Laws, The Federation Press, Sydney, 2001. At p. 954.
A strong characteristic of offences revealed by pro-active policing is the dominance of immediate policing issues in the decision to commence proceedings, where the power of arrest may be used as a tool to deal with the immediate policing situation. In this regard, two forms of tactical arrest that particularly affect Aboriginal people are known as 'trifecta' and 'quinella' arrests. The Royal Commission Into Aboriginal Deaths In Custody exposed the prevalence of trifecta and quinella arrests. These are where the police purport to act under some statutory or common law authority to speak to, to question, to stop or search a person and that person reacts negatively and uses offensive language or behaviour. The use of this language or behaviour may then be used to justify an arrest and in attempting to execute the arrest the person may resist arrest or

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183 This is in contrast to more serious offences that are drawn with particularity including specific requirements of conduct or intent so that the discretion of the police officer is enlarged in terms of the potential exclusion of cases from prosecution. As noted by Pepinsky, the more specifically an offence is defined the greater is the scope to exercise discretion to exclude behaviour from that definition. See Pepinsky, H. E., 'Discretion and Crime Legislation', in M. Evans (Ed.) Discretion and Control, 9, SAGE publications, Beverly Hills, 1978, 27 - 40. Pepinsky presents the two contrasting propositions that 'spelling out the law' in some cases increases discretion and in others, decreases it. Discretion is decreased to the extent that decision makers come to rely on official data (such as police reports) and that decision making is likely to become routinised and bureaucratised (at pp. 32-33). Discretion is increased with specification of the law as predictability for the subject of the law (the defendant) is decreased, even though in terms of official knowledge there appears to be greater predictability. An example is given of mandatory sentencing provisions where the decision that determines sentence outcome is removed from the sentencer to the person who selects the charge (at pp. 36-37).


185 See the various examples provided in Chapter Five.

186 See Eades, D., Aboriginal English and the Law, Continuing Legal Education Department, Queensland Law Society Incorporated, Brisbane, 1992. At p. 93. According to Eades, 'language that is considered to be obscene in most sectors of mainstream society is much less likely to be offensive in Aboriginal societies. Swearing, like fighting, is considered to be normal, necessary parts of social interaction.’ The equating of swearing and fighting as ‘normal’ and ‘necessary’ is problematic and appears to be based on a confusion of ubiquity and acceptability. Both swearing and fighting may be commonplace in some Aboriginal communities, that does not mean that both are equally acceptable and in any event ‘fighting’ is too broad a term to be equated with swearing. For a condemnation of violence in Aboriginal communities, see Pearson, N., ‘On the Human Right to Misery, Mass Incarceration and Early Death’, 25 October 2001, University of Sydney, Sydney, 2001.

187 The case of Director of Public Prosecutions v Carr [2002] NSWSC 194 is an example of the ‘quadrella’ as the initial charge was for offensive language followed by resist arrest, assault police and intimidate police. The charge of intimidate police related to drunken threats made to the police officer at the police station. See footnote 827.

assault police. In some instances bystanders will become involved, in turn becoming the targets for arrest on the basis of hindering police, or for use of offensive language or behaviour.\textsuperscript{189} As Coe\textsuperscript{190} noted in relation to the \textit{Intoxicated Persons Act} 1979 (NSW) the exercise of powers of this type has the potential to elicit a reaction by the person receiving police attention. This may lead to charges being laid should that person resist the police or react with offensive language or behaviour.

The power to issue breach notices under control and surveillance laws has led to a large practice of issuing on the spot fines.\textsuperscript{191} These fines impose a significant financial penalty but their impact to date may be only symbolic as these fines have the lowest rate for recovery.\textsuperscript{192} These on the spot fine provisions create new offences such as possessing knives, failing to obey police directions or failing to provide personal details. More research is required to determine whether these offences and their interrelationship with public order offences (in the event of disagreement with the police) has had a net-widening effect on public order law enforcement and the use of police cautions. In any event, police powers of control and surveillance are backed up by the ready availability of offences against public order\textsuperscript{193} and in particular offensive language and behaviour laws that are used to reinforce police authority regarding minor anti-social behaviour, particularly where such behaviour is associated with a failure to cooperate with police.

A dominant characteristic of street policing is the speed with which decisions have to be made by the police officer on the scene. Street level police decision-making occurs in an

\textsuperscript{189} The courts stand steadfastly in opposition to the idea that a disinterested third party can intervene in police action on the street. See \textit{Walker v Hayes} [1991] SASC 2699 involving the upholding of a conviction against the appellant for loitering when (in his capacity as Chairman of the Aboriginal Deaths in Custody Watch Committee) he sought to intervene in the street arrest by police of an Aboriginal woman. Justice Olsson found that the appellant could have ‘passively stood at a discreet distance for the purpose of discharging a duty as Chairperson of the Watch Committee, of observing and noting the conduct of the police officers...but he did not do so. He positively sought to intermeddle in the police activities and intruded into the very scene of the fracas itself...\textit{He simply had no lawful right or moral or legal duty or mandate to take the action which he took.}’ (Emphasis added, at para. 16).


\textsuperscript{192} See ibid.
environment where there is no time for reflection, where the police officer is expected to act with limited knowledge and where the exigencies of the situation dominate the officer’s judgment:

When confronted with situations requiring immediate decision, officers decide what they want to do and then fit their legal powers around that decision, rather than assessing their legal powers first and then seeing what action might be lawful.  

Certainly, the police may act without deliberation in both pro-active and reactive policing situations, however the initiation of summary police offences is marked by the immediacy of the policing situation and the absence of any sense of deliberation. It is therefore important to scrutinise carefully the reasons that lie behind an immediate decision to arrest. An example of police action without deliberation in pro-active policing is where the police encounter a minor offence being committed on the street and decide to arrest the person involved. A similar lack of deliberation may occur in reactive policing, such as where the police respond to a complaint of an assault, and on attending the scene proceed to an arrest after some preliminary inquiries.

1.F.ii Court Process - Two levels within the criminal justice system

It is now clear that in all but one jurisdiction in Australia [the ACT], there exist two systems of public prosecution. That which operates in the higher courts is based on the principles of independence, fairness and impartiality but the system operating in the lower courts is not based on those same principles.

A dominant theme in respect of criminal justice systems in many common law countries is the idea that there are two levels at which the system operates. In Corns’ view there are two levels at which the public prosecution system operates, represented by the

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195 Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999. At p. 31. The Commonwealth DPP also has primary responsibility for the prosecution of Commonwealth summary cases and the AFP does not have its own police prosecutors. See the discussion of Commonwealth arrangements in Chapter Two.
Corns attributes the principles of independence, fairness and impartiality to the prosecution of offences in the trial courts by the Director of Public Prosecutions (DPP). He then argues that the DPP could also bring these values to the prosecution of offences in the summary court. We should however, treat with caution the primary assertion that the principles of independence, fairness and impartiality necessarily apply to the prosecution by the DPP of offences in the trial courts. Greater scrutiny should be applied to the suggestion that these qualities (to the extent that they are currently delivered in indictable prosecutions) can be brought to the summary court simply by handing over responsibility for summary prosecutions from the police prosecutor to the DPP prosecutor. Even if we were to accept Corns’ primary assertion of the principles underpinning DPP prosecution, his subsequent analysis does not address the very real differences overall in the criminal processes of the summary court and the trial courts and the differences between the processing of cases by guilty pleas versus contested hearings within those courts. There are significant differences between the procedures applicable to indictable offences (currently prosecuted by the DPP), and summary prosecutions. Some of these differences are indicated in Table 3

Comparison of Local Court and District Court Characteristics.

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197 In New South Wales (NSW), the District Court and the Supreme Court.
198 In NSW, the Local Court and the Children’s Court.
### Table 3 Comparison of Local Court and District Court Characteristics

<table>
<thead>
<tr>
<th>FEATURE</th>
<th>LOCAL COURT</th>
<th>DISTRICT AND SUPREME COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Volume of cases</td>
<td>127,430 cases disposed of in 1998-99, while 242,222 cases were registered in this period.</td>
<td>3,827 cases disposed of in 1997-98, while 3,996 cases were registered in this period.</td>
</tr>
<tr>
<td>Limits on charging</td>
<td>Six-month time limit for summary offences.</td>
<td>Fairness principles apply to prosecution delay.</td>
</tr>
<tr>
<td>Court processing times</td>
<td>Charges are dealt with relatively fast (Median delay 83 days from first mention to disposal for defended cases in 1998-99).</td>
<td>(Median delay 318 days from first mention to disposal for defended cases in 1997-98).</td>
</tr>
<tr>
<td>Percentage of matters finalised by defended hearing</td>
<td>13% of finalised cases in 1998-99.</td>
<td>24% of finalised cases in 1997-98.</td>
</tr>
<tr>
<td>Preliminary hearing</td>
<td>There is no provision for a preliminary hearing.</td>
<td>There is a right to a limited preliminary hearing.</td>
</tr>
<tr>
<td>Disclosure to the accused</td>
<td>Prosecution disclosure of the case against the defendant is a recently imposed requirement and only applies following the defendant’s entering a plea of not guilty.</td>
<td>The prosecution is obliged to give full disclosure to the accused and this takes place before the accused is required to plead to the indictment.</td>
</tr>
<tr>
<td>Indigent accused unable to defend charge without counsel</td>
<td>Limited powers to stay proceedings as limited to ‘serious’ offences.</td>
<td>Greater power to stay proceedings although limited to ‘serious’ offences as the jurisdiction mainly deals with serious offences. The court may grant a stay until such representation is available.</td>
</tr>
<tr>
<td>Court of record</td>
<td>Yes.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Questions of law</td>
<td>Decided by the magistrate.</td>
<td>Decided by the judge.</td>
</tr>
<tr>
<td>Questions of fact</td>
<td>Decided by the magistrate.</td>
<td>Decided by the jury or judge in a judge-alone trial.</td>
</tr>
<tr>
<td>Legal arguments on questions of law and the admissibility of evidence</td>
<td>The magistrate hears contested evidence on a voir dire before ruling on the admissibility of that evidence.</td>
<td>The voir dire on contested evidence is heard in the absence of the jury, so that the judge can first determine the issue of admissibility.</td>
</tr>
<tr>
<td>Court procedure</td>
<td>Relatively simplified; often subject to time constraints imposed by other court work or circuit sittings in the country.</td>
<td>Trial procedure is formal and deliberate.</td>
</tr>
<tr>
<td>Prosecution counsel has an overriding duty to the court</td>
<td>Yes.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Appeals</td>
<td>Appeals from the Local Court are not heard de novo; unless leave granted, appeal proceeds on depositions from the Local Court.</td>
<td>Appeals from the jury court are not heard de novo and grounds of appeal must be argued.</td>
</tr>
<tr>
<td>Judgments in appeals</td>
<td>Judgments in ordinary appeals from the Local Court that are heard in the District Court are persuasive but not binding on the Local Court. Judgments in special writs to the Supreme Court are binding on the Local and District Court.</td>
<td>Judgments in appeals from the jury court are binding authority on all courts at the jury court level.</td>
</tr>
</tbody>
</table>


In Section 56 Justices Act 1902 (NSW).

Iv See Jago v District Court of New South Wales and Others (1989) 168 CLR 23.


V This reflects the level of reliance on guilty pleas although some matters are resolved according to other reasons, such as the death of the defendant or accused or prosecution withdrawal.


X The committal procedure is set out in Part 4 Subdivision 7 of the Justices Act 1902 (NSW). The main limitation on the committal is the requirement that where a person has made a written statement, the magistrate has to be satisfied of certain matters before that person is required to attend to give evidence. The magistrate must direct that a person attend to give evidence if both parties consent (s 48E (1A)). However, in the absence of such consent, the magistrate must be satisfied that there are ‘special reasons in the interest of justice’ for calling a witness who is the alleged victim in an offence involving violence (s 48E (2) (a)), or be satisfied that there are ‘substantial reasons in the interest of justice’ for calling any other witness (s 48E (2) (b)). The type of preliminary inquiry includes the possibility of a ‘Basha type inquiry.’ R v Basha (1989) 39 A Crim R 337 before the trial court judge. See footnote 257 and accompanying text.

X See Division 2, Subdivision 6A of the Justices Act 1902 (NSW), in particular s. 66B.

X See, for example, section 47D et seq., Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001 (NSW).


Xv There is provision in New South Wales for a judge-alone trial, see Part 2 Division 2 Criminal Procedure Act 1986 (NSW).

X There is provision in New South Wales for a judge-alone trial, see Part 2 Division 2 Criminal Procedure Act 1986 (NSW).

X See the reference to the difficulty faced by magistrates to hear and determine matters under time constraints in remote locations in Director of Public Prosecutions v Farr [2001] NSWSC 3 at para. 96 ‘The magistrate and the parties in the Local Court worked under considerable difficulties. The questions involved were of some complexity and the court with the concurrence of the parties sat late on the hearing dates to complete the matter. The defendant and her counsel had travelled considerable distance and expense was obviously a factor.’

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The process differences between the Local Court and the higher courts reflect the enormous differences in the volume of cases processed, the speed of disposal and the reliance on guilty pleas, all of which result in the limited explication of the prosecution case. A temporal limit is placed on the laying of summary charges, not only to contain the jurisdiction but as a reflection of the difficulty of prosecuting or defending a minor (and thus less than memorable) charge long after the event. The Local Court relies on a high rate of guilty pleas without significant levels of prosecution disclosure. The Local Court is a court of record and is subject to appeals, however the procedures before this court are simplified and less formal with the magistrate alone deciding questions of law and fact.

The differences in procedure also reflect the nature of the offences involved, and the ways in which an offence is detected in pro-active policing or how a case is assembled or built up during an investigation in reactive policing. Importantly, offences revealed by reactive policing tend either to be heard in the trial courts, or at least to be accompanied by a brief of evidence, thus facilitating review by the prosecutor or the defence as well as forensic review in adversarial court proceedings. In contrast, the summary court processes for the disposal of pro-active offences do not facilitate prosecutor or defence review or forensic review.

When analysed in terms of the ideals defined by Packer, the processes of the trial court are characterised as being based upon ‘due process’ values whereas processes in the summary court are seen as being based on values of ‘crime control’. These terms are

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Packer’s models were most appropriate to the consideration of trial court practice and the results of reactive policing, rather than summary court process and pro-active policing. In any event, the label ‘due process’ is commonly confused with the ideal models conceived of by Packer. Packer summed up the differences between the two models by likening the crime control model to an ‘assembly line’ and the due process model to an ‘obstacle course.’ At p. 163. By the use of the label ‘due process’ in this thesis I include firstly, those attributes of court process often referred to as ‘due process’ qualities creating formal procedural requirements for the presentation and hearing of criminal charges, and secondly, the aggregation of rights recognised under the common law such as the right to a fair trial, the right to silence,
problematic in that they were first used by Packer to describe the state of criminal laws in the United States in 1969 and in particular, the treatment of illegally obtained ‘real’ evidence of the guilt of an accused in the context of the expansion of civil rights protection and due process protection up until that time. Packer described the operation of the exclusionary rule (as it then existed in the USA) as an example of the due process model, with the crime control model based on rules that facilitated conviction of those whom the police and prosecutor ‘know’ to be factually guilty. In fact, Packer questioned the connection between law enforcement and the control of crime and yet subsequently a view has developed that strict law enforcement does serve to control crime. The models of ‘due process’ and ‘crime control’ have also been developed beyond Packer’s original description. In this way many process attributes for the protection of an accused have been included under the heading ‘due process’. Rather than Packer’s notion of controlling the specific crime of which there was ‘real evidence’, a dubious connection has also been made between the prosecution of offences and the outcome of controlling crime in general. That is the connection that is made with aggressive street policing\(^{(201)}\)

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\(^{(201)}\) Referred to as ‘aggressive patrol’ in Wilson, J. Q., Varieties of Police Behaviour: The Management of Law and Order in Eight Communities, Harvard University Press, Cambridge, Massachusetts, 1968. See pp. 63-64. Wilson points out the difficulty of controlling the ‘patrolman’s’ discretion (at pp. 64-82). The work of the police officer is shown to be made up of many strands often without a clear connection with ‘catching “real” criminals’ (at p. 68). Significantly, Wilson makes the point that ‘doing something about crime’ … ‘means putting more patrolmen on the street and ordering them to be more alert. This, of course, increases the likelihood of the patrolmen coming into an adversary relationship with citizens … Today more citizens are aware of their rights … those who are most likely to believe, rightly or wrongly, that they are being “harassed” … are increasing as a proportion of many cities’ population, and thus it will be more difficult than ever for the police administrator to carry out a crime prevention program based on aggressive street patrol.’ (At pp. 63-64).

and the co-extensive development of the rhetoric of ‘being tough on crime’ and of ‘law
and order.’

In assessing the promise of the independent prosecution of police summary cases we
should bear in mind that McBarnet’s 1981 critique of the criminal justice system was
based on a study of the Procurator Fiscal’s Office in Scotland where the Procurator
Fiscal controls police charging and prosecutes criminal charges on behalf of the police
in the summary and trial courts.202 Following a review of summary court proceedings in
Scotland, McBarnet asserted that ‘due process is for crime control.’ Others have
criticised this statement,203 but the idea that there are two tiers of justice (that transcend
the identity of the prosecutor) has become well recognised.204 What is important about
McBarnet’s work in the present context is the lack of attention paid to summary
proceedings and the perfunctory nature of ‘due process’ protections in that jurisdiction.
The summary jurisdiction is not homogenous and some of the processes of the summary
court limit scrutiny of police methods and decision-making in the majority of cases
handled. Even though the prosecutor may still desire to reduce unfairness in the
prosecution of summary cases there is a limited ability to assess those cases for
prosecution.

In fact, both the trial and summary courts exhibit ‘due process’ values in the hearing of
defended cases and ‘crime control’ values205 in their reliance on guilty pleas for the

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202 See, for example, Tombs, J., ‘Independent Prosecution Systems’, in G. Zdenkowski et al (Eds.),
203 For a review of such criticisms see Dixon, D., _Law in Policing: Legal Regulation and Police
205 In this sense ‘crime control’ simply imports the absence of ‘due process’ values rather than
the ‘crime control’ ideal presented by Packer. See Packer, H. L., _The Limits of the Criminal Sanction_,
Stanford University Press, Stanford, 1968. In Packer’s account, crime control facilitated the conviction of
those who are in fact guilty of a certain offence. The reliance on guilty pleas often occurs by compromise
(such as a plea or charge bargain) so that the plea is entered for a lesser offence than that which can be
proved. Alternatively, (as is often the case in the summary court) a plea may be entered for a charge
before the prosecution is required to provide the proof of the case against the defendant. In either case, the
connection between an actual crime committed and the case disposed of in the court may be more tenuous
than Packer’s ideal of ‘crime control’ would suggest.
disposal of the bulk of their caseload. In the trial court however the due process measures for pleas of guilty and defended matters are more elaborate than those that exist for pleas of guilty and defended matters in the summary courts. For example, there is greater disclosure of the prosecution case prior to the entry of a plea of guilty or not guilty in the trial courts than is the case in the summary courts. The situation is represented schematically in Figure 4 Selected 'due process attributes of trial and summary courts. Within each jurisdiction there is a simple division between matters that proceed on the basis of a plea of not guilty to hearing and those that proceed as a plea of guilty. In the summary court the entry of a plea of guilty is expected without the production of a brief of evidence and a brief of evidence must be produced, and disclosure provided, only for a matter proceeding to a contested summary hearing. In the trial court, the defence is provided with a brief of evidence and prosecution disclosure as well as the opportunity for a committal hearing prior to the entry of a guilty plea before the District Court.

206 The summary court is more reliant on the disposal of cases by a guilty plea than the trial courts. See Table 3 Comparison of Local Court and District Court Characteristics. In the Local Court 87% of cases are disposed of by guilty plea. In the trial courts 76% of cases are disposed of by guilty plea. 207 The accused may also enter a guilty plea to the charges as presented in the Local Court and that plea is based on the written brief of evidence alone, without the conduct of a committal hearing. See s. 51A Justices Act 1902 (NSW). In NSW the reason for the relative lack of use of this provision appears to lie in the perceived advantage to accused persons to hold out until the presentation of an indictment in the District Court as this leaves greater room for charge negotiation. This is so particularly as the committal hearing has been restricted to limit the taking of oral evidence, which in turn leads to greater levels of uncertainty concerning the prosecution case and as Albonetti argues, the prosecutor seeks to reduce uncertainty in the processing of cases. See Albonetti, C. A., 'Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processing' (1986) 24 (4) Criminology 623-643. and Albonetti, C. A., 'Prosecutorial Discretion: The Effects of Uncertainty' (1987) 21 (2) Law & Society Review 291-313.

Also, at least historically, the variability in sentence outcomes in relation to sentences imposed by NSW District Court judges has meant that there is a greater advantage to be had for the accused who holds out from entering a plea in the hope of appearing before a more lenient judge – the advantage may even extend to those accused who breach their bail and fail to appear before a less lenient judge to avoid being dealt with by that judge. See Weatherburn, D., et al., ‘Managing Trial Court Delay: An Analysis of Trial Court Processing in the NSW District Criminal Court’, Bureau of Crime Statistics and Research, Sydney, 2000. These reasons for the relative low levels of use of the s. 51A procedure serve to highlight the importance of the overlapping discretion of both the prosecutor and the court in determining the outcome of cases. On the late entry of guilty pleas in the trial courts, see Willis, J., ‘Late Pleas and Withdrawals’ (1998a) 8 (2) Journal of Judicial Administration 77-87.
The prosecution of summary cases is characterised by the speed of disposal. Unlike indictable cases, there is no preliminary hearing and a magistrate sitting alone hears such cases under tight time constraints. Legal aid is restricted, and the costs of mounting a full defence will often be prohibitive for the ordinary defendant. Prosecution counsel,

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208 In NSW, the defendant may elect trial by judge alone in indictable cases. See Part 2 Division 2 Criminal Procedure Act 1986 (NSW). However, this procedure is not available for the hearing of Commonwealth offences heard on indictment in the trial court. See Brown v R (1986) 64 ALR 161. On the policy issues concerning judge alone trials, see Willis, J., ‘Trial by Judge Alone’ (1998b) 7 (3) Journal of Judicial Administration 144-158.


210 ibid.

and even defence counsel, may also more readily make negative assessments of cases concerning repeat offenders on minor charges. It is the high rate at which pleas of guilty are entered that enables the Local Court to process its caseload quickly albeit with a lesser overall penalty range available in that court than is available in the trial courts. This is the classic trade-off in the summary jurisdiction where cases are dealt with rapidly without a jury, and the defendant is liable to a lesser maximum penalty.

Prior to a list day in the Local Court (where many individual charges will be mentioned for the first time against many defendants), the prosecutor will have no way of knowing which matters will become a plea of guilty on the day, which will end up attracting a guilty plea on a subsequent mention and which matters will be defended. As a result, it is simply not practicable for the prosecutor to prioritise or prepare all cases as though they will be defended. In any event, Tombs (referring to the study of prosecutors in the Procurator Fiscal’s Office in Scotland conducted by herself and Susan Moody) describes how the prosecutor’s independence is circumscribed by dependence on the police for information and how the need to process cases quickly leads to cursory case screening. (In Tomb’s study, 13% of cases were for speeding or parking matters and 23% for minor road traffic offences):

The amount of independence enjoyed is also severely circumscribed by contemporary values in criminal justice – notably efficiency and economy. There are strong pressures to routinise work in prosecutors’ offices. To quote the procurators fiscal … ‘a lot of these cases are straightforward’ … ‘you can’t get terribly excited about careless driving when it comes in piles of fifty’ … There is a tendency for the process to take over, encouraging a constant flow of cases and leading ultimately to a conveyor-belt system of justice. The inevitable pressure towards uniformity and streamlining which such large numbers create is reinforced by the nature of modern bureaucratic organisations preoccupied with saving time and expense and encouraging order, uniformity and predictability within the system.

Within this emphasis on efficiency, as with the higher courts, the processes of the Local Court rely on trial avoidance emphasising the discretion of the prosecutor, although

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212 ibid.
without the level of information available to the prosecutor as is available in indictable cases. \textsuperscript{215} This is so because a brief of evidence is only required on the entry of a not guilty plea.\textsuperscript{216} The net effect is that in the summary court the commonly ascribed nature of adversarial criminal justice is inverted. Instead of ‘the search for guilt or innocence according to the law’ described by Blake and Ashworth\textsuperscript{217} the summary criminal process ordinarily commences with the question whether the defendant admits guilt. The defendant is expected to plead\textsuperscript{218} without seeing a prosecution brief of evidence\textsuperscript{219} and with no more than a charge sheet and a police ‘statement of facts’ to indicate the prosecution case. In this setting the prosecutor is not in a position to fully assess whether there is sufficient evidence to prosecute. In most police summary cases there is no brief of evidence, as such, and the prosecutor cannot rely on formal sources of evidence (such as signed statements and physical evidence and forensic reports) but on the statement of facts, and the oral advice and assurances of police. In this situation it is the police officer who exercises maximum control over the flow of information.

There is also considerable inertia against the withdrawal of proceedings once they have commenced.\textsuperscript{220} Nor is there a preliminary hearing before the contested hearing of the

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\textsuperscript{216} See Court process, in Chapter One. Prosecution disclosure is part of DPP prosecution policy but in the absence of a brief of evidence there is unlikely to be material for the prosecution to disclose. The police informant is required to provide a certificate in relation to disclosure when providing a brief of evidence. See footnote 935 and accompanying text.


\textsuperscript{218} Justices Act 1902 (NSW) section 78, similar provisions apply in other jurisdictions, see ‘Chapter 4 General Procedure’ in The Laws of Australia, Law Book Company, Sydney, at p. 40, para. [35].

\textsuperscript{219} Dixon refers to the ‘legalisation process’ that commences with the arrest. See Dixon, D., \textit{Law in Policing: Legal Regulation and Police Practices}, Clarendon Press, Oxford, 1997. However, section 66B of the Justices Act 1902 (NSW) requires that a brief be prepared only after the defendant enters a plea of not guilty. During the course of the Summary Prosecution Pilot at Dubbo Local Court the DPP discovered, in breach proceedings being prosecuted on behalf of the Probation and Parole Service, that police prosecutors routinely did not supply a statement of facts to the defendant until a plea of guilty was indicated. Advice given by the DPP on this practice led to a change of policy within the Probation and Parole Service so as to provide a statement of facts for the defendant to consider before entering a plea. Bailey, C., ‘Pilot Notebook’, 1996b.

\textsuperscript{220} Prosecution inertia is considered in Chapter Six below. In some circumstances it may involve confusion between the immediate decision to arrest, based on reasonable suspicion, and the more deliberate decision to charge, based on a reasonable prospect of conviction. Broadly speaking, there are two opposing arguments. Pulling in one direction is the argument that the court provides the only
charge by the magistrate who alone determines questions of law and fact. These process limitations not only affect the defendant but they also have an effect on what can be achieved by the independent prosecutor. This is particularly so with summary offences because the police control the charge that is placed before the Local Court, and that charge is symbolically brought in the police informant’s name. Of course, the prosecutor can intervene to amend or withdraw the charge but prosecutor action is not required to confirm the charge. Other factors combine to militate against the withdrawal of proceedings such as the relative ease of proof of summary offences, the low risk of a costs order being made against the prosecutor or the police for an unsuccessful prosecution, and the perceived low cost to the defendant in being processed by the summary court.

In contrast, in the trial court, it is the prosecutor who frames the indictment that the trial court must determine. This two-stage process involves a break in continuity from the police charge to the trial indictment. In the transition from charge to indictment, the prosecutor is provided with a brief of evidence and a committal may also take place before the prosecutor has to prepare the indictment. Whilst there is a degree of impetus built up by the commencement of proceedings, the prosecutor ultimately has control of the appropriate venue to resolve any uncertainty. Pulling in the other direction is the argument that it is an abuse of the process of the court to proceed with cases that are unlikely to succeed.

221 On the limits of the committal hearing process see footnote 257.

222 In the Local Court the informant officer is named as a party to the proceedings unless the case has been taken over by the DPP. It is of course possible to change this to allow cases to be brought in the name of the Police Service (for example) rather than the individual informant.

In New Zealand the Law Commission, while supporting the system of police prosecutors, thought that it was undesirable that cases be prosecuted in the names of individual officers and recommended that summary prosecutions should be brought in the name of the agency (eg. the police) but that the information should contain the name of the person who decided to prosecute. New Zealand Law Commission, ‘Criminal Prosecution’, New Zealand Law Commission, Wellington, 2000. At p. 100. Whether such a change would, of itself, remove the informant’s strong sense of ownership of the case is open to question. Cases involving police informants may be cited as ‘Police v’ the defendant, however, the action before the court may still be considered as being between a particular police officer acting as the informant and the defendant.

223 Following the amendment to the Justices Act 1902 (NSW) to overturn the effect of Latoudis v Casey (1990) 170 CLR 534.

224 The initial charge decision may do irreparable damage to a defendant even if there is a decision subsequently not to proceed. The momentum to maintain a prosecution (or the ‘prosecution push-on’) has varying impacts that are reflected in the difficulty of withdrawing charges, even if weak, when to do so might arouse suspicion that the process was corrupted in some way, or a cloud would be left over the head of the defendant. See, for example, McGonigle, S., ‘Public Accountability for Police Prosecutions’ (1996) 8 (1) Auckland University Law Review 163-183. At p. 168, ‘The officer who charges the offender at the time of an arrest starts the chain of events which lead to the prosecution....unless there
over the indictment to be presented and is not bound to file an indictment in the same
terms as the original police charge(s). In addition it is open to the DPP to exercise the
power to issue an *ex officio* indictment so as to commence proceedings directly in the
trial court.

1.F.ii.a Process and the summary hearing

There is another important distinction between the trial courts and the court of summary
jurisdiction and that is the opportunity given to the lay jury, as the arbiter of the facts, to
deliberate in secret and to deliver a verdict without giving reasons, which enables the
jury to act as a potential wild card in the trial process. The jury is expected to follow the
judge’s directions on the law and the evidence, and to deliver a judgment according to
law. However, the jury may simply ignore the judge and act on its own view of
‘commonsense justice’ or even in a wholly capricious way. Some commentators see this
aspect of the jury as a bulwark against state oppression through the criminal law.

Unlike the jury, the magistrate sitting in a court of summary jurisdiction has no power
theoretically to dismiss a charge other than strictly in accordance with the law. As the

is an evidential problem the matter will inevitably proceed to court. The prosecutors accept that the
decision made by the investigating officer is correct, provided there is enough evidence to initiate the
charge. This frequently allows the overloading of charges. A person may face a number of charges that
arise out of the same incident, and which disclose essentially the same facts. Alternatively, a person may
be charged with two similar offences, one of which carries a far greater penalty. An example is assault
under the *Crimes Act* 1961 (NZ), as opposed to the *Summary Offences Act* 1981 (NZ). Since there is no
independent review, the charges will be proceeded with by the police. The only reasons that the police
will alter the charges will be in exchange for a guilty plea.

In the case of Harry Blackburn, there was insufficient evidence to establish the police case and
the DPP withdrew the charges before a committal took place. Whereas in the case against Judge Bell
(following the RCPS and allegations of cover-ups relating to paedophile activity made by Franca Arena
MLC) the DPP did not withdraw the charges and the matter proceeded to a committal. The defence cross-
examined the principal prosecution witness at the committal and Judge Bell was subsequently discharged
by the magistrate. Significantly in this context, section 48E of the *Justices Act* 1902 (NSW) requires the
court to allow the cross examination of a witness if the prosecution consents to that course without having
to be satisfied of the matters set out in subsection (2). This enables the DPP to ensure the committal is
used as a forum for the examination and cross-examination of a witness (or witnesses) rather than have a
matter proceed as a paper committal without oral evidence being given. See footnote 921.

225 That is an indictment in the same terms as the original charges laid by the police, or the
charges for which a person has been committed for trial, or any indictment at all. Substantial departure
from the committal charges may raise the possibility that the accused is entitled to a fresh committal or a
stay of proceedings. The failure to present an indictment also may lead to a stay of proceedings.

226 See for example, Robertson, G., *The Justice Game*, Vintage UK Random House, London,

227 The court’s power to find the offence proved and then to dismiss the charge is regulated and
is set out in s. 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). See footnote 676 and
accompanying text. The Local Court has the power to grant a stay of proceedings in relation to a charge,
where the prosecution of that charge constitutes an abuse of the court’s process. *Director of Public
magistrate acts as the combined tribunal of fact and law, all applications on a point of law are made to the same person who is to hear the evidence. A consequence of this may be that there is less advantage to the defendant in taking points of objection to the prosecution case. Ostensibly, the magistrate has the same power and discretion as a trial judge regarding the admission of illegally or improperly obtained evidence. However, the caseload of the court and the limits of legal aid combine to make it less likely for such issues to be raised, let alone properly explored or argued before the magistrate. Where such issues are raised and argued the defendant remains at a disadvantage because the magistrate hears the contested evidence in any event and may thereby be influenced by it even if the magistrate rules the evidence inadmissible on a *voir dire* hearing.

Most would see this as an appropriate protection against arbitrary action by magistrates, the point being made is that apparently arbitrary acts committed by a jury are legitimated and there is no judicial counterpart, so that the magistrate or judge cannot decide which cases ought to be prosecuted or not. If a magistrate acts arbitrarily, the prosecution has a remedy of appealing to a higher court.228

1.F.ii.b  Process and the jury trial

Whilst there are significant differences between the summary and indictable jurisdictions, both courts are also under pressure to achieve greater bureaucratic efficiency through a variety of measures such as proposals to encourage guilty pleas, defence disclosure, and to permit majority verdicts in jury trials.229 Increasingly the demand for a more efficient disposal of criminal cases has seen ‘due process’ values re-

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*Prosecutions v Shirvanian* (1998) 44 NSWLR 129, at pp. 134-135. In New Zealand the judge in a trial court has a discretion to direct that no indictment be presented, or where the indictment has been presented, direct that the accused not be arraigned. See Section 347 *Crimes Act* 1961 (NZ). This power is available to bring an end to the prosecution of cases on the basis of insufficient evidence or in the public interest. This power is referred to by the Law Commission in its report on prosecutions and the Commission notes that this power has been made available because the committal process enables the trial judge to examine the prosecution case in detail. The Commission recommended that a similar procedure apply in the summary court after the District Court judge has required the prosecution to provide full disclosure and a brief of evidence. See New Zealand Law Commission, ‘Criminal Prosecution’, New Zealand Law Commission, Wellington, 2000. At pp. 58-60. See footnote 708 and accompanying text.

228 But not successfully if the action is characterised as being within the lawful discretion of the decision-maker.
interpreted to include the means to facilitate the efficient and fair disposal of cases rather than Packer’s sense of due process as an ‘obstacle course’ in the way of conviction. ‘Due process’ attributes have developed over time and are not fixed. For example, the nature of the preliminary hearing or committal has changed significantly and remains the focus of trial reform efforts. Similarly, the nature of full prosecution disclosure is interpreted differently from jurisdiction to jurisdiction and the counterpart to entrenching prosecution disclosure has been to require defence disclosure.

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229 See, for example, Standing Committee of Attorneys General Working Group on Criminal Trial Reform, ‘Criminal Trial Reform’, Attorney General’s Department, Canberra, 2001.

230 See footnote 200.


232 Although they are often treated as though they are fixed and immutable.

233 See also Aronson, M., ‘Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure’, Australian Institute of Judicial Administration, Melbourne, 1992. This report lay the foundations for the development of proposals to facilitate the more efficient hearing of complex criminal trial cases.

234 See, for example, Coghlan, P., ‘Committal - Post Committal’, Criminal Trial Reform Conference, Melbourne, Australian Institute of Judicial Administration, 2000.


236 See, for example, section 47D et seq., Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001 (NSW).
2 CHAPTER TWO - EXISTING PROSECUTION ARRANGEMENTS

2.A The history of prosecutions in New South Wales

When the First Fleet set sail for New South Wales, criminal prosecutions in England relied on private informants and the grand jury process.\(^{236}\) Initially the power carried by Governor Philip to convene the first court of criminal jurisdiction under English law was based on a form of martial law and the recital to the relevant Imperial Act stated:

A Court of Criminal Jurisdiction should also be established within such Place as aforesaid, with Authority to proceed in a more summary way than is used within this Realm.\(^{237}\)

The summary and martial nature of proceedings was reflected in the composition of the criminal court, which was to consist of the Judge Advocate appointed for New South Wales and ‘Six Officers of His Majesty’s Forces, by Sea or Land.’ This court could convict on a bare majority\(^{238}\) and whilst it was to be a court of record, the procedure of the court differed from the adversarial method of today.\(^{239}\) Following the reading of the charge, or charges to the accused, the court proceeded with the examination of witnesses, both for and against the accused, on oath.\(^{240}\)

The Supreme Court of New South Wales was subsequently established in 1823.\(^{241}\) However, a critical departure from the procedure in England was that offences before

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\(^{236}\) Corns argues that the office of the Sheriff was not transplanted to the Australian Colonies because of a concern that in this event community elected law-enforcement officials would be a focus for anti-imperial movements given the experience in the American Colonies. See Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999. At p. 8.

\(^{237}\) Act 27 George III. C.2, (1787) (Imp) (s. I).

\(^{238}\) For non-capital offences, the court could impose corporal punishment as it saw fit ‘not extending to life or limb.’ It could sentence an accused for capital offences to death or corporal punishment not extending to capital punishment. However, the court could impose capital punishment for a capital offence provided that at least five members of the court judged the accused to be guilty and the sentence could then only be imposed after being notified to ‘His Majesty and by Him approved’, incidentally involving considerable delay. The original Act applied to the New South Wales Coast and the Parts adjacent. On Norfolk Island there were insufficient numbers to convene a court of seven and Act 35 George III. C. 18 (1795) (Imp) allowed for a criminal court on that island consisting of the Judge Advocate and four officers, and a majority verdict of four was required to impose the death penalty.


\(^{240}\) ibid. ss. II, III.

\(^{241}\) Act 4 George IV. C. 96 (1823) (Imp). This Act was to be in force until 1 July 1827. Its operation was extended until 31 December 1829 by Acts 7 & 8 George IV. C. 73 (1827) (Imp).
the Supreme Court were to be prosecuted 'by Information in the Name of His Majesty’s Attorney General’, thus making the grand jury process redundant and concentrating prosecution decision making power in the office of the Attorney General. The jury in a criminal trial was martial in nature, consisting of seven commissioned officers. A further Act in 1828 re-constituted the Court as a court with one to three Judges. The 1828 Act also allowed the Supreme Court to give leave to any person to institute criminal proceedings in the name of the Attorney General. The same legislation also

242 ‘Or other officer duly appointed for such purpose by the Governor or Acting Governor’ (s. IV).

A similar procedure, with the inclusion of private prosecutors other than police, became settled law in New Zealand where s.345 (2) of the Crimes Act 1961 (NZ) provided that only the Attorney General, a Crown Solicitor or a private prosecutor may present an indictment. Robertson, B., ‘A Privatised CPS’ (1990) 154 (24 November 1990) Justice of the Peace 757 - 759. At p. 757. In practice, however, it is virtually unknown for a private citizen to present an indictment (see NZ Law Commission Preliminary Paper No. 28 ‘Criminal Prosecution’, March 1997 at paras 76-78).

In England the Prosecution of Offences Act 1879 (UK) retained the existing right of the citizen to institute a criminal prosecution, including proceedings on indictment, whilst introducing a DPP to take over a selection of matters of importance or difficulty. However, in England a small measure of control over prosecutions was achieved by the requirement to obtain consent to prosecute in respect of certain offences. Edwards describes how the question of the introduction of a prosecution authority in England led to a hotly contested political debate in the 1800s. The prevailing notion domestically in England and Wales was that the right of private prosecution was a necessary check on government and also ensured that necessary prosecutions took place. Edwards, J. L. J., The Law Officers of the Crown, Sweet and Maxwell, London, 1964. At p. 9. In contrast, those arguments based on the virtues of a private right to prosecution can be seen as the basis of a system of patronage and abuse of prosecutorial discretion. Hay, D., ‘Controlling the English Prosecutor’ (1983) 21 (2) Osgoode Hall Law Journal 165-186. Hay, D., ‘The Criminal Prosecution in England and Its Historians’ (1984) 47 (1) The Modern Law Review 1-29.

Importantly in the context of this thesis, the domestic model in England was not adhered to in the colonies after the American Revolution. The grand jury and private prosecutions for indictable matters were not suited to the colony of New South Wales not simply because it was a penal colony, as South Australia, for example was not, but rather because the possibility of local control of the criminal justice system was untenable in the administration of a colonial possession. See Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999.

243 At common law, the individual had the right to institute a prosecution. However, in the case of indictable offences the common law required a grand jury to find a ‘true bill’ of indictment. See Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999. Whilst it avoided the use of the Grand Jury, the 1828 Act left open the possibility of the introduction of ‘Grand and Petit’ juries by the King on the advice of the Privy Council. (s. X) However, the Grand Jury process did not become established in the Australian legal system. Nevertheless, it is at least notionally preserved in Victoria, see Section 354 of the Crimes Act 1958 (Vic), and the DPP is not able to take over a prosecution commenced by grand jury, see section 22 Public Prosecutions Act 1994 (Vic). See footnote 271 and accompanying text.

244 Act 9 George IV. C. 83 (1828) (Imp) (Section I).

245 Section VI. However, the Supreme Court indicated in the 1885 case of R v McKaye and Others (1885) 6 NSWR 123 that it should not as a general rule sit in review of the Attorney General’s decision, to do so would ‘open the floodgates’ and improperly take up the court’s time in the review of the actions of the Attorney General with disadvantage to any accused then by an order of the court placed on trial. At p. 130.

For a discussion of the power of a circuit judge in Wisconsin to file a criminal complaint if the district attorney refuses or is unavailable to do so (introduced by statute in 1969), see Logan, W. A., ‘A
enabled the King to authorise the Governor to convene other courts. These courts were to consist of a Judge, and between three and five others, with power to impose penalties short of life or limb. Courts of General or Quarter Sessions were to deal with offences (not involving the death penalty) charged against persons still under sentence of transportation. In recognition of the expanding population of free and freed colonists, the 1828 Act effectively allowed this court to hear cases against those not under sentence according to the procedures set out for prosecution and trial in the Supreme Court.

In this way the executive authority to control trial prosecutions was established early in the colonial administration of NSW. For 173 years from 1823 until the introduction of the DPP in 1986, the role of prosecuting in the trial courts was the responsibility of the Attorney General as a member of the executive arm of government. That role was one for which the Attorney General was said to be ‘politically accountable.’ In fact, the administrative functions related to the conduct of prosecutions in the trial courts were handled, prior to the inception of the DPP within the Public Service by the Office of the Clerk of the Peace under the superintendence of the Attorney General. The Attorney General or a delegate of the Attorney General made decisions on no-bills and nolle prosequi. Thus there has always been a distinct dividing line drawn between the police and the prosecutor in the prosecution of indictable offences even though the police have held the power to commence a criminal prosecution for any offence, whether summary or indictable, save for a few exceptions.

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Proposed Check on the Charging Discretion of Wisconsin Prosecutors’ (1990) Wisconsin Law Review 1695-1743. Logan takes the view that the relevant statutory provision offends the doctrine of the separation of powers and advocates that only actual victims of physical crimes should be able to seek review of the prosecutor’s inaction and the court should only be empowered to direct the prosecutor to file the complaint. See pp. 1738-1743.

246 Section V. The Governors had created such courts under previous legislation.
247 Substantially the same provisions applied under the 1828 Act, at s. VII.
248 Section XIX.
249 Although, as pointed out by Blanch (see footnote 781) the reasons for decision of the Attorney General were not made public nor were there published prosecution policies and guidelines prior to the creation of the DPP.
250 These exceptions relate to those charges that require Attorney General consent to be prosecuted, see footnote 832 and accompanying text.
These early developments meant that when police forces were formally established, the procedure for the conduct of cases on indictment was already settled. Whilst police took over the investigation of crime generally, the responsibility for the conduct of criminal trials on indictment continued in the hands of the Attorney General. The fact that the police have not had responsibility for the prosecution of charges on indictment is therefore an accident of history rather than a conscious decision that the prosecution of at least the more significant offences should not be left in the hands of those who conducted the investigation.\textsuperscript{251}

The growth of statutory police forces in the colonies led to an aggregation of police control over the commencement and conduct of proceedings in the Courts of Summary Jurisdiction. Initially, informant police officers prosecuted their own summary cases, appearing as of right in a personal capacity. Over time, the police informant's right of appearance was supplanted by the appearance of police officers who were not always the informant and who appeared, by leave, on behalf of the informant.\textsuperscript{252} This arrangement then became formalised by the creation of prosecuting branches within the police forces.\textsuperscript{253} The role of the police prosecutor was challenged in 1965 and the Privy Council, moved largely by considerations of efficiency, confirmed that the magistrate

\textsuperscript{251} This is in contrast to English legal history where the DPP was established on limited terms after the police forces had been established and the DPP held a residual role until 1986. This lack of an integrated system for indictable prosecutions, combined with the localised control of prosecutions, made a powerful argument to implement a single prosecution agency for England and Wales to ensure consistency and fairness.

\textsuperscript{252} A problem of the police officer being the principal witness, and also the advocate for the prosecution, was demonstrated in the English case of \textit{Webb v Catchlove} [1886] QB 159. Denman and Hawkins JJ criticised the practice of police presenting their own cases. The report says that Justice Hawkins 'thought it a very bad practice to allow a policeman to act as an advocate before any tribunal, so that he would have to bring forward only such evidence as he might think fit and keep back any that he might consider likely to tell in favour of any person placed upon his trial.'

Where another officer appears on behalf of the informant officer, the case continues as an action between the informant and the defendant. In contrast, the DPP take over of a case supplants the rights of the original informant. See \textit{Price v Ferris} (1994) 34 NSWLR 704 at pp. 707-709.

\textsuperscript{253} For example, in New South Wales the Police Prosecution Branch was established in 1941. See, Commission to Inquire into New South Wales Police Administration, 'Report by Mr Justice Lusher of the Commission to Inquire into New South Wales Police Administration', Government Printer, Sydney, 1981. At p. 238.

In Victoria, the Victoria Police Prosecutions Division was established in 1981 - see Head, K., 'Police Prosecutors and Legal Practitioners' (1990) (September 1990) \textit{Law Institute Journal} 842 - 843. pp. 842-843. Head says that four hundred police completed an 'intensive course of seven weeks duration' ... although the course does not presume to substitute for formal qualifications, it does provide a foundation upon which the individual may develop competence in prosecuting criminal matters.' At p.
had an inherent discretion to allow a person to act as an advocate for another in their court and that this discretion was properly exercised to allow police prosecutors to appear on behalf of other police officers to 'secure or promote convenience and expedition and efficiency in the administration of justice.' Where the police had charged an indictable offence, they remained responsible for the presentation of the case at any committal proceedings. If a committal order was made the case was then formally referred to the 'Crown' for prosecution by virtue of the magistrate's committal order.

2.B Summary prosecutions today

Ninety percent of people who ever have to attend a court in New South Wales attend a Local Court.

The field of summary prosecutions is a functionally significant but relatively underrated part of the criminal justice system. The role of the summary courts is enormous, given the volume of criminal charges dealt with summarily, relative to the number of criminal charges dealt with on indictment. Overall, the prosecution of summary criminal charges is important because these prosecutions directly involve the largest number of people and the broadest cross-section of society. On this basis, the individual citizen is most likely to have personal experience of the criminal justice system through the summary court, whether as a victim or as a defendant. It is also of obvious importance

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842. Head notes that the police prosecutor 'can rarely commit to a course of action prior to receiving instructions from informants.' At p. 843.

254 O'Toole v Scott and Another [1965] AC 939 at p. 959.

255 The Attorney General also has the power to file an ex-officio indictment. This power was also given to the DPP by paragraph 7 (2) (c) of the Director of Public Prosecutions Act 1986 (NSW) and although the power of the Attorney General is preserved, (sections 28 and 30), this power is now ordinarily exercised by the DPP rather than the Attorney General.

256 Attorney General's Department, 'Annual Report', Attorney General's Department, Sydney, 1999-2000. Under the heading 'Local Court.'

to members of any community sub-group who may face a greater risk of being prosecuted in this court than do other members of the community.

In comparison to its pivotal role in the criminal justice system, the operation of the summary court has received little critical attention\textsuperscript{258} although the workings of the court of summary jurisdiction came under review in the early 1970s.\textsuperscript{259} The focus of attention was largely the status and role of the magistrate, particularly as a result of the increasing demand on the part of magistrates to be recognised as judicial officers and a growing awareness that the use of status offences was open to abuse.\textsuperscript{260} This focus on the magistrate resulted in the court of summary jurisdiction evolving from being more or less an arm of State bureaucracy to becoming a recognisable part of the judicial branch of government.\textsuperscript{261} For example, the Local Court is presided over by an independent judicial officer, the same general rules of evidence apply as in the higher courts,\textsuperscript{262} and appeals from magistrate’s decisions are no longer heard \textit{de novo}.


\textsuperscript{260} The use of offences of status is discussed further in Chapter Five. See, for example, the work by Tony Vinson and the then Chief Magistrate Murray Farquhar in 1974 on the impact of summary offence legislation on Aboriginal people in country towns. Farquhar, M. F., \textit{et al.}, ‘Minor Offences - City and Country’, New South Wales Bureau of Crime Statistics and Research, Sydney, 1974. This awareness can be contrasted with the opinions of magistrates who presented openly racist attitudes to Aboriginal people. Prior to the reformation of the Court of Summary Jurisdiction as the Local Court, the magistrate at Wilcannia for a time was Mr E Quin. On one occasion Mr Quin addressed a local Aboriginal defendant in these terms: ‘Your race of people must be the most interfering race of people I have heard of. You are becoming a pest race in Wilcannia, wanting to interfere in [the] job of the police. There is only one end to pests’ \textit{Police v Gillon} Unreported, Wilcannia Court of Petty Sessions, 22 March 1979. Mr Quin was one of a number of magistrates of the Court of Summary Jurisdiction not to be appointed to the bench of the newly formed Local Court. See \textit{Attorney General (NSW) v Quin} (1990) 170 CLR 1.

\textsuperscript{261} The magistrate was effectively a part of the public service until the passage of the \textit{Local Courts Act} 1982 (NSW) and only in 1986 were magistrates afforded the same protection from removal as other judicial officers. See Lowndes, J., ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part II’ (2000b) 74 (September) \textit{The Australian Law Journal} 592-612. At p. 518.

\textsuperscript{262} This is not to suggest that different rules were applied in the courts of summary jurisdiction prior to the creation of the Local Court.
2.B.i The Commonwealth and Territories

Under the Constitution, the criminal jurisdiction of the Commonwealth is limited and initially criminal matters were prosecuted at the request of specific departments by the Crown Solicitor’s Office. When the Commonwealth established a police force, later to be known as the Australian Federal Police (AFP), there was already a system in place for the conduct of prosecutions by the Crown Solicitor’s Office. An important factor in preventing the development of an AFP prosecution branch was the limited range of criminal laws to be enforced across the whole of Australia. The limited subject matter of the law and the dispersed geographical range of Commonwealth law enforcement meant that it was impractical for the AFP to develop its own prosecution section.

The Commonwealth was responsible for the administration of the Northern Territory (NT) and the Australian Capital Territory (ACT) prior to self-government. This included control of their police services, which enforced the full range of criminal laws within each Territory. In the Australian Capital Territory, the ACT Police\(^{263}\) had established its own prosecution section and in the summary court of the ACT police prosecutors conducted prosecutions that had been instituted by ACT police officers. In 1974 the Commonwealth exercised its authority and transferred prosecution responsibility for summary police cases in the Australian Capital Territory to the Crown Solicitor’s Office. The Attorney General, Lionel Murphy QC, directed the transfer of responsibility for summary prosecutions in the ACT from police officers to the then office of the Deputy Crown Solicitor (ACT). The reason for transferring responsibility was later summed up by Enderby QC, who was a member of the Government at the time:

> The police function is too important to be allowed to overlap into prosecution work. Police work is basic to the proper functioning of any modern community and the police have enormous power. It is essential that the exercise of that power be seen to be fair and above suspicion and that the police be not weakened by criticism that attaches to them when they become involved in prosecuting.\(^{264}\)

\(^{263}\) Which was a separate police force until 1979 when it became part of the AFP.

The Commonwealth government had executive authority over affairs in the Territory and the decision was readily implemented, as it simply required a unilateral administrative decision concerning a centralised function in one court complex. The reform was nevertheless, controversial and excited dissatisfaction amongst ACT police officers. Despite the transfer of responsibility for prosecuting cases in court, the responsibility for advising on the charges to be laid in summons matters for offences in the ACT has remained with the police.

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265 See: Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999. At p. 9. Some police members were seconded to the Deputy Crown Solicitor’s Office to work as prosecutors at the time of transfer. The current ACT DPP, Richard Refshauge, confirms that three police officers joined the then Crown Solicitor’s Office. Refshauge, R., Personal communication, 29 August 2001. The ACT and NT both provide a model for the absorption of police prosecutors into the independent prosecutor’s office. Two respondents to the 2001 DPP Prosecutor Survey suggested that there be a staged transfer of police prosecutors to the DPP. One stated: ‘Any “take over” should be carefully phased in. Initially, the Police Prosecutors should remain under the administration of the Police Service but answer to the DPP and be subject to DPP directions on legal matters only. Over a period of some years Police Prosecutors could be phased out progressively with legally qualified officers having the right to transfer (or be seconded) to the DPP. This would go some way to reducing police opposition to a DPP take over.’

266 The depth of police resentment and disaffection with the transfer can be gauged from the summary of the paper prepared by Mr A J Oldroyd for the Symposium at which Enderby’s paper was delivered. The paper was not delivered and was not published other than by way of summary presented by the Symposium Convenor, J K Bowen. Oldroyd, A. J., et al., ‘Summary of a Paper Prepared by Mr A. Oldroyd’, The Second Symposium on Law and Justice in the Australian Capital Territory, Canberra, 1977. At pp. AA2 – AA3. Mr Oldroyd was a representative of the Police Association and is attributed as claiming ‘that police have no confidence in prosecuting lawyers whom they regard as being in the enemy camp.’ Of the police prosecutor, he is said to have claimed that ‘...membership of a disciplined force enables him to make a fair decision … he understands the need of the police informant … he has gained the trust of the police whom he represents … he has a responsibility to protect the police informant from an adverse verdict… and he is not there to assist the magistrate to obtain the facts, but to establish that the police informant acted wisely and correctly.’ See footnote 50 and accompanying text. These sentiments are echoed in Sweeny, S., ‘The Role of the Police Prosecutor in the Magistrates Court System’, Prosecutorial Discretion, Australian Institute of Criminology, 1984. pp. 135-153.

267 According to Enderby, when the prosecution of offences was transferred from the ACT Police to the Deputy Crown Solicitor’s Office the following functions were to be included: ‘furnishing of particulars of charges to defendants, answering representations from defendant’s lawyers in relation to the conduct of particular prosecutions, assessment of the strength of the evidence in relation to each charge and any necessary advising thereon to police informants, selection of the evidence to be placed before the courts, preparation of witness summonses, and the actual presentation of police informant cases before courts of summary jurisdiction in the Territory.’ Enderby goes on to describe the uncertainty and confusion that arose following the transfer of functions as the police sought to retain control over those functions. See Enderby, K., ‘Problems Associated with the Institution and Conduct of Prosecutions in the Australian Capital Territory’, The Second Symposium on Law and Justice in the Australian Capital Territory, Canberra, 1977.

The retention of police control of the decision whether to issue a summons in the ACT contrasts with the preparedness of 2001 DPP Prosecutor Survey respondents to take over the decision whether to issue a summons in contrast with their lack of preparedness to take control of the decision to charge more generally. See Table 8 DPP prosecutor attitudes to the responsibility for the decision to charge and accompanying text.
However, the Commonwealth did not transfer responsibility for prosecutions in the Northern Territory. The differences between the ACT and the NT no doubt provided significant reasons to effect change in one but not the other. In contrast to the ACT, the NT is geographically diverse with remote and regional courts, so that servicing the prosecution of police summary cases would be a much larger task in this territory. Another significant difference is that in the ACT as the then federal Labor Government of Prime Minister Gough Whitlam had an interest in putting a brake on police control of political protest in the national capital. In 1998, the practical problem of geographical spread as an obstacle to DPP control of summary prosecutions in the NT was addressed by way of an administrative arrangement entered into in 1998 between the NT DPP and the Police Commissioner, whereby the DPP absorbed the existing police prosecution staff under its authority.

2.C Who prosecutes?

Police control of summary prosecutions and independent responsibility for indictable cases exists in each Australian State jurisdiction today, where all prosecutions on indictment (but few, if any, summary prosecutions) are conducted by the Office of the Director of Public Prosecutions (DPP). Each State DPP was created to prosecute cases on indictment in the trial courts and was not intended to control summary prosecutions to the exclusion of police prosecutors. As a result, the relevant DPP has a limited power to conduct summary prosecutions or, while the power to conduct summary prosecutions is unfettered by the relevant enabling legislation, it is rarely exercised and police routinely conduct police summary prosecutions.

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268 For example see Ball v McIntyre (1966) 9 FLR 237.
269 See Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999. At p. 23-25. Corns describes how the DPP commenced the process by employing three solicitors and seconding them to the police prosecution section in 1996. A senior police officer who also had experience as a Crown Prosecutor was then appointed to head the police prosecution service in 1997. See footnote 82 and accompanying text.
271 The NSW DPP may institute and conduct a prosecution for any indictable offence capable of summary disposition. (Director of Public Prosecutions Act 1986 (NSW) section 8(1)(c)) However, the NSW Director of Public Prosecutions (DPP) may not institute and conduct a prosecution in respect of a summary offence unless either the summary offence is one that is prescribed, or the person otherwise responsible for the prosecution has consented in writing. (Director of Public Prosecutions Act 1986 (NSW), section 8(3)).
2.C.i The police prosecutor

Despite the apparently *ad hoc* development in policy regarding police prosecutions in each State police force, we should not underestimate the now entrenched symbolic, political and practical importance to the police and to the summary criminal justice system of police controlling their own criminal cases. After all, when the prosecuting branch was established in 1941,\(^{272}\) the title of the judicial officer hearing summary cases was ‘police magistrate’\(^{273}\) and for a significant period of time the court of summary jurisdiction in New South Wales was known as the ‘Police Court.’\(^{274}\) The police prosecutor is a serving police officer and is formally bound by the legal discipline of the Police Service\(^{275}\) and informally subject to the same cultural mores as other police officers. Before we consider the possible role of the independent prosecutor in the prosecution of police summary cases, it is worth examining the position currently occupied by the police prosecutor, who each day in the Local Court recites a formulaic request for leave to appear ‘on behalf of police informants in today’s list.’\(^{276}\)

2.C.ii The centrality of police discretion

Whatever may be the origins of police prosecutors,\(^{277}\) it may now be thought to be politically untenable to erode police control of the prosecution process whether for investigation, charging or the responsibility for prosecuting. This may be reflected in

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The position in each of the States is slightly different. For example, in Western Australia the functions of the WA DPP for summary prosecutions are limited to the prosecution of those indictable offences that are capable of summary disposition (*Director of Public Prosecutions Act* 1991 (WA), section 12). More recently the specific power of the Victorian DPP to take over summary prosecutions has been enlarged. See section 4 *Public Prosecutions (Amendment) Act* 1998 (Vic) allowing the Director to take over any summary or indictable offence (except one commenced by a finding of a Grand Jury). See footnote 243 and accompanying text.

\(^{272}\) And for its first six years until 1947.


\(^{274}\) See footnote 8.

\(^{275}\) Although police prosecutors are no longer subject to local line-command authority. See footnote 293.

\(^{276}\) This is the usual form of police prosecutor request to appear by leave at the commencement of each day in the Local Court.

the lack of political action towards that goal. Indeed, the importance of police prosecutors to the police themselves was acknowledged by one of the respondents to the DPP Prosecution Survey who stated:

In many ways I think that if the DPP takes over the role much needed talent, opportunity and scope (in terms of where police officers can go with their careers) will be lost from the police service and I don’t necessarily think that that is a good or desirable thing for the police service.

Importantly, the in-house prosecution of police summary cases preserves control over summary prosecutions within the police service and allows the police to maintain control over the flow of information concerning these prosecutions. Overall, the work of the police prosecutor is opaque and we have limited information concerning their activities, whether before or after the changes to the internal structure of the police prosecution section referred to above. For example, there is no reporting by the Police Service on the manner in which the police prosecution section exercises prosecutorial discretion. Indeed, such is the secrecy surrounding the work of the police prosecutor that information provided to the RCPS by Police Legal Services – North West regarding police prosecutions, was classified as ‘confidential’ at the request of the Police Service and it remains a confidential exhibit.

When analysed on the basis of efficiency principles and an assumption that summary prosecutions require low order prosecuting skills and judgments, (that is, as merely a ‘processing’ form of prosecutions), police prosecutions are entirely defensible and

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278 The other major likely reason for failing to transfer prosecution responsibility is the cost of doing so. In any event, there is currently no political commitment to the transfer of summary prosecutions.

279 2001 DPP Prosecutor Survey response.

280 There is no doubt an underlying police concern regarding the way in which the DPP would exercise prosecutorial discretion, not only in summary cases brought by police but also in summary cases against police. See, for example, Taylor, L., ‘Interview with Nicholas Cowdery Director of Public Prosecutions’ (1997) (August) NSW Police News 13-18.

281 However, it was asserted before the RCPS that the police prosecutors applied the DPP’s Prosecution Policy and Guidelines. See, Police Association of NSW, ‘Submission to the Royal Commission into the NSW Police Service: Police Prosecutors and in-House Legal Advice’, Royal Commission into the NSW Police Service, Sydney, 1996.

appropriate. The criminal justice system accepts wide-ranging police discretion touching minor offences (extending to the use of coercive force and detention), provided that there is some form of review of police action built into this system. Often that review is by way of prosecution. However, the requirement to bring a defendant who has been charged before the court for prosecution is, of itself, a woefully inadequate protection against the abuse of police discretion, if only for the reasons that there is no examination of police action where a charge is not prosecuted, the police control the flow of information where a charge is prosecuted, a defendant is under pressure to plead guilty and is also often unrepresented. There should be a means of reviewing a questionable arrest other than the further criminal processing of the defendant. Severing the link between ‘review’ of police action and prosecution would require a new form of accountability for the police decision to arrest.

Negative aspects of the dominance of police in the Local Court have been noted most recently in the 2002 Aboriginal Justice Advisory Committee Report on Bail where it is stated that the courts are too heavily dependent simply on the information provided by police in bail proceedings leading to anomalous and discriminatory bail decisions.

2.C.iii Police attitudes to DPP prosecution of police summary cases

Officially the Police Service has expressed in-principle support for the independent prosecution of summary cases where a charge has been commenced by a police officer. The Police Association has stated its opposition to the transfer of


285 See footnote 307.


289 The Police Association represents non-commissioned police officers. The power of the Police Association as an effective political lobby group is considerable even to the point of using the manner of law enforcement as a form of political action. See, for example, Egger, S., et al., ‘The Politics of Police
prosecution responsibility to the DPP. Rather than being based on principle, the concerns expressed are practical such as the effect on the careers of police currently serving as police prosecutors, the loss of a career path for police and the loss of prosecutors as an in-house store of knowledge. For example, in a submission to the Royal Commission into the New South Wales Police Service (RCPS), the Police Association expressed its concern regarding the loss of the jobs of prosecutors and their appropriate re-deployment. The Association championed the knowledge and experience of police prosecutors as 'summary prosecution specialists,' some with '25 years experience' with a period of 'at least 12 to 18 months practical training in summary prosecutions' for all new prosecutors.

However, in submissions before the RCPS, the Police Association admitted that Legal Services should be removed from police line command and in July 1999, the police prosecutors were brought under a centralised command in an integrated 'Court and Legal Services Unit' under a General Manager, replacing the old structure of four regionalised prosecution commands. A similar change in New Zealand was welcomed as a significant reform within the Police Service. However, in NSW the role of Local Commanders in the final decisions whether to prosecute or not remains unclear. The police prosecutor has always had limited discretion in the disposal of charges. It is unlikely that the 1999 centralisation of control altered the limits placed on the individual discretion of the police prosecutor.


Police Association of NSW, 'Submission to the Royal Commission into the NSW Police Service: Police Prosecutors and in-House Legal Advice', Royal Commission into the NSW Police Service, Sydney, 1996.

ibid. At p. 8.

ibid. At p. 3.

The change was announced in a brief report by the Police Service in 2000. The report of the change did not indicate how decision-making was affected by the transfer of administrative responsibility to the Legal Service Unit. See NSW Police Service, 'Annual Report 1999-2000', NSW Police Service, Sydney, 2000. At p. 15.

New Zealand Law Commission, 'Criminal Prosecution', New Zealand Law Commission, Wellington, 2000. The reaction of the Law Commission to the introduction of a centrally commanded Police Prosecution Branch was to withdraw the suggestion that police prosecutions be transferred to a prosecution authority independent from the police.

In the negotiations for the Summary Prosecution Pilot the initial police proposal was that DPP prosecutors not be allowed to charge-bargain as this would create an 'unfair' contrast between police prosecutors and DPP prosecutors.
Even though the police prosecution branches in NSW have been brought under the centralised command of the Court and Legal Services Unit, the prosecutors retain their rank and station as police officers within a disciplined command structure.\textsuperscript{296} The problem of such a command structure can be seen in the Cessna Milner affair of 1979, which was examined in 1986 by the Stewart Royal Commission\textsuperscript{297} leading to the charging of police, including the (by that stage) former Police Commissioner, Mr Mervyn Wood.\textsuperscript{298} The ‘affair’ centred on the treatment of the defendants Cessna and Milner in summary court proceedings following the alleged payment of a bribe.\textsuperscript{299} The actions of the solicitor, Morgan Ryan and the then Chief Magistrate, Murray Farquhar were also investigated.\textsuperscript{300} The police prosecutor later recounted how he had been instructed by a superior officer (from the then police prosecution branch) to allow the case (which should have been dealt with on indictment before the District Court) to be dealt with in the Local Court. This was greatly to the advantage of the two defendants. The police prosecutor followed the direction given, and is later quoted as saying that at the time he had hoped the matter would ‘blow up’ after the case was dealt with.\textsuperscript{301}

\textsuperscript{297} The Stewart Royal Commission received a separate reference to examine relevant illegal police telephone intercepts. This reference was added to the initial reference regarding the activities of Nugan Hand Bank. See Royal Commission of Inquiry into Alleged Telephone Intercepts, ‘Royal Commission of Inquiry into Alleged Telephone Intercepts’, AGPS, Canberra, 1986. Whitton, E., ‘The Cessna File: Ready to Explode’, The Sydney Morning Herald, 13 November 1986, Sydney, 2.
\textsuperscript{298} The charges on which Wood was committed to stand trial were stayed in 1991. See Anonymous, ‘Court Stays Drug Case Charge’, The Sydney Morning Herald, 1 March 1991, Sydney.
\textsuperscript{299} The affair became a matter of notoriety in police, legal and political circles before the government referred the issue to the Stewart Royal Commission. See, Anonymous, ‘The $1.5 Million Drug Case That Refuses to Go Away’, The Sydney Morning Herald, 11 September 1986, Sydney.
\textsuperscript{301} The prosecutor was Wayne Evans, now a Local Court Magistrate. See Anonymous, ‘Cessna-Milner ‘Blow up’ Sought’, The Sydney Morning Herald, 8 June 1988, Sydney. Evans is quoted in relation to evidence given at the committal hearing for the former Police Commissioner, Mr Mervyn Wood. He gave evidence that he was told by his superior officer that the Police Commissioner had directed that the matter be dealt with in the Local Court by Chief Magistrate Farquhar if he saw fit. Evans said he would not do this without written instructions, to which the superior said ‘There's no time to get it in writing but you can take it from me that that's the direction.'

The DPP also came under criticism from the ICAC in 1997 in relation to the transparency and the level of accountability within the process for the withdrawal of proceedings in a matter at Lismore, although the ICAC found that the withdrawal did not involve any corrupt conduct. See footnote 773 and accompanying text.
2.D The response to the calls for transfer:

One might speculate on the immediate political reasons that government has for failing to implement the RCPS recommendation to progressively transfer police summary prosecution to the DPP.302 A more fruitful area for analysis is to examine why the independent prosecution of police summary cases is not a popular issue, particularly given that one of the key arguments in favour of the independent prosecution of police summary cases is said to be the need to ensure public confidence in the system of prosecutions.303

The concern about police as prosecutors and the supposed value of involving DPP prosecutors is summed up in the submission of then Chief Magistrate Mr Pike to the RCPS, in which he stated:

In the twenty-six years that I have presided as Magistrate I have seen the competence and integrity of the majority of police prosecutors demonstrated on an almost daily basis. It must be stated however, that during that time I have had cause to question the approach and inappropriate conduct of some and have not been persuaded that the criminal justice system is better off for their existence.304

Whilst Mr Pike stated that he was writing on behalf of all magistrates in support of the take over of police summary cases by the DPP, not all magistrates share in this support.305

Questions of public confidence and the appearance of justice have simply not been enough to bring about change. In part this is due to a general acceptance within a ‘law and order’ environment of the centrality of police discretionary decision-making in summary prosecutions, and of the utility of wide police powers to control the

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302 Among the short term political reasons against implementing change are the apparent discord between the current DPP and the State government, the priority given to other elements of the police reform process, and fear of a negative response from the Police Association.


304 Pike, I., Submission by the Chief Magistrate to the Royal Commission into the Police Service of NSW Regarding the Conduct of Summary Prosecutions before the Local Court, 2 April 1996, Royal Commission into the NSW Police Service, Sydney, 1996. At p. 2.

305 During the Pilot one of the Deputy Chief Magistrates sat at Dubbo. I was present when he spoke to one of the DPP solicitors staffing the Pilot, out of court, and said ‘I don’t agree that the DPP should take over from police prosecutors and I’d do everything I could to stop it [the Pilot] being a success.’
population. At this stage, two systemic impediments in attitudes to summary prosecutions are outlined, namely:

a) the trivial status given to summary cases, and
b) the dominance of process-efficiency concerns.

2.D.i The ‘culture of triviality’

Probably the most important obstacle to the transfer of responsibility for police summary cases is to be found in the general view that the work of the summary court is relatively unimportant and is subject to a ‘culture of triviality.’ This culture sees the offences and penalties in the Magistrates’ Courts and even the people being processed, as trivial.\footnote{McBarnet, D., *Conviction-Law, the State and the Construction of Justice*, McMillan, London, 1981. At p. 146.} According to the culture of triviality, the functions of the Local Court are not sufficiently important to demand many of the ‘due process’ attributes of the trial courts, let alone an independent prosecutor. After all, the role played by defence lawyers is limited and defendants are not legally represented in nearly as many cases as they are represented.\footnote{The percentage of persons charged before the Local Court who have legal representation has declined in the five-year period from 1994/95 to 1998/99 from 61.5% to 54.3%. See Bureau of Crime Statistics and Research, *Key Trends 1999: Summary of Trends - Local Court Processes*, (1999a), Bureau of Crime Statistics and Research, <www.lawlink.nsw.gov.au/bocsar1.nsf/pages/localprocesses> 24 June 2001. Of course, the counter to this argument is that precisely because so few defendants are legally represented it is all the more important that they be able to deal with a prosecutor who is not a police officer.}

That is not to say that the work of the Local Court is invisible: McBarnet argues that the proceedings are deemed too trivial to warrant ‘serious attention’ from the press.\footnote{This is not so in New South Wales, where The Daily Telegraph in particular, provides regular tabloid reporting of cases in the Local Court, usually related to the first mention of a case in court, or to evidence or submissions, but without being followed through to the outcome of each case. In a sense, attention is devoted to Local Court cases as a form of entertainment, a never-ending ‘soap opera.’ The interest is often ephemeral and issues are left unresolved, reflecting the pressures on the court reporter to find colour and interest without getting bogged down in the detail of each case. Attention is also...}
given to the workings of the Local Court where it is perceived that a magistrate is ‘soft’ or biased against the police and where police are either the victims or defendants.

For the individual defendant the processing of the average case is brief and the treatment of it superficial. The pre-emptory nature of proceedings combine with what has been called the ‘ritual degradation’ of the defendant and the constraints of time and the summary nature of the court’s processes may lead to a sense of grievance on the part of individual defendants and victims appearing before the Local Court. The general public perception of the court and its business appears to be one of either amusement or a desire for retribution or to see justice done according to ‘law and order’ values. For some respondents to the 2001 DPP Prosecutor Survey, the relative unimportance of Local Court cases was expressed in the view that summary cases are a training ground for junior prosecutors:

Prosecuting summary cases would be a good starter for new prosecutors/graduates rather than being thrown in the deep end, which is what occurs now.

Another view expressed by DPP respondents was that summary prosecutions are not important ‘legal work’:

The types of cases, which are prosecuted summarily, are such as not to require the experience of lawyers to conduct them. It would be a waste of resources and tedious for those allocated to them.

2.D.ii Cost and Process efficiency

The trivial status accorded to the work of the Local Court means that, on balance, the arguments based on principle for an independent prosecution system are often

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310 In these instances the attention is often focused and critical. See, for example, Akerman, P., ‘Quality of Justice the Real Benchmark’, _Daily Telegraph_, Sydney, 11.
312 2001 DPP Prosecutor Survey response.
313 2001 DPP Prosecutor Survey response.
overshadowed by arguments based on the relative cost effectiveness and efficiency of
the existing system of prosecutions. According to the criteria of cost-effectiveness and
efficiency the police prosecutors could be seen to do a good job.314

The New South Wales Legal Service Branch . . . has been a productive and cost effective feature
of the lower court system for many years.315

One of the main reasons that our system of justice has functioned in the effective, speedy and
fair fashion that it has is due to the contribution of [police] prosecutors.316

Police prosecutors are generally highly skilled and [are] doing a good job.317

Introducing independent prosecution of police summary cases is likely to impact on the
cost and process efficiency of the Local Court in a number of ways. Primarily, the DPP
would create an additional level in the handling of police summary cases. This can be
seen as a positive reform allowing for better quality decision making, which some argue
would be more efficient (as in the quote above), and others argue would create
inefficiencies and slow the processing of cases.318 It has also been suggested that the
transfer of responsibility would be too expensive because of the nature of DPP
practices, or that the DPP would not be able to handle the workload of police summary

314 The role of police prosecutors is seen in a positive light in the Republic of Ireland (see
footnote 343) and New Zealand (see footnote 344).
315 Burkinshaw, I., ‘Submission by Sergeant I Burkinshaw, Prosecutor, Concerning the Future of
316 Wells, G., ‘Submission to the Royal Commission’, Royal Commission into the NSW Police
317 2001 DPP Prosecutor Survey response. There were six responses that stated that the police
were doing a good job. See Appendix A.
318 In Iceland there has been a reverse movement in the allocation of responsibilities from the
DPP to police prosecutors. According to Brienan and Hoegen, the Icelandic legal system made the
transition from an inquisitorial to an adversarial system in 1992. See Brienan, M., et al., Victims of Crime
in 22 European Justice Systems, (2000), International Victimology Website,
independent prosecution of criminal cases, Brienan and Hoegen, report that an office of the DPP had been
established in Iceland in 1961 with responsibility for a range of serious crimes. However, in 1997 the
responsibilities of the DPP were ‘drastically reduced’ to decentralise the handling of prosecutions back to
the police. This was justified on the basis that ‘a reduction in the number of agencies dealing with one and
the same case increases efficiency. The agency conducting an investigation has the most intimate
knowledge of a case, and communication about cases within one agency is easier than communicating
between two different agencies.’ (at p. 430).
Indeed, the DPP appears to have made a strategic attempt to persuade the government to commit itself to the transfer of responsibility for police summary prosecutions by calling for tenders to provide a state-wide summary prosecution service. The Office of the DPP made a ‘bid’ for this work and in doing so put pressure on itself to put forward a streamlined bid. As a result, the DPP may well have under-estimated the resources needed to prosecute police summary cases. A concern held by some DPP prosecutors is that the DPP has overestimated efficiencies to be gained from the transfer of responsibility and have consequently under-estimated the resources needed to conduct summary prosecutions. One 2001 DPP Prosecutor Survey respondent expressed the view that the Pilot was not a good indicator of the resources needed to take over summary prosecutions:

The DPP should prosecute such matters, but only if it can be done properly. The report done some years ago, which suggested that the DPP could replace the Police Prosecuting Branch with little more than half their staff (in reality) was and is laughable.

The RCPS made reference to the Police Commissioner’s qualified support for the independent prosecution of police summary cases. The qualification was that the Commissioner wanted to avoid ‘the difficulties which had occurred in England’ regarding the Crown Prosecution Service (CPS). The RCPS noted that the scale of change in New South Wales would not be as dramatic as that in England and Wales, as the DPP already has responsibility for the prosecution of indictable cases including committals. However, the criminal caseload in the District and Supreme courts amounts to a mere two and a half percent of the combined criminal caseload of the Local,

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319 There are significant unknown factors in the proposal to transfer prosecution responsibility, particularly in relation to the methods to be adopted by the DPP, the level of police co-operation, and the manner of processing Local Court criminal cases.

320 This was done in the absence of any formal commitment of government to the transfer of responsibility for summary prosecutions to the DPP.

321 2001 DPP Prosecutor Survey response.

Children’s, District and Supreme courts. The sheer volume of work therefore does present a significant challenge and this problem should not be under-estimated. Nevertheless a number of DPP respondents took a positive view of independent prosecution of police summary cases and thought that the DPP would be able to handle summary criminal cases more efficiently, without describing how this was to be achieved:

DPP prosecutions would involve faster disposal, more convictions, and independence.323

A strong negative view of DPP intervention is based on the perceived loss of the efficiencies of communication and command within the police structure. Of itself, the introduction of an independent prosecutor can be criticised as leading to double handling and attendant delays. This is perhaps less real than imagined, as the police officer already has to hand over responsibility for prosecution to the police prosecution branch. For some respondents, the introduction of the DPP is seen as leading to the loss of efficiencies derived from the close relationship between police and police prosecutors.324 Sometimes, the concern is bundled with the double handling issue, namely the addition of a further layer of bureaucracy with attendant problems of communication and delay:

Police prosecutors are better situated to prosecute summary matters because they have better access to information at short notice (within the confines of the police station, on the morning of court). They are more accessible for police officers who have last minute information about related matters such as AVO’s, recently charged or recently missing co-offenders, results of ongoing enquiries, fresh charges, etc. This information exchange is not as efficient between DPP and police. DPP prosecutors, particularly in the country, do not have the accommodation that would be required for DPP summary prosecutors to work effectively. Most of the up-dated information that police prosecutors receive comes to them IN the police station. DPP prosecutors don’t operate from within the police station.325

323 2001 DPP Prosecutor Survey response.
324 Importantly, the supposed efficiencies of rapid communication at the police station comes at the cost of accountability in terms of the absence of records of such communications. See the criticisms of police record keeping in relation to prosecution files in Independent Commission Against Corruption, 'Investigation into the Relationship between Police and Criminals, Second Report’, Independent Commission Against Corruption, Sydney, 1994.
325 2001 DPP Prosecutor Survey response. Three of the respondents to the DPP Prosecutor Survey stressed the value of the close relationship of the police and police prosecutor for the efficient disposal of cases.
An example of the problem of information flows from the police to the DPP prosecutor arose in the course of the Summary Prosecution Pilot at Dubbo Local Court. In the case of Clarke the DPP prosecutor accepted a plea to a charge of assault whereas the informant officer had intended to have a more serious charge of assault occasioning actual bodily harm laid at court. A plea of guilty was accepted for the assault charge and once the defendant was dealt with for that charge, it was not possible to proceed with the more serious charge.

In a submission to the RCPS, the Police Association of NSW commented on the Director’s requirement for a brief of evidence before appearing in a committal matter saying:

It does raise an issue that needs to be addressed if a similar policy is to exist for the prosecution of summary matters. The preparation of summary briefs for every arrest would be an unrealistic proposition.

And yet a number of respondents to the 2001 DPP Prosecutor Survey expressed the view that the police should provide briefs of evidence in all cases:

Each case is individual ... It is not for me to make a judgment call on whether any one person is more or less likely to be telling the truth about a matter ... In ALL cases, police should be providing complete briefs. In the event there is a plea of guilty, if nothing else it demonstrates a strong Crown case, or leads to the defence realising that there may need to [give] advice for a plea ... It may ... indicate [that] other charges, [should be laid, or] lead to a different assessment being made of the witnesses [and] each witness needs to be spoken to and assessed individually.

In contrast to the projected loss of efficiency, efficiency gains are projected to result from the vertical integration of prosecutions. Vertical integration arguably favours DPP

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326 Police v Clarke Unreported, Dubbo Local Court 24 July 1996.
327 The more serious charge was a late addition to the court list which was missed by the DPP prosecutor. This matter was the subject of a complaint against the DPP and the DPP apologised to the victim. In some respects the reliance on paper based files handled by a number of persons, and on personal communication (usually by word of mouth) between the police officer and the prosecutor is symptomatic of the failings of the current system, in that it allows for information exchanges without accountability. A way around the supposed obstacle of the varying shifts of police officers and the need to communicate concerning a particular case could be addressed by allowing the police and prosecutor to communicate by electronic means updating information as required in relation to each case.

329 2001 DPP Prosecutor Survey response.
involvement in summary prosecutions because of the rationalisation of prosecution resources overall. Projected benefits of such a rationalisation are the timely review of all cases to determine 1) whether to proceed, 2) the appropriate charge(s), and 3) the appropriate court level for prosecution.\textsuperscript{330} However, this argument has greatest validity where the summary and indictable jurisdictions overlap, so that cases begun by police prosecutors may end up as trial cases in the higher courts. However, this issue does not apply in New South Wales where the integration of DPP control of cases to be heard on indictment\textsuperscript{331} already takes place by virtue of the DPP’s conduct of committals in the Local Court.\textsuperscript{332} Despite the DPP control over committals, it may be that there are a small percentage of cases dealt with in the Local Court that should be considered for prosecution in the trial courts and this may not take place currently as the police prosecutor controls the referral of such cases, to the DPP to consider prosecution on indictment:\textsuperscript{333}

There are many serious matters that don’t get referred to the DPP at all by police that are serious enough to warrant DPP and/or District Court involvement. Involvement at an early stage, or from the beginning would be more likely to see the correct charges, and jurisdiction preferred.\textsuperscript{334}

\section*{2.E Other models for the conduct of police summary prosecutions}

Before proceeding to consider police and prosecution discretion in NSW in more detail, it is worth commenting on the suggestion that the use of police as prosecutors is a peculiar and temporary feature of the criminal law in the Australian States. Corns describes three stages in the development of summary prosecution systems in Australia. The first was from 1788 to 1850 with the use of private prosecutors and \textit{ad hoc} policing arrangements based on similar arrangements in England. The second stage from 1850 to the 1980s saw the acceptance of police as prosecutors in the courts of summary

\begin{footnotesize}

\textsuperscript{331} The efficiency of DPP involvement in committals has been enhanced in metropolitan Sydney by centralising committals at particular Local Courts.

\textsuperscript{332} In relation to those indictable offences that may be dealt with summarily, the decision whether to elect trial on indictment must be made by the prosecutor or defendant before a hearing commences in the Local Court. Section 20 \textit{Criminal Procedure Act} 1986 (NSW). See footnote 150 and accompanying text.

\textsuperscript{333} The police prosecutor currently decides whether to refer cases to the DPP, for the DPP to make an election for the case to be heard in the District Court. The procedure for the DPP to make an election is set out in the \textit{Criminal Procedure (Indictable Offences) Act} 1995 (NSW). See footnote 150 and accompanying text.

\textsuperscript{334} 2001 DPP Prosecutor Survey response.
\end{footnotesize}
jurisdiction. According to Corns, the questioning of current prosecution arrangements marks the third and current stage. Corns says of this stage:

> It may be some time before a wholesale transfer of summary prosecutions to the DPP takes place, but, it is suggested, the driving forces are so compelling that it is inevitable that sooner or later a single system of summary prosecutions conducted by a single agency will emerge. When this last step occurs, the traditional prosecutorial role of police will be seen for what it has always been, a temporary measure to meet the practical and administrative needs of societies in transition.\(^{335}\)

Certainly the current arrangements for the prosecution of police summary cases are based on historical conditions and circumstances. It is less clear that the ‘driving forces’ for change are as compelling as Corns suggests or that there is any clear model for the organisation of prosecutions or that there is any clear model for the allocation of executive or judicial authority for the conduct of prosecutions.\(^{336}\)

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\(^{336}\) There are a number of models for the organisation of prosecutions based on the various permutations that exist regarding who may commence criminal charges, whether they be individuals, or State officials exercising judicial or executive authority. When one considers the question of who may commence proceedings and in what capacity, it becomes more difficult to fit various prosecution systems to distinct models. See, for example, the various arrangements within the 22 European nations in the study by Brienen, M., *et al.*, *Victims of Crime in 22 European Justice Systems*, (2000), International Victimology Website, <http://www.victimology.nl/onlpub/Brienenhoegen/BH.html> 5 June 2001. Similarly, we have the contrast between the nineteenth century domestic English model of criminal prosecutions based on the grand jury and individual power to prosecute indictable offences and the colonial English model of superintendence of indictable prosecutions by the Attorney General. Another more ancient hybrid model is presented by the Procurator Fiscal’s office in Scotland. This office represents a non-elected executive office holder in an opportunity system of prosecutions with superintendence of the police.

Significantly, the wide range of arrangements for prosecutions reflects the various social, political and cultural settings in each jurisdiction and points to the importance of considering the overall decision-making environment. See Edwards, J. L. J., ‘Walking the Tightrope of Justice’, Royal Commission on the Donald Marshall Jr., Prosecution, Halifax, 1989. At p. 96-98, for a description of six models then in use among Commonwealth nations for the organisation of prosecutions. They are:

1) the Attorney General as a public servant combining the role of DPP (Kenya, Singapore, Pakistan, Cyprus),
2) the political Attorney General as a member of government but not of cabinet with an independent prosecutor who is subject ultimately to the direction and control of the Attorney General (England and Wales),
3) the political Attorney General as a member of cabinet with an independent DPP who is subject ultimately to the direction and control of the Attorney General (Commonwealth of Australia, the Australian States, the ACT and NT, Canada),
4) the DPP as public servant not subject to direction or control by any other person or authority (Jamaica and Guyana),
5) the DPP as public servant subject to the direction of the President (Tanzania, Ghana 1962-66), and
And yet, there is a perception that the police prosecution of summary police cases is increasingly seen as an unacceptable anachronism. One respondent to the 2001 DPP Prosecutor Survey expressed the view that New South Wales ought to catch up with other jurisdictions:

We should come into line with the vast majority of other jurisdictions. The PPs [police prosecutors] have a police mentality, not a prosecutorial mentality/approach/outlook.\textsuperscript{337}

However, the acceptance of police as prosecutors is not unique to Australia.\textsuperscript{338} Brienan and Hoegen describe how prosecutions are organised in each of the 22 countries surveyed.\textsuperscript{339} Of the 22 European countries, seven use police as prosecutors namely: Cyprus, France, Denmark, Iceland, Ireland, Malta and Norway. Police are also used as prosecutors in summary cases in New Zealand\textsuperscript{340} and Horwitz describes the use of police as prosecutors in the USA as ‘a widespread practice in the lower state courts’ and that ‘the police prosecution of misdemeanor offences before federal magistrates in various United States Magistrates’ Courts is a relatively common practice.’\textsuperscript{341}

The creation of the CPS in England and Wales as a single prosecution agency was a response to a situation where both summary and indictable charges were largely in the

\textsuperscript{6) } the DPP as public servant generally free of control but required to consult with the Attorney General who may then give directions to the DPP (Zambia).

See also Bryett, K., \textit{et al.}, ‘Criminal Prosecution Procedure and Practice: International Perspectives’, Northern Ireland Office, Belfast, 2000. This study reviews the prosecution process in Northern Ireland, England and Wales, Scotland, Republic of Ireland, France, The Netherlands, Belgium, New Zealand, Australia, Canada and United States of America.

\textsuperscript{337} 2001 DPP Prosecutor Survey response.

\textsuperscript{338} Given the difficulty of separating rhetoric from reality in the criminal law there are very real difficulties in making direct comparisons between domestic and overseas legal systems. There will inevitably be problems of interpretation and emphasis, and a need to understand the cultural and historical context in which a legal system exists. See Damaska, M., ‘The Reality of Prosecutorial Discretion: Comments on a German Monograph’ (1981) 29 \textit{The American Journal of Comparative Law} 119-138. Nevertheless, subject to that understanding, international comparisons are useful. See, for example, McKillop, B., ‘What Can We Learn from the French Criminal Justice System’ (2002) 76 (1) \textit{Australian Law Journal} 49-72.


\textsuperscript{340} For a discussion of the role of police prosecutors in New Zealand see McGonigle, S., ‘Public Accountability for Police Prosecutions’ (1996) 8 (1) \textit{Auckland University Law Review} 163-183.

hands of local police authorities. More recently, in the Republic of Ireland, the government commissioned an inquiry to consider the transfer of responsibility for summary prosecutions and in 1999 this recommended against such a proposal on efficiency grounds. The Law Commission of New Zealand similarly concluded in 2000 that police should continue to prosecute summary cases in the NZ District Courts:

Given the considerable steps taken by the police to establish an independent police prosecution service, and the substantial costs in transferring responsibility for these prosecutions to another body, the Commission confirms its previous view. The police should retain the prosecution of summary offences, subject to appropriate guidelines and mechanisms of accountability being put into place, as recommended in this report.

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342 See footnote 251.
3 CHAPTER THREE – THE SUMMARY PROSECUTION PILOT

The Pilot was developed by the Royal Commission into the NSW Police Service, the NSW Police Service and the DPP and as such was a relatively spontaneous and poorly planned exercise in assessing the impact of the independent prosecutor on the conduct of police summary cases. There was no statistical design; the study period was too short, and the sites selected too restricted (in that it applied in just two courts and no other sites were selected to act as a statistical control).\(^{345}\) In these respects the Pilot reflects the compromise and negotiation between the DPP (advocating a transfer of responsibility) and the Police Service, (which supported the idea in principle but with strong reservations) arrived at under the tight timeframe imposed by the RCPS. Despite these limitations, there is value in examining the Pilot experience because it is a unique experiment in the transfer of prosecution responsibility in a jurisdiction that has hitherto not been closely studied. It also involves the DPP prosecutors confronting issues that are unique to the Local Court and seeking to resolve them.

3.A.i The allocation of prosecution discretion during the Pilot

Prosecution discretion was allocated during the Pilot as shown in Figure 5 The prosecution decision-making hierarchy for the Summary Prosecution Pilot. The allocation of prosecutorial discretion allowed individual DPP prosecutors to exercise the full range of prosecutorial discretion short of withdrawal of all charges in respect of the one incident.\(^{346}\) Most prosecution decision-making concerning the withdrawal of charges was decentralised to a local solicitor-in-charge at each Pilot court. However, police support for any proposal to withdraw a charge was pivotal to this arrangement and the solicitor-in-charge of the Pilot at either Campbelltown or Dubbo could only decide whether or not to withdraw a prosecution where the police informant agreed to the proposed action. In the event that the police informant disagreed with the action

\(^{345}\) Care must be taken with the figures provided from the Pilot. The NSW Bureau of Crime Statistics and Research reported to the Evaluation Team that the Pilot was an inadequate basis for drawing statistical conclusions about the effect of DPP prosecution of summary cases. See Waller, K., et al., 'Prosecuting Summary Offences: Options and Implications', NSW Premier's Department, Sydney, 1997. Accepting these limitations, the Pilot material is used in this thesis as an indicator of the work of the Local Court in the absence of more detailed studies.

\(^{346}\) The power to charge bargain is particularly important in relation to over-charging by the police. Over-charging may be used by the police to provide leverage for a plea to the lesser charge. See for example, McConville, M., et al., The Case for the Prosecution, Routledge, London, 1991.
proposed at a local level, the matter had to be referred to the Director’s Chambers and fourteen disputed matters were referred to the Director’s Chambers from the Campbelltown Pilot.\textsuperscript{347}

\textit{Figure 5 The prosecution decision-making hierarchy for the Summary Prosecution Pilot}

\begin{center}
\begin{tikzpicture}
\node (dpp) at (0,0) {DPP};
\node (deputy) at (0,-5) {Deputy Directors};
\node (solicitor) at (0,-10) {Solicitor in Charge of Pilot};
\node (pilot) at (0,-15) {Pilot Solicitors};
\path[->] (dpp) edge node {Withdrawals where the police informant objects} (deputy);
\path[->] (deputy) edge node {Withdrawals where the police informant consents} (solicitor);
\path[->] (solicitor) edge (pilot);
\end{tikzpicture}
\end{center}

3.A.ii The reasons for considering matters for withdrawal

Perhaps the most remarkable aspect of the Pilot was the ability of DPP prosecutors to identify cases to be considered for withdrawal without the police or defence pointing out deficiencies in the prosecution case.\textsuperscript{348} The Pilot demonstrates that problems with reluctant victims become self-identifying and that given sufficient resources DPP prosecutors can identify a number of problem cases as shown in Appendix B - \textit{The Survey of Summary Prosecution Pilot}. Matters considered for withdrawal during the Pilot fell into four basic categories:

1. insufficient evidence to prove the offence,

\footnotesize{\textsuperscript{347} In each of these cases the police objected to the withdrawal of charges. Conceivably, the prosecutor’s decision to continue a prosecution could also be disputed by the police informant, particularly if that was likely to lead to judicial criticism of some failing in the police case.}

\footnotesize{\textsuperscript{348} Helen Wilson, the Solicitor in charge of the Campbelltown Pilot, confirmed in discussion with me in January 2000, that the Pilot solicitors at Campbelltown were readily able to identify factual and victim deficiencies in the prosecution case in most of the cases considered for withdrawal. The capacity of DPP prosecutors (working outside of the Pilot) to identify suspect cases may be questioned particularly given the limited information exchanged by police prior to the entry of a not guilty plea.}
2. evidential problems, such as an incompetent witness or the police not being able to locate a witness,
3. public interest issues militating against prosecution, and
4. victim wishes not to proceed.

The discontinuance records kept for the Summary Prosecution Pilot at Campbelltown showed that assault charges were most often considered for withdrawal, comprising some 37% of the matters considered for withdrawal, as shown in Table 4 Reasons for considering cases for withdrawal - Campbelltown Pilot. Of these, almost three in four were reviewed because of the victim’s application for withdrawal and only 8% on the basis of there being no case or no reasonable prospect of conviction.\footnote{This indicates that victim co-operation is likely to be at least as significant an issue as it is in the trial courts. See Table 7 NSW DPP no-bill statistics 1987-88 – 1994-95 and accompanying text.} In a limited number of cases considered for withdrawal\footnote{The procedure for the withdrawal of prosecutions during the Pilot is discussed in Appendix B.} during the Pilot, police informants raised problems with the prosecutor and sought withdrawal; in other cases the defence made representations to the DPP prosecutors. However, DPP prosecutors put forward the majority of matters considered for withdrawal during the Pilot.\footnote{See the analysis of the Pilot at Appendix B.} Of all the matters considered for discontinuance, 41% were on the basis of evidential problems and 41% on the basis of the victim’s wishes.\footnote{See the discussion of existing DPP decision-making below. Over an eight-year period of reporting, victim issues were cited 20% of the time in relation to decisions to file a no-bill. It should be noted that no-bill figures do not include decisions to withdraw charges made prior to a committal at the Local Court level. See footnote 950 and accompanying text.}
Table 4 Reasons for considering cases for withdrawal - Campbelltown Pilot

<table>
<thead>
<tr>
<th>Reason for review</th>
<th>Total for all charges</th>
<th>Assault only</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Factual – no case</td>
<td>43</td>
<td>41</td>
</tr>
<tr>
<td>Public interest</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Evidential problem</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Victim’s request</td>
<td>43</td>
<td>41</td>
</tr>
<tr>
<td>Total n(^{353}) =</td>
<td>106</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Analysis of DPP records for matters recommended to be discontinued at Campbelltown during the Summary Prosecution Pilot.

3.B Case study - A bike, a plastic bag, and three violent arrests

Cases involving public order offences did not figure prominently in the discontinuance register for the Pilot at Campbelltown or Dubbo. Nevertheless in the course of the Pilot at Dubbo Local Court, there were two related cases that illustrate the independent prosecutor’s dilemma of what to do about questionable police practices that push the limits of ‘consent’ policing in the lead-up to the decision to charge. The following case study taken from the Pilot at Dubbo is based on two incidents over a number of months involving the same three juveniles and different police. The case study opens up the possibility of an expanded role for the independent prosecutor in the prosecution of public order offences by considering context and the conflicting narrative understanding of the police and the defendant and the propriety of surrounding police action.

In the first incident the police arrested two juveniles and charged one with the ‘quinella’ of using offensive language and resisting arrest. The other juvenile faced an additional charge of assaulting police, making up the ‘trifecta.’ There is no dispute that the

\(^{353}\) Of the 111 cases listed in the Discontinuance Register for the Campbelltown Pilot only 106 contained sufficient detail to determine the nature of the charge and the reasons for decision. There were however, two sets of DPP Pilot records. One was for attending court and another abridged set was separately kept as a register of matters considered for withdrawal. It was the abridged record that was made available for this study.
language used by the children towards the police officers was, at the time of the Pilot, capable of being found to be offensive. The crucial issue for the independent prosecutor was the extent to which the police behaviour in the incident should be taken into account.

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354 See footnotes 584 and 662. In the case of Shannon Dunn at the Dubbo Local Court in 1999 the magistrate dismissed a charge of offensive language based on the use of the words 'fuck off' directed by the defendant to a police officer. The case of Police and Shannon Thomas Dunn is referred to in Chan, C., et al., 'Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan', Institute of Criminology, University of Sydney, Sydney, 2000, as a 'Poor Practice Case Study.' The facts of Dunn are very similar to the scenario described in relation to B and W in the first incident regarding the bike. There is an important difference between the decision by Heilpern LCM in Shannon Dunn's case and the decision of the DPP in the cases of B and W in relation to the offensive language charge. Heilpern's decision was based on a finding that 'a reasonably tolerant and understanding and contemporary person would not have been wounded or angered or outraged.' The DPP did not base its decision in the cases of B and W on the argument that the words were not offensive. Rather it considered the whole of the circumstances and decided that it was not in the public interest to proceed, given the behaviour of the police.


356 The 'facts' in this case come from the facts sheet prepared by the police and from police statements supplied to the DPP.
Incident 1 – A bike

On a Saturday afternoon during a routine patrol, two police officers see three young people, one of whom is riding a bike. None of the young people is wearing a bicycle helmet. Officer 1 stops the young people saying ‘Stop there I want to talk to you for a minute.’ Two of the young people continue to walk away and Officer 1 says ‘Stop there I asked to speak to you, I want to know who owns the bike and where are your helmets.’ The young people stop and Officer 1 inspects the serial number of the bike.

Officer 2 then says to Youth B ‘Can you tell me who owns the bike?’ Youth B replies ‘What the fuck for? It’s my f**ken bike I tell you, fuck off.’ Youth B is arrested for offensive language. A struggle takes place with Youth B as the police led him to the police van. In the struggle, Officer 1 sees ‘the young person push his right elbow back and up in the direction of my face.’ Officer 1 says he believed that he was about to be struck by the arm and elbow. That action is the basis of a charge of assault police. The defence alleges that Officer 1 struck Youth B in the back of the head to force him into the truck.

Officer 1 then picks up the bike and Youth W says ‘F**k me y**ken dogs.’ Officer 1 says ‘You’ve been told not to swear you are also under arrest.’ Both officers grab an arm of Youth W who says ‘don’t you f**ken touch me.’ He is then led to the rear of the

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358 In this way, the officer seeks to have all three children respond to his command.

359 At this point, the officer is broadening the scope of his inquiry to the ownership of the bike, which becomes a critical issue in relation to whether there was reasonable cause to stop and question the young people.

360 It is questionable whether there was any probable cause to have any suspicion in relation to the bike and it is not until months later, when the subsequent arrest is put into question that the officer says that he was acting on a report of a ‘similar’ bike having been stolen.

361 Defence submission to the DPP.
van and placed inside. He is also charged with resist arrest, apparently based on the use of the words 'Don’t you fucken touch me.'

Both young people are taken to the police station and held for one hour and twenty minutes before being questioned about the bike. They refuse to talk to the police and are released after both have been served with court attendance notices for the charges of offensive behaviour and resisting police. In addition, youth B faces a further charge of assaulting police. The police take no action concerning the ownership of the bike.

Just one month later, the same young people were involved in another incident, although not with the same police officers.

**Incident 2 – a plastic bag**

It is mid-morning on a Saturday and Officer 3 is on patrol in a police car when he sees ‘three young persons well known to me’ in Macquarie Street, Dubbo (the main shopping street). One of the young persons (B) appears to hide a plastic bag behind his back and when the police car passes, the three start to walk off. Officer 3 drives around the block and stops his car in a driveway off the main street in front of the three young persons. He gets out and approaches the three saying ‘Come here boys.’ One of the three (the defendant, W) says ‘What have we done?’ Officer 3 says ‘I just want to speak to you.’ He says to B ‘What is in your bag?’ the young person replies ‘Track pants.’ Officer 3 then asks ‘Have you got a receipt for the pants?’ A receipt is produced by B and checked by Officer 3.

Officer 3 then says ‘You are all going to be searched, do you have anything in your pockets that you should not have?’ Officer 3 searches two of the young people including the defendant. Officer 4 searches the other young person. Nothing

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362 This time delay included time spent by the police to secure the attendance of an adult to sit in on an interview with the two young people.

363 The account that follows is based on the witness statement of Officer 3, dated 4 September 1996.
incriminating is discovered in the searches. Officer 3 says ‘OK boys, you can go now, see you later.’

Officer 3 gets into the police car and hears ‘yelling that sounded like swearing. I turned to look and saw the young person (the defendant W) facing me and [he] was saying something to (Officer 4) and me which I believed was offensive.’ Officer 3 walks up to W and says ‘What did you say?’ W says ‘You can’t pick on us, we have done nothing wrong, you can’t just stop us whenever you want.’ Officer 3 says ‘Come here’ indicating for W to come away from the other young persons.

Officer 3 says in his statement ‘My intention was to speak to the young person away from his brother and the third young person. I thought that I would be able to explain my actions better if the young person was away from the other two where he was showing off by mouthing off at us. As the young person and I walked away from the other two he said ‘You fucking dog.’ I said ‘Right you are under arrest for offensive language’ he said ‘Get fucked, I ain’t done nothin.’ I took hold of the young person’s left upper arm to escort him to the rear of the police truck. He pulled away and began to yell, I do not recall what the young person was yelling.’

Officer 3 then tightens his grip on W who pulls away and flings his arms about. Officer 3 applies a wristlock to the left hand of W and Officer 4 helps to push W towards the police truck. W punches Officer 3 with a ‘roundhouse motion.’ Officer 3 grabs W again, pushing him backwards and then uses a ‘leg sweep’ to knock W to the ground where W falls on his buttocks. Officer 3 knocks W flat and pins him to the ground. W lashes out. W is then placed in the truck with the assistance of Officer 4. On the way to the police station ‘he yell[s] offensive language out of the truck the entire way.’ Officer 3 ends his statement after noting that W had a graze, saying, ‘As a result of the assault upon myself I had swelling, redness and soreness to the right side of my face and stiffness to my neck.’

The trigger for the review of these cases was not the manner of policing but an issue of police non-disclosure that came to light when the hearing of the second incident
commenced at Dubbo Children's Court.\textsuperscript{364} When the non-disclosure was discovered, the hearing of the charges was adjourned to allow the police to obtain statements from the other witnesses. The DPP prosecutor commenced a review following defence representation regarding the first incident, and that review expanded to consider the circumstances of the police interaction in both incidents. The police were opposed to the withdrawal of these charges. Like all matters during the Pilot, in the event of disagreement with the informant officer, the decision to withdraw could then only be made in the Director's office.\textsuperscript{365} A decision was made not to further proceed with the prosecution of the charges against B and W arising out of both incidents. This decision was made on public policy grounds because the police actions, which led to the words complained of, were said to be 'unreasonable' and 'in excess of authority'.

The two incidents involving B and W illustrate the nature of 'consent policing' in police-defendant interactions where the power exercised by the police is not based on any formal enabling rules but is actively negotiated between the officer and the defendant.\textsuperscript{366} In each case, the officer acts on an unarticulated and indistinct suspicion. The defendant could refuse to cooperate without using any of the words 'fuck,' 'fucken,' 'fuck off,' 'fuck me,' or 'fucking dogs.' In the absence of such language, the police would have to rely on a formal power to take further action against the defendant. However, as soon as B and W use these expressions the police arrest them for an offence based on the very language used to object to questionable police behaviour.

The offensive language charges could be easily proven, although the resist police and assault police charges might be considered less readily established on the evidence of the police officers. A DPP prosecutor had screened the charges in the second incident only before it came on for hearing and had not recommended that the charges be withdrawn. It may be that the prosecutor did not have much time from receiving the

\textsuperscript{364} It just so happened that the second incident became the first to be heard before the Dubbo Children's Court. The problem that arose in the hearing was that the police had failed to disclose the existence of potential witnesses (being two nearby shopkeepers who had seen the initial interaction between the police and the juveniles). The officer in charge had incorrectly indicated in a routine disclosure form that no other material existed that might be relevant to the prosecution.

\textsuperscript{365} That is by either the Director or one of the Deputy Directors.

\textsuperscript{366} Section 352, \textit{Crimes Act} 1900 (NSW) statutory stop and search powers postdate these two case studies.
police statements to consider the matter. In any event, seen in isolation, the circumstances of the offence did not cause the DPP prosecutor to make a recommendation for withdrawal.

The two incidents are set out in some detail to indicate the nature of many summary police cases where pro-active policing practices push the limits of police authority. In the first incident the police officers had two rationales for taking action. One was the riding of the bike without a helmet and the second was the 'suspicion' touching the bike. From the police perspective, the three young people with one bike was seen as suspicious, and the lack of a bicycle helmet may have added to the police officer's suspicion regarding the ownership of the bike (depending on the general observance of the law requiring a helmet to be worn). The suspicion was also probably heightened because the juveniles were Aboriginal. The police officer later claimed that there had been a report of a bike of a similar description being stolen in the area. However, the incident reports later used to substantiate this claim were generic in nature and were not proximate in time to the incident. Whatever suspicion was held by the officer, was not communicated by him to the juveniles and instead has to be inferred from the officer's behaviour.

Officer 1 stopped the juveniles and inspected the serial number of the bike, and to do so would have required close inspection of the bike. At this point the officer did not indicate to the juveniles or in his statement the legal basis for this action. Thus, up to this point the officer was using his street authority to negotiate what he could do. When he asked 'Who owns the bike?' the language used in response to this question formed the basis of arrest and charge. From the police point of view, the reaction of B and then of W may be taken as a further indication of guilt. However, within the negotiating framework established by the police officer, there was no room for dissent. To not cooperate would have indicated guilt or at least a bad attitude. Either way, from the police

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367 Which only applied to the rider and yet the officer says 'Where are your helmets?'
368 In the same way an Aboriginal driving a late model car was treated as suspicious in the documentary *Cop it Sweet*. Brockie, J., *Cop It Sweet*, ABC Television, Sydney, 1992. On the making of this documentary see Brockie, J., 'Police and Minority Groups' (1993) 74 (7) *Police Journal* 8-10.
369 This view also accords with the common saying that 'Those with nothing to hide, have nothing to fear.'
perspective, if non-co-operation had arisen from guilt then it may have been worthwhile for the police to pursue their inquiries with that person. If non-co-operation had arisen from a bad attitude to authority then ‘a little aggravation’ directed at the defendant would have done him or her no harm\textsuperscript{370} and gives the officer a sense of empowerment.\textsuperscript{371}

From the point of view of the juveniles, they are in a no-win situation with the police. If they co-operate, the police want more. Their reaction (with the language indicated) results in a violent struggle with the police. Normal everyday activities like riding a bike become a focus for police attention. Even going shopping or ‘hanging out’ in the main street becomes perilous. Under police observation, should they hide? Should they conceal anything that might arouse police attention? Whether they do or they don’t, the police may well be drawn to them in any event. Having had at least one run in with the law, the attempt to hide the bag, or to walk away, or even to hide from the police may seem the best way to avoid being hassled. For the police, it is a sign of suspicious behaviour.

These incidents also demonstrate the spiralling intensification of repeat processing by police. The police officer in situation 2 says that the juveniles are were well known to him which is effectively code for the number of run-ins between the juveniles and this particular officer and other officers, illustrating the individual and collective aspects of police ‘knowledge’ and also of the juvenile's understanding of the role of the police. It therefore formed part of the construction of the ‘deviant’ character of the juveniles and the ‘oppressiveness’ of police. In the second incident the officer gave no explanation of what suspicion he held to require the search and after nothing suspicious was found in the bag.\textsuperscript{372} In this incident the juveniles were co-operative with the police throughout

\textsuperscript{370} For example see Jopson, D., ‘Young, Harassed and Aboriginal’, \textit{The Sydney Morning Herald}, 22 November 1999, Sydney, 6. Wellington Police Station Commander, Sergeant David Powell is quoted as saying ‘It’s policy in this area of command that recidivists are targeted as hard as we can go.’

\textsuperscript{371} Brockie indicates that ‘general duties police feel misunderstood, undervalued and constantly under siege from politicians, the media, welfare groups and their own bureaucracy.’ See Brockie, J., ‘Police and Minority Groups’ (1993) 74 (7) \textit{Police Journal} 8-10.

\textsuperscript{372} See also the reports of street searches in the experience of young Asian defendants in Cabramatta in Sydney. Maher, L., \textit{et al.}, ‘Anh Hai: Young Asian Background People’s Perceptions and Experiences of Policing’, University of New South Wales, Faculty of Law, Sydney, 1997.
their ‘field interrogation.’ Only afterwards was there a reaction, which the police responded to. In that response W put his complaint clearly without invective. The officer’s reaction was again to take control and separate W from his companions to speak to him. W was given no choice in the matter. He reacted with invective and was arrested.

Importantly, the juveniles involved in these incidents were Aboriginal. As members of a marginalised community, the young people could have expected to be the subject of police suspicion and be required to submit to many more stops and searches than other community members. The disrespect for the police in these two cases was specifically related to the attention paid by the police to the young people, which included stopping, questioning and searching them. The result of each interaction was the arrest of two, and then one, of the young people for the manner in which they questioned and took issue with the behaviour of the police. In the first incident, two young people were detained for over an hour in custody whilst the police pursue further inquiries. In the second incident, the youth W was involved in a violent physical confrontation with police as they forcibly arrested him.

373 See footnote 169.
374 See, for example, NSW Ombudsman, ‘Policing Public Safety’, NSW Ombudsman, Sydney, 1999. In this report of the Ombudsman’s review of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW) it is stated that ‘people from 15 to 19 years of age are much more likely to be stopped and searched for knives than any other group’ (at p. 18). The report then goes on to claim that 6.6% of those searched were identified as Aboriginal and that 5.7% of searches where a knife or other implements were found involved Aboriginal people. Elsewhere, the study notes the looseness of the definition of a ‘knife or other implement’ indicating incidents involving such things as scissors for school, scissors in a motor vehicle, and pen knives (at pp. 170-188). It also points to the looseness of police discretion citing instances where one officer takes no action regarding a pair of folding scissors and yet another officer the next day takes action (at p. 174). In another instance a police officer is criticised by another police officer: ‘you can go overboard like [small regional NSW town] did. Remember that twit, highway patrol fella, went out and stopped at the saleyards and went right through all the cockies because they were carrying their pocket knives, and came back with a bucket full, and of course there was an outcry over that.’ (at p. 180). And yet, the appropriateness of the definition, and of the police officer’s interpretation, is implicitly accepted in the report of ‘successful’ searches involving Aboriginal people. Furthermore, the risk of under-reporting of Aboriginality is not acknowledged in relation to this finding. Most strikingly, the report indicates that some of the police districts with the highest use of powers under the Act are the same as those with high Aboriginal populations as identified in Jochelson, R., ‘Aborigines and Public Order Legislation in New South Wales’, NSW Bureau of Crime Statistics and Research, Sydney, 1997. See also, Chan, C., et al., ‘Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan’, Institute of Criminology, University of Sydney, Sydney, 2000. Overall, the report indicates the dramatic widening of police powers through non-offence provisions and of net-widening in relation to concepts of deviance.
In the short term, the arrest was used to force the juvenile to submit to police authority although the officer had available the alternative option of making a breach report against the juvenile for a summons to issue. In this situation, the immediate policing goals of maintaining control and authority led instead to the arrest of the young people. The overwhelming impression is that in the second incident arrest was being used as a punishment for the attitude displayed by W to the elaborate and extended display of police authority. In both incidents the use of arrest put an end, albeit by means of escalating violence, to the challenge to police authority. This targeting of suspect Aboriginal children who are ‘well known to police’ as shown in the cases of B and W ensures that even in the absence of any other offending such children’s behaviour is continuously criminalized through the attention of the police.

The cases of B and W illustrate two important points. The first is the readiness with which police behaviour of this type is normalised and of itself, does not prompt prosecution review of the charges. The second point is that once the attention of the prosecution was focused on the police behaviour the prosecutor undertook a review of the charges, which led to their withdrawal. In this the prosecutor looked beyond the legal elements of the charge i.e., the immediate use of language against the police involved and considered the larger context in which that language was used and whether the application of police working rules in this way is appropriate.

375 After first seeing the juveniles the police 1) turn their car around, 2) stop in front of the juveniles, 3) call them over, 4) question them, 5) request they produce a receipt and 6) on production of the receipt check it, 7) question them further, 8) search each of them in the main street, 9) peremptorily dismiss them without apology, 10) return to them because of the possible use of offensive language, 11) challenge them, and 12) require one of them to move away from the group ‘to be further spoken to’.
4 CHAPTER FOUR – ‘LIVING IN THE CRIMINAL JUSTICE SYSTEM’

The practicality is that when dealing with the Aboriginal community, police are often only left with one option and that is to arrest. Situations need defusing, victims need protecting, continual offenders need to be detained and the community expects protection.

If Aborigines are arrested once, the likelihood of re-arrest is 92 per cent. If they go to a second arrest, the likelihood of a third arrest is 94 per cent. You get to the point of virtual certainty. These people are living in the criminal justice system once the sequence is set under way.

It is inescapable that the law is differentially applied (or more precisely breaches of the law are differentially revealed) to the detriment of members of marginalised communities. The disproportionate use of the law against minority groups is well recognised in Australia and elsewhere and it is a notorious fact that Aboriginal and other minority group members are over represented in the statistics for prosecution of public order offences. The way each agent in the criminal justice system responds to that issue is of crucial importance to the rule of law.

New South Wales figures for 1998 show that Aboriginal people were fifteen times more likely than the state average to be charged with offensive behaviour offences and in some regions up to eighty times more likely to be charged with offensive behaviour

376 Goodall, B., ‘Deaths in Custody: Where to Now?’ (1996a) (April) Police News 15. Goodall was at the time a serving police officer in Bourke, NSW.


offences.\textsuperscript{380} A study by Chan and Cunneen for the period 1997-98 showed that in each of these years there were grossly disproportionate rates of apprehension of Aboriginal males for Offensive Conduct or Language charges in those five local area commands which have the highest rates of charging for these offences and the highest levels of growth in the use of these charges. In these commands the ratio of over-representation ranged from 19.1 to 32.3.\textsuperscript{381} The rates of over-representation for Aboriginal females was in some locations many times that for non-Aboriginal females and greater than the rate of over-representation for Aboriginal males.\textsuperscript{382}

There has been a long-standing awareness of the problem of the over-representation of Aboriginal people in statistics for police summary cases. In a nationwide study undertaken for the RCIADIC into police custody in 1991, it was found that 29\% of police custody incidents involved Aboriginal people and that overall, the custody rate for Aboriginals was 27 times that of non-Aboriginals.\textsuperscript{383} There is a large body of work now available on the over-representation of Aboriginal people in crime statistics and, in particular, for public order offences. The high rate of arrest for Aboriginal people in contrast to non-Aboriginal people is shown in a thirteen-year longitudinal study of arrest patterns in Bourke using the police station charge book entries for the years 1980-1992. In this study, Alvares\textsuperscript{384} found that 882 Aboriginal people were arrested over that

\textsuperscript{380} NSW Aboriginal Justice Advisory Committee, ‘Policing Public Order’, Aboriginal Justice Advisory Committee, Sydney, 1999. The overall decline in deaths in custody or Aboriginal people has been from 4.4 deaths per 100,000 for the period 1980-89 to 3.8 deaths per 100,000 for the period 1990-99, with a transfer from rates of death in police custody to deaths in prison custody. See Williams, P., ‘Deaths in Custody: 10 Years on from the Royal Commission’, Australian Institute of Criminology, Canberra, 2001b.


period in Bourke.\textsuperscript{385} There were a total of 2,336 public order offences\textsuperscript{386} for Aboriginals and non-Aboriginals in Bourke in the period of Alvares' study. Of these charges, 2,038 were laid against Aboriginal people and this accounted for 87.2\% of all public order charges, despite Aboriginals making up only about 35\% of the population. Overall, 'public order charges' represented 26.6\% of all charges laid against Aboriginal people.\textsuperscript{387} Regarding the frequency of arrests, the study shows that just over 40\%\textsuperscript{388} of the Aboriginal people arrested for these offences were arrested on just one or two occasions.\textsuperscript{389}

The spread of arrests for all offences into the Aboriginal community can be gauged by the fact that the number of individual Aboriginal people arrested over the 12 year study period equates to about three-quarters of the resident Aboriginal population of the town.\textsuperscript{390} Aboriginal people were arrested at a far higher rate than non-Aboriginal people were.\textsuperscript{391} This arrest rate is made up of very high levels of repeat arrests\textsuperscript{392} and high levels of one or two arrests for individuals. More than half of the Aboriginal

\begin{footnotesize}
\textsuperscript{385} Alvares quotes the overall population of the Bourke community as 3,400 from the Australian Bureau of Statistics Census Data for 1991 and the Aboriginal population is estimated to be 1,200 based on figures provided by the ATSIC office in Bourke. ibid. At p. 3.

\textsuperscript{386} ibid. At p. 64. Public order offences were defined by Alvares for the purposes of her study to include: offensive language, offensive conduct, resist police, hinder police, throw missile, break bottle in a public place, riotous assembly, violent disorder and other public order offences. See footnote 537 and accompanying text.

\textsuperscript{387} ibid. At p. 64.

\textsuperscript{388} 485 Aboriginal people were arrested on just one or two occasions. ibid. At p. 67. The difference between repeat arrests and arrests on one or two occasions needs to be considered when assessing claims that the use of arrest by police is declining. See footnote 662 and accompanying text.

\textsuperscript{389} During the study, 62 people or 5.16\% of the Aboriginal population were arrested for a public order offence on just one occasion. A further 91 people or 7.59\% of the Aboriginal population were arrested twice in the period of the study for a public order offence. ibid. At pp. 67-8.

\textsuperscript{390} The figure of 882 represents 73\% of the estimated population of 1200 Aboriginal people of all ages. This is the average for the three census years of the survey being 1981, 1986 and 1991. ibid. At p. 3. The study does not take into account the extent to which the Aboriginal population for Bourke was settled or itinerant over the period of the study.

\textsuperscript{391} The average arrest rate for Aboriginal people was 458.47 arrests per thousand in the Aboriginal community and the average rate of arrest of non-Aboriginals was 28.78 per thousand. A difference of 16 times. ibid. At p. 46.

\textsuperscript{392} With a subset of 398 Aboriginal people (from 882) facing 6564 charges (an average of just over 16 charges each) ibid. At p. 51. The Alvares study provides an important view of the rate of repeat arrests. This information is not readily ascertained from existing statistical measures, see Chan, C., et al., 'Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan', Institute of Criminology, University of Sydney, Sydney, 2000. At p. 23-24 and the study there referred to of Hunter, B., et al., 'The Effect of Arrest on Indigenous Employment Prospects', Bureau of Crime Statistics and Research, Sydney, 1999. This points to a very valuable role for the prosecutor in keeping records of offences across the jurisdiction.
\end{footnotesize}
population had faced one or two arrests as opposed to only one-quarter of the non-Aboriginal population. The pattern of law enforcement therefore shows a disproportionate rate of penetration across the Aboriginal community as well as a high rate of repeat arrests for certain individuals.

In a study of the use of offensive language and offensive behaviour charges generally in New South Wales for the period April 1994 to December 1995, Jochelson found that these two charge categories accounted for 4.1% of all Local Court appearances. Jochelson also reported that there was a statistically significant correlation between the Aboriginal population of certain Local Government Areas and the rate of appearance for offensive behaviour and offensive language charges and combinations of these offences. It was also found that people in Local Government Areas with high Aboriginal populations were more likely to be charged with offensive language or behaviour charges and that Aboriginal defendants accounted for an increasing proportion of charges laid as the percentage of Aboriginals in the Local Government Area population increased. It was also shown that where the Aboriginal proportion of the population was low, Aboriginal persons were most over-represented in the charges for offensive language and behaviour.


A total of 604 non-Aboriginal persons (or 27.45% of the non-Aboriginal population) ibid. At p. 50.


In the Western Australian setting Harding points to the increased probability of a career of multiple arrests for Aboriginal people and particularly where there is an early entry into the criminal justice system. Harding, R., ‘Justice and Injustice’, Proceedings of the Benchmarking Workshop, Council for Aboriginal Reconciliation, 1998.


In the Alvares study nearly one-quarter (23.5%) of all offences charged in Bourke were for public order offences. Alvares, E., ‘Police Charging in Bourke 1980 -1992’, Masters of Laws thesis, University of Sydney, 1998. At p. 64.

4.A A problem of denial

The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress. Indeed, when Atwater’s counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one.399 We are sure that there are others, but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests.400

Despite disproportionate patterns of arrest and incarceration, the racist overtone to police work very often is either denied as in the majority judgment in the US Supreme Court case of Atwater401 quoted above, or is otherwise not acknowledged in official discourse.402 An example of the reluctance to find anything improper in the targeting of Aboriginal people through social control laws is found in the Report of the Aboriginals and the Law Mission of the International Commission of Jurists released in the same year as the reports of the RCIADIC. The Mission403 made specific criticisms in a number of areas:

400 Atwater et al v City of Lago Vista et al 532 U.S. (2001), at pp. 32-33. The majority inserted a footnote criticising the minority judgment claim of the potential for abuse of the power of warrantless arrest saying: 'Noticeably absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into reality. In fact, as we have pointed out in text, there simply is no evidence of widespread abuse of minor-offense arrest authority.' The majority made it clear that they were not prepared to 'mint a new rule' requiring 'reasonableness' in the exercise of the power to effect a warrantless arrest as this would require too much of the arresting police officer and overburden the courts with review cases: '[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review ... Often enough, The Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. At pp. 26.

This case encapsulates the conflicting public interest concerns of, on the one hand, the desire to ensure that the police have the tools to do ‘a difficult job’ and to uphold the law and, on the other hand, ensuring that the rights of individual citizens are protected. A contrary view was put by Janet Reno in 1999, see footnote 151.
401 ibid.
a) the use of arrest for offensive language charges,
b) the increased use of offensive behaviour charges from 1985 to 1989 from 4 percent to 9.7 percent of Local Court appearances,
c) the heavy police presence relative to the population policed,
d) the minor nature of offences,
e) the use of arrest over summons,
f) charging of multiple offences from the one incident,
g) bail and recognisance conditions being used oppressively.

The Mission attended a Bourke law and order meeting and noted that concern about law and order was disproportionate to the level of serious crime in the community in question. Whilst the Mission Report draws attention to the complete failure to challenge the assumptions of the criminal law that enabled all of these practices to flourish and in particular, it made the perhaps surprising finding that there were no ‘major abuses of power.’

Another example of an official incapacity or unwillingness to acknowledge the targeting of Aboriginal people on the basis of race alone is shown in the Report of the Inquiry into the death of Daniel Yock. In this case the Inquiry sought to categorise objectively the interaction between the police and Yock and his companions as simply the application of a ‘model of policing.’ The report concluded that Aboriginality did not play a part in the attention given to the group of which Yock was a member when police attended. There was no specific criticism of the police for the level of their reaction (such as the application of handcuffs behind the back on Yock) or of the failure to obtain medical attention for Yock following this arrest. The conclusion in the Report is an example of what Wootten describes as the myth of equal treatment, which he says...

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405 The police actions were found to be correct ‘within the model of policing being utilised to react to specific incidents.’ Remarkably, this issue is not further examined, but the view is expressed that other policing models may be more appropriate to avoid confrontation. Criminal Justice Commission, ‘A Report of an Investigation into the Arrest and Death of Daniel Alfred Yock’, Criminal Justice Commission, Brisbane, 1994.
arises because so many assumptions and stereotypes are silently built into decision-making processes.\textsuperscript{406} For many non-Aboriginal people the problem of the unequal enforcement of laws regulating the use of public space is blamed on Aboriginal people and explanations in terms of the racist use of the law are not admitted.

4.A.i Recognising the impact of differential policing

Nevertheless, the differential application of police resources and power is increasingly seen as a significant civil liberties concern in common law jurisdictions.\textsuperscript{407} The over-representation of minority groups in police statistics and the unequal use of public order offences are problems that are not unique to Aboriginal-police relations. In North America and the UK, oppressive policing practices have been interpreted as contributing to the outbreak of riots.\textsuperscript{408} The rioting in these instances can be seen to be at least in part, as a reaction to police techniques of surveillance and police interference with people using public space.\textsuperscript{409} More often than not, the targets for police attention


\textsuperscript{408} See Fielding, N., The Police and Social Conflict, The Athlone Press, London, 1991. At p. 70, In the USA in the 1960s the causes of riots were thought to be 'police practice, unemployment and housing conditions' with minor police action leading to riots. Note however that some of the 1980s riots in England led to the arrest of more whites than blacks. See Fielding, N., The Police and Social Conflict, The Athlone Press, London, 1991. At p. 234. Fielding points to the paradoxical relationship between everyday policing and the outbreak of riotous behaviour and the ways in which the language of crisis can be exploited to lead to further repression. 'If one comes down too hard on a socio-economically pressured community it takes little to provoke disorder. But power is better prepared for the apocalypse than are the weak, and is always poised to profit from a clamour which can be depicted as resolvable by more repression: See Fielding, N., The Police and Social Conflict, The Athlone Press, London, 1991. At p. 6.


\textsuperscript{409} On the role of public order law in the 'contestation over the legitimate use of public space', see Cunneen, C., 'The Policing of Public Order: Some Thoughts on Culture, Space and Political Economy', in M. Findlay et al (Eds.), Understanding Crime and Criminal Justice, Law Book Company, Sydney, 1988. At p. 191-192. Cunneen identifies the unrelenting nature of social control through the use of public order law by police. Within this framework, individual resistance leads to more police attention (see the case study of B and W in Chapter Three). If defendants submit to police authority then they may hope to get over it and move on. If defendants contest police authority, this is generally not seen as a legitimate response to police and these defendants can expect to live with the potential consequences every day, in all facets of their life.

Hemmens describes how the right to resist unlawful arrest has been steadily abrogated in USA jurisprudence: 'The abrogation of the right to resist unlawful arrest substitutes reliance on the courts for
are blacks or people of Asian origin.410 In Australia, there is evidence to show that other minority group members are disproportionately over-represented in negative police-defendant interactions411 and that Aborigines in particular are over-represented in statistics for the prosecution of minor offences and in the prison population.412

personal autonomy, requiring even greater faith in our legal institutions. This may be difficult for some to stomach because, as Justice Sanders wrote in his dissent in Valentine (1997), “When government agents commit assault and battery against the very citizens they are sworn to protect, the government is no longer our friend: It is our dangerous enemy.” (At p. 494). See Hemmens, C., et al., ‘Resistance Is Futile: The Right to Resist Unlawful Arrest in an Era of Aggressive Policing’ (2000) 46 (4, October 2000) Crime and Delinquency 472-496.

With most individuals disempowered in relation to the exercise of police authority, contestation is contained by the repeat targeting ‘by face’ of those who would challenge the police. The remarkable thing to note is how effective this mechanism is in controlling the marginalised population but that even this mechanism of social control has its limits. Overall, the strategy is a high risk one, because the value of the rule of law is being constantly diminished by each defendant’s negative experience.

At times the ‘simmering resentment’ of the marginalised group is expressed in large-scale social disorder such as riots. The ‘trigger’ for rioting very often is a specific incident that symbolises for the marginalised community a lack of protection under the law. Note however, as Fielding argues ‘social injustice is endemic throughout the world’ (quoting Carr-Hill, R., ‘Review of Benyon and Solomos’ (1989) 28 (3) Howard Journal of Criminal Justice 236-7.) and ‘the explanation why Britain, and why the 1980s, does not lie in the measurable variables of deprivation and discrimination which index the phenomenon of injustice, but in their impact on subjective experience at that time and place. The argument runs counter to the dominant idea that specific events are ‘merely’ the particular ‘trigger’ which manifest deeper problems. The ‘trigger’ and the circumstances surrounding it become a fruitful locus of explanation.’ See Fielding, N., The Police and Social Conflict, The Athlone Press, London, 1991. At p. 235-236.

For example, in NSW, the Bourke riot of August 1996 ‘was sparked by the feeling that Blacks were unfairly treated under white law’. See Cunneen, C., ‘The Policing of Public Order: Some Thoughts on Culture, Space and Political Economy’, in M. Findlay et al (Eds.), Understanding Crime and Criminal Justice, Law Book Company, Sydney, 1988. At p. 205. As Cunneen notes ‘The police response was to fly in the Tactical Response Group to police a demonstration at the court house by Aboriginal people. The reaction served to confirm the view that Aborigines were unjustly treated as a community. Not only were they over-policed, but when they complained about it more police were used to control their dissent.’ The original trigger for the demonstration was a car accident in which an Aboriginal boy was run over and severely injured and the local Aboriginal community felt that the police were not going to take action against the driver because he was white. See Cunneen, C., et al., Criminal Justice in North-West New South Wales, NSW Bureau of Crime Statistics and Research, Sydney, 1987. Overseas examples include, the LA riots following the Rodney King beating and the acquittal of police involved, and the UK riots discussed in Keith, M., Race, Riots and Policing: Law and Disorder in a Multi-Racist Society, UCL Press, London, 1993.


411 See, for example, Maher, L., et al., ‘Anh Hai: Young Asian Background People’s Perceptions and Experiences of Policing’, University of New South Wales, Faculty of Law, Sydney, 1997.

It is claimed that operational policing methods actually reproduce institutionalised racism among English police. According to Lea, the Scarman Report on rioting had rejected a racist motive for the riots (having defined racism as an overt racist policy consciously pursued by an institution). The later Macpherson Report widened the definition of racism to include unintentional discriminatory practice. Lea takes the issue further by arguing that the disproportionate use of stop and search powers by police on black youths is based on the belief that membership of an ethnic group alone is sufficient to create a reasonable suspicion of involvement in crime. According to Lea, the role of the police is to ‘control the dangerous classes.’ This role is not concerned so much with the detection of crime but the generalised surveillance of entire social groups and communities. Police pay attention to people on the street according to diffuse notions of danger and disorder rather than any concrete suspicion of criminality. In the end, this attention itself becomes the source of hostility between police and citizens.

Paradoxically, the police can also be seen as a socially isolated grouping that is remote from the general community as well as marginal communities. The police share values through their common work experience and create informal rules in response to the policing environment. This can occur even where the officer seeks to act differently because of the nature of the power relationship between police and the citizen. This contributes to a ‘them and us’ attitude among police officers, which appears to be quite

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414 ibid. At p. 220. Note in comparison, the wider definition of racism in the criminal justice system adopted by the Royal Commission on the Donald Marshall Jr Prosecution in Nova Scotia, Canada: ‘All one need demonstrate is systemic discrimination or “adverse effects” discrimination. In accordance with such an approach, discrimination has been defined as “a specific act, policy or structural factor – intended or unintended – that results in adverse effects for members of certain specified groups.”’ See Archibald, B., ‘Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia’, Royal Commission on the Donald Marshall Jr., Prosecution, Halifax, 1989. At p. 99.


pronounced in rural communities such as Bourke. This was indicated by a police officer transferred from Bourke who said:

> What do you get for putting up with this lifestyle where you deal with a violent hostile community of both black and white hoodlums? – Where you live across the road or around the corner from the person you locked up the night before who vowed he would get even with you or your wife and kids; where boredom and isolation are as much a problem as your work.'

In noting this aspect of policing, Desroches draws attention to the common development of racial stereotypes by police and a tendency to view protest as the deviant behaviour of leaders and not as a legitimate protest against social conditions. The peer development of racial stereotypes is supplemented according to Sealey by the personal experience of officers who become engaged in stereotypical interactions with minority group members. In a similar vein, McCorquodale points to the solidarity of police officers in the task of maintaining order whilst acknowledging the difficulty for police of living in the same small community that they police. The stereotypes that they build up are of good and bad blacks and of Aborigines being on the outer of the ordinary standards of the non-Aboriginal community. Such a stereotypical police view of Aboriginal-police relations is expressed by Goodall writing on the topic of Aboriginal deaths in custody:

> The tragedy is, that in general there hasn’t been a proper educational program which would enable the Aboriginal community to assimilate into contemporary society and look after their own interests and welfare - the emphasis always seems to be placed on individual rights to the neglect of more pressing social needs.

As for the role of the police, Goodall takes the view that police have to protect the ‘entire community’, to reduce fear, crime and violence. Most importantly, Goodall

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422 Goodall served as a police officer in the NSW country town of Bourke.
424 See footnote 376. In a commentary on the views presented by Goodall, Davis suggests that if arrest rates and incarceration of Aboriginal and Torres Strait Islander people increase, or even remain static, the gulf between these communities and the police will only widen despite the RCIADIC’s recommendations. He believes the answer is for Aboriginal people to become more involved in the
expresses a paternalistic view that identifies Aboriginals as others who cannot look after themselves because they have not ‘assimilated’ into mainstream society. The high rate of criminalisation of Aborigines is thus often dealt with by emphasising the areas of difference between Aborigines and non-Aborigines.425

4.A.ii Do Aboriginal people offend more?

The real problem with the view that Aboriginals offend more than non-Aboriginals is the implicit acceptance that conviction rates accurately gauge offending behaviour by Aborigines and non-Aborigines and ignores the effect of police ‘legislative’ discretion and unequal patterns of enforcement.426 427 The argument that Aboriginals offend more than non-Aboriginals implicitly assumes that crime is objectively defined and that policing occurs in a neutral and ‘objective’ fashion. In a more liberal construction of this view, whilst the individual offender is held responsible for committing criminal acts, it is acknowledged that social and economic disadvantage are conditions that predispose the offender to commit criminal behaviour. Both arguments fail to acknowledge the subjectivity of the police officer’s initial discretion in defining crime and deciding in which cases to proceed with a prosecution:

The brilliance of racial profiling as an instrument of modern, deniable racism is that the issue – be it crime, welfare, drug abuse or what have you – is seen by many as a real issue that is only coincidentally about race. The trait of blackness associated with the problem is viewed as nothing more than an unfortunate reality that is secondary to the public hostility and the punitive measures.427

The consideration of context in the different types of police-defendant interaction highlights the problem of approaching crime as though it was a unitary construct. The


differentiation of police action and defendant response requires us to consider the active role played by police historically and immediately in the lead-up to the ‘offence’ taking place. Parker recognised the connection between methods of policing and the perpetuation of racial conflict towards Aboriginal people in 1972, saying:

The quality of interaction between agents of law enforcement and members of indigenous minority groups reinforce such behaviour. In Western Australia, policemen exhibit attitudes and behaviour towards Aborigines, which provoke the very behaviour they wish to prevent.\(^{428}\)

White\(^ {429}\) describes the ‘construction of a field of knowledge’ about Aboriginal people as subjects of the law through police practices.

4.B Towards a theoretical framework

There are two extremes in the interpretation of the relationship between Aboriginal peoples and the criminal justice system. At one extreme, the relationship between the Aboriginal person and the state is seen as the product of institutionalised conflict. At the other end of the spectrum, it is argued that the law is impartially applied and differences in rates of arrest and imprisonment are not determined by race.

In 1995, Smandyech et al. distilled the following general propositions on Aboriginal offending from reported research into Aboriginal over-representation:\(^ {430}\)

1. indigenous people commit less serious crime and are imprisoned generally for public order offences,
2. Aboriginal people are arrested at a far higher rate than non-Aboriginals,
3. Aboriginal people have a higher rate of recidivism,
4. indigenous women are over-represented compared to non-indigenous women,
5. the age of incarceration is declining,
6. indigenous offenders are identified at an earlier age,
7. alcohol use is present in a high percentage of offences,
8. a high proportion of offences involve intra-familial and inter-personal violence,

9. there is also a trend towards more serious violence.

The authors proceeded to identify a number of reasons used to explain Aboriginal over-representation. The list includes:

1. racist bias,
2. visibility,
3. cultural factors,
4. legal factors,
5. extra-legal factors,
6. over-policing and
7. other factors.

Among these ‘other factors’, are criminal justice policies and practices that have a differential impact on Aboriginal communities because of the socio-economic conditions in those communities and it is necessary to consider how these influences affect Aboriginal over-representation in crime statistics. Importantly, Smandych concluded that there are a number of issues that lie behind the over-representation of Aboriginal people that need to be considered together. LaPrairie points to the breakdown of traditional systems of interdependency in Aboriginal communities with a pathology of negative rather than positive shame arising out of social marginalisation, a lack of connection with mainstream society and dysfunctional family life leading to anger and frustration. In addition to external causes or causes based on the environmental setting, Smandych argued for the recognition of how the process of policing, and police methods themselves, contribute to the problem.

Theorising about Aboriginal over-representation has tended to concentrate on the Aboriginal defendant as an object of knowledge and has denied the subjectivity of the Aboriginal defendant. Police practices and defendant actions come together in the labelling of a marginalised social group as ‘deviant’ and the deviant status of that group

431 ibid.
432 See Ogilvie, E., et al., ‘Young Indigenous Males, Custody and the Rites of Passage’, Australian Institute of Criminology, Canberra, 2001. Ogilvie and Van Zyl discount the idea that juvenile imprisonment represents a rite of passage for young Aboriginals.
is maintained through on-going negative police-citizen interactions. The interactions of police and Aboriginal defendants also take place within a social and political setting as Holmes notes:

[Police-minority relations symbolize the deeply rooted social divisions separating dominants and minorities. Even efforts to increase minority representation within police departments seem likely to have relatively little success because of class distinctions and antagonisms within minority populations. Popular policy proposals to address the problem will likely have little effect because they focus on altering the individual and interpersonal dynamics of police-minority relations while failing to recognize that those dynamics are produced by the underlying structural divisions of interest within society.]

The definition of minority deviance through everyday policing transactions is both an artefact and an ongoing process that results in the disproportionate representation of minority group members as defendants to summary charges. The construction of deviance through policing methods means that minority group victims are also identified as part of the deviant community and may become victimised by the criminal justice system. When the law is discredited in these two ways, namely the seemingly arbitrary enforcement of police authority and the disempowering of minority group victims, the value of the law is doubly diminished. Both effects have an impact on the work of the prosecutor and present a major challenge in terms of ensuring fairness in the prosecution of police summary cases.

4.B.1 Colonialism and post-colonialism

Many explanations for the disproportionately high rate of arrest for Aboriginal people in Australia depend on a model of institutional conflict between the police and Aboriginal people and use the terminology of battle, conflict, or post-colonial legacy as summed up in the following quote from the RCIADIC:

435 See, for example, the finding of a correlation between Aboriginal people as victims of crime and as defendants to criminal charges in Hunter, B., ‘Factors Underlying Indigenous Arrest Rates’, NSW Bureau of Crime Statistics and Research, Canberra, 2001.
436 Tyler argues that explanations of criminality based on the nature of white settler societies describe ‘the pathology of the transition to modernity rather than the current environment of post-modernity which is marked by unstable identity, indeterminate social and cultural processes and global rather than a national positioning of the Aboriginal subject.’ See Tyler, W., ‘Aboriginal Criminology and the Postmodern Condition: From Anomie to Anomaly’ (1999) 32 (2) The Australian and New Zealand Journal of Criminology 209-221.
The warfare for the control of the countryside has long since ceased, but in many towns in rural Australia another kind of warfare has continued for control and use of the open space in towns. Rarely has there been negotiation between the contending forces to see whether some accommodation could be found which would allow cultural differences to be maintained without undue violence to the lifestyles of either side. Instead, the white section of society, through its armed agents the police, has continually, although never quite successfully, sought to impose its ideas on Aboriginal communities. The ‘warfare’ has not been recognised as such because the dominant community has defined disliked Aboriginal conduct as criminal through the various channels of local government law, street offences (significantly often called ‘police’ offences), protection legislation and planning laws. For present purposes, the point is simply that through all this conflict the police have had the role of controlling and subordinating Aboriginals. Issues that cried aloud for solution in the spirit of co-operation and negotiation have been handed to police to resolve by the application of the force of the law. For instance, intoxicated persons, usually of little danger to anyone except themselves, were made the responsibility of police who had neither the training nor facilities to look after them, instead of being taken into appropriate care.\textsuperscript{437}

Cunneen has argued that police have performed and continue to perform the colonial role of controlling the Aboriginal population.\textsuperscript{438} In a similar vein, Bird has characterised the relationship as one of a ‘civilising mission.’\textsuperscript{439}

The colonial model has been useful in drawing attention to the historical context in which the policing of Aboriginal people takes place today. It can be argued however, that a simple colonial model does not properly take into account actual changes in the law affecting the status of Aboriginal people or of changes in the manner of policing Aboriginal communities. Perhaps more importantly, the colonial conflict model lacks the refinement to account adequately for the position of Aboriginal people as victims of crime as well as not accounting for the similarities between the policing of Aboriginal people and the policing of members of other marginalised minority groups.


4.B.ii Public space

White argues against drawing a direct link between colonial practices against Aborigines and current rates of over policing. Instead, he argues that policing methods reflect standard functions of surveillance and regulation rather than a colonial model of policing. In White’s view the mechanism for the policing of Aborigines is based on the concept of a ‘territory of public space’, power is exercised to secure public order and police-Aborigine interactions commence as a contest for sovereignty of this Territory. In this way policing is a contest over this territory of public space, in which Aborigines are identified with disorder and Aboriginal contestation reinforces the escalation of aggression.

Cunneen adds to this by stating that police violence is firstly associated with contests over the use of public space and secondly with situational factors related to the police wishing to gain admissions or inflict summary punishment. This violence may often be unprovoked and in a 1991 study, some 81% of Aboriginal juveniles surveyed complained of racist abuse. There is thus a linkage between violent dispossession of the past and order maintenance as used today to justify high levels of police surveillance and intervention. In this way, racism has become institutionalised in the police service.

4.B.iii Visibility of deviant behaviour

In the context of policing in the United States, Klinger argues that the visibility of deviant behaviour in public spaces increases the perception of deviance generally. Officers share the experience of deviance in a patrol, the indicators of which tend to be relatively stable, so the experience of police work leads to shared perceptions among police. However in areas with higher levels of crime, more deviance may be seen as normal. The belief also develops in areas of high deviance that victims are less deserving. Aggressive policing can lead to disregard for victims. Because of workloads,

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there is usually a developing cynicism about the utility of vigorous police action. In the end, in areas of high deviance, deviance may be defined downward or increasingly serious crime may become viewed as normal crime in areas of high deviance, requiring less vigorous action. The opposite tendency appears to have developed in country New South Wales where minor crime remains a significant part of police charging. The almost irresistible conclusion that calls for further study is that the high rate of prosecution of public order offences reflects the over-policing of the Aboriginal community.

4.B.iv The defendant as subject or object

Hudson argues that the differences between offenders and non-offenders often lie in the manner in which they are treated by the criminal justice system rather than actual differences between these people. According to Hudson, the 'criminology of difference' rationalises and justifies this situation by emphasising 'punitive strategies based on incapacitation and elimination.' Significantly, Hudson sees the discriminatory use of the law as partly a consequence of giving people deviant status, which places them outside the protection of accepted notions of civil rights. There is also empirical research that supports this analysis. The results of a study by Boeckman suggest 'that

443 See for example, Milne, T., 'Aboriginal Drunkenness and Discrimination', *Australian Psychological Society Conference*, Macquarie University, Bureau of Crime Statistics and Research, 1981. At p. 16. Referring to the high proportion of cases processed for public order offences related to drunkenness Milne states: 'It therefore seems possible that a low incidence of other types of crime, more prevalent in urban communities, means that these street offences come to occupy the bulk of police time. Further research needs to be done to validate this hypothesis, but it may help explain why [the] detention rate[s] of aborigines for drunkenness are higher in the more remote, less populated areas of the state.' At p. 16.

444 See, for example, Jackson, H., 'Policing Remote Aboriginal Communities: Wiluna 1994' (1995) 7 (1) *Current Issues in Criminal Justice* 88-92. Jackson (a Judge of the District Court of Western Australia) refers to a study by the Aboriginal Legal Service on policing in the remote settlement of Wiluna. The study found that while the population of Wiluna halved between 1983 and 1994 the number of police increased from three to eight (including two police aides). At the same time charge rates rose (in 1994 six times the rate for 1991/91 and the majority of charges were for 'street offences' at 78% of charges in 1994 compared to 40% for 1991/92. See at p. 89.

445 Hudson, B., 'Criminology, Difference and Justice: Issues for Critical Criminology' (2000) 33 (2) *The Australian and New Zealand Journal of Criminology* 168-182. At p. 169. An alternative approach is offered by the 'criminology of sameness', which reduces deviance and encourages 'taking responsibility for preventing oneself or one's community being victims of crime.'

in the context of evaluating suspect wrongdoers, the perception of an offender as an out-group member can set the stage for denying that person full procedural protection. Hudson points to the failure of criminological theories based on the treatment of the criminal as an object of knowledge. As she puts it, these theories serve to perpetuate the problems they seek to describe:

My problem with the theories is that although they locate the ultimate sources of criminality in social values and relations, their end product is just like that of the right realisms. Conflating description with explanation as they constitute the criminal as object of knowledge for us, they portray the criminal as predominantly young, black, impoverished and powerless, and give us good, liberal accounts of why that should be so. Along with the campaigns for greater criminalisation and penalisation waged by various victim movements, they give us in Chesney-Lind and Bloom's phrase 'more men to jail, particularly men of color'.

This fits into criminological analysis based on difference which emphasises the malevolent 'other' and relies on 'punitive strategies based on incapacitation and elimination', rather than criminological analysis that sees a shared identity between offender and other members of society and which de-emphasises deviance and encourages 'taking responsibility for preventing oneself or one's community being victims of crime'.

4.C DPP prosecutor attitudes

In the DPP Prosecutor Survey, respondents were asked which of a number of statements they thought best-explained Aboriginal over-representation. The results are shown in Table 5 DPP prosecutor acceptance of various explanations for disproportionate rates of apprehension of Aboriginal people for summary offences. The responses reflect the complexity suggested in the theoretical discussion above. DPP prosecutors accepted various explanations for Aboriginal over-representation. The most commonly accepted explanation was situational, based on the presence of Aboriginal people in public places

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This explanation is neutral in terms of the role of the police and of Aboriginal defendants in the definition of crime. The next tier of responses ranged from blaming ‘racism’, the ‘style of policing’ and the ‘inherent criminality’ of Aboriginal people. The second most commonly accepted explanation attributed over-representation to racism as an external force affecting Aboriginals (33%), followed by the application of zero tolerance policing to Aboriginals (32%), and inherent rates of offending by Aboriginal people (31%). The third tier of explanations accepted by respondents was split between blaming Aboriginal people for being more likely to challenge police authority (28%) and blaming over-policing (22%).
Table 5 DPP prosecutor acceptance of various explanations for disproportionate rates of apprehension of Aboriginal people for summary offences

<table>
<thead>
<tr>
<th>NSW, VIC, and WA&lt;sup&gt;451&lt;/sup&gt;</th>
<th>N</th>
<th>%*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aboriginal people are more likely to be in a public place</td>
<td>55</td>
<td>46</td>
</tr>
<tr>
<td>Disproportionate rates of charging are the result of racist attitudes</td>
<td>40</td>
<td>33</td>
</tr>
<tr>
<td>A form of zero tolerance policing is applied to Aboriginals</td>
<td>39</td>
<td>32</td>
</tr>
<tr>
<td>Aboriginal people are more likely to commit a summary offence</td>
<td>37</td>
<td>31</td>
</tr>
<tr>
<td>Aboriginal people are more likely to challenge police authority</td>
<td>34</td>
<td>28</td>
</tr>
<tr>
<td>Disproportionate rates of charging are the result of over-policing</td>
<td>26</td>
<td>22</td>
</tr>
<tr>
<td>Total for all reasons nominated</td>
<td>231</td>
<td>**</td>
</tr>
<tr>
<td>Total number of respondents nominating one or more reason as a proportion of total survey respondents</td>
<td>120/175</td>
<td></td>
</tr>
</tbody>
</table>

* Expressed as a percentage of the number of respondents who nominated one or more explanation (N=120)
** Because each respondent could nominate multiple reasons the total figure exceeds 100%.

To criticise the level of enforcement of certain offences against Aboriginal people is not an argument about law versus lawlessness. Rather it is to do with the degree of participation of minority community members in setting the policing agenda and having respect for the law. Pearson<sup>452</sup> argues that Aboriginal communities face severe problems

<sup>451</sup> DPP Prosecutor Survey Question 12: Indicate which of the following statements (if any) you think best explain disproportionate rates of apprehension of Aboriginal people for summary offences.
related to welfare dependency and addiction to drugs and alcohol. He argues for increased policing in Aboriginal communities, for trial prohibition of alcohol, and zero tolerance policing for those selling drugs to Aboriginal children. He does so from the perspective of a community needing to take charge of its own regulation. This might be termed the goal of ‘true’ community policing where minority group members have an effective say in the way policing affects them. In contrast, where the members of minority groups have only token involvement in developing police policies and practices, the criminal law is discredited as being unfair and colonial.

The policing of Aboriginal communities presents numerous difficulties for the communities involved, the police, the judiciary, politicians, and society generally. The prosecutions that arise from this policing will present particular difficulties for the independent prosecutor. Certainly, the problem is multi-dimensional. When it is said that Aboriginal communities need to take control of, and be more responsible for, crime issues, there is a danger of conflating all criminal offences. A community simply cannot control some crimes to the extent that the police themselves control differential policing practices and the criminalisation of status.

4.D The transactional definition of deviance

The ‘quinella’, ‘trifecta’ and ‘quadrella’ describe ritualistic confrontations between police and defendants over police authority, which culminate in the charging of the defendant. The case study of B and W in Chapter Three is a typical example. It is important to consider how the defendant may be moved to challenge police authority and therefore to analyse more closely the nature of defendant-police interactions. Defendant action in public order offences can be broadly classified according to whether or not the defendant is directly involved in some form of confrontation with, or negotiation of, police authority. Where police authority is at stake in the definition of certain behaviour as criminal, it is legitimate to question whether the way in which the police officer exercised that authority affects the public interest in the prosecution of the offence. Even where the focus of the citizen’s action does not directly involve police authority, there may nevertheless be an underlying issue to be addressed regarding the patterns in which police officers exercise their discretion to commence those criminal proceedings.
A remarkable feature of offences involving challenges to police authority is the depth of antagonism at times directed at police and the degree of antagonism shown by the police to the defendant. In the following examples used to illustrate direct challenges to police authority, the police may be seen in some cases to be acting reasonably prior to the reaction of the person of interest. The use of the words against police in these circumstances may be interpreted as outright contempt for the police.\footnote{Care needs to be taken to distinguish contempt for the police from an actual criminal offence.} From the defendant’s point of view, there may be an element of a claim to a right in defying police (either because the defendant disputes the authority of the officer \textit{per se} or the manner in which that authority is being exercised).\footnote{See Hemmens, C., \textit{et al.}, ‘Resistance Is Futile: The Right to Resist Unlawful Arrest in an Era of Aggressive Policing’ (2000) 46 (4, October 2000) \textit{Crime and Delinquency} 472-496.} For the police officer, street policing requires that authority be established quickly and convincingly, in many instances this means the officer may resort to abusive language, threats or physical violence.\footnote{See footnote 523 and accompanying text on police ‘taking charge’.} Overall, the personal history of the relationship between the defendant and the police appears to be a primary determinant of the reaction of each. There is also an historical and collective dimension where the police action is shaped by the related experiences of other police officers\footnote{See, for example, McCorquodale, J., ‘Clamp Down: Police Attitudes Towards Aborigines in New South Wales’ (1986b) 19 \textit{Aboriginal Law Bulletin} 14-18.} and the defendant’s response is shaped by the experience of other defendants from the same community.\footnote{Findlay, M., ‘The Ambiguity of Accountability: Deaths in Custody, and the Regulation of Police Power’ (1994) 6 (2) \textit{Current Issues in Criminal Justice} 234-251.}

Findlay reported that in 1991 Aboriginal juveniles were in custody at a greatly disproportionate rate and that there was a strong body of evidence of police brutality against these juveniles.\footnote{Findlay, M., ‘The Ambiguity of Accountability: Deaths in Custody, and the Regulation of Police Power’ (1994) 6 (2) \textit{Current Issues in Criminal Justice} 234-251.} The principal causes of this brutality were conflict over the use of public space and violence in the police station to gain admissions or to punish offenders. In Findlay’s view, explanations of police brutality based on the assertion of police authority are inadequate. According to Findlay, there is an historical role of violence in police-Aboriginal relations and an acceptance by Aboriginal juveniles of
police violence as normal. In this way, the violence has become deeply institutionalised and Aboriginal people have been seen as naturally criminal.\footnote{See also Cunneen, C., ‘Aboriginal Juveniles in Custody’ (1991a) 3 ibid. 204-218. Cunneen points out that police violence against youths appeared to be widespread and argues that such violence directed at Aboriginal youths was an institutionalised form of racist violence and that within this framework Aboriginal children were seen as naturally criminal and there was a vocabulary of racism based on racist epithets and language that transformed the violence and intimidatory behaviour of police into racist abuse. At pp. 213-214.}

In a study of Aborigines and public order legislation, Jochelson noted the ‘seemingly ritual confrontations between police and Aboriginal people’ in country towns.\footnote{Jochelson, R., ‘Aborigines and Public Order Legislation in New South Wales’, NSW Bureau of Crime Statistics and Research, Sydney, 1997. At p. 15. From Jochelson’s analysis, this is not simply an urban-rural division, although the scale of policing is no doubt a significant factor. Jochelson points out that the significant distinguishing feature in terms of public order policing is the proportion of Aboriginals in the population of a country town.} He identified three typical forms of narrative for these ritual confrontations. The first is where the person reported takes the initiative in provoking the confrontation. The second is where the police seek to question or attempt to detain an Aboriginal person for ‘matters unrelated to offensive behaviour.’ The third type is where the police are called to an incident and are ‘unable to calm a situation or when they themselves become the subject of abuse.’\footnote{ibid. At p. 15.} He concludes that ‘in many of the cases involving Aboriginal people the legislation would appear to provide a trigger for detention of an Aboriginal person who has abusively challenged police authority rather than as a means of protecting members of the community at large from conduct which is patently offensive.’ The pattern of offences in urban areas with low Aboriginal populations was found by Jochelson to be qualitatively different. In this setting, ‘urinating in public’ figured prominently and in a number of cases the behaviour, which is the subject of the charge, occurs before the attendance of the police. In addition, incidents are said to arise after police speak to a person about their behaviour (whether the behaviour is directed at the police or another person) and an arrest ‘typically ensues whenever there is an escalation of the allegedly offensive behaviour.’\footnote{ibid. At p. 15.}

Jochelson’s portrayal suggests that Aboriginal-police interactions lie predominantly at one end of the scale of abusive violence directed at police. In fact we need to consider
the broad range of Aboriginal-police interactions and consider in more detail the actions of the police officer and the Aboriginal defendant, that taken together, result in the outcome of the laying of a criminal charge. It is only with such an understanding of the range and complexity of Aboriginal-police interactions that the independent prosecutor can formulate appropriate policies in this area. The following classifications of defendant action draw on these observations made by Jochelson to build an analytical framework to consider defendant action towards the police. In Jochelson’s view a negative response by the defendant is a marker of ritual confrontation. However, there is a danger of focusing too heavily on the part of the defendant alone and ignoring the police officer’s approach to the interaction.\footnote{See footnote 445 and accompanying text.} If the defendant submits, there may be no charge but the interaction may nevertheless still involve a confrontational approach by police. There are two broad types of interaction depending on whether or not police authority is challenged by the defendant. These broad categories are described in the following section. Later in this Chapter I return to these categories and report on the results of the 2001 DPP Prosecutor Survey where DPP prosecutors were asked how they would react to these situational factors in exercising prosecution discretion.

4.D.i Situations not involving a direct challenge to police authority

The types of citizen action that may attract police attention and which do not involve a direct challenge to police authority are uninhibited action or anti-social behaviour (very often associated with intoxication) and political/industrial protest.

4.D.i.a Uninhibited action and anti-social behaviour.

Cases of this type usually involve situations where the commission of a simple act unrelated to the presence of police constitutes the offence - such as urinating,\footnote{See however, \textit{Spence v Loguch Unreported}, NSWSC CLD, 12 November 1991 referred to in Brown, D., \textit{et al.}, \textit{Criminal Laws}, The Federation Press, Sydney, 2001. At p. 965-7. A magistrate’s decision to dismiss an offensive behaviour charge for urinating was upheld on the basis that it was open to the magistrate to find that few people were present to be offended. However, the presence of others to be offended is not a requirement for the offence to be made out. See \textit{Stutsel v Reid} (1990) 20 NSWLR} swearing, or street fighting - and the police are often in a position to give direct evidence of the offence. The police may use an active surveillance strategy for known trouble spots, sometimes known as ‘intelligent policing.’ Offences of this type often
involve the policing of drunks and the targeting of areas near hotels and other liquor outlets at closing time.\textsuperscript{464} The commission of these offences is unlikely to be related to the presence or otherwise of the police. Nevertheless ‘detection’ depends on the police being present to observe the behaviour, or more rarely, the police being prepared to act on the report of a complainant.

In Jochelson’s survey a variety of these types of offences are briefly described. The act of urinating is reported in a number of these examples and include incidents at day and night times in such places as the front door of a police centre, the wall of a hotel, a door of Council Chambers, on a tree in the street, in the middle of the street, on children’s playground equipment, and on a telegraph pole. Language not directed at police and not observed by the police is reported in one incident where a juvenile is alleged to have attended a school sports carnival and commenced swearing for which the juvenile was then arrested, following a complaint. Other examples include incidents where no other offence would be available, such as kicking a shop window without breaking it and throwing stones at a house. One incident shows the use of offensive behaviour charges to deal with the action of a young person seen striking his grandmother to the head, which was observed by police. The offensive behaviour charge in this situation would not require the evidence of the grandmother, as would an assault charge.\textsuperscript{465}

Another example of a case of this type can be found in \textit{Police v Abdulla}\textsuperscript{466} In this case the actions of the defendant were initially not directed at the police. However when the police proceeded to arrest Abdulla, her response became the subject of a charge of resist police and Abdulla was convicted of the ‘quinella.’ The charges arose out of an incident on the lawns opposite the Berri Hotel. Police were at the premises just before midnight and Abdulla was cautioned for using offensive language and told to leave the area. As she did so she called out ‘fuck’ about five times to an Aboriginal man and began pushing him. The police arrested Abdulla and in doing so she ‘squared up to’ the police

\textsuperscript{461} See, in contrast, the English provision which has been interpreted as requiring the presence of a person to be caused ‘harassment, alarm or distress’ referred to at footnote 545 and accompanying text.
officer and ‘thrust both arms out in front in a pushing action’. She was handcuffed and placed into a police vehicle.467

4.D.i.b Political/industrial protest

The politicised nature of policing is most clearly revealed in the use of public order offences to control political and industrial protest.468 The use of public order offences to suppress political and industrial protest in a confrontational setting figured prominently in policing in Australia in the late 1960s and early 1970s.469 In this period public order laws were used to suppress political protests concerning the Vietnam War and the South African Springbok tours.470

However, the re-introduction of the Summary Offences Act in New South Wales471 in 1988 was not directed at the control of political or industrial protest as such. Large-scale

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466 Police v Abdulla (1999) 74 SASR 337.
467 Ibid. In this crown appeal the court found that a five-day sentence of imprisonment imposed for a break, enter and steal charge was inadequate. However the appeal was dismissed. The court cited the principle of double jeopardy and stated that the appropriate penalty of three months’ imprisonment could well have been suspended. Abdulla had been placed on a one year supervised bond for the charges of offensive language and resisting arrest. The appeal Judge stated that the sentencing principles laid out by Wood J in Fernando (1992) 76 A Crim R 58 at 62 should not be confined to Aborigines living in remote communities. (Judgment paragraph 35).

468 Political protest is here used in the sense of organised political protest. The defendant’s objection to oppressive police action in saying such things as ‘What the fuck for? It’s my fucken bike I tell you, fuck off’ and the other language used by the young people B and W in the case study in Chapter Three is no less a political statement in the sense that the young people are making a claim to their rights. However, this aspect is not recognised perhaps given the nature of the interaction or the readiness to accept the police classification of deviance. See Hemmens, C., et al., ‘Resistance Is Futile: The Right to Resist Unlawful Arrest in an Era of Aggressive Policing’ (2000) 46 (4, October 2000) Crime and Delinquency 472-496. See also Whitty, N., et al., Civil Liberties Law: The Human Rights Act Era, Butterworths, London, 2001. In this text a distinction is drawn between common offences as illegitimate and political protest as legitimate. See footnote 1019 and accompanying text.


470 See, for example, R v Burgmann [1975] PSC 1326. As there were strong political associations between the Labor party and these protest movements, it is not surprising that the Commonwealth Labor government was moved to transfer responsibility for police prosecutions from the police to the Crown Solicitor’s Office in the ACT (where many political protests found their focus) but did not do so in the NT. Similarly, in New South Wales in 1979, the Labor government repealed the Summary Offences Act 1970 (NSW) which had been enacted in response to the political protest movement by the Askin government. See the discussion of the history of public order legislation in New South Wales in Brown, D., et al., Criminal Laws, The Federation Press, Sydney, 2001. At pp. 944-951 and in particular At p. 945.

471 Summary Offences Act 1988 (NSW).
protests in the cities had by and large been abandoned or contained. Where protests were taking place in the forests of the north and south coasts, the police were able to employ charges such as trespass and breach of forest closure laws in preference to offensive language and behaviour charges. The potential use of offensive language and behaviour charges for the control of political and industrial protest nevertheless remains a powerful tool for police action. In some instances the power of arrest is simply utilised to remove protesters who are then released without charge. Nevertheless the potential for the use of public order offences and offensive language and behaviour charges remains. The S11 protest in Melbourne in 2000 is an example of the police being involved in the confrontational policing of public space to suppress political protest. The policing of the waterside workers dispute of 1998, in Melbourne in particular provides an example of confrontational policing in the industrial arena.

4.D.ii Direct challenges to police authority

The types of citizen action that may attract police attention and which do involve a direct challenge to police authority are when a person reacts to the mere presence of police without police attention necessarily being directed towards that person, and objection to police action or a response to police attention whether the action or attention is justified or unjustified.

The police intervention may be rationalised in terms of reasonable suspicion or the police officer’s observation of an offence. The power and authority of the police to act may be far more obscure in situations where the police officer seeks to stop and

472 Offensive behaviour and language charges were also not available in those places that were closed to the public.

473 See Levy v State of Victoria and others (1997) 71 ALJR 837 for the closure of areas concerned with duck shooting except to those with a valid game licence, and the validity of prosecutions for breaches of the prohibition. See also, however, Sally Ann Denise Watson and Vaughan Lewis Williams v R (1998) 122 NTR 1, on the intersection of the right to protest and the definition of 'disorderly behaviour.' The conduct complained of was the burning of Indonesian flags outside the Indonesian Consulate in a protest concerning East Timor. Mildren J commented 'In my view this is a case of "much ado about nothing." No one was seriously inconvenienced or had their comfort seriously threatened; there was no tendency to disturb the peace. The supposed danger was trifling and insubstantial, and this probably explains why it took the complainant months to decide that charges under the Fire Services Act (NT) could not be justified and instead to lay the present charges. In all the circumstances I do not consider that the appellant’s behaviour warranted the sanctions of the criminal law.'


question or stop and search, based on ill-formed, indistinct or unarticulated grounds. In these situations there is enormous scope for confusion concerning the proper exercise of the police officer’s authority. In some instances, the Aboriginal people who are seen as the subject of social control law are viewed as powerless objects of police authority. The very nature of the police offender interaction, and the language used in offensive language charges, shows Aboriginal people asserting rights and performing positive acts of resistance.

4.D.ii.a Reaction to the presence of police.

The seriousness attached to offences of this nature is illustrated in the case of *R v Stephen Bruce Porter*. Porter was appealing various charges, arising out of two separate incidents. The first group of charges involved dishonesty and entering a dwelling with intent. On this last charge Porter had been caught on the premises and in his attempt to escape had broken his leg. Within six months, Porter was at liberty and went to a police shopfront window and hit the window with his crutches. The window did not break and when asked by the police what was wrong, the defendant said that his wallet had been stolen and then the police ‘endeavoured to placate him’, after which he threatened the police with his crutch. The court said that a term of three months imprisonment was called for particularly because of the aspect of assault on the police (by using the crutch to threaten them). In passing, the court commented ‘There is something irrational and perhaps pathetic in relation to the second series of offences’. That remark reflects the narrative understanding of the dominant community that sees the defendant’s actions in isolation and the judge goes no further in finding what reasons may lie behind this behaviour.

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479 *R v Stephen Bruce Porter* [2000] QCA 331, at p. 2-3. Imposing an effective additional cumulative term of three months (on top of sentences of two years imprisonment for the ‘entering a dwelling’ charges).
480 The defendant had his wallet stolen and this example raises the question of how police and members of marginalised communities interact when the marginalised person becomes a victim of crime.
Another example is the case of *Police v Smith et al.* which was heard in the Wilcannia Local Court. In that case two police officers (Burton and Cashion) had approached the Court House Hotel. Ronald Murray was standing near the entrance to the Hotel and said ‘What do you fucking cunts want?’ Although many people may consider these words to constitute strong language that could cause offence, they are capable of being interpreted in a similar manner to the vernacular use of ‘bastard’ as in ‘you old bastard’ and variants. They are also capable of being interpreted as an insult and a challenge. It appears from what followed that that is how the police viewed the use of the words and how Murray probably intended them to be viewed. Constable Burton told Murray that he was under arrest for swearing and then both police officers attempted to arrest Murray following this exchange. This led to a disturbance in which the police eventually went on to arrest eight people and were to lay a total of 66 charges, of which, eight were for offensive language, 25 were for hinder police, 16 were for assault police and 17 were for resist arrest. The magistrate, Sue Schreiner LCM, noted the failure of the police in this instance, to proceed by way of summons. Her Worship said ‘because those procedures were not used, what really started off as an extremely minor incident was escalated to a dangerous extent, dangerous to the police officers themselves in my view and dangerous to the other defendants.’

Some examples of the words used by defendants to the police are found in the report by Jochelson. These examples show a mixture of disrespect and aggression towards police and suggest that it is not unusual for strongly provocative words to be used towards police officers where the police have not themselves taken any action. For example:

- The person of interest (POI) at 1.15 am outside the police station says ‘C’mon out you cunts come out and fight.’ The police came out of the police station whilst other people were leaving the Bowling Club, the defendant says, ‘C’mon you fucken copper cunts, come out and fight. You’re a bunch of cunts. Fuck you.’

- Police on foot patrol in licensed premises walk past the POI who says ‘Arsehole’ and shortly after ‘What are you fucking looking at?’

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• A young male person says to a female police officer across the street at about 9.20 pm, 'Hey you, have a go? You slut, you mother-fucker.'

4.D.ii.b Reaction to police attention.

Offensive language may arise as a result of a negative reaction to police attention. This can occur in a number of ways, such as where the police commence an interaction with a person who then responds with the use of offensive language. Alternatively, the police may be acting in response to a call-out or they may be on patrol and come across a person swearing or behaving offensively. The person may or may not be given a warning not to swear and either continue swearing in the presence of police or direct their swearing at police. Some of the defendant responses to the police noted by Jochelson cover a range of reactions including: 483

The use of vilifying language:
• 'I don't want to talk to fuckin' shit' which was said to a police officer inquiring into an earlier incident in a restaurant.

Questioning police attention:
• 'What the fuck you hassling us for' which was said to a police officer speaking to a young person about walking through private property.

Challenging police:
• 'Come on cunt, I'll smash you cunt' which was said to a police officer after being escorted from a rodeo three times for using language.

Dismissive language:
• 'You can get fucked, you can fucken lock me up' which was said to a police officer after being asked by the officer to stop swearing.
• 'You can go and get fucked you cunt', 'You go and get fucked or I'll kick you in the cunt' which was said to a police officer when asked to leave the police station.
• 'You can get fucked you dog arsed cunts' which was said to police when they intervened in a fight between the defendant and another female.

483 ibid. At pp. 16-18. All defendants referred to here were identified as Aboriginal persons in Jochelson's report.
• ‘You are nothing but ficken dog arses, you fucken cunts’ which was said to police outside a Hotel when the defendant was refused admission.
• ‘Fuck you’ which was said to police after being asked to stop swearing to another person.
• ‘I don’t give a fuck what you say dog arse. You can get fucked and so can the other cunt’ which was said to police at police station when making a complaint about an incident with her brother and after being warned to watch her language.

Threat to another in the presence of police:
• ‘You fucking slut, your [sic] nothing but a cunt. I should belt you whilst the fucken coppers are here, I don’t give a fuck if the coppers lock me up.’ Said to the defendant’s de facto when the police attend the hotel in relation to the defendant and his de facto.

The Northern Territory case of Damien Gerald Clark v Robin Laurence Trenerry\(^ {484}\) was an appeal arising out of convictions for assaults on two police officers. The police were on patrol outside a nightclub in Darwin at 4.00 am. They separated two Aboriginal women involved in a fight and others present began calling out abuse. The police alleged that the appellant called out ‘you fucking white cunts’. The officers then attempted to arrest the appellant and a violent scuffle took place in which one officer received facial injuries. The magistrate had found that the appellant had used the words ‘stupid pigs’ and not those attributed by the police. Martin CJ quotes the magistrate as saying:

> Even if [the appellant] believed the arrest to be unfair, he had no right to react in the way he did, [which was] a gross over-reaction, in no way constituting a reasonable level of resistance to an arrest that [the appellant] may have considered to be unfair or unlawful.\(^ {485}\)

Martin CJ pointed to the role of the court in protecting the community in upholding the sentence of three months for the charge of assault:

> The courts would be lacking in their responsibility in that regard if they failed to do as much as is in their legitimate power to protect the police who have a more direct and vulnerable role in achieving the same objective.\(^ {486}\)

\(^{486}\) At para. 25.
4.D.iii The cycle of street policing transactions

As we have seen, members of marginalised social groups are most likely to experience the law through negative interactions with the police. Studies show that Police are often less tolerant of the behaviour of minority group members and impose more stringent standards of behaviour. This negative treatment affects the marginalised members of society as either defendants or victims. As a victim, the person is likely to be exposed to negative perceptions by police, which affect police treatment and the handling of their complaint, including prosecution vindictiveness for not supporting the prosecution throughout.

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490 Either by not responding to further complaints, or by retaliating for a lack of support for the prosecution case, such as by seeking to charge the victim with public mischief. See for example, the experience of Nduka-Eze referred to at footnote 941 and accompanying text. A distinct problem of State control of domestic violence prosecutions is highlighted. Whilst the aim of giving complainants no choice but to proceed may seem laudable in terms of attempting to remove the pressure on complainants to withdraw, it also has the effect of reinforcing the powerlessness of complainants and forces them to
members as defendants and victims leads to a general perception for the marginalised group that the law is unjust and consequently not worthy of respect. On the other hand, the police labelling of minority group members as deviant through the criminal law becomes a self-fulfilling construct that legitimises the negative treatment of the marginalised group.

There are distinct phases in the cycle of street policing transactions. The first is the result of anonymous targeting (where individuals are selected for police attention on the basis of detection of that person committing an offence), or on the basis of police suspicion determined by concepts of racial deviance and of the deviant location.

Some of these defendants will enter the next phase of repeat contact with the law because they fall into a predisposing category such as being more likely to be present in a public place (such as B and W) or of frequently using offensive language or exhibiting offensive behaviour (such as A), or of being in the minority in a particular place. Importantly, for these defendants the reasons for police targeting remain rooted in the surrounding conditions or in the behaviour exhibited by that person.

For other defendants the repeated contact may be instigated by the police because the police label that person as a deviant or as a ‘troublemaker,’ requiring additional attention. This deviant label is more readily applied to those persons who have previously challenged police authority. For these defendants there is an escalating cycle of repeat contacts and criminalisation that becomes dissociated from the original markers of offending or presence in places associated with deviant behaviour. At the

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491 See for example, in relation to young members of the Lebanese community in Sydney Poynting, S., 'When "Zero Tolerance" Looks Like Racial Intolerance: "Lebanese Youth Gangs", Discrimination and Resistance' (1999) 11 (1) Current Issues in Criminal Justice 74-78. As La Prairie argues, the result of negative attitudes to the law, may be a lack of anti-crime values within the marginalised social group, and a lack of opportunities to promote pro-social values. See LaPrairie, C., 'Reconstructing Theory: Explaining Aboriginal over-Representation in the Criminal Justice System' (1997) 30 Australian and New Zealand Journal of Criminology 39-54.

492 This indicates the importance of racial information in crime statistics, not to support racially based theories of deviance and policing, but rather to reveal the effect of them.

493 This can be temporarily defined such as outside hotels at closing time or city parks at nighttime when disorder and crimes of violence may be more likely to occur. See, for example, Briscoe, S., et al., 'Temporal and Regional Aspects of Alcohol-Related Violence and Disorder', NSW Bureau of Crime Statistics and Research, Sydney, 2001.
same time the suspicion relied on by the police to exercise a formal power to stop, or to
stop and search, or exercise other control and surveillance powers may become more
tenuous. The defendant may also come to direct offensive language or behaviour
towards police prior to the police taking any direct action against the defendant, or in
the course of 'policing by consent' to express disapproval of police attention. This
personalised targeting of the deviant defendant is a characteristic of the policing of areas
where the police\textsuperscript{494} have become familiar with the persons being policed.\textsuperscript{495} For this
reason personalised targeting is more likely to be a characteristic of policing in small
country towns rather than in urban areas where there is a high degree of anonymity such
as the city centre, and where the police are more likely to rely on the anonymous
targeting of the population on the basis of the actual detection of offences and according
to views of race and place.\textsuperscript{496}

As Wootten\textsuperscript{497} notes, a major shift in public opinion regarding indigenous peoples has
driven a re-orientation in police attitudes and practices. According to Wootten, police
leaders face a great challenge in bringing their services to an understanding and
acceptance of the new situation, in changing attitudes and practices that have become

\textsuperscript{494} That is, police officers whether individually or collectively. There is a need to research the
arrest patterns of individual officers (with suitable adjustments for time and place of shift) in an attempt to
discover whether, and if so, to what extent, overall police patterns of intervention or arrest are influenced
by the personal policing style of officers. The study and monitoring of individual officer arrest patterns
would help to identify both good and bad street policing practices and is an important accountability
measure.

\textsuperscript{495} For example, see the reference to a homeless person in Melbourne faced with accumulated
fines in the order of $100,000 on Carrick, D., \textit{Homelessness and the Law - Part 1}, 2002. A solicitor, Phil
Lynch is quoted as saying: 'The client was an elderly homeless man, who had an acquired brain injury
and was under an administration order, and over a period of about five years, he accrued more than
$100,000 in fines for these public order offences for offences such as drinking in public, for begging,
often for swearing because he’d tell the police officer or the public transport officer or the council officer
what he thought of the fine. And he came to us potentially facing 1259 days in jail for non-payment of
those fines; that could have been the outcome. We brought the matter on before the Melbourne
Magistrates’ Court and the magistrate exercised his discretion to dismiss all of the fines and impose the
condition which basically will provide for the rehabilitation of the client, that will involve him obtaining
aged care support and adequate accommodation. So we’re really looking at addressing the systemic issues
and the causes of the offences, rather than punishing people for what is basically a manifestation of their
disability and poverty.'

\textsuperscript{496} Note however, the status achieved by Peter Hoare as a ‘serial pest’ for his disruption of the
Australian Open in 2000, and of the funerals of Tommy Smith and Michael Hutchence. Anonymous,

embedded in police culture, in developing effective communication with Aboriginal communities, and in devising appropriate policies.

Where the cyclical transactions in street policing operate, they serve to perpetuate the contentious nature of police-defendant interactions. In this setting, cultural awareness training, the recruitment of more officers from marginalised communities and the introduction of liaison officers from these communities will not necessarily overcome the transactional cycle by which members of these communities are labelled as deviant and become involved in confrontations with police. For those who hope to achieve cultural change through the police service by concentrating on appropriate training for new recruits, perhaps the most startling aspect of the policing of towns such as Bourke is the large proportion of inexperienced police on transfer to that patrol at any one time. These officers are exposed to the entrenched views of more senior police who have been conditioned by the transactional definition of police-Aboriginal relations. These young officers are then put in the position of enforcing the law through the repetition of the same transactional model of policing.

4.E Acknowledging the subjective experience of Aboriginal people

In the study by Jochelson of court appearances involving offensive language and offensive behaviour charges, offensive language alone accounted for 29% of charges reported, and offensive behaviour alone accounted for 28%. Both charges together, but with no other charges, were used less frequently, accounting for just 2% of appearances. In a number of cases the offensive language or behaviour charges were combined with charges for behaviour directed at police. The greater proportion involved the ‘quinella’ in combination with one charge of either resist police or assault police accounting for 10% of appearances and 4% involved the ‘trifecta’ in combination with charges of resist police and assault police. Finally, 27% of appearances involved offensive behaviour or language with other charges. These overall figures would suggest that the trifecta and quinella are not particularly important. However their true significance lies in the selective use of these charges in the repeated targeting of individual defendants. This

occurs within a framework whereby police-defendant interactions reinforce and perpetuate attitudes of contempt for the law on the part of some Aboriginal people and confirm the labelling of Aboriginal defendants as deviants by the police. Significantly, Jochelson found that among those Aboriginal people charged with offensive conduct just over a quarter were also charged with an offence against the police.\textsuperscript{499} Jochelson also found that the rate of charging of the quinella or trifecta was positively related to the proportion of Aboriginal people in a Local Government Area.\textsuperscript{501}

Perhaps a step forward for Aboriginal people has been the national dismantling of restrictive and controlling 'protection' legislation following the 1967 Referendum.\textsuperscript{502} Even so, Aboriginal people have a strong awareness that non-Aboriginal administrators have in the past subjected Aboriginal people to control of even the minutest aspects of their lives. For example, in 1991, during the first trial concerning the Brewarrina riot, the trial judge, Nash DCJ, commented, in the absence of the jury, that when he was a solicitor in Bourke some 30 years previously such lawlessness was unheard of. One of the three principal accused who had effectively been exiled from Brewarrina for three years by the conditions of his bail leapt up and shouted 'Yes that's because you had the Dog Act!'\textsuperscript{503} There is now wider recognition of this aspect of our collective history.\textsuperscript{504} Even though the legal machinery of the ‘Protector of Aborigines’ has been dismantled, there is continuity between the old racially based laws and what can be seen as the racially based enforcement of current, ostensibly non-racist law and this is how many Aboriginal people experience the law today.


\textsuperscript{500} A 1999 report found that one-quarter of offensive language or conduct charges against Aboriginals were accompanied by a charge for an offence against police. See NSW Aboriginal Justice Advisory Committee, 'Policing Public Order', Aboriginal Justice Advisory Committee, Sydney, 1999. See also Chan, C., et al., 'Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan', Institute of Criminology, University of Sydney, Sydney, 2000. At pp. 18-19.


\textsuperscript{502} See, for example, Goodall, H., Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972, Allen & Unwin, Sydney, 1996b.

\textsuperscript{503} Bathurst District Court, 1991, Nash DCJ. One of the three accused was acquitted by the jury on the charge of riot. Because the indictment was framed to name only the three principal accused as rioters, the convictions of the remaining two accused were overturned on appeal.

The striking feature in many Aboriginal and police interactions is the strength with which police authority is rejected. It would be easy to dismiss this as the combined effect of alcohol and bad attitude. However, there is another reality involved, and that is the assertion of a right to be free of police interference. In this sense the ritualised conflicts noted by Jochelson can be seen to represent a post-colonial conflict where the Aboriginal person asserts the right to be free from arbitrary police attention and to be free from arbitrary arrest. The experience of policing on the street becomes a powerful source of knowledge, which reinforces the pattern of police and Aborigine interactions. For many Aboriginal people these interactions (whether experienced personally or as part of a shared identity) define the nature of the criminal justice system as something remote and oppressive. Murrundu Yanna refers to Aboriginal understanding of the ‘white man’s law’ as ‘domestic terrorism’ and cites as examples the ‘stolen generation’ and the specific cases of David Gundy, Daniel Yock, and Robbie Barker. Yanna sees the use of the criminal law as an instrument to control dissent saying the law is used ‘to intimidate Aboriginal men and women to know our place ... the message is, don’t stand up for what you know is right or wrong.’

In large part pro-active street policing powers are tolerated as the price of ensuring that the police have the ‘flexibility’ to use coercive means to ‘maintain order’ in society. In this way the cost of allowing the police such wide powers and the difficulty of ensuring accountability for the misuse of police power is either not acknowledged or is reckoned to be tolerable. In particular what the police can do is limited by time constraints before a suspect or defendant has to be brought before a court. It is the promise of being brought to court that justifies the police exercise of executive authority in the short term. However, for those who do not regularly come into contact with the police, or who can expect to be treated with civility or courtesy when they do (and most

505 David Gundy was shot and killed in his home in a series of police raids in Redfern following the shooting death of a police officer in inner Sydney. Gundy is referred to in the Eromanga tape discussed in Chapter One.
507 ibid.
importantly not be arrested), this does not seem to be too high a price to pay. For the members of marginalised communities however, the price may be very great and the ultimate cost to the criminal justice system overall is the undermining of respect for the law as a whole and hence its normative value. And yet as Edwards points out, there is little attention given to the study of the experience of those being policed.

Ultimately, perceptions of justice and the normative value of the law are forged through the collective experience of citizens and those who constitute a marginalised group in society are likely to be subjected to differential treatment through control and surveillance and the enforcement of public order law, and thereby be more readily inducted into the summary criminal justice system. The differential treatment of the members of marginalised social groups is an important aspect of the context in which offences are revealed and charged by police. Having been inducted as defendants into the criminal justice system, these persons are subject to the processes of the Local Court and no matter what process protections are available to a defendant in the Local Court, if the initial decision to induct them into the criminal justice system is seen as

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510 See NSW Aboriginal Justice Advisory Committee, ‘Aboriginal People and Bail Courts in NSW’, NSW Aboriginal Justice Advisory Committee, Sydney, 2002. The report finds that ‘the impact of heavy policing and discriminatory use of police discretion has a direct impact on Aboriginal remand rates and access to bail,’ and that convictions for public order offences are linked to negative bail decisions. See p. 17.

There is an implicit undervaluing of liberty for those labelled deviant and thus subjected to arrest. This is often supported by notions of the deviant lifestyle with value judgments characterised by reference to indolence, unemployment, waste, and alcohol or drug addiction. By reference to such negative stereotypes, non-custodial penalties are seen as ‘too light’ and custodial penalties as ‘less of a burden’.


513 See footnote 200 and accompanying text.
unfair, every subsequent step towards prosecution will be seen not only as unfair but also as a parody of justice:

If the norms fail to reflect the interests of all to whom they are applied, the substantive outcomes of their application will disadvantage just those persons whose interests are ignored. This bias will exist regardless of whether the norms pertaining to street misconduct meet requirements of due process and regardless of whether trustworthy and benevolent police officers enforce these norms.514

Taking into account the narrative perspective515 of those who experience the enforcement of the criminal law provides a tool to explicate the coexistence of different views of the criminal justice system.516 This perspective also promotes a reassessment of the claim to fairness and objectivity in the enforcement of the law:

Given the power relations between dominant and subordinate groups, the fact that each individual speaks from a subjective point of view leads to the conclusion that the perspectives that have shaped our legal, political, and philosophical concepts have been those of the dominant groups. Although these concepts may seem objective and neutral and are couched in neutral and general language, they are the result of the deliberations, implicit assumptions, and moral intuitions (not to speak of purposeful attempts at exclusion) of persons with a particular subjective perspective. Thus they are inherently and necessarily nonneutral and nonobjective. What has been imposed as objectivity is in fact subjectivity plus power.517

515 The idea of 'narrative understanding' is drawn from multiple perspectives as a means of comprehending how the one event may have divergent interpretations, depending on the historical or cultural understanding of each participant and observer. This theme may be developed by examining the over-representation of Aboriginal people in the criminal justice system and employing the tool of narrative understanding that flows out of critical race theory developed in the USA. Particularly in the United States of America, narrative discourse has emerged as a means of explaining and teaching law in the last two decades. It is predominantly a discourse generated by members of minority groups and includes black American, Hispanic speaking American and ethnically Asian-American advocates. The development of this legal movement can be seen as a response to the dominance of traditional legal discourse based on the rhetoric of the law and the denial, or diminishing, of individual accounts that run counter to the rhetorical claims of the law. For example see Gentilli, V., 'Comment: A Double Challenge for Critical Race Scholars: The Moral Context' (1992) 65 (July) Southern California Law Review 2361. For a discussion of the value of narrative in the context of critical race theory in the USA see Johnson, A. M. J., 'Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship' (1994) 79 (May) Iowa Law Review 803 - 852.
There is a need to consider the current patterns of police-defendant interaction within an historical context in which Aboriginal people have actively struggled to assert their rights. In a sense, the period following the 1967 referendum represented a stage of post-liberation, where the reality of rights and participation in society fell far short of the rhetoric. Indeed, as Pearson argues, Aboriginal people have since the 1970s been increasingly marginalised in terms of employment, and as a result, have become dependent on social welfare. In theoretical terms the role of the criminal law has been seen as serving 'the interests of those who control the economic resources' particularly those 'laws used to coerce an otherwise unwilling labor force into providing that labor which is the basis of the economic structure of the society'. During the post-colonial period, Aboriginal people have only been admitted to society in a formalistic sense and the old patterns of social, political and economic dispossession continue to be played

518 For an account of the history of Aboriginal struggle see for example, Reynolds, H., *This Whispering in Our Hearts*, Allen & Unwin, St Leonards, NSW, 1998. For an account of the struggle of Aboriginal people focusing on land rights in New South Wales see Goodall, H., *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972*, Allen & Unwin, Sydney, 1996b. Goodall describes six broad stages in this struggle, namely 1) immediate post-invasion 1788-1850, 2) regaining land 1860s to 1900s, 3) defending the land 1910s to 1930s, 4) under the 'Dog Act' 1930s, 5) border wars 1948 to 1965, 6) the Aboriginal tent embassy 1965 to 1972. See the reference to the 'Dog Act' below, see footnote 503 and accompanying text.


520 Chambliss, W. J., ‘The State and Criminal Law’, in W. J. Chambliss et al (Eds.), *Whose Law What Order? A Conflict Approach to Criminology*, John Wiley & Sons Inc, New York, 1976, 66-106. At p. 68. Chambliss and Mankoff refer to the East African tax and labor laws as a means of coercing black villagers to labour on white-owned estates. In Australia the criminal law was only part of a matrix of law that served three essential purposes in the development of the Australian capitalist state. The first was to dispossess the Aboriginal people of their traditional lands by enforced removal; intermingling of groups in collective ‘reserves’; and assimilationist policies that saw children removed from their families. See Goodall, H., *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972*, Allen & Unwin, Sydney, 1996b. and Wilson, R., ‘Bringing Them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.’ Human Rights and Equal Opportunity Commission, Sydney, 1997. The second purpose was to control those Aboriginal people who remained in contact with traditional lands either by regulating their presence on that land or in settlements close-by. The third purpose of the law was to control the Aboriginal people as a pool of cheap labor largely to service the (often seasonal) demands of the pastoral industry. Aboriginal people were cooks, shearsers, rouse-about, drovers, stockmen, fencers, ring-barkers and domestic servants to the vast, then labour-intensive sheep and cattle enterprises. As Pearson notes, Aboriginal people are no longer employed to the same extent in these industries, and as a result many communities have become increasingly ‘welfare dependent’ and have been forced into closer settlement in rural communities. See Pearson, N., ‘On the Human Right to Misery, Mass Incarceration and Early Death’, 25 October 2001, University of Sydney, Sydney, 2001. In fact ‘welfare dependence’ in many Aboriginal communities is moderated by Community Development Employment Programs (CDEP) into working on community projects and services. In any event in the era of large scale rural unemployment for Aboriginal people, the criminal law serves largely to contain the population as an end in itself rather than to maintain a labour force for industry.
out in the criminal law.\textsuperscript{521} The current challenge is to ensure that Aboriginal people achieve progress in terms of social, political and economic participation.\textsuperscript{522}

\textsuperscript{522} Whether through self-determination, or in mainstream society.
5 CHAPTER FIVE – PUBLIC ORDER, POLICE DISCRETION AND THE ‘DUTY’ TO ENFORCE THE LAW

Faced with the threat of disorder, officers use laws to get leverage over people, to threaten that if police orders are not followed, the people will go to jail. This is one reason police condemn the decriminalisation of nonconforming behaviour in public places, such as drinking alcoholic beverages, being drunk, and loitering, that has taken place over the last generation. Such laws are needed police argue, to help them gain control before more serious incidents occur.523

5.A Public order law

Whilst there is a strong tendency in the general community to associate minor crime with lawlessness, there has also been a long-standing consciousness of the potential for abuse in the enforcement of public order or ‘police’ offences. This consciousness among the Magistracy goes back to the nineteenth century as these laws developed in significance as shown in the following extract from a manual for colonial Justices: 524

An offence so general in its terms, requiring so few facts to support it, so easily trumped up, and so difficult to be rebutted, requires a very careful investigation at the hands of Justices; it is a charge to which a poor man out of employment, and loitering his time away in the streets for want of something better to do, is peculiarly open.

Now, when it is remembered that, whether or not a party be a bad character, he very probably becomes one after being sent to gaol as a rogue and a vagabond, - that his character is very much affected, - that after such a conviction, it is nearly hopeless for him to endeavour to obtain honest employment, - and that he is almost necessarily thrown back amongst the worst classes, who are the only ones who are ready to receive him, it behaves Justices to pause ere they consign a party to so miserable a fate. It is to be feared that, with many Justices, a conviction under this Statute is thought to be but a very light matter; perhaps they think that a few weeks’ imprisonment and hard labour operate as a very wholesome correction for evil propensities; the law certainly points out imprisonment and hard labour as the punishment to be awarded, but there is too much reason for fearing that, whilst few are reformed by such a corrective, very many are made infinitely worse, and ultimately ruined by its infliction.


Wilkinson placed this entry under the heading *Vagrancy Act* in a discussion of that Act in 1860. Wilkinson clearly recognised that the *Vagrancy Act* could easily be used to bring about an injustice. As Wilkinson says, such a charge requires ‘careful investigation’ by the Justice and ‘it behoves Justices to pause ere they consign a party to so miserable a fate.’ Implicit in what Wilkinson tells us is the view that there are those who deserve this ‘miserable fate’ and there are those who do not. Working out one from the other was the job of the Justice who had the moral responsibility to make the right decision. Wilkinson’s discussion reflects the inquisitorial role of the Justice at the time and whilst he does not state that the Justice’s investigation is essentially subjective in nature, this is implicit in his discussion.

The sentiments expressed by Wilkinson resonate loudly today even though in the course of more than 140 years and in particular, the last 30 years, much has changed. Official attitudes to the extensive use of vagrancy, drunkenness and prostitution offences have, on the whole, shifted considerably towards decriminalisation and a realisation of the inappropriateness of using the criminal law to control such social problems. This shift coincided with a modernisation of the Magistracy, allowing them to shed ‘some of their nineteenth century baggage.’ Even so, criminal laws are still readily used to achieve social control and they give the police wide discretion to label uncooperative, unruly or marginal behaviour as criminal and they have a strong negative effect on those who find themselves accused. The policing of offences against public order has been the subject of intense debate for the last thirty years in New South

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525 *Vagrancy Act* 15 Vic No. 4 (1851) (NSW) This Act replaced the *Vagrancy Act* 6 Wm IV No. 6 (1835) (NSW).

526 Wilkinson also has a similar entry in relation to prostitution offences under the same Act at pp. 414-415.


529 Only to respond to the same social problems through quasi-criminal laws such as the *Intoxicated Persons Act* 1979 (NSW) and other control and surveillance legislation, or through outright criminal laws such as through public order law. The underlying constant is the control of the marginalised population through the construction and preservation of strong apparatus for both State and private control.

There have also been significant shifts in the political treatment of different areas of public order law. Chambliss and Mankoff provide us with a means of rationalising the conflicting directions taken in the development of the law. They examine the theoretical explanations for the formulation and development of law in the process of ‘rule creation’ and discount the two extreme models of ‘value consensus’ (where the law reflects the values of the social group) and ‘ruling class’ control (where the law is an expression of the needs of the ruling class). The authors offer an alternative model ‘described as a conflict model of change’:

The starting point for this theory is the recognition that modern, industrialised society is composed of numerous social classes and interest groups who compete for the favors of the state. The stratification of society into social classes where there are substantial (and at times vast) differences in wealth, power and prestige inevitably leads to a conflict between the extant classes. It is in the course of working through and living with these inherent conflicts that the law takes its particular content and form. It is out of the conflicts generated by social class divisions that the definition of some acts as criminal or delinquent emerges.

The definition of public order offences depends in the first place on what is provided by the legislature, with an increasing range of loosely defined powers and criminal offences. Secondly, criminal justice officials interpret the law and decide how to respond to words or behaviour within the loose framework that public order legislation provides. Despite the numerous changes in public order law over the last thirty years, the pattern of policing has remained largely unaffected. A constant factor in the use of the criminal law has been the role of the police who literally give definition to the law. We should therefore challenge the assumptions which underpin the categorisation by police of certain behaviour as constituting public order offences.

The offences of offensive language and behaviour have long been used to regulate police-citizen interactions and although these offences are apparently not so significant

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in volume across the jurisdiction\textsuperscript{534} they constitute an important part of the work of the court of summary jurisdiction.\textsuperscript{535} The effect of the enforcement of these laws on general community perceptions of crime and on individual perceptions of the criminal justice process is more important than the volume of cases processed. There is also a link to be drawn between entry-level criminality for minor offences such as offensive language and offensive behaviour and subsequent criminal careers.\textsuperscript{536} More importantly it is the correlation between high rates of charging for these offences and areas with a higher proportion of Aboriginal people that is worth noting.\textsuperscript{537} The police use of widely drawn offences in conjunction with expanded control and surveillance powers has resulted in significant net-widening in police regulation of behaviour on the streets despite the movement away from the enforcement of moral crimes and offences of status.

Summary offence laws by their very open definition can be moulded to capture a wide range of behaviour,\textsuperscript{538} so that the use of offensive language and behaviour charges to regulate anti-social behaviour remains at the fringes of the definition of criminality.\textsuperscript{539} At times the behaviour complained of might not ordinarily be thought to be deserving of

\textsuperscript{533} ibid. At p. 101.

\textsuperscript{534} Jochelson reports that some 4.1% of all offences in the Local Court are for offensive language or offensive behaviour. See Jochelson, R., 'Aborigines and Public Order Legislation in New South Wales', NSW Bureau of Crime Statistics and Research, Sydney, 1997. The use of offensive language charges, particularly against Aboriginal and Torres Strait Islanders was shown to have increased in the period 1997-1999 (by 37.7%, overall). See NSW Bureau of Crime Statistics and Research, 'Race and Offensive Language Charges', NSW Bureau of Crime Statistics and Research, Sydney, 1999.

\textsuperscript{535} Sturma, M., 'Vice in a Vicious Society' (1983). At p. 135-136 Referred to in Brown, D., \textit{et al.}, \textit{Criminal Laws}, The Federation Press, Sydney, 2001. At p. 958. According to Brown et. al., Sturma reported that some 7% of arrests in the 1850s in Sydney were for obscene language involving such words as 'bloody', 'bugger' and 'whore.'


\textsuperscript{539} Shoemaker argues that the use of 'dirty words' should not be considered criminal unless it can be shown that the offence claimed survives a rigorous test of 'reasonableness'. See Shoemaker, D. W., '"Dirty Words' and the Offense Principle' (2000) 19 (5) \textit{Law and Philosophy} 545-584.
a criminal sanction.\textsuperscript{540} Some of the more extraordinary examples involving police officers as ‘victims’ that I have come across in practice include such oddities as calling out ‘melonhead’ to a balding police officer,\textsuperscript{541} calling out ‘dog’s arse’ allegedly to a dog whilst passing a police officer who thought that the words were directed at him,\textsuperscript{542} and shaking one’s hand in the air in a ‘masturbatory gesture’ towards a police officer.\textsuperscript{543} Quite often the circumstances of the ‘offence’ suggest that there is very little to be gained in the public interest by pursuing the prosecution. Very often in such cases the offence has a symbolic significance to do with the authority of individual police officers.\textsuperscript{544} Looking at the manner of street policing reveals the symbolic value of police summary offences.

In general terms, the judicial interpretation of public order offences pays little or no regard to preceding or precipitating actions of the police\textsuperscript{545} except to the extent that the

\textsuperscript{540} A connection is often drawn between low-level issues of order and crime. In 1998 the Australian Institute of Criminology announced plans for a research agenda on ‘the enhancement of civility’. The Institute stated ‘International research has shown that there is a link between disorder and crime’ and stated that ‘we have a great deal to learn from our Asian neighbours’ and ‘apart from the benefits of a more respectful society, a renewed focus on respect and civility may be one of the most significant steps towards reducing petty crime.’ See Graycar, A., \textit{Incivility and Crime in Australia}, (1998), Australian Institute of Criminology, <http://www.aic.gov.au/media/980225.html> 18 January 2002.


\textsuperscript{542} This case proceeded as a defended hearing in the Bourke Magistrates’ Court. The police officer gave evidence of the defendant riding his bike in the street and calling out in the direction of the officer the words ‘dog’s arse.’ The defendant gave evidence of calling to his dog and said he referred to it as ‘dog’s arse.’ In an apparent bid to appease both parties, the magistrate found that the defendant had used the words to his dog and that the words used were offensive. The defendant had a long history of interactions with the police commencing as a juvenile. His older brothers had also been involved in disputes with police and had been subjected to multiple arrests. This defendant had contracted poliomyelitis as a child and walked with a distinct limp. The police nickname for him was ‘Hoppy.’ The defendant’s reaction to the use of that nickname to his face had on at least one occasion led directly to a charge of offensive language being laid against this defendant. (Personal recollection).

\textsuperscript{543} The masturbatory gesture case was also heard in Bourke and involved a young man who had a dispute with a local police officer over a previous incident and he was alleged to have made the gesture towards a police officer. The matter was defended and the defendant was found guilty. (Personal recollection).

\textsuperscript{544} The report by the NSW Ombudsman into the complaint histories of individual police officers suggests that further study should be conducted into the degree to which individual officers use street offences as part of the tools they apply in policing. See NSW Ombudsman, ‘Improving the Management of Complaints’, NSW Ombudsman, Sydney, 2002.

\textsuperscript{545} Nor are any particular consequences of the citizen’s action required, such as ‘a tendency to disturb the peace’, as required under English law. On the question in England of the presence of ‘a person likely to be caused harassment, alarm or distress’ see \textit{Director of Public Prosecutions v Orum} [1988] 3 All ER 449. In this case it was held that the police officer was not likely to be caused harassment, alarm
directing of words or behaviour to a police officer may become part of the definition of the offence. In normative terms, it is the citizen’s action that is seen as the starting point for deciding whether a charge should be laid. The judicial treatment of police discretionary decision-making in Australia has until 1995 been primarily concerned with responding to illegality or impropriety in the manner of collecting evidence of specific offences. However, the courts have, in decisions from the Supreme Courts of South Australia and New South Wales, expanded the range of judicial concerns (and their preparedness to rule against police action) to include instances where police inaction or action has precipitated an offence. This is a major shift from pre-existing judicial concern about the manner of collecting evidence, which in the USA led to the complaint that this would allow the factually guilty to go free merely because of the mistake of the police officer. The courts in Australia are showing a preparedness to review the role of police methods and police behaviour in setting the scene for the commission of an offence, quite apart from any question of entrapment. This preparedness on the part of some judicial officers is unlikely to affect the bulk of cases processed by the Local Court. It does however, add a legitimating principle (if that were needed) for DPP intervention on the basis of the public interest regarding unreasonable police action.

or distress and the officer could not arrest on the basis of harassment, alarm or distress being caused to another person, as no other person was present at the time of the behaviour alleged. See footnote 463 and accompanying text.

546 See Ridgeway v R (1995) 184 CLR 19 on the illegality of police action engaged in to detect an offence. See the discussion of reactive policing in (1.F.i.e). In Ridgeway the court extended judicial discretion to reject evidence because of illegality in the collection of evidence to also reject evidence because of illegality through police participation in the offence under investigation.


549 See Wigmore, J. H., 'Using Evidence Obtained by Illegal Search and Seizure' (1922) 8 American Bar Association Journal 479. For subsequent treatment in the United States of this issue of police illegality in the collection of evidence, see footnote 1009 and accompanying text.

550 See, for example, on the effect of the illegality of police behaviour in facilitating the commission of a serious offence: Ridgeway v R (1995) 184 CLR 19 See also Director of Public Prosecutions v Carr [2002] NSWSC 194 for the extension of the power of the court to reject evidence on the basis of police behaviour leading up to the commission of a minor offence by the defendant. See also Robinett v Police [2000] SASC 405 for a South Australian case where evidence was rejected on the basis of police inaction in the lead-up to the offence. See footnote 693. See also Presser, B., 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly Obtained Evidence.' (2001) 25 Melbourne University Law Review 757.
As we have seen in the case study of B and W,551 the notion that defendant action can be viewed in isolation from its wider context is untenable. Context, particularly the presence of police and their interaction with the defendant, in some cases precipitates a response from the defendant and it is the police officer who then determines whether the defendant’s actions are classed as criminal or not. It may be simply a question of police officers being present as direct observers, whether on patrol or on being called-out in response to a complaint (and thereby being in a position to witness the defendant’s criminal behaviour). Alternatively, the police may be actively involved in an exchange with the defendant that has as its end point the criminalisation of the defendant’s negative response to police authority because of the manner in which it is expressed.

Patterns of policing are fashioned by a combination of the law, internal controls (for example, deployment decisions, guidelines, and police working culture) and external controls (for example, the review of police decisions through various complaint mechanisms and the judicial treatment of criminal charges initiated by police officers). Overseas, there is a large body of research including observational studies of street policing practices552 and generally the area of policing law and theory is well documented and covers a vast array of often-complex issues553 including the police assessment of the ‘victim’ of an offence, if any.554 In Australia there has not been the

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551 See the case study in Chapter Three.


554 As Mastrofski et al. indicate in relation to the USA, police are less likely to arrest when requested to do so by another citizen, however as the evidence of an offence increases so does the
same level of governmental and institutional commitment to research as say, in England and Wales and yet there have been a few detailed studies of policing practices.555

5.B De-criminalising lifestyles

Crime is a political phenomenon. What gets defined as criminal or delinquent behavior is the result of a political process within which rules are formed which prohibit or require people to behave in certain ways. It is this process which must be understood as it bears on the definition of behavior as criminal if we are to proceed to the study of criminal behavior. Thus to ask ‘why is it that some acts get defined as criminal while others do not’ is the starting point for all systematic study of crime and criminal behavior. Nothing is inherently criminal, it is only the response that makes it so. If we are to explain crime, we must first explain the social forces that cause some acts to be defined as criminal while other acts are not.556

police homosexual activity in the toilets of Sydney.\textsuperscript{559} Now prostitution is treated as a problem of regulation of place rather than a question of prohibition\textsuperscript{560} and whilst homosexual acts between consenting adult males in private have been decriminalised, it is no longer necessary for police to look into public toilet cubicles\textsuperscript{561} or peer under toilet partitions\textsuperscript{562} to detect offences in ‘public.’ The change in attitude to the policing of persons engaged in homosexual activity reflects a fundamental change in the political power of members of the homosexual community, the movement in public debate, and a changed public attitude to police methods for the detection of these offences.\textsuperscript{563}

The historically aggressive policing of these victimless offences had intersected with notions of deviance\textsuperscript{564} and the policing of public order as indicated by a then retired Detective Inspector commenting in 1987 on the closure of Darlinghurst Police Station:

> When the young gentlemen and ladies of the Force flow out of the new centre on patrol they will drive along Oxford Street past punks, poofers, prostitutes and the various deviants that go to make up that area, and regard it as par for the course...How sweet it was when one did not have to worry about the Ombudsman or the Council for Civil Liberties or the Gay Liberation Council. When one did not have to back off from an angry man and magistrates could refuse time to pay.\textsuperscript{565}

\textsuperscript{559} Prompting the magistrates to call for a study of offenders charged with homosexual offences and the convening of a seminar. See Institute of Criminology, \textit{Male sex offences in public places}, Sydney, Institute of Criminology, 1970.

\textsuperscript{560} Sections 19, 19A and 20 of the \textit{Summary Offences Act} 1988 (NSW).

\textsuperscript{561} In a discussion of an ‘epidemic’ of male sex offences in Sydney in the late 1960s, Lewer notes that many public toilet doors had a glass panel insert (said to be about 20 inches by 8 inches). He says that the Supreme Court of NSW held that the toilet cubicle was part of a ‘public place’ relying on the authority of Inglis \textit{v} Fish [1961] VR 607. (In the case of Klaus Janitz Unreported, NSWCCA, 26 July 1968). See Lewer, W. J., ‘Introduction - Legal and Other Aspects’, \textit{Male Sex Offences in Public Places}, Institute of Criminology, Sydney, 1970. At p. 9. In the confusion before the Janitz decision, the defendant was able to successfully plead \textit{autrefois acquit} in relation to his behaviour in a toilet cubicle. In \textit{R v Blonner} (1968) 89 (1) WN (NSW) 17. Blonner had pleaded guilty to the charge of offensive behaviour in a public place but the magistrate vacated the plea and dismissed that charge on the basis that the cubicle was not a public place. However, the magistrate re-charged Blonner with offensive behaviour within view of a public place. Blonner pleaded guilty but the conviction was quashed in the Court of Quarter Sessions on the basis that the dismissal of the first charge entitled Blonner to plead \textit{autrefois acquit}.

\textsuperscript{562} Inglis \textit{v Fish} 1961 VR 607. A case involving a male offender found by police to be looking from a male toilet cubicle through a hole in the wall to observe females using the adjacent female toilets.


The abandoning of a crime control model for homosexual behaviour in public toilets can be seen at least in part to be a response to the concern that police should not be required to work undercover to keep watch in toilets in order to detect these offences.\textsuperscript{566} This reflects a rejection of policing based on the targeting of places that are public areas by undercover police who seek to expose the sexual behaviour of consenting adults. It also reflects the greater political power of the gay rights movement. A seminar on male homosexual offences, held at the instigation of the Magistracy in 1970\textsuperscript{567} is notable not only for the perception of some speakers that the criminal law provided an inappropriate response but also for the condemnation of homosexual behaviour. For some speakers this condemnation was based on moral grounds and for others on the medicalisation of homosexual behaviour as a psychiatric disorder. Interestingly, a survey of offenders was proposed within a medicalised framework for the treatment of offenders only to be abandoned when the police unit that had previously provided a large number of defendants before the Magistrates’ Court had ceased to operate.\textsuperscript{568} The agenda for reform regarding this aspect of the criminal law appears to have changed considerably by 1977, when a conference was organised by the Bureau of Crime Statistics and Research.\textsuperscript{569} This conference was much more focused on the inappropriateness of criminalizing adult, consensual homosexual behaviour in private.

At about the same time, the movement to de-criminalize status offences such as drunkenness was based on the view that the criminal law was not an appropriate mechanism to address a social or health related problem.\textsuperscript{570} Indeed, the use of the law in this way was seen as an affront to human rights values.\textsuperscript{571} The offence of ‘public
drunkenness' had been used by police in NSW as a 'street sweeping offence' up until its repeal in 1979 as part of a package of reforms to the *Summary Offences Act 1970* (NSW) in 1979.\textsuperscript{572} The crime of public drunkenness was replaced by a scheme of welfare-based regulation\textsuperscript{573} contained in the *Intoxicated Persons Act 1979* (NSW).

However, the political process in New South Wales has come to be dominated by law and order concerns and strong public order legislation has been seen as an important tool for the police to operate effectively.\textsuperscript{574} As a result, the overall response to the decriminalisation of drunkenness has been to re-criminalize minor offending associated with the maintenance of 'order' and the implementation of non-criminal policing strategies of control and surveillance.\textsuperscript{575} The repertoire of police powers has in this way been expanded by the inclusion of non-offence regulatory powers to detain and remove people from the street, whilst leaving it open to the police to arrest and subsequently charge particular individuals for minor public order offences or simply for non-cooperation with move-on and other regulatory powers. When the abuse of the drunk (such as 'A' who is referred to in the case study in Chapter One) is labelled as 'offensive language' or 'acting in an offensive manner', rather than being 'drunk and disorderly' or 'a vagrant', the use of coercive powers of control by the police is given

\textsuperscript{573} ibid, at p. 1002.
\textsuperscript{575} In Western Australia in the five years following de-criminalisation of public drunkenness in 1990 the number of Aboriginals arrested for public order offences was at least double the number in the six years preceding. The number of non-Aborigines arrested for these offences showed a more modest increase for the same period with the highest increase in any year being one-third higher than the highest level prior to 1990. Harding, R., 'Justice and Injustice', \textit{Proceedings of the Benchmarking Workshop}, Council for Aboriginal Reconciliation, 1998.


The unpredictable results of the interrelationship between formal legal rules and police culture is noted by Chan who says 'Bourdieu's conceptions of field and habitus assist our understanding of the relationship between the formal structural context of policing and police cultural practice. Changes in the field (e.g. in the formal rules governing policing) inevitably alter the way the game is played, since habitus interacts with the field, but the resulting practice may or may not be substantially or even discernably changed.' Chan, J., 'Changing Police Culture' (1996) 36 (1) \textit{British Journal of Criminology} 109-134. At p. 131.
new legitimacy. Where once the argumentative behaviour of the abusive drunk would not have been treated as a separate offence, it is now more readily condemned as an offence in itself, and the initial police action is retrospectively justified by the negative response of the defendant.\textsuperscript{576}

It is worthwhile comparing changes in policing affecting homosexual offences to the continued methods of policing members of the Aboriginal community. The lack of positive and enlightened change in street policing methods reflects not only the dominance of ‘law and order’ reasoning,\textsuperscript{577} but also the continued powerlessness of members of the Aboriginal community and the pervasiveness of mainstream concepts of deviance\textsuperscript{578} and of the portrayal of Aboriginal people as ‘lawless’, ‘dangerous’ and ‘deviant’ and of street offences as ‘real’ crime (albeit petty) that must be aggressively policed to prevent more serious crime.

Whilst the legislative formula for criminalizing behaviour and language has varied, the courts have consistently held that meaning can be objectively determined.\textsuperscript{579} However, within the framework of objectively determined offences, the definition of offensiveness has itself been a matter of dispute. For example, Weisbrot\textsuperscript{580} attacked what he saw as the inappropriate use of offensive language charges and criticised the ‘reasonable person test’ for offensiveness as being ‘too precious.’ Weisbrot favoured the ‘reasonably tolerant, understanding and contemporary approach’ put forward by Kerr J in \textit{Ball v McIntyre}.\textsuperscript{581} And yet, variation is tolerated on two grounds, firstly, as an aspect of the simple judgment discretion of each magistrate and secondly, on the basis that each magistrate may reflect local conditions and social standards. For example, it is

\begin{thebibliography}{99}
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\item \textsuperscript{576} See Hogg, R., ‘Criminal Justice or Social Justice?’ in D. Moore et al (Eds.), \textit{Keeping the Peace: Police Accountability and Oversight}, University of Canberra and the Royal Institute of Public Administration, Canberra, 1994.
\item \textsuperscript{579} See \textit{Connolly v Willis} [1984] 1 NSWLR 373, \textit{Smith} [1974] 2 NSWLR 586 per Street CJ. In \textit{Smith} it was argued that the offence of offensive language offended ‘due process’ requirements in the law because it was so widely drawn as to be meaningless and susceptible to producing unequal enforcement. Street CJ rejected this argument on the basis that there is no requirement for ‘due process’ in the manner comprehended in the USA Bill of Rights.
\item \textsuperscript{580} Weisbrot, D., ‘Sex, Words and Magistrates’ (1991) 16 (6) \textit{Legal Service Bulletin} 297-298.
\item \textsuperscript{581} (1966) 9 FLR 237 at p. 962.
\end{thebibliography}
expressly recognised that there may be wide variance among magistrates in deciding whether a reasonably tolerant person would find behaviour or words in fact offensive.\textsuperscript{582} Whilst in \textit{Khan v Bazeley},\textsuperscript{583} the Supreme Court of South Australia took the view that the local magistrate is best able to know the standards of the 'local community.'

However, a feature of this open definition of what constitutes offensive words or conduct is that a magistrate’s findings of fact are generally considered within the magistrate’s discretion and not reviewable. A finding of law that words or conduct are not offensive extends beyond the wide factual discretion of the magistrate and as such, may be more likely to be overturned as being incorrect in law, unlike a finding of fact that the use of certain words or behaviour in the particular circumstances of the case being determined is not offensive. In this way, the law maintains the openness of definition and limits the development of more clear-cut standards. In accordance with this approach, the New South Wales Supreme Court has generally rejected findings made by magistrates that particular language or behaviour is not offensive as a matter of law. The Court has consistently left it open for the magistrate to find as a matter of fact that particular behaviour or words are not offensive.\textsuperscript{584} It is not possible to gauge from the few appeal cases that exist, the extent to which courts ordinarily consider the wider context in which language or behaviour is used. If the surrounding circumstances were to be considered by the magistrate, then this would most likely be through a finding of fact, that ‘in the circumstances’, behaviour or language was or was not offensive.

\textsuperscript{582} See McNamara \textit{v} Freeburn Unreported, NSWSC CLD, 5 August 1988. See also Kerr J, in \textit{Ball \textit{v} McIntyre} (1966) 9 FLR 237, at p. 245, where His Honour says ‘I recognize that different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that a so-called reasonable man [sic] is reasonably tolerant and understanding, and reasonably contemporary in his reactions.’

\textsuperscript{583} (1986) SASR 481.

\textsuperscript{584} The decision of Heilpern LCM in the case of \textit{Police \textit{v} Shannon Dunn} Unreported, Dubbo Local Court 27 August 1999 is significant because His Worship ruled that the use of the words ‘fuck off’ could no longer be considered offensive. See Brown, D., \textit{et al.}, \textit{Criminal Laws}, The Federation Press, Sydney, 2001. At p. 965-6. In the past such a ruling might be expected to lead to a challenge by the DPP (on behalf of the police) by way of prerogative relief of mandamus from the Supreme Court. The DPP did not take such action in Dunn’s case. The magistrate’s decision in Dunn was not based on the surrounding circumstances whereby the police sought to stop the defendant and take him into custody to resolve the question of ownership of the bike, then in the possession of Dunn. See also footnotes 662, 354 and 959 and accompanying text.

However, the DPP did appeal on unrelated grounds in \textit{Director of Public Prosecutions \textit{v} Carr} [2002] NSWSC 194 where Heilpern LCM relied on the provisions of the \textit{Evidence Act} 1995 (NSW) to disallow evidence because of police action leading to the offence in question.
5.C Police discretion

Among the Australia States there is a hierarchy of decision-making operating in the decision to prosecute. In this hierarchy the police exercise wide discretion at the threshold where a decision is made whether to induct a person into the criminal justice system or not. Pre-charge decisions not to investigate an offence or not to charge a person are made solely by individual informant police officers every day. A variety of factors will influence the officer’s decision whether to investigate or charge. The decision whether or not to act will involve any one of, or a combination of, the discretionary mechanisms indicated by Pattenden and referred to in Chapter One. Principal among these are the indeterminancy of police powers to the extent that these powers are unaccountable, vague, indistinct and often ambiguous. Studies in policing indicate the complexity that attaches to the exercise of police powers including the use of sometimes ill-defined legal powers, extra-legal powers and policing ‘by consent.’ Secondly, some offences such as public order offences set a very low threshold of behaviour that may be criminalized. Thirdly, the police officer acts as a gatekeeper, and sorts potential cases by deciding not only those matters in which to charge, but also those matters in which not to proceed. When the police officer’s threshold discretion is exercised negatively, it is ‘invisible’ and sometimes ‘unreviewable’, or it is practically treated as though it were immune from judicial review. This negative component of police discretion to rule cases out of the criminal justice system is hidden

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585 The decision to charge for Commonwealth offences by Australian Federal Police officers is controlled by the Commonwealth DPP (except for arrest matters). See the discussion of Commonwealth arrangements in Chapter Two.

586 See Miller, F., Prosecution - the Decision to Charge a Suspect with a Crime, Little, Brown and Company, Boston, 1970. Miller observes that the decision not to charge is ordinarily made because the prosecutor thinks, either that the offence cannot be proved or ‘full enforcement would not be in the overall community interest.’ At p. 293.


See the treatment in the USA of the arresting officer’s discretion in Atwater et al v City of Lago Vista et al 532 U.S. (2001).
and unchecked and so the process of subjective evaluation employed by police is partly obscured. Consequently, it is difficult in this situation to get a sense whether police charging practices overall are fair or not.

The capacity of individual police to respond to the policing environment will depend on how many police are deployed overall, as this affects the time and resources available to the individual officer. At the same time, the authority of individual police officers in street policing is high as each is invested with the markers of that authority by way of a uniform, a revolver and other service equipment. The manner in which this circumstantial discretion is exercised is affected by formal guidelines and rules that are generally derived from the role authority of the employing organisation, and informal norms, understandings and expectations that grow up out of the practice of decision-making. As we have seen, the level of circumstantial discretion, the nature of police culture and the degree of autonomy given to the decision-maker can have the effect of allowing an officer on the street to act illegally or extra-legally.

The contrast between normative assumptions about policing and the practice of the police have been put dramatically and provocatively as follows:

1. No one may be subjected to criminal punishment except for conduct, provided that young males, the poor, the scruffy, the 'slag', black people, gays, people who have long hair or unconventional dress and other out groups as may be defined by the police from time to time may be subject to harassment whenever the police decide that this is appropriate;

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591 This equipment may indicate a capacity to respond (such as a police car), or the capacity to invoke collective strength by linking with other officers (such as communications equipment). At times the equipment may symbolise a heightened level of response by police (such as the use of horses for crowd control, the use of batons, riot shields and other riot equipment). At times ordinary police are transformed by donning the markers and apparatus of a high-level police response such as with the formation of a tactical response group. See, for example, Goodall, H., 'Policing in Whose Interests? Local Government, the TRG and Aborigines in Brewarrina, 1987-1988' (1990) 3 Journal for Social Justice Studies 19-34.


593 These 'rules' are based on Packer's 'minimum requirements of any criminal justice system.' See McConville, M., et al., 'Deceptive or Critical Sociology: The Choice Is Yours' (1997) 37 (3) British Journal of Criminology 347-359. Referring to Packer, H. L., The Limits of the Criminal Sanction, Stanford University Press, Stanford, 1968. These amended principles were drawn as an extension of the arguments that had been put by David Smith in a book review of McConville, M., et al., The Case for the
Conduct may not be treated as criminal unless it has been so defined by appropriate lawmakers before it has taken place, except that individuals or groups may be harassed or otherwise the subject of coercive force whether or not they have committed any offence if this will help ease social strains;

This definitional role is assigned primarily and broadly to the legislature, secondarily and interstitially to the courts, except and provided that it is understood that such rules as may be created by the legislature may be deemed by the police to be merely 'presentational' and thus not worthy of respect, and further that the courts may not be interested in how the police behave nor seek to control their activities, and further that the police themselves will be allowed to define what conduct should be proscribed;

In order to make these prescriptions material and not merely formal, the definitions of criminal conduct must be precisely enough stated to leave comparatively little room for arbitrary application, provided always that individually and in aggregate the law will be so arranged that the police will always have power to arrest anyone at any time.

These qualifications also represent themes that are consistent in a number of jurisdictions, and as we have seen, Australia, and NSW in particular, is no exception. Police power is broad and ill defined in part because policing is seen as a dangerous and unpredictable activity that requires strong and malleable coercive powers for the police to maintain control of the streets in any unforeseen circumstance. It is also seen as necessary to ‘support police’ carrying out their ‘dangerous and difficult work’. Within this setting deviance is often associated with membership of a marginalised community, which of itself, becomes a reasonable ground for police attention and

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Footnotes:

597 In popular political terms support for the police has two aspects, the first is the provision of an extensive repertoire of powers and the second is the imposition of increasingly severe punishment for offenders.
598 Particularly following the killing of a police officer whilst on duty. See footnote 787 in relation to the murder of David Carty which led to the enactment of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW).
The law also tolerates the use of coercive force by police in the absence of proof of the commission of any offence. It is in the nature of the work of the police officer (who has to respond to the uncontrolled and spontaneous demands of the policing environment) to be called on to exercise discretion in a wide range of unpredictable ways. Ultimately, the police can arrest anyone at any time, not necessarily because they are specifically empowered to do so but because they can.

Police work is so varied it cannot be subject to formal rules nor can it be effectively monitored and because policing is multi-faceted in nature it does not fit readily into any one model of analysis. The analysis of discretionary decision making outlined in Chapter One is applied to the work of the police officer in Figure 6. The law and the allocation of police resources for control and surveillance, formally establish the field in which a police officer may exercise discretion. Within this framework, discretion is utilised by individual officers in the way they go about the job of policing. The width of police discretion is demonstrated in the case study of B and W, in the first incident involving the bike, the police officers involved could 1) ignore the young persons, 2) stop the young person riding and give an informal warning, 3) stop the young persons and question them, 4) formally caution the young person, 5) in the event of a challenge of police action expressed with ‘offensive’ language, arrest the young person involved, for charges relating to public order, 6) ignore the language and take no action.
5.C.i The negative exercise of discretion

Discussing the negative exercise of discretion by police,\textsuperscript{606} Lord Denning, said ‘there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere’.\textsuperscript{607} However, the House of Lords has more recently emphasised the wide discretion given to the police in making law enforcement policy. In referring to Blackburn’s case in \textit{Chief Constable of Sussex, Ex Parte International Trader’s Ferry Ltd, R v.}\textsuperscript{608} Lord Hoffman said:

\textsuperscript{606} Whilst commenting on the extent to which the law will not interfere in the exercise of police discretion in the English case of \textit{R v Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118.}

\textsuperscript{607} In Australia an example is \textit{North Broken Hill; Ex parte Commissioner of Police (1992) 61 A Crim R 390.}

\textsuperscript{608} [1999] 2 AC 418. In this case, the House of Lords held that it was open to the Chief Constable of Sussex to refuse (on the basis of inadequate resources) to provide police resources to protect the movement of live animal exports being sent by a trading company through the port of Shoreham and for police to direct lorry drivers to turn back from the port to avoid a breach of the peace. Although agreeing with the majority that the Chief Constable’s discretion had not miscarried, Lord Cooke of
In domestic law, the Chief Constable has a public duty to keep the peace and enforce the law. But the law gives him a wide discretion as to the way in which the duty is performed.\footnote{609}

In any event, the police do not report the discretionary decisions made by them, on a case-by-case basis, not to enforce the law and whilst individual victims may have a reason to complain, a suspect has no real interest in demanding that proceedings be instituted. This means that there is a lack of information on, and accountability for, these police decisions not to charge. It is then very difficult to make any comparison of, or to evaluate the fairness of, those police decisions to charge a person, compared with those cases where the police have decided not to charge.

The individual police officer has ‘operational autonomy’ and differences exist between the ‘occupational culture’ of the lower ranks as opposed to the commitment of senior police to ideals such as community policing.\footnote{610} In a review of policing studies and the nature of occupational culture the authors concluded that:

> Whilst causal relationships are hard to establish, the evidence shows clearly that at least some of the differential treatment is directly attributable to discriminatory policing. Police do not simply respond to hostile and uncooperative behaviour from ethnic minorities – although they may receive plenty of this, instead, prejudicial attitudes, strongly reinforced by occupational culture, inform the way in which the police respond to incidents involving black people.\footnote{611}

An unresolved question is whether the police officer’s exercise of discretion is in formal terms truly autonomous or whether it may be subject to the direction of the Police

\footnote{609} Lord Nolan quotes from Lord Denning in \textit{R v Commissioner of Police of the Metropolis, Ex parte Blackburn} [1968] 2 Q.B. 118, 136: ‘... [I]t is for the ... chief constable ... to decide ... on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter.’

This issue was highlighted in the so-called ‘Stupid as a Painter’ case, where the Police Association commenced, but did not pursue, a Supreme Court action for a declaration that ‘the Commissioner had no power to give directions or advice to a police officer in respect of Government policy.’ The lack of co-ordination in the implementation of criminal justice policy leads to the chaotic and ad hoc implementation of initiatives in this area.

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611 ibid. At pp. 184-185.
612 See Hogg, R., et al., ‘The Politics of Police Independence’ (1983) 8 Legal Service Bulletin 160 and 220. The ambiguity concerning the accountability of the Police Service to government and of the individual officer to the law or the police hierarchy is exploited by the Police Service and government according to Hogg and Hawker who note that ‘the vagueness in legal and administrative arrangements, and their lack of visibility, are exploited opportunistically as the need arises, but this rarely if ever entails an explicit political renunciation of the principle of independence.’ As noted by Hogg and Hawker, the idea that police (whether individually or collectively) are accountable to the law alone is used to argue that the police are therefore not under political control. Given that police and policing have become significant political issues in the last 20 years of law and order politics, there is a fine line to be drawn between exploiting police issues for political gain and being seen in a negative sense to be politically interfering in the operations of police. At times the use of the police conforms with majoritarian views and the political nature of enforcement is largely unnoticed. See, for example Bronitt, S., et al., ‘Political Freedom as an Outlaw: Republican Theory and Political Protest’ (1996) 18 (2) Adelaide Law Review 289-330.


5.D Pro-active policing

There are a number of reasons why the police might exercise their powers of control and surveillance or be involved in the detection of offences. The primary reason might be expected to be for the intrinsic value of maintaining public order. However, the police also use the law as a control device and ‘the aims of stops and arrests are often not to enforce the law per se.’ Arrests are used to secure broader objectives such as ‘the imposition of order, the assertion of authority, the acquisition of information.’

The work of the police officer on the street is based on the exercise of specific powers or on the mediation of police authority through the ‘consent’ of the defendant. The use of formal power usually has a pre-condition that the police officer has a relevant reasonable suspicion that justifies the use of that power. In policing ‘by consent’ there are no such requirements. Whether a formal power is being relied on, or the police officer’s authority is negotiated, there is considerable latitude in terms of what the officer may do. The officer may even act in an entirely extra-legal capacity with little


See McBarnet, D., Conviction-Law, the State and the Construction of Justice, McMillan, London, 1981. McBarnet comments on the limits of any post hoc check on the reasonableness of the police officer’s belief that arrest was justified. At p. 29.

In the USA context Moran describes how the Supreme Court has developed a hierarchy of police-citizen interactions for the purposes of the Fourth Amendment, they are ‘consensual encounters’, ‘investigative stops’, and ‘custodial arrests’. The Court has ‘defined the boundaries’ between these types and indicated the allowable level of police intrusiveness for each type of interaction. See Moran, D. A., ‘Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine’ (2000) 37 American Criminal Law Review 1143-1164. At pp. 1143-4. Moran argues that the Court needs to develop a fourth type of ‘non-custodial arrest’ where the police officer responds to an actual (though minor) offence and the defendant is not consenting but is also not free to leave and the officer is acting on more than mere suspicion. Moran points out that a stop for a traffic violation is not considered as a custodial arrest (even though the person may be detained for longer than they might for an ‘investigative stop’), nor is the stop considered a period in custody for the purposes of the Fifth Amendment. The aim of creating this fourth category, according to Moran, would be to resolve the question whether the officer can stop a person for a minor traffic offence on less than probable cause and resolve whether it is ‘unreasonable for the police to take a person into custody for a petty offence’. See, at

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prospect of any sanction. Perhaps most importantly, the threat of arrest backs up the practice of 'policing by consent' which enables police power to be used to achieve immediate policing goals, such as:

a) the use of the interaction as a means to investigate other offences,

b) the enforcement of the law symbolically to reinforce police power and control,

c) the use of street offences as a pretext for investigating some other specific offence then known to the police,

d) the containment of a person, or

e) to impose police control of the use of public space.

The police may use three distinct criteria to initiate a 'field interrogation'. They are 'incongruity, prior information and appearance'. These criteria are often vague and uncertain. The police may also discover people with the 'wrong attitude' to police intervention indicating that they must have something to hide, are likely to offend, or that they have an attitude that ought to be punished in itself. The interaction of the police officer and defendant therefore involves an active negotiation of power for the police officer to act with the 'consent' of the defendant. For many people subjected to this filtering the interaction goes no further, provided they submit to the process and it is the reaction of the person stopped that is often critical:

But if patrolmen adopt rather loose standards for deciding when to stop and question people, their standards for taking further action are usually somewhat stiffer. In most of the incidents described they were rather easily convinced that nothing was wrong. The exception to this is when the person challenges their authority, their right to stop and ask them questions. The question 'what right do you have to question me' is not construed as rightful indignation but as implicit guilt.

pp. 1145-1146. At least the second question is resolved by the Supreme Court decision in Atwater et al. v City of Lago Vista et al. 532 U.S. (2001) where the Court decided that a custodial arrest for an offence not carrying a custodial penalty was a matter for the 'good sense' of the police officer.


As opposed to the strictly legal power of arrest.


By questioning or search.

On the whole, the goal of the 'patrolman' is to 'reproduce order' and achieving 'order' is associated with lowering 'the likelihood that future disorder, particularly crime, will occur':

An essential part of police work is taking charge. The means used to accomplish this end depend on the circumstances. They can involve hitting, shooting, referring, rescuing, tending, separating, handcuffing, humoring, threatening, placating and discussing. The objective is to minimize the disruptions of normal life. As one officer said 'We keep the peace, we don’t settle problems' … They do not view law enforcement as an end in itself but as a tool for convincing people not to do wrong.

Paradoxically, the attempt to maintain order through aggressive street policing may have the opposite effect. The tenor of the interaction is likely to be negative from the start as filtering is generally carried out in an aggressive style. In some cases this is because the police suspect or accuse the person of being involved in some (perhaps trifling) offence and police officers assert their authority in clear and forceful terms. At times the street policing strategy is to make an area ‘too hot’ for those who may contemplate committing more serious crime. In this way, the presence of the police is seen to provide a sense of security and to have at best, a preventative deterrent or at worst a displacement effect. The criminalisation of minor offenders may also absorb people into the criminal justice system before they commit other serious crime. This is the incapacitation aspect of ‘law and order’ policies and defendants are increasingly

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being absorbed by way of incarceration both as a matter of policy and as an effect of the growth in individual cases, of a person’s growing criminal record.

The enforcement of minor offences may be seen by defendants to be an unwarranted interference into their lives in an apparently arbitrary or racist manner with the effect of triggering disorder. The aggressive and violent nature of interactions between police and defendants on the streets, and in the period of custody following arrest, has been documented in many countries including the United States of America, England, and South Africa. In the USA, Amnesty International has reported on the ‘patterns of ill-treatment across the United States, including police beatings, unjustified shootings and the use of dangerous restraint techniques to subdue suspects’ and reported that ‘racial and ethnic minorities were disproportionately the victims of police misconduct, including false arrest and harassment as well as verbal and physical abuse.’

5.D.i Distinguishing the decision to arrest from the decision to charge

In the decision whether to charge or not, there is the potential for confusion to arise out of the way in which the decision to arrest is regarded. The courts view arrest as a means

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631 See footnote 487.
to bring the suspect into the judicial system.\textsuperscript{636} Arrest once used to serve the purpose of bringing the accused before a magistrate ‘to be examined and otherwise dealt with’, during the nineteenth century.\textsuperscript{637} As a consequence of treating the decision to arrest as a means of bringing the defendant before the court, there is now a tendency to equate the decision to arrest with the decision to charge. However, as the magistrate’s inquisitorial function has fallen away, the police have come to use the arrest for purposes other than simply bringing the defendant before the magistrate and the ultimate tool of the police officer on the street is the power to arrest. It is recognised that the police use arrest for a number of purposes unrelated to simply bringing the defendant before the court.\textsuperscript{638} The arrest may serve as an end in itself with no further action taken by police following the release of the defendant without charge. It is important therefore to distinguish the arrest discretion from the charge discretion, as they each have different purposes and depend on very different evidential standards. The basic test for arrest is that the defendant is caught in the act of committing an offence or immediately after, or the officer has a reasonable suspicion that the defendant committed an offence.\textsuperscript{639} The test for prosecuting a charge is that there is a reasonable prospect of conviction and that it is in the public interest to proceed with a prosecution.\textsuperscript{640} Often the distinction between the two tests is blurred. Because the police officer is so closely involved as a party to the proceedings it is unreasonable to expect the police officer to make an objective assessment of the public interest.

Even though the decision to arrest is different from the decision to charge the prosecution may be overwhelmed by the initial arrest decision. It is significant that in the Local Court the prosecution is not obliged to prepare a brief prior to the defendant


\textsuperscript{637} ibid. At p. 130. See also footnotes 527 and 922 and accompanying text.

\textsuperscript{638} ibid. This work is primarily concerned with the growth of the police practice of using arrest to aid in the questioning of the defendant and the gathering of evidence.

\textsuperscript{639} Derived from the statutory provision in section 352 \textit{Crimes Act} 1900 (NSW). See generally Part 10 Arrest of Offenders \textit{Crimes Act} 1900 (NSW).

\textsuperscript{640} Derived from the NSW DPP \textit{Prosecution Policy and Guidelines}, reproduced in part at Appendix C.
being required to plead. As a result, the prosecution is unlikely to have little more than the ‘facts’ prepared by the police officer prior to a ‘not guilty’ plea being entered. The default requirement in the Local Court therefore is for the defendant to admit guilt or not rather than for the prosecution to satisfy itself that there is ‘a reasonable prospect of conviction.’ Another problem occurs when, even though the distinction between the decision to arrest and the decision to prosecute is recognised, the factual threshold for arrest is merged into or confused with the factual threshold for prosecution. Outwardly, there appears to be agreement between the police and the DPP on the test of evidential sufficiency for a prosecution to proceed. However, it seems that the factual test for an arrest of ‘reasonable suspicion’ is sometimes confused with the factual or evidential test for prosecution of a ‘reasonable prospect of conviction’.

Of particular importance is the potential for this confusion to impact on subsequent charges and prosecution decision-making. The decision to arrest may itself be based on limited information and be the result of short-term policing goals and objectives that are

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641 Section 66B Justices Act 1902 (NSW) (subject to an order by the magistrate not to require a brief under section 66E). This procedure applies to offences other than those to which a penalty notice applies, or which have been prescribed under section 66A.

642 In a formal legal sense arrest serves the purpose of initiating the charging process. There is however, a significant disjuncture between the decisions to arrest and charge in practical terms. The merging of the arrest and prosecution tests is shown in the following quote from Nicholas Cowdery: ‘If a police officer or the prosecutor decides that there should be a charge, the prosecution commences at that point. The test to be applied at this first stage – or gateway – by a police officer is whether or not the evidence supports a reasonable suspicion that the person committed the offence.’ (emphasis added) Cowdery, N. R., Getting Justice Wrong: Myths, Media and Crime, Allen & Unwin, Sydney, 2001b. At p. 9.

643 Although the police have in the past, applied a prima facie test for prosecution, they now claim to apply the same prosecution test as the DPP (of a reasonable prospect of conviction). See Police Association of NSW, ‘Submission to the Royal Commission into the NSW Police Service: Police Prosecutors and in-House Legal Advice’, Royal Commission into the NSW Police Service, Sydney, 1996. At p. 2. The NSW DPP Nicholas Cowdery says ‘Police prosecutors sometimes claim that they apply the Policy and Guidelines, but in my observation often they do not’ Cowdery, N. R., Getting Justice Wrong: Myths, Media and Crime, Allen & Unwin, Sydney, 2001b. At p.9.

644 ibid. The test of reasonable prospect of conviction itself is based on ‘a reasonable jury (or other tribunal of fact) properly instructed as to the law’. See Director of Public Prosecutions, ‘Prosecution Policy and Guidelines’, Office of the Director of Public Prosecutions, Sydney, 1998.

not necessarily connected with eventual prosecution. These may interfere with, or be inconsistent with, other aspects of criminal justice policy such as using arrest as a last resort or ensuring fairness and consistency in law enforcement. At the same time there are imperatives within the criminal justice system that favour the prosecution of police summary cases, so that, from different perspectives the prosecution of a summary charge following arrest may be seen as an important aspect of providing a means of review of police action or of protecting the interests of the arresting officer.

An example of the latter view comes from the lead-up to the Dubbo Summary Prosecution Pilot, when DPP officers attended a parade at the Dubbo Police Station. A concern raised by local police was that where the DPP withdrew a case the police officer in charge of the case remained potentially liable for bringing the charge. The police therefore perceived that it was in their interest to have charges prosecuted rather than withdrawn. Similarly in the USA, Amnesty International has noted concerning New York police that:

In a large proportion of cases, the alleged victims of police assaults were themselves charged with offences such as resisting arrest or assaulting a police officer, charges which were usually dismissed later for lack of evidence. Amnesty International was told that it was common practice for police officers involved in misconduct to charge victims with offences in order to justify the use of force and to cover up abuses. Amnesty International was told that it was common also to 'overcharge' suspects (i.e. charge someone with additional offences or more serious charges) to cover up misconduct: in such cases the suspect may be under pressure to accept a plea bargain to a lesser charge rather than persist with a complaint against the police ... The Mollen Commission ... found that police perjury and falsification of documents was common among officers guilty of abuses and was often used to conceal corruption or excessive force.

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645 See, for example, the comments by the then Commonwealth DPP Mr Ian Temby QC in 1985, where he says 'Sometimes people have to be arrested although they are involved in no more than peaceful protests. That may solve the immediate problem at least. It will take the offender away from the scene of confrontation, for at least as long as it takes for bail to be granted and satisfied.' In Temby, I., 'Prosecutors and Citizens' Rights', *Victorian Council of Civil Liberties*, Melbourne, 1985. At p. 4.


Similar findings have been made in Australia in the RCIADIC and more recently in the case against Fish and Swan in NSW. Fish and Swan were police officers who perjured themselves in proceedings in 1991 and 1993 concerning police officers forcing youths to ‘run the gauntlet’ following their arrest in 1990. Significantly, the truth about the ‘gauntlet’ incident and the subsequent perjury only came to light in the Police Royal Commission.

5.D.ii The ‘power’ of arrest

Arrest serves as a tool for the arbitrary short-term detention of suspects or quarrelsome citizens, by police. The exhortations to use arrest as a last resort have often gone unheeded. Where police wish to commence a criminal prosecution they have available the options to arrest, to issue a field court attendance notice or to proceed by way of summons. A police officer or other person may arrest without warrant ‘any person in the act of committing or immediately after having committed’ an offence.

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650 ibid.
651 The arrest itself is akin to a ‘degradation ceremony’ incorporating the alienation of the property in the person of the defendant by searching, taking photographs, fingerprinting and (in cases of investigative detention) taking body samples. See footnote 311.
653 Note however, the suggestion that arrest is used less often in western New South Wales since the decision of Heilpern LCM in Police v Carr. See footnote 662.
654 Section 352 Crimes Act 1900 (NSW). This section, in part, provides:
(1) Any constable or other person may without warrant apprehend, (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act, (b) any person who has committed a serious indictable offence for which the person has not been tried, and take the person, and any property found upon the person, before an authorised Justice to be dealt with according to law.
(2) Any constable may without warrant apprehend, (a) any person whom the constable, with reasonable cause, suspects of having committed any such offence, (b) any person lying, or loitering, in any highway, yard, or other place during the night, whom the constable, with reasonable cause, suspects of being about to commit any serious indictable offence, and take the person, and any property found upon the person, before an authorised Justice to be dealt with according to law.
See also footnote 9 in relation to the more stringent test under Commonwealth law for arrest.
655 Section 100AB Justices Act 1902 (NSW).
656 Section 60 Justices Act 1902 (NSW). Police may arrest a person on ‘reasonable suspicion.’ Following arrest the police officer may release the person without charge, administer a caution, recommend criminal proceedings be commenced by submitting a breach report for the issue of a summons, or commence criminal proceedings by way of a charge or court attendance notice. The initiating process in the Local Court is known as an ‘Information.’ Bail imposed after arrest provides a means of requiring the defendant to attend court. A court attendance notice or a summons has the effect of notifying the defendant of the court proceedings.
punishable on indictment or summarily, or a person who has committed a serious indictable offence. In addition, if a police constable reasonably suspects that a person has committed such an offence the constable has the power to apprehend that person without warrant. Jochelson reported some progress in the falling rate of charging in the township of Bourke alone in NSW. However, this has not translated into a falling rate of arrest to commence the processing of defendants because the substitution of Court Attendance Notices (CAN) instead of charges does not rule out the use of arrest by police prior to the issue of a CAN. The use of court attendance notices was meant to provide an alternative to charging and to simplify the conduct of court proceedings should the defendant not attend court to answer the police allegation. The ‘field CAN’ was to enable the police officer to initiate court proceedings on the street without the delay of a breach report for a summons to issue and without having to detain or arrest a suspect to attend the police station. In practice the use of court attendance notices has not removed the option for the police officer to arrest a defendant as the CAN may be issued at the police station following arrest.

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657 Crimes Act 1900 (NSW) s. 352 (1) (a).
658 Crimes Act 1900 (NSW) s. 352 (1) (b).
659 Watson, Blackmore and Hosking also refer to a common law power to arrest in relation to a breach of the peace noting at p. 1-2291 that arrest is not justified if the person has left the area and there is nothing to show that he or she intends to renew the offence. The authors cite the following authorities: Baynes v Brewster (1841) 2 QB 375, R v Light (1857) Dears & B 332, Cook v Nethercote (1835) 6 Carr & p. 741, R v Marsden (1868) LR 1 CCR 131, cf. Coupey v Henley (1797) 2 Esp 539. It may be thought that section 352 fully regulates the power of arrest. However, it does not deal with the use of arrest to prevent a breach of the peace and the common law in England has affirmed the police officer’s power to not only arrest, but also to give directions to stop lawful activities in order to prevent a breach of the peace. See Chief Constable of Sussex, Ex Parte International Trader’s Ferry Ltd, R v [1999] 2 AC 418. This case considers the power of the police to direct a person to refrain from carrying out a lawful activity, in order to prevent a breach of the peace. Lord Slynn of Hadley said that ‘police, in the performance of their duty, here sought to protect people exercising a lawful trade from the acts of violent demonstrators acting unlawfully and threatening a breach of the peace. When, with their finite resources of officers and finance, the police could do this they did so. Only when their resources were insufficient did they not provide the protection and, in order to prevent a breach of the peace, on rare occasions, they told the lorry drivers to turn back. I do not accept that Beatty v Gillbanks (1882) 9 QBD 308 lays down that the police can never restrain a lawful activity if that is the only way to prevent violence and a breach of the peace. Professor Feldman in Civil Liberties and Human Rights in England and Wales (1993) at page 791 writes: ‘Furthermore, the police have a duty to prevent reasonably apprehended and imminent breaches of the peace, and failure to obey instructions reasonably directed to that end constitutes the offence of obstructing a constable in the execution of his duty.’ See Feldman, Civil Liberties and Human Rights in England and Wales, Oxford University Press, Oxford, 1993.


It has been reported that solicitors of the Western Aboriginal Legal Service claim that there has been a reduction in the use of arrest by police (in the areas they service) following the decisions by
There are three main reasons why arrest might legitimately be preferred by the police officer. The first is where a person is 'caught in the act' and thus where the link to the offender is not made by a forensic trail. In such a case the identity of the offender is likely to be in issue and the police may need to arrest and take physical custody of the person until their identity can be verified.\(^{663}\) The second is to stop the offence from continuing by physically removing the suspect from the situation.\(^{664}\) The third reason is usually related to the seriousness of the offence\(^ {665}\) where the police feel the need to impose bail to ensure the appearance of the person before a court.\(^ {666}\)

However, there are reasons for effecting an arrest that are related to the policing situation rather than to any eventual prosecution and they include:

- a) the prevention of a continued offence,
- b) the prevention of the escape of the alleged offender,
- c) the reinforcement police authority,
- d) the removal of a person from a situation,
- e) to facilitate the conduct of further inquiries with the arrested person,
- f) to deal with the person for the immediate offence,
- g) the investigation of another offence,

Heilpern LCM in Dunn’s case in Dubbo (see footnotes 584 and 354) and Carr's case in Wellington. Crichton, S., ‘Cut in Arrests after Landmark Ruling’, The Sydney Morning Herald, 29 January 2002, Sydney, 6. However, care must be taken in assessing these assertions as no verifiable data is referred to. In addition, the use of court attendance notices in the way suggested by Chan and Cummine, may mask the use of arrest (see Chan, C., et al., ‘Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan’, Institute of Criminology, University of Sydney, Sydney, 2000.). It may also be that in terms of the typology of police-defendant interactions referred to in Chapter One, the police may reduce their reliance on arrest for compliant defendants whilst still using the arrest power strategically to target individuals according to the personal labelling of those individuals as deviants. See also footnote 388 and accompanying text.

\(^{663}\) See the minority judgment in \textit{Atwater et al. v. City of Lago Vista et al.} 532 U.S. (2001) at p. 6 of the dissenting judgment. See the Victorian example of the unidentified alleged killer of an abortion clinic guard who was first arrested at the crime scene on 17 July 2001. This case presents an extreme example of the difficulty the police may face in identifying a suspect. The defendant did not cooperate with police and was not identified until the end of September 2001. Anonymous, ‘Hermit from Scrub Named as Abortion Clinic Accused’, The Sydney Morning Herald, 28 September 2001, Sydney.

\(^{664}\) See the minority judgment in \textit{Atwater et al. v. City of Lago Vista et al.} 532 U.S. (2001) at p. 6 of the dissenting judgment.

\(^{665}\) Bail may also be imposed for quite minor offences to achieve secondary objectives for the control of future conduct, such as curfews for Aboriginal offenders and restrictive movement conditions in bail for environmental protesters.

\(^{666}\) Bail may also be set for the protection of the community. See the minority judgment in \textit{Atwater et al. v. City of Lago Vista et al.} 532 U.S. (2001) at p. 6 of the dissenting judgment.
h) the prevention of another offence,
i) just simply to stop a person,
j) to get rid of a nuisance,
k) to punish,
l) to make life difficult for a person or a class of people identified as ‘troublemakers’, and
m) to obtain data on a person by way of fingerprints, photographs and the observation of distinguishing characteristics whilst in custody.

The arrest may therefore serve purposes that are quite distinct from the eventual prosecution of a particular charge and the police may arrest a suspect on the basis of extra-legal motives. Whilst it is undoubtedly true that this is the case, the dominant fiction is that police use arrest simply for the purpose of enforcing the law. There is always the possibility that the officer may make a strategic arrest and worry about the justification later, whilst some of the extra-legal criteria affecting the arrest decision are obviously contrary to the spirit, if not the letter, of the law.

5.E The ‘duty’ to enforce the law

Whilst there is no doubt that the opportunity model of prosecutions applies in Australia there is a tendency to claim that police have a ‘duty to enforce the law’ or a ‘duty to charge offenders’ and police action is characterised as ‘a neutral bureaucratic response to individuals who are suspected of violating the criminal law.’ A good example of this can be found in the Parliamentary debate surrounding the Justices (Costs) Amendment Bill (no. 2) 1991 (NSW) where the Minister for Justice, Mr Griffiths said that ‘police officers act under a public duty to apprehend and bring

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667 These may be ulterior and legally unacceptable or comparatively benign. See footnotes 616 and 953 and accompanying text.
668 In the sense of objectively pursuing offenders for offences that have been committed.
669 See footnote 194 and accompanying text.
proceedings against offenders. Policies of zero tolerance and aggressive policing are built on this premise that enforcing the law is essentially a 'neutral and bureaucratic function'. This is the form of rationalisation Delgado describes where the decision-maker denies the reality that each discretionary decision involves making a choice, and instead claims to be simply applying objective criteria.

The concept of a 'duty to enforce the law' hides the reality that not only does selective enforcement take place but the police-defendant interaction itself can lead to the supposed offence. The suggestion that the police are acting on a legality principle ignores the reality of selective decision-making by the police officer. The exercise of the officer’s discretion may become an issue in a subsequent prosecution, however the focus of the hearing of a charge is not the police officer’s decision, or the manner in which it was made, except to the extent that these decisions may lead to the exclusion of evidence. The court might consider illegality or impropriety in the admissibility of evidence or on the question whether to impose a penalty. However, apart from excluding evidence or issuing a stay for an abuse of process, the court cannot substitute its own judgment and dismiss a charge outright on the basis that the police officer exercised poor judgment in deciding to commence proceedings. Even where

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674 Indeed, the very nature of selective enforcement means that police decisions not to charge or take other action are not accounted for and remain largely invisible.
675 For example, under section 138 of the Evidence Act 1995 (NSW).
676 Under section 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) the court may without proceeding to conviction, dismiss the charge or discharge a defendant having 'regard to the following factors: (a) the person’s character, antecedents, age, health and mental condition, (b) the trivial nature of the offence, (c) the extenuating circumstances in which the offence was committed, (d) any other matter that the court thinks proper to consider.' (emphasis added). See footnote 227 and accompanying text.
678 Under the 'original powers' doctrine of individual police officer autonomy the police are held to be ultimately accountable to the courts for the manner in which they exercise their power. For a brief account of the original powers doctrine see Brown, D., et al., Criminal Laws, The Federation Press, Sydney, 2001. At p. 148-9. However, a considerable part of police activity falls outside the view of the courts either because the police activity does not lead to any court proceeding, or the court does not
unequal patterns of enforcement (whether in the one incident or across the State) can be
discerned in the charges that are pursued by police, the courts are reluctant to interfere
when the question of selective enforcement arises.679

The role of the courts is simply to decide the question of guilt or innocence and the penalty to be
imposed in the event of a finding of guilty. It is for other parts of the structure of democratic
institutions in our society to deal with the problems, if any, of selective law-enforcement.680

In addition, the hearing of an individual case does not provide the opportunity for
reflection on the patterns in which police discretion is exercised.681

can concern itself with certain aspects of policing practice. For example, the courts are generally reluctant to
intervene in the exercise of police charging discretion, whether that discretion has been exercised
positively to charge a person, or negatively to not charge a person.

There is authority that the court may oversee the prosecutor’s discretion in relation to the
indictment to be presented to the court in indictable proceedings. See for example, Maxwell v R (1996)
184 CLR 501 discussed at footnote 801 and accompanying text, see also Aronson, M., and J. Hunter,
Litigation: Evidence and Procedure, 6th Edition, Butterworths, Sydney, 1998. However, in rare cases the
court may review the positive exercise of police discretion on the basis that an abuse of court process is
involved. In this regard a Local Court magistrate can act to protect the integrity of Local Court processes.
See footnote 711 and accompanying text.

authors refer to Wright v McQualter (1970) 17 FLR 305. In contrast, in the USA unequal enforcement
may infringe constitutional ‘due process’ rights and warrant dismissal of a prosecution. See Abramovsky,
Responses’ (2000) 63 (3) Albany Law Review 725. The difficulty of establishing unequal enforcement by
objective statistical evidence is noted at p. 726. A fact that was relied on in the majority opinion in
Atwater et al. v City of Lago Vista et al. 532 U.S. (2001). See footnote 618. Abramovsky (at p. 727) also
describes how investigations may be challenged on the basis that a ‘racial profile’ was used to single out a
person for police attention. However, the Supreme Court decision in Whren v United States 517 U.S. 806
(1996) had the effect of validating racially motivated traffic stops provided there was some other
objective reason that could be pointed to, to justify the stop.

680 Wright v McQualter (1970) 17 FLR 305, per Kerr J.

681 For an example of the importance of developing an awareness of patterns in police behaviour
6 CHAPTER SIX - PROSECUTION DISCRETION

6.A Prosecution discretion

The work of the prosecutor fits between that of the police officer who commences prosecution action and the court, which determines the outcome of a case prosecuted before it. The prosecutor bridges the gap between the executive sphere of the police officer and the judicial sphere of the court. It is therefore impossible to discuss the independent prosecution of police summary cases without addressing the balance of discretionary power available to the informant, the prosecutor, and the court. From the threshold discretion of the informant, the discretion of the prosecutor and the adjudication discretion of the judicial officer, each office exercises varying degrees of control over the course of a police summary case at successive stages and determines whether and how that case may progress from one stage to the next. Importantly, in the summary disposal of cases, each successive level of discretion is contingent on, and more circumscribed than, that of the decision-maker below.

Under the present system where the police prosecute their own cases, the role of the prosecutor is not explicitly differentiated from the interests and concerns of the police informant. The greatest challenge may be to balance the need for efficiency with a commitment to ensuring fairness and justice. This will require the independent prosecutor to make choices following the threshold discretion exercised by the police. A good starting point would be to examine the exercise of police discretion through a careful dissection of existing police practices and then develop a typology to describe and analyse those practices. Once police practices have been de-constructed we can then see where any incongruities may lie for the independent prosecutor to address.


683 See, for example, the discussion of the difference between the court’s power to stay proceedings and the prosecutor’s discretion to file a no-bill in R v Tolmie Unreported, NSWCCA, 7 December 1994. On the court’s power to stay proceedings in England, see Pattenden, R., ‘The Power of Courts to Stay a Criminal Prosecution’ (1985) April Criminal Law Review 175-189.
There are serious issues to be resolved concerning the balance between the informant's threshold discretion and the prosecutor's discretion. At the outset it is to be noted that there is a lack of clear definition of these roles in the current system where the same agency is responsible for both the informant and the prosecutor. The system of police prosecutions is opaque and matters are resolved 'in-house' within a disciplined command structure. This is the situation in each State, where there is no established role for the independent prosecutor in police summary cases. Existing DPP prosecution procedures are based on trial practice and do not readily apply in the summary jurisdiction. In addition the values of the independent prosecutor consist of vague notions of independence, fairness and impartiality with apparently contradictory objectives of faster and more efficient disposal of cases and more convictions.

For the prosecutor, the ability to exercise discretionary decision-making powers may be effectively circumscribed by being assigned to work on cases before a particular court. The work of the prosecutor is more predictable and assignment to a particular role sets a limit on the types of matters in which the prosecutor may exercise circumstantial discretion. For example, a DPP prosecutor may be assigned to prosecute only Local Court committals and thereby is only ever exposed to these types of cases. And while certain decisions (such as to not proceed with the case) may be reserved for senior prosecutors to make, the prosecutor is free to make all other discretionary prosecution decisions for the conduct of the case such as charge-bargaining, fact-bargaining, the manner of calling witnesses (if required) and presenting the prosecution case at

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684 The experience of the CPS in England and Wales points to the difficulty for the independent prosecutor in establishing a role for itself. As noted by Addison, (see footnote 882) the CPS is criticised for bringing cases that are lost and for being soft on crime for dropping other cases. See also The Economist, 'Soft on Crime', The Economist, 11 December 1993, London, 58 - 59. Ashworth and Fionda point to the structural difficulty for the CPS in being confined to consideration of only those cases that the police pass on for prosecution. Ashworth, A., et al., 'The New Code for Crown Prosecutors: (1) Prosecution, Accountability and the Public Interest.' (1994) (December 1994) Criminal Law Review 894 - 903. At p. 903. It has been recommended in England and Wales that the power to lay charges be transferred from the police to the CPS, see Auld, R., 'Review into the Workings of the Criminal Courts', Home Office, London, 2001. This recommendation has received in-principle support from government, see Gibb, F., 'Lawyers to Take over Police Role on Court Charges', The Times, 15 March 2002, London.

685 This means there is no data on which to base any measure of accountability and as the decisions made are internal to the one organisation, there is less likelihood of exposure of any conflict.


687 See footnote 323 and accompanying text.
committal. The control over work allocation and the reservation of some decisions to the Director's Office has the effect of strongly centralising some aspects of prosecution discretion. However, within the sphere of work of the individual prosecutor (just as with the police officer), there is little capacity to centrally control the full operation of that discretion.

The main problems for the independent prosecutor in establishing a role in police summary prosecutions are 1) the fact that police discretion at the pre-charge and charge stages is wide and largely unaccountable, 2) the prosecutor is dependent on the police for information (whether informally or by way of a brief where that is required), and 3) the opportunity for pre-court review is limited. Consequently, there is currently no systematic external review of police circumstantial discretionary decisions prior to the court mention of any summary charges and there is limited internal review. The courts are prepared in some circumstances to intervene in cases arising from illegal or

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688 Such as Crown Prosecutor, instructing solicitor, or solicitor-advocate, within the hierarchy of the NSW DPP.  
689 The essential difference may be that the police officer’s accountability to the law is more remote than the accountability of the prosecutor to the court as an ‘officer of the court’. However, accountability for both may mean no more than the potential to be exposed to judicial criticism. The limits of the liability of, and the control mechanisms for, the individual prosecutor (or police officer) have not received much attention in Australia.  
690 This unaccountability may be because police discretion is hidden or because the courts do not effectively review police action given that the focus of each hearing is the case against the defendant. However, in Australia (and New South Wales in particular - enlivened by the Evidence Act 1995 (NSW)) the courts have in some cases been prepared to review police action. See, for example Director of Public Prosecutions v Farr [2001] NSWSC 3, Director of Public Prosecutions v Carr [2002] NSWSC 194, R v Gibbon [2000] SADC 80, R v Rankine and Sabino [1999] SADC 5. However, these may be isolated instances and do not necessarily mean that the courts are prepared to review police action. For instance, the decision in DPP v Carr was limited to the use of the power of arrest and did not address the initial police decision to charge Carr for the offence of using offensive language. On judicial reluctance to act in relation to police misbehaviour see Presser, B., ‘Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly Obtained Evidence.’ (2001) 25 Melbourne University Law Review 757.  
691 In relation to the USA, Misner comments: ‘The day-to-day, minute-to-minute decisions by the police have never been reviewed by the court. Police decisions regarding which crimes to investigate, which persons to pursue, and which persons to arrest have come under judicial review only in the most egregious situations...even the symbolism of the exclusionary rule has been quickly and consistently limited by the Burger and Rehnquist Courts. Developments in such procedural areas as standing, stop and frisk, administrative searches, automobile searches, impeachment and post conviction relief have all resulted in a continued narrowing of judicial review of police conduct.’  
693 If a police officer wishes to proceed by way of summons this requires the production of a breach report to be considered by another officer.
improper police behaviour and there are review mechanisms for oversight of the police such as an Ombudsman's inquiry. However, the bulk of summary criminal charges are disposed of by way of a guilty plea and so the court does not review police action. For almost every police decision to commence proceedings made in summary criminal prosecutions, the prosecutor effectively is the only person with the opportunity to review that decision from the point of charging until finalisation (by plea or the hearing of the matter in court). Even where the prosecutor might wish to review the case, that task will be made difficult by the absence of a brief of evidence. However, review is not impossible (as was shown in the Summary Prosecution Pilot).

Historically, the exercise of prosecution discretion in police summary cases has rarely received close academic examination. Without further study and analysis there is little prospect of addressing the lack of understanding shown by the police officer and the prosecutor as quoted in Chapter One. There are four principal reasons for neglect in the study of the prosecution of police summary cases. In the first place this is due to the impenetrability of this area of law. Second, the work of the police prosecutor is virtually invisible as it is performed within the one organisation. Third, prosecutions are typically considered in terms of trial cases. Fourth, the dominant paradigm for criminal prosecutions is based on a supposed clear divide between the investigator and the prosecutor with a view that the prosecutor is not concerned with policing decisions.

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693 See Robinett v Police [2000] SASC 405 In this case the South Australian Supreme Court ruled that inaction by a police officer preceding an offence can constitute an impropriety and lead to the rejection of evidence of a subsequent offence. In Director of Public Prosecutions v Carr [2002] NSWSC 194, the New South Wales Supreme Court held that a court could exclude evidence of an offence on the basis of preceding actions of the police that constituted improper behaviour.

694 The courts will entertain applications for injunctions to prevent police carrying out unlawful acts or acts in excess of their authority under warrant. The courts may review police action by way of criminal or civil proceedings after the event but not generally review police decisions such as to charge a person.

695 This aspect of prosecution review is examined in relation to the Summary Prosecution Pilot at Campbelltown Local Court in Appendix B. See also Chapter Three. The Pilot is a special case and the staffing and resources applied by the DPP for the Pilot may not be replicated in a large-scale transfer of responsibility and the work of the prosecutor may quickly become routinised. See, for example, Tombs, J., 'Independent Prosecution Systems', in G. Zdenkowski et al (Eds.), The Criminal Injustice System: Volume Two, Pluto Press, Sydney, 1987, 90-110.

made in police summary offences. A consequence of the neglect in this area is the lack of quantitative and qualitative data to describe the current work of the police prosecutor.697

Some attention has been given in Australia to the work of the DPP prosecutor in indictable prosecutions.698 The work of prosecutors in other jurisdictions has attracted scholarly attention such as with District Attorneys in the USA since the 1970s,699 the Procurator Fiscal in Scotland700 and more recently England and Wales following the introduction of the Crown Prosecution Service.701 Even so, whilst there has been a

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697 On the lack of published data, see footnote 282 and accompanying text. Much of the work of the police officer in summary cases is concerned with pro-active policing and is largely hidden. The prosecution of police summary offences depends mainly on direct detection by individual police officers, although the police service may respond broadly to complaints about anti-social behaviour by instigating patrols. There is effectively no outside check on individual police officers, who decide, on the street, which cases to prosecute or not. In any measure of the fairness of police practices an essential element for comparison is therefore missing, and that is information concerning those cases where the police exercise their discretion not to take action.


growth of research into prosecutions in the USA, the study of summary prosecutions in that jurisdiction has been largely neglected also.\textsuperscript{702}

6.B The invisibility of the prosecutor

Fixation on the role of the informant police officer can mean that the role of the prosecutor in the presentation of cases is simply not recognised. For example, in the following quote from a District Court case \textit{In the appeal of Michael Robert Sutherland}\textsuperscript{703} our attention is drawn to the centrality of the police informant’s threshold discretion:

I cannot imagine a more trivial example of an offence under the section. … I believe that the action of the constable was unnecessarily provocative, and was calculated to create an incident. Anybody familiar with this sort of scene would know that it’s a situation requiring a degree of discretion. People after they’d been drinking a bit may be somewhat careless and potentially combative and may also be somewhat resentful of authority … there was an element of harassment and oppression evident in following this particular appellant out onto the street and ordering him to pick up the cigarette, or, at least, telling him not to throw the cigarette down. A more trivial act one cannot imagine. Perhaps straining the law to its limit, there may have been some offence committed under the local Government Act, such as littering. However, I’d have thought that a police officer exercising any reasonable degree of discretion would not have pursued the matter. Indeed it’s difficult to resist the feeling that there was some residual lingering resentment on the part of the police officer as to the conduct of the appellant inside the licensed premises and that this event concerning the cigarette was little more than an opportunity for the officer to try to exert what he saw as his authority.

The lack of advertence to the role of the prosecutor in police summary cases is arguably attributable in part to the myth that the police act according to a legality principle as discussed in Chapter Five. It is also a reflection of the fact that the police prosecutor in police summary cases has not been seen to fill the role of screening cases in the way

\textsuperscript{702} See, for example, Horwitz, A., ‘Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases’ (1998) 40 \textit{Arizona Law Review} 1305-1378.

\textsuperscript{703} Ducker DCJ, \textit{In the appeal of Michael Robert Sutherland}, Unreported, District Court of NSW at Gunnedah, 13 November 1991, Transcript p. 2-3. This was an appeal against conviction for the charge of using offensive language. The police had attended a hotel in Coonabarabran at ‘closing time.’ The defendant was asked to leave and pointed to others still inside the hotel and said ‘What about those bastards?’ Out on the street the appellant threw a lighted cigarette on the ground. A police officer told the appellant not to throw the cigarette on the ground. The appellant then said ‘Leave me alone you cunts’ which formed the basis of the offensive language charge. The Judge found the offence proved but dismissed it under section 556A of the \textit{Crimes Act} 1900 (NSW) (the statutory provision at the time which allowed a charge to be dismissed without conviction).
that is expected of the DPP.\textsuperscript{704} Significantly, the DPP has the potential to exercise discretionary power that is not as constrained as that of the court and is capable of taking a dominant role in filtering cases that are to be prosecuted before the Local Court. For example, the DPP could simply substitute its discretion for that of the police officer. However, if the prosecutor adopts that role in the prosecution of police summary cases then it will have to overcome the initial problem of obtaining sufficient information about a case. If the DPP prosecutor then decides not to prosecute cases commenced by police or substantially alters those cases then it is also likely to be in conflict with the police and will have to establish a legitimate basis for such interference.

6.B.i The court’s adjudication discretion

The Judge finds in the case of \textit{In the appeal of Michael Robert Sutherland}\textsuperscript{705} that a more trivial example of an offence under the section could not be imagined, that the police officer’s actions had involved ‘harassment and oppression’, a desire to exert authority, and were probably motivated by ‘lingering resentment’.\textsuperscript{706} Despite all this, having found that the words ‘leave me alone you cunts’ were used by the appellant in a public place and that these words were offensive,\textsuperscript{707} the offence is found proved.\textsuperscript{708} The appellant is then discharged without conviction as a concession to the circumstances commented on. In the absence of an acquittal, a stay of proceedings, or the exclusion of evidence, the Judge has a limited capacity to do anything about the police practices cited other than by way of commentary in dealing with the charge against the appellant before the court.\textsuperscript{709}

\textsuperscript{704} The discretion of police prosecutors is limited in that decision-making is centralised and, for example, police prosecutors are not able to charge bargain. The Police Prosecution Branch submission to the Royal Commission into the Police Service (RCPS) on Prosecution Branch activities was and remains a confidential exhibit. See footnote 282 and accompanying text.

\textsuperscript{705} supra.

\textsuperscript{706} Concerning the defendant asking ‘What about those bastards?’ when he was asked to leave at closing time. See footnote 703.

\textsuperscript{707} The possibility of a defence of reasonable excuse is not mentioned in the judgment.

\textsuperscript{708} The offence of using offensive language in a public place is expressed in wide terms and was easily proved by the calling of direct police evidence. Importantly, the judge does not have the discretion to find the appellant not guilty in the same way that a jury may exercise its ‘common sense’ and keep a check on the criminal process. Nor does the judge have the power to dismiss the charge on public interest grounds as is the case in New Zealand, see footnote 227 and accompanying text.

\textsuperscript{709} The conduct of District Court appeals in relation to summary cases has been significantly altered since this appeal was heard. By virtue of sections 132 and 133 of the \textit{Justices Act} 1902 (NSW)
The Judge in Sutherland’s case is ruling on an appeal against conviction for the use of offensive language. In this judgment we find encapsulated, at one end of the spectrum, the breadth of the threshold discretion exercised by police in many public order prosecutions, and the constraints on the court’s adjudicative discretion at the other. The adjudication discretion does not allow the court to reject a charge outright. Apart from finding a person not guilty according to the evidence, the court does have the power to stay the prosecution (in appropriate cases) on the basis of an abuse of the process of the court or it may decline to admit evidence in the exercise of its discretion under section 138 of the Evidence Act 1995 (NSW) with the possible consequence of undoing the prosecution case.

appeals against conviction are no longer heard de novo. The value of judicial comment in the absence of the exclusion of improperly obtained evidence is to be doubted.

710 The case of Binge and others v Bennett and another (1988) 13 NSWLR 578 is a Supreme Court of New South Wales decision in which it was held that a court in New South Wales could refuse to make an extradition order in relation to a New South Wales resident if to do so would be ‘unjust or oppressive’. At pp. 585-586.

711 The Local Court has the power to stay proceedings before it. However, the power to stay proceedings is limited as held by Justice Perry in Police v R [1998] SASC 6518, (22 January 1998) Supreme Court of South Australia:

‘Not all allegations of misconduct on the part of the police in the course of investigating a crime and in their treatment of the accused will give rise to circumstances which can properly found an application to stay. Impropriety attaching to aspects of police investigation, including the interrogation of an accused person, will sometimes render evidence inadmissible, or give rise to a discretion to exclude it. Nor can I see how matters going to the physical management of an accused person after he or she has been placed in custody after arrest could ordinarily give rise to the sort of procedural unfairness that can found an order for a stay.’ At p. 6.

This case was an appeal from the order of a magistrate staying proceedings against the defendant in the Youth Court. The magistrate granted a stay on the basis that the defendant had been held in custody for two hours before release and in that time was not given access to medical treatment for an injury to his ear (a perforated ear drum) after his head was ‘smacked into … the windscreen of the (police) car five times’ following a violent scuffle with police. (p.3) The original basis for police intervention was that the defendant was riding a bicycle without a helmet. On the appeal the Judge held that the failure to provide medical treatment following arrest whilst the defendant was in custody did not properly found an order for a stay of proceedings. At p. 6.

712 The courts seem to more readily draw a distinction between proper and improper police conduct in the search of motor vehicles (or their occupants) following a traffic stop, than in relation to the questioning and search of a person on foot in the street - where the transition from ‘consent policing’ to impropriety is seamless. For example, the police practice of looking into a vehicle once stopped under the traffic law was expressly disapproved as an unauthorised search in the South Australian District Court case of R v Gibson [2000] SADC 80 (28 June 2000). Judge Lee held that resulting evidence relating to the charge of possessing methylamphetamine for sale should be excluded. In this case the police officer had stopped a vehicle under the Road Traffic Act 1961 (SA), the police officer proceeded to look into the vehicle while asking the passenger to wind down his window. The judge held this to be an unauthorised search, as the officer had no ‘suspicion based on reasonable grounds’ to justify a search at that stage. The evidence of the finding of the drug and subsequent interviews with the accused were all excluded by the judge. See also R v Rankine and Sabino [1999] SADC 5, (2 February 1999). Evidence of the search of a vehicle was excluded on the basis that the officer did not entertain a reasonable suspicion under s.52 of
The court’s discretion in the exclusion of illegally or improperly obtained evidence has been extended significantly at common law by the Supreme Court of South Australia and under the Evidence Act 1995 (NSW) by the Supreme Court of NSW. Recent cases establish that police impropriety in the treatment of the defendant that gives rise to the offence may justify the exclusion of evidence of that offence.\textsuperscript{713}

In \textit{Robinett v Police}\textsuperscript{714} it was held that evidence of threats made by a defendant to police whilst in the police cells ought not to have been admitted, on the basis that the threats were a response to an unreasonable failure on the part of the police to obtain medical assistance for the defendant. The police had applied capsicum spray to the defendant in the course of arresting him for failing to truly answer questions\textsuperscript{715} and he had then complained of irritation to his eyes and of his suffering from asthma. Applying the common law test for the admission of illegally or improperly obtained evidence,\textsuperscript{716} the judge concluded ‘the circumstances are not such that the public interest in securing a conviction for that type of offence, committed in the circumstances, outweighs what would otherwise be condonation of the impropriety and unfairness, if the evidence were to be admitted.’\textsuperscript{717}

In \textit{Director of Public Prosecutions v Carr},\textsuperscript{718} the Supreme Court referred with approval to \textit{Robinett v Police}, holding that evidence of an offence might be excluded under section 138 of the Evidence Act 1995 (NSW) on the basis of police action leading to the offences before the court.\textsuperscript{719} The action of the police complained of was the arrest of

\textsuperscript{713}These cases relate to the behaviour leading to the offence, whether by action or inaction. A separate issue, considered below, is the police definition of offending behaviour.

\textsuperscript{714}[2000] SASC 405. See also footnote 165 and accompanying text.

\textsuperscript{715}Other charges laid were resisting arrest, offensive behaviour and disorderly conduct. The defendant was ‘extremely intoxicated’ at the time of the arrest and he was then detained in custody owing to his intoxication.

\textsuperscript{716}See Bunning v Cross (1978) 141 CLR 54 and \textit{R v Swaffield; Pavic v R} (1998) 192 CLR 159.

\textsuperscript{717}[2000] SASC 405. See also footnote 165 and accompanying text.

\textsuperscript{718}[2002] NSWSC 194. See also footnote 590 and accompanying text.

\textsuperscript{719}The offences which followed the decision to arrest were resist arrest, assault police and intimidate police in relation to threats at the police station. Note however, that the magistrate upheld the
Carr instead of proceeding against him by summons or Court Attendance Notice for a charge of offensive behaviour.\textsuperscript{720} The officer arrested Carr to facilitate the issue of a court attendance notice.\textsuperscript{721} This was held to be improper given the weight of Supreme Court authority condemning the inappropriate use of arrest for minor offences, including the 1980 decision of \textit{Lake v Dobson}.\textsuperscript{722}

6.B.ii The role of the prosecutor

These cases suggest that the courts, on some occasions are prepared to deal with the inappropriate exercise of police discretion when that issue is raised in a defended hearing or on appeal. However, the prosecutor has a wider discretion than the court and whilst the judge in Sutherland’s case queries the exercise of discretion by the police officer, there is no reflection on the decision to proceed made by the prosecutor. Between the harassment and oppression of the police officer (as described by the Judge) and the eventual discharge of the appellant, there were prosecutors from two different offices involved in presenting the case against him. In the Local Court, the case was presented by the police prosecutor and in the District Court a DPP solicitor appeared for the prosecution. Neither the police prosecution service, or later, the DPP saw fit to withdraw the charge prior to the appearance in the Local Court, and subsequently prior to the appeal being heard, in the District Court.\textsuperscript{723} Apart from the possibility of a claim of reasonable excuse (which appears not to have been argued even though Mr Sutherland was represented on the appeal) the offence was readily proven. Where offences arise out of police defendant interactions the police officers themselves can usually provide the evidence of the defendant’s guilt.\textsuperscript{724} The difficult issue for the lawfulness of the arrest itself on the basis that the use of offensive language constituted a continuing offence.

\textsuperscript{720} Police officers had spoken to Carr about an incident in which rocks had been thrown, he refused to assist the police and swore at them, Carr then started to walk away and the police officer called out to him and Carr swore back.

\textsuperscript{721} A practice noted by Chan, C., \textit{et al.}, ‘Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan’, Institute of Criminology, University of Sydney, Sydney, 2000.

\textsuperscript{722} NSWCCA 19 Dec 1980 Petty Sessions Review 2221.

\textsuperscript{723} Further research is required into the withdrawal practices of the police prosecution service in the Local Court and of the DPP in District Court appeals.

\textsuperscript{724} As is discussed in relation to process, the prosecutor has a limited view of the police case to begin with. Where there is a contest in relation to the facts the prosecutor may not have any notice of that until a contested hearing takes place. See however, the judgment of the Canadian Supreme Court in the case of \textit{RDS v R} [1997] 3 S.C.R. 484, where the court held that it is open to the judge hearing a case to consider the pattern of unequal and oppressive police defendant interactions when weighing up the police officer’s account of a routine stop as against the defendant’s account of unreasonable police behaviour.
independent prosecutor will be in the application of the public interest test\footnote{Within the framework of the two-staged prosecution test of evidential sufficiency and the public interest in proceeding. See footnote 816.} in these prosecutions.\footnote{The Police Association submitted to the Royal Commission into the New South Wales Police Service (RCPS) that the police prosecution branch applies the DPP’s \textit{Prosecution Policy and Guidelines}, See footnote 643 and accompanying text. However, individual police prosecutors do not have the power to take into account public interest considerations. This factor combined with the secrecy surrounding the work of the Police Prosecution Branch means that there is not an existing culture within police summary prosecutions of considering whether it is in the public interest to prosecute police summary cases.} In making that judgment the prosecutor may consider whether fairness in the overall pattern of law enforcement and proportionality in the police officer’s initial discretion in the instant case, justified the continued prosecution of the charge of using offensive language.

Another factor to consider is the view put in 1986 by the Human Rights Commission that the prosecution of a summary offence is in itself important as a means of ensuring judicial review of police action.\footnote{See Human Rights Commission, ‘Civil Disobedience and the Use of Arrest as Punishment: Some Human Rights Issues’, Australian Government Publishing Service, Canberra, 1986a.} In the District Court appeal the DPP continued the Sutherland prosecution. The prosecutor’s continuance discretion may be limited in a defendant’s appeal at the District Court level. It can be argued that prosecution discretion on appeal is different from its exercise at the Local Court level because there has been a court judgment against the defendant and there arises a public interest in that appeal being heard.\footnote{This reasoning makes it difficult to infer how the DPP might view summary cases when exercising the initial screening discretion, as the approach could be (but may not necessarily be) quite different. Alternatively, the specific matter in contest in a Crown Appeal or stated case may equally represent a goal of the DPP rather than an attempt to obtain a firm ruling on a general problem area of law.} There are two aspects to this public interest. The first is the importance of openness and transparency of processes once proceedings have been subject to court adjudication. The second and related aspect is the need to ensure that the appeal courts have the opportunity to supervise the lower courts and draw attention to and criticise inappropriate behaviour of the police or other criminal justice agents.\footnote{cf. the DPP decision not to seek a review of the decision of Heilpern LCM in Dunn’s case. \textit{Police v Shannon Dunn} Unreported, Dubbo Local Court 27 August 1999. See footnote 584.}

Despite the special considerations that affect the continuance discretion on appeal, the questions remain whether the exercise of the continuance discretion ought, could, or would be exercised differently by an independent DPP prosecutor at the Local Court
level. To answer those questions it is necessary to firstly examine the threshold discretion exercised by the police officer working within a framework of sweeping powers that are at once ambiguous, uncertain and ill defined, as discussed in Chapter Five. As seen in Chapter One it is important to take stock of any differences in substantive offences and the processes to be applied to their disposal between the summary court and the trial court. We should also be wary of assuming that there is a seamless transition from the exercise of prosecution discretion in indictable cases and its exercise in summary cases. For these reasons I concentrate in this part on public order offences particularly offensive behaviour and offensive language as archetypical pro-active police summary charges that illustrate many of the unique aspects of summary prosecutions. An examination of these offences also highlights the difference between the immediacy of police decision-making on the street and the potential for more careful consideration in subsequent prosecution decision-making.

6.C How prosecution discretion is currently exercised by the DPP

A starting point for consideration of the potential role of the DPP in prosecuting police summary cases is to review the operation of DPP discretion in its existing indictable work. However, there are few sources of information available. One reported in this thesis, is the results of the 2001 DPP Prosecutor Survey and another is the DPP’s statistics produced in the first eight years of operation.

6.C.i Lessons from existing DPP practice

Even accepting that the differences between the summary and indictable jurisdictions make comparisons difficult, we simply do not have consistently reported information on how the DPP applies its own Prosecution Policy and Guidelines to its current caseload.

730 The lack of definition of police powers has two major aspects. The first is the looseness and ambiguity of definition and the second is the lack of accountability for breach of power. See generally Bradley, C. M., ‘Criminal Procedure in the Land of Oz: Lessons for America’ (1990) 81 The Journal of Criminal Law and Criminology 99-135. Bradley notes that effective curbing of police abuse of power requires, not only a means of external redress, but also the rejection of evidence obtained illegally. He favours an exclusionary rule and cites a number of Australian cases that illustrate the judicial reluctance to exclude illegally or improperly obtained evidence.

731 Of course the jurisdiction of the Local Court extends further than the hearing of public order offences. For a discussion see Brown, D., et al., Criminal Laws, The Federation Press, Sydney, 2001. At p. 942. The authors describe the relationship between the regulation of public order and the summary jurisdiction as ‘strong.’
In some cases the DPP will give reasons for its decision. However, there is no systematic reporting of the reasons for prosecution decisions, such as the withdrawal of charges or the entry of no-bills. It is therefore difficult to gauge the way in which DPP prosecutors currently apply the prosecution policy and guidelines and this is an area that requires further research.

In a paper on the power to enter a *nolle prosequi*, Willis made the point in 1984 that without publicity there was no way of knowing whether the prosecutor was properly using this power nor the criteria on which such decisions were being made. There has been some improvement since 1984 in that each of the Australian DPPs have produced publicly available prosecution policies and guidelines. However, the work of the DPPs has not been closely examined and continues to be taken on trust. There are no published studies that systematically analyse the exercise of prosecution discretion within the office of the DPP. The most basic measure of the number of cases that are

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732 For example, the Commonwealth DPP was criticised for inconsistency in the detail given in the provision of reasons for not prosecuting such as with the decision not to proceed against Mal Colston and the decision not to prefer any charges in the Peter Reith 'Telecard' affair. See Kingston, M., et al., 'The Telecard Affair', *The Sydney Morning Herald*, 21 October 2000, Sydney, 29; O'Loughlin, T., 'Line Still Open over Telecard Scandal', *The Sydney Morning Herald*, 23 November 2000, Sydney, 10. The two cases can be distinguished however, because, in the case of Mal Colston, charges had already been laid and the decision was not to proceed with those charges, whereas in the Reith affair no charges had been laid. The Commonwealth DPP is in a unique position of controlling the laying of (Commonwealth) charges by the Australian Federal Police.

733 The decisions to withdraw charges, or to no bill or *nolle prosequi* matters lie at the apex of the prosecution decision-making pyramid (see Figure 8 The DPP prosecution decision-making hierarchy) and therefore, while significant, only represent a part of prosecution decision-making. Perhaps, more importantly, the exercise of this discretionary power can be centrally controlled unlike the decentralised discretion exercised by every prosecutor in the conduct of cases.

734 The need for such research is quite urgent given the highly politicised debates that have arisen concerning the role of the DPP. See footnote 767 and accompanying text.

735 Willis, J., 'Reflections on Nolies', *Prosecutorial Discretion*, Canberra, Australian Institute of Criminology, 1984. At p. 186. Willis says 'The public interest, an overworked phrase in this area, would be better served by greater public knowledge of the existence and nature of the nolle.' Willis also says 'There are cogent grounds for arguing that this area of prosecutorial discretion should be opened up to more public scrutiny and analysis than has as yet occurred in Australia.' At p. 174.

736 Willis ibid. At p. 186 refers to his own 'implicit assumption that decisions about nolles are properly made.' Without the benefit of a study into the operation of the Victorian DPP, it was overhauled by the Kennett Liberal Government in Victoria following adverse political attention concerning the charging of police officers and the possible charging of the then Premier Mr Kennett with contempt of court. See Corns, C., 'The Politics of Prosecutions' (1994) 68 (4) (April 1994) *Law Institute Journal* 276 - 279, 281.

737 DPP prosecutors have participated in a number of attitudinal studies such as for the NSW LRC report on the right to silence. Law Reform Commission of New South Wales, 'Research Report 10 (2000) - the Right to Silence and Pre-Trial Disclosure in New South Wales', Law Reform Commission of New South Wales, Sydney, 2000.
withdrawn as a result of the exercise of prosecution discretion is not reported in NSW. Even though the DPP has a policy of providing reasons for decisions in individual cases, these are not collated as a matter of public record. The relevant policy states the traditional concern in reporting on individual cases, that the reasons for prosecution decisions can jeopardise the interests of the defendant against whom no action is taken or charges are dropped and other affected parties, notably the alleged victim:

Reasons for decisions made in the course of prosecutions or of giving advice may be given orally or in writing. Generally their disclosure is consistent with the open and accountable operations of the Office; however, the terms of advice may be subject to legal professional privilege. Reasons will only be given to an inquirer with a legitimate interest in the matter and where it is otherwise appropriate to do so ... Reasons will not be given in any case, however, where to do so would cause serious undue harm to a victim, a witness or the accused, or would significantly prejudice the administration of justice.  

Under this policy it would be necessary to approach the DPP for reasons on a case-by-case basis and to establish that one had a legitimate interest in each matter. Currently the DPP does not report on the exercise of prosecution discretion to discontinue or withdraw cases or of instances of charge bargaining.

6.C.ii Prosecutor action reported in the DPP Prosecutor Survey

The DPP Prosecutor Survey was devised to provide a baseline survey of the attitudes of DPP prosecutors to various issues. These issues either arose during the course of the Summary Prosecution Pilot or emerged from a review of the literature concerning prosecution arrangements in other jurisdictions. The survey of State DPP prosecutors is speculative as it asks about their attitudes concerning the possibility of the DPPs conducting summary prosecutions. The prosecutors necessarily would draw on their experience, which for the most part is in the prosecution of indictable cases. They are

739 For example, the only statistical accounting for the exercise of prosecution discretion in the Annual Report for 1999-2000 is to the percentage of trial cases no-billed on the eve of the trial (3.5%) and the percentage of trial cases disposed of under the heading ‘other’ (1.7%) Director of Public Prosecutions, ‘Annual Report 1999-2000’, Office of the Director of Public Prosecutions, Sydney, 2000. At p. 46.
740 The survey is described in more detail in Appendix A.
741 The Summary Prosecution Pilot conducted at Campbelltown and Dubbo Local Courts is described in Appendix B.
also asked to give opinions on issues in the abstract, without the aid of prosecution policies and guidelines that might be specifically developed for the prosecution of summary cases.

Given this lack of information about the current exercise of DPP discretion, the survey of DPP prosecutors contained a question to find out what reasons prosecutors had relied on in recommending that charges be withdrawn. The question was structured to require the respondents to consider reasons that are likely to be relevant to the review of the threshold discretion in police summary cases and DPP prosecutors were asked whether they had recommended the withdrawal of charges, at least in part, for various nominated reasons. There are of course, problems with any attempt to measure the work of the DPP’s Office through the isolated responses of survey participants. The purpose of this question was to find out if any prosecutors were conscious of using the categories offered as a basis for recommending withdrawal. The categories are shown in Table 6 The extent to which DPP prosecutors have relied on various reasons for recommending that cases be withdrawn.
Table 6 The extent to which DPP prosecutors have relied on various reasons for recommending that cases be withdrawn

<table>
<thead>
<tr>
<th>NSW, VIC and WA</th>
<th>The triviality of the alleged offence</th>
<th>The anticipated rejection, by the court, of evidence because it was illegally or improperly obtained</th>
<th>The anticipated rejection, by the court, of evidence for any other reason</th>
<th>Because there was no apparent reason for singling out any one defendant from a number of identified potential defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Never</td>
<td>45</td>
<td>28.7</td>
<td>65</td>
<td>40.4</td>
</tr>
<tr>
<td>Once</td>
<td>18</td>
<td>11.5</td>
<td>15</td>
<td>9.3</td>
</tr>
<tr>
<td>2-10</td>
<td>77</td>
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<td>66</td>
<td>41.0</td>
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<tr>
<td>11+</td>
<td>17</td>
<td>10.8</td>
<td>15</td>
<td>9.3</td>
</tr>
<tr>
<td>Total</td>
<td>157</td>
<td>100</td>
<td>161</td>
<td>100</td>
</tr>
</tbody>
</table>

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742 DPP Prosecutor Survey Question 10: Have you ever recommended that charges be withdrawn, at least in part for any of the following reasons?
Among the survey respondents the largest percentage (78.7%) had at least once relied on the anticipated rejection by the court of evidence for a reason other than its being illegally or improperly obtained in making a recommendation for the withdrawal of a charge. This category encompasses questions of the reliability of witnesses and the exclusion of evidence on discretionary grounds such as the ‘unfairness discretion’\footnote{See \textit{R v Lee} (1950) 82 CLR 133 See Aronson, M., and J. Hunter, \textit{Litigation: Evidence and Procedure}, Fifth Edition, Butterworths, Sydney, 1995. At pp. 341-346. The survey States of Victoria and Western Australia maintain the common law of evidence and the \textit{Evidence Act} 1995 (NSW) applies in NSW. See in particular, section 90 \textit{Evidence Act} 1995 (NSW).} or the ‘unfair prejudice’\footnote{See \textit{R v Christie} [1914] AC 545, and section 137 \textit{Evidence Act} 1995 (NSW) See Hunter, J., \textit{et al.}, \textit{Evidence, Advocacy and Ethical Practice}, Butterworths, Sydney, 1995. At pp. 341-346. See in particular, sections 135, 136 \textit{Evidence Act} 1995 (NSW).} discretion.

The next highest percentage of respondents (71.3%) had relied, at least once, on the triviality of the alleged offence as a reason for recommending that charges be withdrawn. A respondent explained that under this heading they included the reduction of charges:

I have only worked with indictable or elected table matters (not summary matters), but in the case of triviality of offence or singling out of defendants, I have charged down for those reasons, but not withdrawn charges altogether.

Of particular interest in the intersection of the prosecutor’s discretion and the judicial discretion of the court is the extent to which the prosecutor is prepared to anticipate the court’s discretion to exclude evidence that has been illegally or improperly obtained.\footnote{The anticipation of the judicial discretion regarding illegally or improperly obtained evidence in trial matters is focused on illegally or improperly obtained physical or confessional evidence. The anticipation of this discretion by the prosecutor is itself problematic, given possible judicial reluctance to exclude real evidence of an offence. See Presser, B., ‘Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly Obtained Evidence.’ (2001) 25 \textit{Melbourne University Law Review} 757. Illegal or improper behaviour in relation to pro-active policing opens up the examination of the nature of police actions in the lead-up to an offence.} The anticipated rejection of evidence because it had been illegally or improperly obtained had been relied on at least once by 59.6% of respondents as a reason for recommending the withdrawal of a charge. The final category of ‘no apparent reason to single out any one defendant from a number of identified potential defendants’, which is relevant to the question of the unequal enforcement of the law by police officers was

\footnote{The anticipation of the judicial discretion regarding illegally or improperly obtained evidence in trial matters is focused on illegally or improperly obtained physical or confessional evidence. The anticipation of this discretion by the prosecutor is itself problematic, given possible judicial reluctance to exclude real evidence of an offence. See Presser, B., ‘Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly Obtained Evidence.’ (2001) 25 \textit{Melbourne University Law Review} 757. Illegal or improper behaviour in relation to pro-active policing opens up the examination of the nature of police actions in the lead-up to an offence.}
relied on by the lowest percentage of survey respondents. Even so, 32.5% of respondents reported that they had relied on this category at least once.\textsuperscript{746}

\textbf{6.C.iii The DPP’s no-bill statistics 1987-88-1994-95}

Another source of information about the exercise of prosecution discretion within the DPP’s Office can be found in a series of statistical reports provided in the Annual Reports of the Director for the first eight years of operation up until 1994. These reports indicated the numbers of cases no-billed by the NSW DPP and the reasons attributed to the decision to no-bill a prosecution. However, these statistics have not been produced since the Annual Report for the year 1994-1995.\textsuperscript{747} A review of the statistics for the 8 years of reporting shows that the three main reasons for directing a no-bill in this period\textsuperscript{748} were: that there was no reasonable prospect of a conviction (26%), that there was no case (12%), and at the request of the victim (20%).\textsuperscript{749} The other principal reasons for no-bills are shown in Table 7 \textit{NSW DPP no-bill statistics 1987-88 – 1994-95}.\textsuperscript{750}

The subjective assessment of there being no reasonable prospect of conviction was cited most by the DPP. This is perhaps not surprising given the malleability of this category to interpretation and the largely holistic approach that must be applied to the assessment of a case. The likelihood of conviction can at best, only ever be approximated according to an assessment of the strengths and weaknesses of the evidence. This category of no reasonable prospect of conviction is important as it includes cases where the prosecutor might anticipate the rejection of evidence (not separately measured). The importance of the victim’s view of the prosecution is also demonstrated by the fact that the wishes of

\textsuperscript{746} See also the discussion of unequal application of the law in Chapter Four.


\textsuperscript{748} The first three years of reporting prior to the committals initiative are marked by the high proportion of cases no-billed on the basis of there being no case and the number of cases no-billed because the matter was more appropriate to be dealt with in the Local Court. If the reasons are reliably stated, this suggests that the involvement of the DPP in committals had a positive effect in diverting weak and minor cases from being processed into the District Court by way of committal. See footnote 781 and accompanying text.


\textsuperscript{750} The DPP had developed 10 separate categories for the reporting of reasons for applying for and granting no-bills. Director of Public Prosecutions (NSW), ‘Annual Report 1994-95’, Office of the Director of Public Prosecutions, Sydney, 1995. At p. 64.
the victim constitutes the second most common reason indicated for the decision to no-bill. The third most cited reason for considering a no-bill was change in evidence which peaked as the reason cited in 1990-1991 and declined in following years, suggesting the importance in this category of delay in the hearing of cases and the reduction in the accumulated backlog of cases for a variety of reasons since the introduction of the DPP.\textsuperscript{751}

The number of matters in which the DPP referred to there being 'no case' as a reason for withdrawal peaked in the period up until the committals initiative in 1991. The decline in the period after 1991 would be expected from the involvement of DPP prosecutors in committals. Perhaps the most surprising result overall, is the relatively few matters in which the DPP attributed the consideration of no-bills to public interest concerns. It could be that public interest issues are subsumed into the categories of no case (where the judicial discretion to exclude evidence is anticipated by the prosecutor) or no prospect of conviction (in anticipation of the jury's assessment of the case).

\textsuperscript{751} For example, the setting up of the Criminal Listing Directorate to list cases, the internal court allocation of (and actual appointment of) more District Court Judges to reduce delays from arraignment to trial, and the sentence indication scheme. On the sentence indication scheme, see Willis, J., 'The Sentence Indication Hearing' (1997) 7 (2) Journal of Judicial Administration 98-117.
### Table 7 NSW DPP no-bill statistics 1987-88 – 1994-95

<table>
<thead>
<tr>
<th></th>
<th>No-bills</th>
<th>No-bills</th>
<th>No prospect of conviction</th>
<th>Victim request</th>
<th>Change in Evidence</th>
<th>Dealt with in other sentence</th>
<th>Other reasons</th>
<th>Matters personal to the accused (N)</th>
<th>Suitable for Local Court (N)</th>
<th>Trivial (N)</th>
<th>Delay (N)</th>
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<tbody>
<tr>
<td><strong>Year</strong></td>
<td><strong>Applied for</strong></td>
<td><strong>Direced</strong>*</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
<td>(N)</td>
</tr>
<tr>
<td>87/88</td>
<td>1091</td>
<td>425</td>
<td>72</td>
<td>66</td>
<td>48</td>
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<td>0</td>
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<td>0</td>
<td>14</td>
<td>23</td>
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<td>88/89</td>
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<td>605</td>
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<td>30 14</td>
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<td>409</td>
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<td><strong>Total N</strong></td>
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<td>761</td>
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<tr>
<td><strong>Percentage</strong></td>
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<td>5</td>
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</tbody>
</table>

**Sources:** DPP Annual Reports (NSW): 1987-88, at pp. 12-13; 1989-90, Appendix 9, at pp. 56-57 (2 years); 1990-91, Appendix 15, at pp. 88-89; 1991-92, Appendix 11, at pp. 79-80; 1993-94, Appendix 11 at p. 57 (2 years); 1994-95, Appendix 11 at p. 63.

**Including instances where all charges were no-billed, only some charges were no-billed, and back-up charges were no-billed.**

**The figures given by the DPP show each time the person making the no-bill decision nominated a reason. There is an element of double counting. The total number of no-bills directed is 4417; the total number of times a particular reason is indicated is 4841.**

**752** The figures shown show applications made and no-bills directed each year, there is however a lag between making an application and a direction being given so that more directions may be given than applications made in a reporting year.

**753** Of the total number of times a particular reason was cited (4841). The percentages shown are rounded off.
In the Summary Prosecution Pilot the two principal reasons given for no-bills were firstly, the evaluation that there is insufficient evidence and secondly, the wishes of the victim seeking that charges be withdrawn.\footnote{See Appendix B and the discussion in Chapter Three.} The importance of these issues is confirmed in the figures reported by the DPP\footnote{The figures reported by the DPP showed the reasons assigned in the Director’s office for the decision to enter a no-bill according to ten possible categories. There is an element of double counting as more than one reason may be shown for the one no-bill decision. These figures therefore do not show factors that may be considered in the decision to enter a no-bill but that are not on the list. And there may be an under-reporting of factors that were treated as supplementary to the main reason for entering a no-bill.} in indictable cases, which point to the importance of the judgment of prosecutors in evaluating the likelihood of a conviction and also to the role of the victim in determining whether cases should proceed.

6.D The independent prosecutor

In the 2001 DPP Prosecutor Survey many respondents stressed the importance of the ‘independence of the prosecutor’ in broad terms.\footnote{More than one-quarter of 92 separately identified issues raised by the DPP Prosecution Survey respondents related to the need for prosecution independence and the separation of investigative and prosecutorial functions.} This ideal was expressed generally without elaboration and few respondents attempted to articulate what this might mean in practice. However one respondent did link independent prosecution with consistency:

> It is the only way to ensure impartiality and some consistency across the judicial system in criminal cases\footnote{2001 DPP Prosecutor Survey response.}

The vagueness and indeterminacy of the goals of the independent prosecutor in the prosecution of police summary cases is at least, in part, a reflection of the lack of appreciation of the difficulties to be faced in prosecuting summary cases.

There are three senses that may be conveyed by the label ‘the independent prosecutor’. The first is as a corporate identity being the office responsible as a whole for the conduct of prosecutions. For this entity, discretion is largely considered in terms of formal powers and rules contained in the law and stated policies and guidelines. The second sense conveyed by the term ‘the independent prosecutor’ is the head of the prosecutor’s office such as the Director of Public Prosecutions (DPP).\footnote{The prosecution service in New South Wales is headed by the Director who is a statutory appointee for life. See sections 4 and 5, \textit{Director of Public Prosecutions Act} 1986 (NSW). The Director acts as the head of a Barristers’ Chambers made up of Crown Prosecutors who are also statutory} When used in
these ways, ‘the independent prosecutor’ label takes no account of the diffusion of prosecution responsibility among the many prosecutors759 who act under the authority of the Director. The third sense refers to any one of these individual prosecutors who is assigned to prosecute a particular case.

Prosecution independence is generally seen as a capacity to exercise judgment in a clear and rational manner free from external interference.760 It is perhaps this quality, above any other, that is put under the greatest strain in the decision-making environment in which police summary cases are prosecuted. Independence is generally conceived of in terms of political independence of the DPP or DPP independence from the police. Considered in either way, the focus is on the overall position of the DPP, rather than the individual independence of a DPP prosecutor (whether a Crown Prosecutor or Solicitor). However, it is individual prosecutors who in most instances are responsible for the exercise of prosecution discretion. In this section I consider these two aspects of the institutional independence and individual prosecutorial independence.

6.D.i Institutional independence

The NSW DPP, like the other Australian DPPs, asserts that his Office is independent from the political process.761 As Edwards points out though, each Australian DPP is appointees for life. See sections 4 and 9 of the Crown Prosecutors Act 1986 (NSW). There is also a Solicitor for Public Prosecutions who heads an ‘Office of the Director of Public Prosecutions’ in a manner similar to a firm of solicitors who have the right of appearance as prosecutors in court and who also instruct the Crown Prosecutors. The current DPP (Nicholas Cowdery QC) refers to himself as the ‘client’ of the solicitors in the Office of the Director of Public Prosecutions. In England and Wales there is a separate corporate identity for the Crown Prosecution Service (CPS) which the Director of Public Prosecutions heads. The use of a different name for the corporate identity of the CPS helps to distinguish the office and its workings from the Director personally.759 In the NSW DPP’s Office there are some 268 solicitors and 82 Crown Prosecutors. See footnote 1044.


761 Indeed, as Bugg argues, political independence was the initial rationale for creating the office of independent prosecutor in Australia. See Bugg, D., ‘The Role of the DPP in the 20th Century’, Judicial Conference of Australia, Melbourne, 1999. At the Commonwealth level, some of the precipitating events included the revelations of the Costigan Royal Commission concerning Commonwealth prosecutions run by the Commonwealth Crown Solicitors Office, and the resignation of Eliott QC as Attorney General (based on his dispute with Cabinet concerning a Cabinet decision that the prosecution in Sankey v Whitlam and others (1978) 142 CLR 1 be taken over and terminated).
under the general superintendence of the relevant Attorney General. Of all the Australian models, the original legislation setting up the Victorian DPP’s Office gave that Office perhaps the most freedom from political supervision. However, following a series of decisions concerning the prosecution of police and the consideration of contempt charges against the then Premier, Mr Kennett, the Attorney General introduced legislation to ‘make the DPP more accountable’. The result was the Public Prosecutions Act 1994 (Vic) which repealed the Public Prosecutions Act 1982 (Vic). The 1994 Act makes it clear that the DPP is responsible to the Attorney General and requires the Director to convene a ‘Director’s Committee’ to advise the Director on a wide range of prosecution decisions. Notably, the Attorney’s original proposal to allow a Deputy Director to have an effective power of veto over the Director was rejected.

The issue of accountability of the DPP has been driven in NSW by press attention focusing on the personality of the DPP, the questioning of controversial decisions, and

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763 Ibid. At pp. 46-49. See also the comments by the Law Reform Commission of Canada in 1990 where it was said: ‘The Victoria model is at the extreme end of independence in the prosecution of criminal offences. As with the Republic of Ireland, therefore, it is arguable that little room has been left for accountability. Further, even more than in the United Kingdom, it is open to the government, and indeed the Attorney General, to disavow responsibility for any unpopular or unwise decisions. The Attorney General has no power to influence particular prosecutions, for proper or improper motives. The Director is similarly limited. The government is not responsible for the actions of the Director, beyond having made the initial appointment, and so at no level above the individual prosecutor is there anyone who can effectively be held accountable. See Law Reform Commission of Canada, ‘Controlling Criminal Prosecutions: The Attorney-General and the Crown Prosecutor’, Law Reform Commission of Canada, Ottawa, 1990. At p. 47.
765 Section 10 states: ‘(1) The Director is responsible to the Attorney-General for the due performance of his or her functions and exercise of his or her powers under this or any other Act.

(2) Subject to this Act, nothing in sub-section (1) affects or takes away from the authority of the Director in respect of the institution, preparation and conduct of proceedings under this or any other Act.’
766 Accountability is a perennial issue in relation to DPPs. The DPP must be sufficiently distant from politics and independent of investigative agencies and of the judiciary. Marshall conceived of two models of DPP accountability that he considered mutually exclusive. These models are direct executive accountability and explanatory accountability. See Marshall, G., ‘Constitutional Conventions the Rules and Forms of Political Accountability’, 1984. referred to in Edwards, J. L. J., ‘Walking the Tightrope of Justice’, Royal Commission on the Donald Marshall Jr., Prosecution, Halifax, 1989. At p. 160. Edwards disputes the notion that the models are mutually exclusive. Edwards notes that the DPP may well be called to account before being directed to act in a particular way under a number of the examples of accountability to the Attorney General.

In NSW the DPP has an explanatory accountability to the Attorney General and can be given guidelines by the Attorney General. See section 26, Director of Public Prosecutions Act 1986 (NSW). The real problem for the NSW DPP may be a combination of a lack of openness regarding DPP decisions, negative perceptions of the role of the DPP in a predominantly law and order environment, and press
the attention given to claimed ‘failures’ of the DPP. The ‘lack of accountability of the DPP’ has been a consistent theme in the background of State politics. In January 2002 the NSW Opposition announced plans for the DPP to be appointed for a limited term of seven years and to make the DPP ‘answerable to a parliamentary watchdog committee.’ The rationale given for proposing these changes reveals a narrow victim’s rights agenda. The Leader of the Opposition is quoted as saying ‘We believe the DPP has a responsibility to explain and, if necessary justify the decisions made on behalf of victims or their relatives to ensure those decisions reflect community expectations and values.’ Early in 2001 the Senior Crown Prosecutor for NSW revealed that the Government was planning to install a committee to oversight the DPP and it was suggested that the Police Commissioner might be on that committee. The response by the legal community was muted, with one article by the Senior Public Defender published in the Sydney Morning Herald. In 2001 a briefing paper was prepared for the NSW Parliament on the independence and accountability of the DPP. Previously, the Council on the Cost of Government had extensively reviewed the DPP’s operations in 1998.

There had also been a review by ICAC of a police complaint concerning the Lismore Office of the DPP in 1997. That review concerned a DPP decision to withdraw the

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767 For a detailed discussion of the progress of this debate in the NSW Parliament see Johns, R., ‘Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey’, NSW Parliament Library, Sydney, 2001. In particular, Johns notes the difference between early attempts to make the DPP report to a Parliamentary Committee and more recent proposals to give a Parliamentary Committee unprecedented power to oversee expenditure within the DPP’s Office and to require the DPP to account in individual cases.

768 No doubt with an eye to the next State elections to be held in March 2003.


case against a defendant who had appealed against conviction to the District Court. The
Commissioner found that there was no evidence of corrupt conduct but concluded:

> There were unsatisfactory features of the process ... Some of these ... give rise to feelings of
> anger and frustration on the part of the police concerned in the matter. To some extent that
> response is justified in the absence or inadequacy of, or departures from, proper systems and
> procedures in the Lismore Office of the DPP.774

Specific failures noted by the Commissioner were the lack of a record of allocation of
the file within the DPP Office, inadequacy of the solicitor’s reports on the case, failure
to consult the informant, and delay in informing the police of the decision to withdraw
(one week after notifying the defence).

As in Victoria, the decision to take action against police is particularly controversial
(unless the allegations involve corruption, as with cases arising out of the findings of the
RCPS775). Other decisions not to take action, which have led to criticism of the DPP,
include to withdraw charges or to no-bill cases,776 and decisions not to take action by
way of a Crown Appeal in cases with a high degree of victim sympathy.777 These types
of cases are prominent in the tabloid press. They provide ‘good copy’ in terms of their
currency and topicality. Press reports present the drama of conflicting values regarding
victims and the accused. These reports are supplemented by commentary from

774 ibid. At pp. 39-41.
775 See for example, English, B., ‘Delay in Charges against Police’, The Daily Telegraph, 22
776 See English, B., ‘$8m Drug Charges Dropped’, The Daily Telegraph, 22 July 1997, Sydney,
8. The DPP dropped charges of supply and possession of 3.7 kg of heroin against Vu Phong Bui. The
heroin was found in a car in which Bui and another person Quoc Dung Duong were travelling. Duong
pleaded guilty to possession of the drug for supply and was sentenced before Bui’s case could be heard.
The DPP’s decision led to the Attorney General’s seeking an explanation and the Premier was reported to
be ‘angered’ and to have ‘sought the advice of the Crown Advocate.’ See English, B., ‘$8m Drug Charge
777 For example, regarding the DPP’s decision not to appeal the sentences imposed on three
young men convicted of the manslaughter of a truck driver Mark Evans who was killed when they
dropped a rock onto his truck from an overpass. See Morris, R., et al., ‘No Appeal on Lenient Jail
Terms/DPP Rules, Goes on Leave’, The Daily Telegraph, 29 August 2000, Sydney. There was a
significant expression of disapproval in the Daily Telegraph in the days following this decision and Mr
Carr is quoted as saying that the leniency of the sentences was ‘outrageous.’ In one account, Cowdery is
quoted as saying ‘Normally we hear these statements before an election...it’s a great pity that it’s now
happening between elections. Politicians should get on with the job that they are supposed to be doing
and leave the specialists...to do their jobs.’ See Morris, R., et al., ‘Stick to Politics - DPP Fury at Carr’s
Sentence Remarks’, The Daily Telegraph, 23 August 2000, Sydney. Despite the criticism of the Premier
by the DPP, the opposition joined the controversy surrounding this case by proposing legislation to ‘make

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politicians (often responding to ‘public opinion’) and the DPP who is personally portrayed variously as either intransigent, unaccountable or cavalier.\textsuperscript{778} In many cases, it is the way in which the DPP proceeds which is the focus of attention (such as where it is alleged that the DPP has failed to keep the police or the victim or the victim’s family informed of developments in the case).\textsuperscript{779}

In contrast to the general lack of reporting on the work of the DPP, the willingness of the NSW DPP to respond publicly to political and press attacks\textsuperscript{780} can be criticised on the basis that the DPP then becomes mired in political debates that cannot be won. This politicisation of the DPP’s role also can be seen as an indicator of the DPP’s precarious claim to legitimacy. The DPP, as the sole person responsible for indictable prosecutions, is an easy target for criticism as one person who can be blamed for what goes wrong and for acting ‘wilfully’ and ‘without accountability.’ In a perhaps surprising twist, the internal Director’s Committee system in Victoria provides a model to blunt personal criticism of the DPP. It does so by giving formal definition to the internal processes that already exist within the DPP’s Office for the exercise of prosecution discretion, with solicitors and Crown Prosecutors making recommendations to the Director.\textsuperscript{781} The

\textsuperscript{778}See O’Shea, F., ‘DPP Will Not Appeal Car Crash Sentence’, The Daily Telegraph, 7 January 1999, Sydney, 17. In this instance, the DPP did not appeal the sentence imposed on a 14-year old who was driving a stolen BMW when he crashed into another car, in which ‘a young Newcastle doctor and his accountant girlfriend’ were killed. The young person had been sentenced on December 15 to three years and three months detention on two charges of aggravated dangerous driving causing death. The families of the victims are reported as finding out on Christmas Eve and as expressing their dismay. Their local member is quoted as saying ‘The law is an ass because of the way it has let these people down.’


\textsuperscript{779}In one high profile case this led to the withdrawal of the Crown Prosecutor from the handling of the matter. In the prosecution concerning the killing of police officer, David Carty, the Crown Prosecutor was blamed for not advising police of a bail application (where the accused was granted bail). The Premier was reported as telling the DPP to ‘lift his game.’ See Anonymous, The Daily Telegraph, 30 October 1997, Sydney. See also footnote 787 and accompanying text.


\textsuperscript{781}The procedure for deciding to terminate a prosecution (by way of no-bill) was described by the then NSW DPP, Reg Blanch QC (now Chief Judge Blanch of the District Court) in his first Annual Report in these terms, ‘The procedure for deciding to terminate a prosecution is painstaking. Those decisions are made by me after receiving separate advice from both a junior barrister and a Queen’s Counsel. It is a system designed to achieve a decision which is careful, balanced and beyond reproach.’ Director of Public Prosecutions, ‘Annual Report 1987-88’, Office of the Director of Public Prosecutions, Sydney, 1988. At p. 13. Under Blanch, the DPP’s Annual Report gave the most comprehensive account
NSW government’s proposal in 2001 represents a potentially far worse outcome in terms of independence of the prosecutor as it appeared to involve the loss of financial control over the running of the prosecutor’s office.\(^{782}\)

The role of the DPP has come under scrutiny in other Australian jurisdictions. At the Commonwealth level, in 1994 there had been a suggestion that the work of the Commonwealth DPP could be privatised and an extensive review was commissioned by the Attorney General’s Department and the DPP.\(^{783}\)

The NSW DPP provides an Annual Report to Parliament but is not required to appear before a Parliamentary Committee (as is the DPP for England and Wales\(^{784}\) and the Commonwealth DPP\(^{785}\)\(^{786}\)). In this setting, the reduction of information from the DPP may be a defensive move to prevent opponents from gaining material with which to attack the office. It also has the opposite effect of making the DPP appear unaccountable and secretive. The DPP needs to do more to address ways in which public confidence in the Office can be obtained and to both explain the means of decision-making and give a better account of its decisions.\(^{786}\) It is to be expected that the work of the DPP will attract ongoing criticism and public policy review. In the conduct of summary prosecutions it appears inevitable that DPP pursuit of the goals of independence, fairness and impartiality will come into conflict with the ‘law and order’ imperatives of

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of decisions not to continue prosecutions. See Footnote 748 and accompanying text. Blanch explained his approach in this way ‘Under a system where the decision was made by the Attorney General and that decision was made on advice, there was a basis for not revealing the advice. The change in the system meant that the decision was made by a public officer who is a professional criminal lawyer and the previous policy of non-disclosure required reappraisal. That was particularly so in New South Wales where the reputation for integrity of the administration of justice had been under constant questioning and those questions could not be answered because the policy of not explaining decisions.’ Director of Public Prosecutions, ‘Annual Report 1987-88’, Office of the Director of Public Prosecutions, Sydney, 1988. At p. 12. See footnote 249 and accompanying text.


\(^{785}\) The Commonwealth DPP appears before Estimate Committee hearings of the Federal Parliament.

\(^{786}\) With the removal of reports on the disposal of no-bills, the NSW DPP provides less information now about its work than it did in its first eight years of operation.
politics. The uncertainty of DPP accountability, and the lack of openness and transparency in DPP decision-making, makes the DPP all the more vulnerable to attack in terms of legitimacy and the exercise of discretionary power. The political context in which the DPP operates is already volatile and involves public disputes between political leaders and the DPP.

Another aspect to the political agenda for the prosecution of police summary cases is the opinion often expressed by the courts that the police must be supported in the performance of a dangerous and difficult job. The emphasis on immediate control and preservation of authority in the method of policing can actually intensify the situation with tragic consequences. For example, the police have been criticised for escalating the levels of violent confrontation and for using paramilitary style Tactical Response Group methods in the Bourke police district in the lead-up to the Brewarrina Riot.

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787 The dangerousness of policing was underscored by the murder of off-duty police officer David Carty in 1997. See the facts of *R v Esho, R v Sako* [2001] NSWCCA 415 at paras 8-10. This case involved a defence appeal, following trial and conviction, for the murder of David Carty. The accused Esho had earlier in the evening been involved in an incident where he yelled out ‘fucking pig’ towards two police officers across the street. One of the officers was David Carty and Carty cautioned Esho about his use of offensive language. Esho was with a group of young men at the time. Later, Esho and a small group of young men confronted Carty outside the Cambridge Tavern. Esho pushed Carty and Carty pushed back, at which point the other young men joined in. One of Carty’s attackers produced a knife that caused an injury to Sako who withdrew. Following this Carty was stabbed in the heart. Other young men joined in, punching, stomping and kicking Carty, thinking that Sako had been mortally wounded. See *R v Adam (Richard) and Adam (Gilbert)* [1999] NSWSC 144. The defence in *R v Adam* was partly based on blaming the others present as members of a gang known as the ‘Assyrian Kings’ and highlighting their history of conflict with police. The evidence of the incident between Esho and Carty was admitted in the trial of *R v Adam* on this basis, see paras 6-9. See also footnote 779 and accompanying text.


789 As in the case of Ron Levi, shot by police on Bondi Beach. See also the discussion of police killings of civilians in McNamara, J. D., *How to Police the Police*, (1999), Hoover Institution, <http://www-hoover.stanford.edu/publications/digest/994/mcnamara.html> 29 May 2001. Of the USA situation McNamara says: ‘The truth is, bad police shootings and instances of police brutality do not take place in a vacuum. They ferment in negative police cultures thriving on overheated rhetoric that describes cops as “soldiers” in “wars” against crime and drugs.’ At p. 2. And McNamara (a former police chief of Kansas City) refers to a series of shootings by police of civilians in San Jose: ‘Those shootings, tragic as they were, were part of a more serious problem. Like Giuliani’s officers today, San Jose police back then believed it was their job to keep the citizens in line. They saw themselves as tough cops and believed that confronting everyone—especially minority males— as potential criminals would scare people into being law abiding. In reality, police disrespect made citizens reluctant to report crime, help gather evidence, or come forward as witnesses. Paradoxically, the police were discouraging the very citizen cooperation they needed to fight crime.’ At p. 3.

other situations the police have ended up in sieges or stand-offs that have ended in the
death of the civilian involved.\textsuperscript{790}

\textbf{6.D.ii Judicial treatment of the independent prosecutor’s discretion}

Judicial review is also significant and may influence the prosecutor in either of two
ways. The first is that it creates the law to be applied in the exercise of prosecution
discretion. The second is that judicial review may sanction the use of prosecution
discretion in a particular way\textsuperscript{791} and the prospect of judicial review may moderate
prosecutor behaviour.\textsuperscript{792} It is also divided between the review of the DPP as an
institution and the review of individual DPP prosecutor action.

In 1987, Coldrey QC as the first Victorian DPP commented on the insulation of the
DPP from judicial scrutiny:

The Victoria Courts have eschewed the conduct of any examination of the executive decision-
making process involved in the entry of \textit{nolle prosequi}. Any reversal of this stand would be
fraught with problems.\textsuperscript{793}

The insulation of DPP decision-making from judicial scrutiny has steadily been
diminished. The role of the independent prosecutor in each State is still evolving and
important issues are yet to be resolved about the nature of that role. Some of the
pointers to the extent of court supervision of the DPP prosecutor can be found in those
cases dealing with:

- \textit{nolle prosequi},\textsuperscript{794}

\begin{itemize}
  \item \textsuperscript{790} See Curry, G., ‘Ex-Judges Join Battle over Tumut Shooting.’ \textit{Canberra Sunday Times}, 25
March 2001, Canberra, 18. In this incident, the police attended a property to serve warrants for failing to
attend court on charges of having a knife in a public place, resisting police, offensive behaviour,
assaulting police and other warrants including for non-payment of car registration fees. Mr Kep Enderby,
former federal Attorney General lives in the area and commented, ‘He certainly didn’t have a good
relationship with the police. He did sometimes put his finger up to them. All bushmen, of course, wear a
little knife. I do it myself when I pretend to be a bushman. But Hank went into town with such a thing, no
more than a pocket knife. The cops got on to him and just charged him with carrying a dangerous
weapon.’ The defendant was ‘shot in the back of the head after a 33 hour siege.’

  \item \textsuperscript{791} It has been held that ‘only in extreme cases will the court, by the use of its power to stay
proceedings, intervene in the prosecutorial discretion’. See Jago \textit{v} The District Court of New South Wales

  \item \textsuperscript{792} For a detailed discussion of judicial review and the CPS prosecutor see Fionda, J., \textit{Public


  \item \textsuperscript{794} See Maxwell \textit{v} R (1996) 184 CLR 501, see also \textit{Director of Public Prosecutions v B} (1998)
194 CLR 566 discussed below. See also McDermott, P. M., ‘Nolle Prosequi - the Law and Practice in
• the over zealous crown prosecutor,\textsuperscript{795}
• jurisdictional restraint on the DPP,\textsuperscript{796}
• restraint based on statutory powers,\textsuperscript{797} and
• insulation of DPP decisions from interlocutory process.\textsuperscript{798}

Two broad and countervailing duties of prosecutorial freedom and prosecutorial restraint emerge from these authorities. On the one hand, there is a duty on the prosecutor to avoid an abuse of the court’s process and on the other hand, there is a duty to keep the processes of the criminal law open and accountable. These duties apply in differing ways to the individual prosecutor and to the DPP.

A particular area of controversy that has led to judicial pronouncements on the limits of prosecution authority in Australia has been the prosecutor’s discretion to enter a \textit{nolle prosequi}. The issue in these cases is not so much the entry of the \textit{nolle prosequi} as a decision not to prosecute as such, but the tactical use of the \textit{nolle prosequi} to cease proceedings at a particular stage, while leaving the accused liable to further prosecution later, in fresh proceedings for the same offence. In this way the concern about the \textit{nolle prosequi} is similar to the concern that the courts have expressed about double jeopardy and falls within the power of the court to prevent an abuse of process. For example, the courts have allowed two mechanisms to protect the accused from double jeopardy. The first is the availability of the pleas in bar of \textit{autrefois acquit} and \textit{autrefois convict}. Beyond the narrow scope of these pleas in bar (which are an absolute protection) the accused may call on a second mechanism for protection, and that is by way of reliance on the court’s inherent power to avoid an abuse of its process.\textsuperscript{799} In contrast, the

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question of supervision of the prosecutor’s decision to not enforce a particular law has not been examined.800

The High Court has suggested that some DPP decisions are amenable to judicial supervision.801 In *Director of Public Prosecutions v B*,802 concerning the limits of the prosecutor’s power to enter a *nolle prosequi*, the High Court decided not to answer the questions reserved.803 However, Gaudron, Gummow and Hayne J.J. spoke in general

800 For an account of a USA approach to the supervision of the prosecutor for non-enforcement of crimes that the prosecutor has the means to detect and apprehend, see Ferguson, C. C. J., ‘Formulation of Enforcement Policy: An Anatomy of the Prosecutor’s Discretion Prior to Accusation’ (1957) 11 (3) *Rutgers Law Review* 507-525. At p. 515. The author gives an account of the case of *State v Winne* 21 N. J. Super. 180, 91 A.2d 65 (Law Div. 1952), in which a state prosecutor was prosecuted by the Attorney General for non-enforcement of anti-gambling laws. Corruption was not alleged. The prosecutor’s misfeasance by inaction was in issue (because the prosecutor was ‘lazy or utterly incompetent’). See p. 514. The Supreme Court of New Jersey found that the prosecutor could be indicted on this charge by the Attorney General.


Erlinder and Thomas refer to cases where the prosecution relies on more serious charges or factual allegations in the re-hearing of a case against an accused. They argue that the emergence of the doctrine of ‘appearance of vindictiveness [has emerged] to avoid the application of double jeopardy principles to judicial discretion in sentencing. Rather than adopting [the] viewpoint…that judges should be prohibited from increasing penalties following re-trials in all circumstances, the Court created an “appearance of vindictiveness” doctrine that would prevent abuses that might arise, while attempting to maximise judicial discretion in that small number of cases in which increased sentences would be justifiable based upon occurrences after the original sentence.’ See Erlinder, C. P., *et al.*, ‘Prohibiting Prosecutorial Vindictiveness While Protecting Prosecutorial Discretion: Towards a Principled Resolution of a Due Process Dilemma’ (1985) 76 (2) *The Journal of Criminal Law and Criminology* 341-438. At p. 427.

In response to a similar problem in England, Dingwall notes that the courts have developed two remedies for double jeopardy by the pleas in bar of *autrefois acquit* and *autrefois convict* creating a ‘more general discretion afforded to judges to stay proceedings if they would amount to an abuse of process’ see Dingwall, G., ‘Prosecutorial Policy, Double Jeopardy and the Public Interest’ (2000) 63 (March) *The Modern Law Review* 268-279. At p. 269. These pleas in bar operate within Australia.

802 (1998) 194 CLR 566.

803 The Court refused on jurisdictional grounds to answer the questions reserved. The majority held that the questions in the case stated constituted a request for an advisory opinion. ‘In our view, the questions reserved did not arise at the trial of the respondent. It follows that there was no power to reserve them for the consideration of a Full Court. It also follows that this Court should not, and indeed cannot, accept the invitation proffered by the appellant to express its opinion upon the issues which it was sought to agitate by the case stated. To do so would be to deliver an advisory opinion and that, of course, is beyond the power of this Court whether in its appellate or its original jurisdiction.’ *Director of Public...
terms of the court’s capacity to supervise the DPP. Their Honours, in a joint judgment, distinguished between executive decisions and decisions of the court:

The line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions the province of the executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court’s processes (which are the province of the courts) is of fundamental importance. As was said in Maxwell v The Queen:

‘It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.’

The accused’s trial not having begun and the decision being a decision about whether to continue a prosecution, the question whether to do so was a matter which fell within the province of the executive. It was not a question which arose at the trial of an accused. And the trial not having begun, no question could arise whether the entry of a nolle prosequi constituted an abuse of process. Other considerations may have arisen (we do not say they would) if the question had been one relating to the continuation of a trial that had already begun or had been whether prosecution of a fresh information amounted to some abuse of process. But those questions did not arise here.

It was suggested, in argument, that the power of the Director of Public Prosecutions to enter a nolle prosequi was a power that could be exercised only (as s. 7(1)(e) of the Director of Public Prosecutions Act (SA) says) ‘in appropriate cases’ and that accordingly the primary judge’s decision to reject the nolle prosequi could be founded in the supervisory jurisdiction of the Supreme Court of South Australia by way of judicial review. We say nothing about whether s. 7(1)(e) does limit the power of the Director to enter a nolle prosequi or about whether judicial proceedings could be brought to control the exercise of that power. If the decision of the primary judge is properly characterised as an exercise of power of judicial review it would clearly not be a decision of a question arising at the trial of the respondent. 804


Kirby J (dissenting) argued that the DPP could no longer lay claim to the executive immunity previously given to the Attorney General as prosecutor. According to Kirby J, the actions of the DPP are susceptible to wider judicial scrutiny than simply to defend the court from an abuse of process or to ensure a fair trial:

In these circumstances, given that the power relied upon in these proceedings was a statutory one, afforded to the appellant subject to conditions established by the DPP Act, I would not be prepared to import into the appellant’s statutory entitlement all of the hitherto unreviewable prerogative rights of the Crown formerly enjoyed by the Attorney General. In particular, I would not accept that the incantation by the prosecutor of the words ‘the Crown enters a *nolle prosequi*’ placed that decision, made under the DPP Act, *beyond judicial scrutiny as to its lawfulness* or beyond a judicial response necessary to defend the court from abuse of process or to ensure a fair trial. These are inherent powers of any Australian superior court. Their protection cannot be left solely to the decision of the prosecution once proceedings are before a court. Courts with the requisite power may, in proper cases, protect themselves. One of their means of doing so is to stay the proceedings. However, it is not the only means.

I would therefore reject the argument that the prosecutor’s announcement that ‘the Crown enters a *nolle prosequi*’ terminated at that instant the jurisdiction of the primary judge. Doubtless, in most cases, as a matter of practicality, the proceedings initiated by the presentation of the indictment would come to an abrupt halt. In most cases, the accused would welcome that result on the footing that a new indictment might not be found and fresh proceedings might not be commenced. But in other cases, it has been held that the circumstances of the attempted entry of a *nolle prosequi* can be an abuse of process, giving rise to a reserve power to refuse to accept the *nolle prosequi*.805 (Emphasis added).

And later Justice Kirby left open the possibility of judicial review of a prosecution decision made by an Attorney General.806

805 *Director of Public Prosecutions v B* (1998) 194 CLR 566 per Kirby J at para. 63-64. (Endnotes omitted).

806 ‘Having regard to the parties named and to the procedures adopted, the suggestion that the primary judge was actually engaged in the judicial review of the appellant’s decision to enter a *nolle prosequi* cannot be accepted. The only relevance of the suggested susceptibility of that decision to conventional judicial review is that it calls attention to the differentiation between decisions of the Attorney General exercising a vestige of the royal prerogative and decisions of the appellant which must in every case conform to the DPP Act. As Debel J correctly discerned, this differentiation affords a court different, and larger, powers of scrutiny in relation to the appellant than were conventionally exercised by courts in relation to decisions of the Attorney General. Whether the latter might also now be subject to examination by a court is a question which does not have to be considered in these..."
In a reference to the quote from Coldrey at the commencement of this section on the lack of judicial examination of the decision to enter a *nolle prosequi*, Edwards reflects on Canadian jurisprudence and notes that Coldrey’s comments would have no place in Canada following the Charter of Rights and Freedoms which saw judicial review impact on executive decisions including those of the Attorney General.807

At times the courts explicitly recognise that prosecution discretion is wider than that of the court and invite the DPP to consider the exercise of that discretion. For example, in the case of *R v Tolmie*808 the NSW Court of Criminal Appeal discussed the nature of an

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As Dotan indicates, the judicial review of the Attorney General as prosecution authority has become part of Israeli jurisprudence in a series of cases to do with state responses to the *Intifada* and a 1983 banking scandal. Dotan points to the influence of Justice Aharon Barak in this process beginning with his opinion in the case of *Nof v Att.-Gen.* (1981) 37 (4) P.D. 326 (at p. 334). ‘It seems to me...that as to the issue of the scope of intervention of this court there is no difference between the Attorney-General and any other public official. Both should exercise their discretion with fairness, honesty, reasonableness, without arbitrariness or discrimination, and by taking into account only the relevant considerations. Both are subject to judicial review...there is no special law concerning the scope of review (of the Attorney-General’s decisions).’ See Dotan, Y., ‘Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the Law in England and Israel’ (1997) (Autumn) *Public Law* 513-531. At p. 523.

Dotan also points to the development in English law of review of CPS decisions on the basis of non-adherence to general prosecution policies. See pp. 517-518. The cases referred to are *R v Chief Constable of Kent ex p. L* [1993] All ER 756 and *R v Director of Public Prosecutions ex p. C* [1995] 1 Cr.App.R. 136. Dotan notes that in England, ‘judicial review of prosecution discretion is very limited as compared with the standards of judicial review applied to administrative authorities in general’. In particular, according to Dotan, the standard of Wednesbury unreasonableness or the ‘hard look approach’ are not applied to prosecution discretion. See p. 516.

807 Edwards, J. L. J., ‘Walking the Tightrope of Justice’, Royal Commission on the Donald Marshall Jr., Prosecution, Halifax, 1989. At p. 51. Kirby J referred to Canadian jurisprudence in *Director of Public Prosecutions v B* supra (at para. 62). In the case of *R v Velvick* (1976) 33 CCC 2d 447 the court held that the court’s power to stay proceedings as an abuse of process ‘cannot be used to supervise [the] discretion given to the Attorney-General by Parliament’ (at pp. 456-7). *In Re W.A. Stevenson Construction (Western) Ltd. et al. and Fradsham* (1991) 66 CCC 3d 201 the court held that the announcement of a decision by the Attorney-General that a private prosecution would be taken over and terminated did not justify the court granting a stay of proceedings. The case summarises the development of Canadian law affecting the exercise of the Attorney General’s discretion and sets out the two tests to be applied being the ‘flagrant impropriety test’ and the ‘abuse of process’ doctrine. It is noted that under the abuse of process doctrine the Canadian Supreme Court upheld ‘the judicial discretion to issue a stay of proceedings “to control prosecutorial behaviour prejudicial to accused persons” following “confusion in the 1970s and early 1980s as a result of a trilogy of cases”’. (At p. 207) See *R v Jewitt* (1985) 21 CCC (3d) 7. The sequel to the Stevenson case is *Kostuch (Informant) v Attorney General of Alberta* (1995) 128 DLR (4th) 440. In that case the court refused to overturn the Attorney General’s intervention to withdraw Kostuch’s action and held that the right to bring a private prosecution was subject to intervention by the Attorney General and that the Attorney General’s discretion to withdraw a private prosecution should only be overturned on the basis of ‘flagrant impropriety’.

808 Unreported, NSWCCA, 7 December 1994, 60503/94.
application to the court for a stay of proceedings based on delay from the time of the
offence (some seven years earlier). Because of the delay, the investigating police no
longer had a recollection of the circumstances in which they took the statement of the
principal prosecution witness identifying the respondent accused. The court treated the
identification as an issue of fact for the jury and held that there was not a fundamental
defect to justify a stay. However, the court clearly passed the matter to the DPP to
consider as a matter of prosecution discretion. There had been a previous trial for the
same offence, at which the accused had been convicted. That conviction was quashed
on appeal, because of misdirection relating to inferences that might be drawn from
selective answers to questions. Hunt CJ at CL for the court said:

There is a very real distinction to be drawn between the power of the courts to stay proceedings
permanently and the discretion of the prosecutor to file a no-bill … These arguments (on the stay
application) are more appropriately directed to the Director of Public Prosecutions for such a no­
bill. They perhaps should cause the Director anxious concern in the present case, but they are
not, in my opinion, sufficient as would have warranted the District Court imposing a permanent
stay upon the basis that the prosecution is doomed to failure.809

Thus the court recognises the appropriateness of the DPP exercising discretionary
power to not proceed with a case, based on a lower test than that required for a stay.

6.D.iii The individual prosecutor

As previously indicated it is individual prosecutors who in most instances are
responsible for the exercise of prosecution discretion. Whilst they are subject to process
limitations in the law, corporate deployment decisions and policy and guidelines, they
also bring to the exercise of discretion, their own attitudes, opinions, skills and
strategies. Within the office of the DPP, control is exercised over individual prosecutors
through three formal methods:

1) by limiting the delegation of authority for certain decisions to a number
of senior DPP prosecutors (control of authority),

2) limiting individual DPP prosecutors to appearing in certain types of
cases in particular courts (control of role), and

3) by the creation of prosecution policies and guidelines (policy control).

809 Ibid. At paragraph 13.
Individual prosecutors also claim a separate and distinct duty to the court, which is the basis for a claim to individual prosecutor autonomy to act within the framework of the three formal controls (prosecutor autonomy). Indeed, this is the duty referred to by the Summary Prosecution Pilot prosecutor in the exchange with the police officer that is quoted in Chapter One.810

As shown in Figure 7 *The prosecutor’s discretion*, the prosecutor’s circumstantial discretion is affected by process influences on prosecution decision-making that are beyond the control of the prosecutor and ‘internal’ influences that are within the control of the prosecutor or the prosecutor’s office. External influences include the law, judicial review, the manner in which the police officer presents the case for prosecution and the political and social circumstances of the decision-making environment. The prosecutor does not directly control these factors. There is a range of internal influences that operate at a corporate, organisational, or individual level, which also affect the prosecutor’s exercise of discretion. In its corporate sense, the prosecutor creates prosecution policies and guidelines and makes deployment decisions that effectively control the opportunity for individual prosecutors to exercise circumstantial discretion. There is also an organisational culture formed out of the collection of individual prosecutors.

810 See footnote 49 and accompanying text.
6.D.iii.a Control of authority

In essence, prosecution discretion is reducible to three possible ways of acting.

1) The first is to proceed with the case initially presented by the police without alteration.

2) The second is to continue with the case presented by police subject to amendments or alterations at the discretion of the individual prosecutor (including withdrawal of some but not all charges).  

3) The third is to discontinue the case presented by the police.

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811 Individual prosecutors have the authority to reduce charges and to charge-bargain which entails the withdrawal of some charges.

812 The authority to withdraw charges depends on the status of the proceedings and whether the effect of withdrawing a charge (or charges) would be to leave no charge to proceed in relation to the initial incident for which the police laid a charge or charges. The decision to withdraw summary or indictable charge (or summary charges before the Local Court) must be referred to a designated senior...
These three possibilities are graded in terms of the hierarchical level of decision-making and the degree of visibility of the discretion being exercised. Effectively, it is only the third form of discretion that the DPP personally has direct involvement in, or at the very least, limits who may decide this question. The hierarchy of prosecution discretionary decision-making is represented in Figure 8. It can be seen that the Director exercises centralised control over the decision to discontinue a case by withdrawal (or offering no evidence) at the Local Court level or by nole prosequi at the trial court level. In all other respects, the individual prosecutor has a personal discretion within the Prosecution Policy and Guidelines to decide how to run a prosecution.

Figure 8 The DPP prosecution decision-making hierarchy

As shown in Figure 8 The DPP prosecution decision-making hierarchy, the authority to enter a nole prosequi is one area of discretion that is reserved for the Director (or a Deputy Director). A number of senior Crown Prosecutors in each office of the DPP hold a delegation to direct that summary charges in the Local Court be withdrawn as well as

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Crown Prosecutor. Following a committal, indictable charges must be referred to the Director for withdrawal.

813 Or an appeal from the Local Court. For an examination of the DPP’s procedures for deciding whether or not to continue to prosecute a charge that is subject of an appeal from the Local Court see Independent Commission Against Corruption, ‘Investigation Reports: Circumstances Surrounding the Offering of No Evidence by the NSW DPP on an All Grounds Appeal at the Lismore District Court on 25 May 1995’, Independent Commission Against Corruption, Sydney, 1997.
most indictable charges\textsuperscript{814} at the committal level in the Local Court. In this way, the DPP has partially devolved decision-making for the withdrawal of proceedings in the Local Court while the authority to withdraw matters once a committal order has been made is controlled centrally.

In Chapter Three the allocation of decision-making authority for the Pilot was shown in Figure 5 \textit{The prosecution decision-making hierarchy for the Summary Prosecution Pilot}. During the Pilot, prosecution decision-making in the withdrawal of all charges relating to the one incident could be dealt with at a local level at each court by the solicitor in charge of the Pilot for that court, provided that the informant police officer consented. If the officer did not consent to the action proposed by the solicitor in charge, then the case had to be referred to the Director for decision by the Director or a Deputy Director. This arrangement ensured that contentious issues could be resolved whilst allowing flexibility at a local level. The scale of the Pilot made it possible to adopt this centralised procedure and it should be seen as a reflection of the special circumstances, which then applied. In the event of a wholesale takeover of police summary cases, the DPP would have to develop a strategy to ensure consistency whilst enabling decisions to be made promptly.

\textbf{6.D.iii.b Control of role}

The second control within the hierarchy of DPP decision-making is the assignment of court appearance work. While the legal profession in NSW is divided into solicitors and barristers, there is no restriction on the right of appearance of solicitors in the summary or trial courts.\textsuperscript{815} Technically a DPP solicitor can run a summary hearing in the Local Court, or a trial in either the District Court or Supreme Court. However, court advocacy (and the authority to exercise relevant prosecution discretion) is allocated according to the prosecutor’s position within the DPP hierarchy as shown in Figure 8 \textit{The DPP

\begin{itemize}
\item \textsuperscript{814} The power to withdraw certain charges (such as murder) has not been delegated by the Director.
\end{itemize}
prosecution decision-making hierarchy. For example, solicitor positions are graded into levels. The most junior level consists of those solicitors who instruct in trials in the District and Supreme Courts and conduct District Court appeals. At the next level, solicitors conduct committals in the Local Court. Finally there are solicitors employed as ‘trial advocates’ who conduct trials in the District Court. The authority delegated to solicitors employed at each level differs in accordance with the nature of the prosecution work carried out. In this way, the solicitor conducting committals has wide authority to exercise prosecution discretion personally, short of withdrawal of the charges altogether in the Local Court (which can only be authorised by a senior Crown Prosecutor with the appropriate delegation). The authority of trial advocates is wider still in that it extends to the conduct of pleas and trials in the District Court and enables them to exercise prosecution discretion, short of withdrawal, in the trial court.

6.D.iii.c Policy control - The DPP Prosecution Policy and Guidelines

In some cases, the prosecution policy and guidelines may provide clear guidance for the conduct of the prosecution or reserve certain decisions (such as withdrawal) to certain decision-makers. The DPP provides a general framework for the exercise of prosecution discretion in the Prosecution Policy and Guidelines, which puts a three-stage test for prosecutions in two categories of 1) evidential sufficiency and 2) the public interest:

The primary question is whether or not the public interest requires that a matter be prosecuted. That question is resolved by determining:

1. whether or not the admissible evidence available is capable of establishing each element of the offence;
2. whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not
3. whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

The NSW DPP Prosecution Policy and Guidelines indicate that prosecution discretion is to be exercised in a structured manner and that the prosecutor is to consider a sequence of factors. Within that structure it is also made clear that not all cases need be

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816 Director of Public Prosecutions, ‘Prosecution Policy and Guidelines’, Office of the Director of Public Prosecutions, Sydney, 1998. The DPP is currently primarily responsible for presenting criminal charges in the criminal trial courts and the Prosecution Policy and Guidelines have not been drawn up with specific attention given to summary prosecutions. See footnote 725 and accompanying text.
prosecuted,\textsuperscript{817} that consideration should be given to the public interest in not prosecuting, and that the most serious charge need not be preferred.\textsuperscript{818} The policy describes the first test in terms of whether there is a \textit{prima facie} case.\textsuperscript{819} The second test ‘requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the Crown case in light of the anticipated course of proceedings, including the circumstances in which they will take place.’\textsuperscript{820} If the prosecutor decides that there is no reasonable prospect of conviction, then the prosecution should be terminated and there should be no need to consider the public interest.\textsuperscript{821} However, where there is a reasonable prospect of conviction the prosecutor then continues to consider whether there are factors that dictate that the matter should not proceed in the public interest. Various public interest concerns are set out in the DPP \textit{Prosecution Policy and Guidelines}\textsuperscript{822} and the policy notes that ‘The applicability of and weight to be given to these and other factors will vary widely and depend on the particular circumstances of each case.’\textsuperscript{823}

\textbf{6.D.iii.d Prosecutor autonomy - Diffused discretion}

An important aspect of the accountability of the DPP is the personal duty of the DPP prosecutor to the court, which is a counterpart to the claimed personal autonomy of the individual police officer.\textsuperscript{824} The DPP prosecutor is required to operate according to the DPP \textit{Prosecution Policy and Guidelines} but overlapping that framework there is a sphere of personal discretion with responsibility and accountability to the court. This feature of the individual responsibility of prosecutors is seen in those cases dealing with

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{817} ibid.
\item \textsuperscript{818} ibid. See Temby, I., ‘Prosecution Discretion and the Use of Appropriate Charges’, \textit{Criminal Trial Reform Conference}, Melbourne, Australian Institute of Judicial Administration, 2000.
\item \textsuperscript{819} Director of Public Prosecutions, ‘Prosecution Policy and Guidelines’, Office of the Director of Public Prosecutions, Sydney, 1998.
\item \textsuperscript{820} ibid.
\item \textsuperscript{821} In summary cases the prosecutor may be faced with reviewing a file without details of the evidence available. Nevertheless the prosecutor may be prepared to consider withdrawal based on public interest concerns alone.
\item \textsuperscript{822} Director of Public Prosecutions, ‘Prosecution Policy and Guidelines’, Office of the Director of Public Prosecutions, Sydney, 1998. There are some 22 separate matters listed for the prosecutor’s consideration in relation to the public interest. The full list of matters to be considered by the prosecutor is reproduced at Appendix C.
\item \textsuperscript{823} ibid.
\item \textsuperscript{824} See footnote 613.
\end{itemize}
\end{footnotesize}
the duty of the prosecutor to the court. The degree to which the prosecutor is free to exercise prosecution discretion free from direction or interference is nevertheless an unresolved question. For practical reasons the situation may not arise where a DPP prosecutor would wish to proceed in a particular way against the wishes of the DPP. A Crown Prosecutor who enjoys professional seniority and tenure may be more likely to actively exercise discretion but even a Crown Prosecutor may avoid going against the wishes or directions of the DPP. However, the problem could also arise and be less visible where the prosecutor fails to exercise prosecutorial discretion to either seek approval to withdraw appropriate cases or to otherwise intervene in cases where according to DPP prosecution policy and guidelines this would be appropriate. In this way, the lazy, incompetent, or complacent prosecutor could undermine for example, any general DPP commitment to ensure equality of prosecution treatment.

Beyond the control of authority, role and policy, the Director cannot centrally control the ways in which individual prosecutors apply discretionary decision-making authority in the routine processing of individual cases. The DPP prosecutor can amend a charge by leave of the court, or substitute another charge or charges in lieu of those laid by police. The prosecutor can also plea-bargain, charge-bargain or fact-bargain. The bulk of the work of the prosecutor (short of withdrawal of all charges for the one incident) is therefore carried out through the diffused and personalised discretion of individual DPP prosecutors who have extensive discretionary power that is not readily controlled by the Director. The judicial remedy for prosecutor error or excess also concentrates on the effect on the ‘fairness’ of the trial of the accused and as in the case


826 Particularly in relation to any possible conflict between prosecution policy and guidelines or directives and the individual prosecutor’s perceived duty to the court.

827 Subject to a time limit of six months for laying an information (for an offence where some other time limit is not specified), see section 56 Justices Act 1902 (NSW). This provision does not automatically invalidate an information laid out of time and the prosecutor may lay an information after the time allowed, provided the defence does not object, and this may happen to secure a plea bargain to a lesser charge. A similar example of DPP prosecutors finding ‘practical’ ways to settle prosecution cases, is indicated in the practice adopted in the mid 1990s of substituting the summary charge of intimidation for the offences of assault police or threaten police officer. The practice was subsequently adopted by police to add to charges and the ‘trifecta’ in some cases was converted to the ‘quadrella’. See for example, Director of Public Prosecutions v Carr [2002] NSWSC 194 discussed at footnote 187.
of Anderson v R\textsuperscript{829} the court may make no more than passing reference to the conduct of the Crown Prosecutor as such.

The discretionary power available to individual prosecutors is similar to the wide-ranging discretion of the individual police officer. As is the case for the police officer, there is an area of discretion that is hidden in the sense that its exercise goes unnoticed or there is no accounting of the reasons for either acting or not acting in a particular way. In the police officer’s case, the area of hidden discretion is in those instances where the police officer declines to initiate criminal charges. For the prosecutor, the area of hidden discretion lies in the decision to continue prosecutions and extends to the manner in which such prosecutions are continued. Just as it is difficult to ensure consistency in the commencement of criminal proceedings by police officers in comparison to their decisions to take no action, it is difficult to ensure consistency in the continued prosecution of cases by prosecutors. Both the police officer and the prosecutor have wide discretion because policies and guidelines can only ever deal with principles and broadly stated objectives and it is impossible to stipulate what should happen in every factual circumstance.

6.D.iii.e Degrees of independence among individual prosecutors

The terms of appointment of solicitors and Crown Prosecutors differ significantly.\textsuperscript{830} The terms and conditions under which solicitors are employed by the DPP are similar to those for other public servants. The solicitors do not have the ‘tenure’ enjoyed by Crown Prosecutors nor the independence of barristers from the private bar and so may be expected to be cautious in their approach to the exercise of prosecution discretion. The Crown Prosecutors are barristers who are statutorily appointed and so enjoy ‘tenure’ in their positions and who therefore can be expected to act with a high degree of personal independence. However, in any takeover of summary prosecutions the Crown Prosecutors would not be expected to have a significant role in the initial filtering of cases. This raises the practical difficulty of relying on less experienced and

\textsuperscript{830} See footnote 758.
non-tenured DPP prosecutors to decide which matters should be singled out for critical attention in the initial prosecution review of police summary cases.

6.E Process influences on prosecution discretion

In the summary courts in New South Wales the processes of the court and particularly the emphasis on the guilty plea for the disposal of cases, mean that the prosecutor in this jurisdiction does not have the time or information available to review all cases to be prosecuted to ensure that the prosecution tests of evidential sufficiency and the public interest in prosecuting are made out. In this sense, the summary courts function in a very different manner to the trial courts and in many cases the exercise of the prosecutor’s circumstantial discretion may effectively only ever be cursory or non-existent. Beside the authority, role, and policy controls discussed above there are a number of other significant influences on the exercise of discretion. The determining factor in the making of any particular decision will vary. At times, the dominant influence will be the nature of the case transferred by the police officer, or the opportunity (or lack of it) for review of the case afforded by the processes of the court. These process attributes are particularly significant for the prosecutor in dealing with police summary cases and give the police officer considerable influence over the outcome of the case.

6.E.i Independence - stage and function

A core value in the DPP prosecution of police summary cases is the independence of the DPP from the police. Prosecution independence from the police includes two aspects of 1) the point in the processing of cases when responsibility is handed over to the prosecutor (stage) and 2) whether (and then, to what degree) the prosecutor may be involved in the conduct of the investigation (function). In the 2001 DPP Prosecutor Survey a clear majority of respondents thought that the police should retain control over the decision to charge (thus supporting the status quo for the police control of criminal cases up to and including the charge stage). When given the opportunity to comment on the takeover of police summary cases, sixteen (out of 92 responses) of the 2001 DPP Prosecutor Survey respondents indicated that they thought that there was a need for

831 For a detailed comparison of the processes of the summary and trial courts see Chapter One.
prosecution ‘independence’ and yet most did not elaborate on what that meant for them. However, one respondent linked independence with the division of function between investigator and prosecutor saying:

I feel that the DPP prosecuting police summary cases would be a very positive change, especially in terms of it providing excellent early experience for DPP lawyers, and for the community perception of independence of the prosecution body, even in respect of relatively minor matters. It is these police summary matters that are, after all, the sort of criminal matters that have most direct impact on most citizens. The same office should not investigate and prosecute.

Another ten respondents took up the theme based on function, stating that the same office should not investigate and prosecute. One such response was:

[It is] clearly inappropriate for [the] police to both investigate and prosecute criminal matters. [There is] High potential for both actual and/or perceived bias, misconduct, corruption. Doesn’t necessarily have to [be] ODPP, but any criminal prosecution should be conducted by a body independent of the police service.

6.E.i.a The stage at which the prosecutor intervenes

In NSW, police officers exercise the discretion to decide whether to initiate proceedings for offences to be prosecuted (whether summarily or on indictment) under State criminal law. As seen in Chapter Five, this discretion includes both pre-charge and charge decision-making. The pre-charge decision-making steps begin with corporate police deployment decisions that determine the number of police officers available and policy decisions that determine the style of policing to be employed by those police officers. It is then up to individual police officers as to how they will react to specific complaints or pro-actively patrol an area. The individual officer therefore controls a number of the early steps in the policing sphere and determines not only who may or may not be charged, but also puts together the case to be passed to the prosecutor. It is a police officer who decides whether or not to engage in control and surveillance

832 There are a few cases where the DPP acts as the informant in summary cases but these are negligible in comparison to the number of police summary cases. Prosecutions for contempt of court and breach of non-publication laws are examples. Some indictable offences require the authorisation of the Attorney General to consent to the laying of a charge: See, for example, sections 78A and 78B (incest and attempted incest) and sections 78H, 78I, 78K, 78L, 78N, 78O and 78Q (homosexual sexual offences) of the Crimes Act 1900 (NSW). See footnotes 250 and 835 and accompanying text.
activities or to investigate a matter. In the event that a police officer identifies a suspect, the police officer elects whether or not to arrest that person. Subsequent charge decision-making by the officer includes determining ‘the facts’ and choosing whether or not to take action, whether by way of caution, diversion or ultimately, by charge. The initial determination of bail is also made by a police officer, although not usually the informant officer. These pre-court processing steps therefore determine the nature of police summary cases. If police initiate a criminal prosecution, they also decide on the type and number of charges. In addition, the manner of proceeding is selected by the police officer, choosing between summons, court attendance notice, or formal charge. In many instances resolving what to do at each stage in the process will be a matter of judgment on the part of the law enforcement official involved, without the aid of clear guidelines.

6.E.i.b The police decision to charge

The arrangements for prosecution of police cases in NSW are similar to those in the other Australian States. The prosecutor is therefore usually faced with deciding what to do after proceedings have been set in train in the prosecution of offences. It is then too late for the prosecutor to direct that the police take no action to initiate a criminal

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833 Such as: to stop and search, to question, or give a direction to, a person or persons.
834 The police have various statutory powers in relation to the manner of proceeding and bail. On the manner of proceeding see Justices Act 1902 (NSW). The police have power under the Bail Act 1978 (NSW) to set bail in relation to a defendant following charge (s. 18). The power to set bail is given to an officer of or above the rank of sergeant (present at the police station) or other officer ‘for the time being in charge of the police station’ (s. 17 (1)). Police bail is usually set by the Station Sergeant (or the next most senior officer on duty at a police station) when a person is placed in police custody. At times there may not be another officer available to make a separate bail decision and the decision will be made by the informant. Where an officer is working alone or with limited other personnel on duty, a decision to refuse bail may necessitate making special arrangements for supervision of custody, or for that person to be taken to a police station with remand facilities. Thus the presence of a separate bail officer and the facility to accommodate persons who are bail refused may make it more likely for bail to be refused as opposed to the situation where bail refusal could lead to significant inconvenience in a police station with limited staff.
835 The ‘prosecutor’ here refers to the DPP prosecutor and the police prosecutor. As already noted, each state DPP does not routinely prosecute police summary cases. However, the DPP may be involved in the prosecution of summary matters linked to indictable prosecutions. The DPP may also be involved in special cases such as certain sexual offences dealt with summarily, or proceedings against police officers. In some instances the police may consult the DPP before laying a charge. Most notably this is the case in relation to child sexual assault cases (see footnote 899 and accompanying text) or in complex fraud cases where the police may be more likely to seek advice. In a limited range of cases, the DPP may be consulted because of the need to secure the Attorney General’s consent to a prosecution and the approach is made through the DPP (see footnote 832 and accompanying text).
charge, or that the defendant be diverted from the court process altogether.\footnote{836} Importantly, the boundary between the investigator and the prosecutor is taken to be the charge decision, and this is the marker formally adopted by each of the State DPPs. In Australia the notion of an investigator-prosecutor divide has historically been relevant only to the prosecution of offences on indictment as there has always been a break between police accusation and the prosecution in the trial court, namely the Attorney General’s finding of a Bill of Indictment in colonial New South Wales.\footnote{837} In contrast, while police\footnote{838} have prosecuted and continue to prosecute their own summary cases, there is no real division of responsibility.\footnote{839}

At the time the predecessors to the State police forces were first established, summary prosecutions were brought by one person against another.\footnote{840} This system of private prosecutions had fallen into disrepute because of the perceived arbitrary and unjust ways in which defendants came to be prosecuted at the whim of private informants.\footnote{841} The value of the police officer’s decision to formally charge was to be found in the public nature of the accusation\footnote{842} and determination of that accusation by the courts. The notion of the police officer’s duty to uphold the law\footnote{843} is a reflection of this early history, which made a virtue of public determination of police accusations. The

\begin{footnotes}
\footnotetext{836}{The prosecutor may be involved in deciding whether a summons should issue if given responsibility to determine breach reports. (See the procedure for the issue of summonses at footnote 869 and accompanying text.) The police may also seek the prosecutor’s advice before taking action. Ordinarily however, in all but summons cases the individual police officer will make a decision whether to commence proceedings or not, without consulting the prosecutor. However, senior police officers may play a role in deciding whether a charge is laid.}
\footnotetext{837}{In England the Grand Jury continued in the role of determining the Bill of Indictment to be presented in the trial courts. However, local police authorities controlled the conduct of most prosecutions on indictment.}
\footnotetext{838}{As private informants or on behalf of other police as private informants.}
\footnotetext{839}{The right to privately prosecute was held up in England as a bulwark against the possible corruption of the criminal justice system by the inaction of state prosecution agencies. In colonial New South Wales the law that required the Attorney General to present an indictment also allowed the Supreme Court to direct an indictment to be filed at the request of a private litigant, in the event of the Attorney General’s inaction. For Canadian decisions on this point see footnote 807.}
\footnotetext{842}{Even though in reality the police officer also had considerable discretion to decide not to charge.}
\footnotetext{843}{This has already been commented on in relation to the enforcement of summary offences. See footnotes 116 and 670 and accompanying text.}
\end{footnotes}
investigator–prosecutor divide based on the decision to charge is therefore a construct that combines the existing accountability requirement that police accusations not only be made public but also be determined in the courts, and the idea of division, which is itself a separate value within the criminal justice process.844

In the trial courts there is a two-staged process from charge to presentation of an indictment. In summary proceedings there is essentially one step in the charging process. The Local Court can deal with the charge, information or court attendance notice prepared by the police officer to finality without the prosecutor having to prepare further process. There is thus not the same opportunity to review the police charge decision and once that process is initiated the case can proceed to finality in the Local Court. The dualistic framework for the conduct of criminal prosecutions is co-extensive with two very different and entrenched views of the prosecutor in the indictable and summary jurisdictions. The first (in indictable cases) is that the prosecutor exercises a complete and autonomous discretion to decide whether to continue a prosecution. The second (in summary matters) is that the prosecutor appears essentially on behalf of the informant officer.

The notional liability of informants for costs (as parties to the proceedings) strongly reinforces their sense of ownership of summary cases, which they institute. The 1990 High Court decision of Latoudis v Casey845 led to the routine awarding of costs against informants in failed prosecutions.846 In fact the costs awarded were paid out of a special budget847 administered by the Attorney General’s Department and as pointed out by

844 The importance of setting a dividing line between the police investigator and the prosecutor based on the decision to charge is central to the recommendations of the Phillips Royal Commission which led to the establishment of the CPS. See Royal Commission on Criminal Procedure, 'Royal Commission on Criminal Procedure Report', HMSO, Cmd 8092-1, London, 1981. Note however that the British government has committed itself to implementing the recommendations of the Auld Report whereby the CPS would be given the responsibility for the decision to charge in relation to police cases. See Gibb, F., ‘Lawyers to Take over Police Role on Court Charges’, The Times, 15 March 2002, London. For the Auld Report see Auld, R., ‘Review into the Workings of the Criminal Courts’, Home Office, London, 2001. See footnote 886 and accompanying text.
847 In relation to costs awards, the police prosecution branch advised ‘It has been the practice of the Government to usually pay costs awarded against police informants and no alteration to that policy is
Hyams, this was specifically noted by Mason CJ, quoting with approval from *Barton v Berman* that in the award of costs the possibility of deterring police was an irrelevant consideration as police are generally indemnified against an adverse order for costs.

The Police Service Response to a government review after the *Latoudis* decision pointed to the stress suffered by individual informants waiting for the Government to pay out the costs awarded. The Police Service warned of dire consequences arising from the award of costs against police and presents a police view of the difficulty of proving cases before a magistrate where the evidence consists of the word of the officer against that of the defendant (The quote is here reported at length to indicate the mixing of police perceptions of the difficulty of proving criminal cases so that the awarding of costs would lead to police neglecting their 'duty' or fabricating evidence to avoid costs. The suggested consequences include the breakdown of law and order and the usurping of the judicial role):

The effect of this decision [*Latoudis v Casey*] could lead to police doing one of the following: 1) neglect their sworn duty by failing to take action against an offender on the basis that the matter may fail at court, 2) the fabrication of evidence to ensure a conviction so as to avoid costs.

Take for example the situation many police find themselves in when they are working alone and see an offender commit an offence and the only evidence available is their word against the offender’s. Experience tells us many magistrates in circumstances such as a one on one defended matter will err on the side of the defendant and dismiss the information. Because of the High Court’s decision the same magistrate will visit costs upon the constable.

anticipated.' See Legal Services Branch, ‘Costs Following the Dismissal of Prosecutions’ (1991) 28 January 1991 *Police Service Weekly* 15. In 1991, I was advised by a police prosecutor at Dubbo that concerns about the possible impact of costs awards on the budgets of Local Area Commands had led to a more stringent review of doubtful cases by the police. Given that the budget for costs awards were met externally, the police were probably concerned about the perception of mounting costs orders rather than their direct budgetary impact. Subsequently I attempted to obtain more information about the effect of the *Latoudis* decision on police decision-making by way of Freedom of Information applications addressed to the Police Service and the Attorney General’s Department. These requests led to the disclosure of no more than a police circular outlining the *Latoudis* decision from the Police Service and the records of the Justices Act Review – Costs Sub Committee from the Attorney General’s Department.

850 Justices Act Review – Costs Sub-Committee. Information obtained through a request under the *Freedom of Information Act* (NSW) by the author.
It only stands to reason that police will in future fail to prosecute matters on the basis that costs will follow along with the stress and frustration that they cause. Police will be forced into the situation of usurping the judicial function of deciding guilt or innocence before they will commence action to bring an offender before the court.

Any decision which brings the police into a situation where they have to usurp the court’s function in deciding ‘guilt or innocence’ is lamentable and should be quickly rectified. The consequences of not doing so may lead to the break down of law and order in the community. The scales of justice are already heavily loaded in favour of a defendant in criminal prosecution because of the standard of proof required in such a prosecution – ‘beyond reasonable doubt.’ With this loading we now place the additional onus of meeting the costs of the person who has the substantial benefit.851

As mentioned in Chapter Five, this fundamentally flawed interpretation of prosecution discretion was repeated by the Police Minister and Minister of Justice, Mr Griffiths, in introducing the Justices (Costs) Amendment Bill (No. 2)852 when he referred to the possibility of costs orders forcing police to decide the guilt or innocence of defendants and the public duty of police ‘to apprehend and bring proceedings against offenders’:

- Police officers act under a public duty to apprehend and bring proceedings against offenders. They are not expected to be able to make a snap decision as to the ultimate guilt or innocence of an offender. That is a function reserved for the courts in a democratic society such as ours.853

This concern expressed by both the Police Service and the Police Minister that police somehow would be required to decide guilt or innocence provides a remarkable twist to the opportunity model of prosecutions. Similar thinking persisted in the training manual

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852 See footnote 950 and accompanying text. The potential liability of the police informant for a costs order for a failed prosecution (as a party to the proceedings) is now subject to section 81 of the Justices Act 1902 (NSW). Subsection (4) of which provides: ‘Professional costs are not to be awarded in favour of a defendant unless the Justice or Justices is or are satisfied as to any of the following: (a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner, (b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecution in an improper manner, (c) that the prosecution unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the defendant might not be guilty or that, for any other reason, the proceedings should not have been brought, (d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecution, it is just and reasonable to award professional costs.’
for police prosecutors prepared in 1995 and presented in evidence before the RCPS where it says:

Fundamentally, it is the role of the magistracy when the case is before the court, not the prosecutor, to judge the weight and the merit of each case. However, this does not mean that a prosecutor applies blinkers and takes an attitude of ‘let the court decide’, regardless of obvious weaknesses in the prosecution.854

Significantly, the police prosecutor training manual does not refer to the public interest in the prosecution of the case and this reflects the limits placed on police prosecutors in terms of authority and policy controls.855

The transposing of a public duty to apprehend and prosecute over the opportunity model of prosecutions is based on the notion that the police officer has a duty to uphold the law. It simultaneously denies the reality that the law is a tool in the hands of the police856 and that not every potential case can be prosecuted. The police officer exercises discretion at a number of levels before deciding to commence proceedings. The centrality of the informant’s role in the summary prosecution process gives rise to a further question whether the prosecutor should only ever overturn857 the police officer’s circumstantial discretion where it has miscarried, or whether the prosecutor may in any case substitute his or her own discretion regarding continued prosecution for that of the police officer. Addison expresses such a view in putting forward the proposition that the CPS prosecutor should not be allowed to discontinue cases for “public interest” grounds:

criticised the Commonwealth DPP’s Prosecution Policy and Guidelines on the basis that it took away from the role of the courts in the review of police behaviour. See footnote 917 and accompanying text.


855 See Sweeny, S., ‘The Role of the Police Prosecutor in the Magistrates Court System’, Prosecutorial Discretion, Australian Institute of Criminology, 1984. In the negotiations for the Summary Prosecution Pilot the Police Service wanted DPP prosecutors not to have the authority to charge bargain, to allow for a ‘fair comparison’. (Personal recollection).


857 Whether in whole, (by withdrawal) or in part, (by proceeding on fewer or lesser charges or entering a ‘charge’, ‘plea’ or ‘facts’ bargain).
One other area that should be re-examined is the power of the CPS to discontinue for ‘public interest’ grounds. This is seen as part of CPS independence but merely serves to reduce police morale and public accountability.858

However, this comment ignores the subjectivity of the police officer and the initial gate-keeping discretion that they exercise as noted by Bayley and Bittner:

Whether the public approves or not, patrol officers continually make judicial types of decisions, deciding whether the imposition of the law will achieve what the spirit of the law seems to call for.859

Referring to the CPS in England and Wales, Block pointed out (in 1993) that the then prosecution test for the sufficiency of evidence involved a relatively straightforward assessment of the elements of the offence and a much more subjective predictive assessment of the reaction of the magistrate860 and the performance of witnesses (often without meeting the witness). These tests require judgments in respect of which differences may be expected. Block refers to the incongruity of police pressure on CPS prosecutors to proceed with dubious cases by referring to the ready exercise of the police discretion to divert offenders:

It seems rather rich that the police, who caution countless offenders – all of them guilty – criticize the CPS for not proceeding with cases that do not meet the statutory criteria. That is why, when the CPS prosecute under pressure from the police to do so, but with prospects of conviction that fall short of realistic, magistrates see prosecutors, whatever their competence, struggling with cases that are pathetically weak on evidence.861

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859 Bayley, D. H., et al., ‘Learning the Skills of Policing’ (1984) 47 (4) Law and Contemporary Problems 35-59. At p. 41. The authors go on to note how the police have a special interest in the cases they have selected for prosecution and have often higher expectations of penalty than prosecutors or the courts. ‘Police officers are convinced that they know more about the deterrent utility of law than does anybody else. This attitude probably explains why they become so angry at prosecutors and courts that are more lenient than the police expected. They view prosecutors and courts as second-guessing the evaluation made by officers who are more immediately in touch with the practical reality of the situation’.


One means to overcome the prominence given to an initial decision made by an informant police officer is to view the DPP prosecutor as a part of the executive with a duty under statute, and to the court, to exercise its powers and discretion independently and responsibly. That means taking an active approach to the exercise of prosecution discretion and deciding not to proceed where under prosecution policy and guidelines that is appropriate. According to this approach the prosecutor replaces the police officer’s discretion as of right, without having to find that the police officer’s discretion has miscarried in some way. Nevertheless, Sanders points to the difficulty of the prosecutor acting after the police have initiated proceedings:

[T]he CPS’s role as a decision-reversing rather than decision-making body is an institutional blockage to ‘public interest’ factors operating on prosecution decision-making. 862

The exercise of separate and distinct prosecution discretion is not a function then of supervision of the police as such, but rather executive oversight of the power to initiate criminal proceedings on behalf of the state. 863 At the same time it also has to be acknowledged that it is not possible for the prosecutor to provide much more than a cursory review of many police summary cases. There is therefore a need to prioritise prosecution attention and to deconstruct the concepts of ‘crime’ and of the defendant as ‘an object of knowledge’. 864 Perhaps more importantly, the nature of the discretion exercised by the police prosecutor needs to be examined closely so that the DPP can identify those aspects of summary prosecutions that are worth changing and that are possible to change.

6.E.i.b.1 DPP Prosecutor Survey responses to prosecution involvement in the police decision to charge

As indicated in Chapter One, the survey of DPP prosecutors was conducted in 2001. The survey responses give an indication of how those individual prosecutors who responded to the survey feel about the each of these issues, rather than simply hearing

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863 This approach recognises that the prosecutor has no control over the police use of arrest, even though arrest may often lead to prosecution. Separate accountability mechanisms are therefore needed for supervision of the police use of arrest.
from the Director of Public Prosecutions. This is an important perspective to assess, given that individual prosecutors are in fact responsible for the bulk of decisions made in the prosecution of criminal charges.

As indicated in Table 1\textsuperscript{865} the largest proportion of respondents to the 2001 DPP Prosecutor Survey thought that the DPP should prosecute police summary cases (61.5%). However, that level of support was not translated into the question of the degree to which the DPP should be involved in the charging process. In the DPP Prosecutor Survey, a series of questions were asked concerning who should be responsible for the decision to charge. The results are shown in Table 8 DPP prosecutor attitudes to the responsibility for the decision to charge.

Most respondents thought that police should continue to control the decision to charge and the support for DPP prosecution of police summary cases is therefore significantly moderated in terms of the limited involvement that a majority of respondents felt DPP prosecutors should have in charge decision-making. A majority of respondents to the 2001 DPP Prosecutor Survey (85.3%) agreed with the proposition that the police should continue to be responsible for the decision to charge, with 37.4% agreeing to this proposition and a further 47.9% strongly agreeing. The response to the alternative proposition that the DPP should decide whether charges should be laid in all cases is basically inverted. This may be a reflection of current practices and could be linked to practical concerns regarding the workload involved in reviewing cases, alternatively, the respondents may be expressing a philosophical view that the division between investigator and prosecutor is properly drawn in the decision to charge. Further research is required to examine prosecutor motivations on this issue, as it is an important aspect of DPP involvement in summary prosecutions. It is also the point of division adopted in the NSW DPP proposal to take over summary prosecutions.\textsuperscript{866}

Nevertheless among survey respondents there was a gradation of views concerning other aspects of DPP involvement in charge and summons decisions. A lesser majority

\textsuperscript{865} In Chapter Two.
\textsuperscript{866} Taylor, L., 'Interview with Nicholas Cowdery Director of Public Prosecutions' (1997) (August) NSW Police News 13-18.
of respondents (67.7%) supported the proposition that the DPP should actively give charge guidelines to police for specific types of cases. However, 52.1% of the respondents agreed with the proposition that the DPP should be able to indicate which charges must be referred to the DPP before charges are laid.
Table 8 DPP prosecutor attitudes to the responsibility for the decision to charge

<table>
<thead>
<tr>
<th>NSW, VIC and WA</th>
<th>The police should continue to be responsible for the decision to charge</th>
<th>The DPP should actively give charge guidelines to police for specific types of cases</th>
<th>The DPP should be able to indicate which charges must be referred to the DPP before charges are laid</th>
<th>The DPP should decide whether charges are to be laid in all cases</th>
<th>The DPP should decide what charges are to proceed by way of summons</th>
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<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
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<td>37.4</td>
<td>70</td>
<td>42.7</td>
<td>49</td>
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<tr>
<td>Neutral</td>
<td>7</td>
<td>4.3</td>
<td>29</td>
<td>17.7</td>
<td>32</td>
</tr>
<tr>
<td>Disagree</td>
<td>14</td>
<td>8.6</td>
<td>15</td>
<td>9.1</td>
<td>34</td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>3</td>
<td>1.8</td>
<td>9</td>
<td>5.5</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>163</td>
<td>100</td>
<td>164</td>
<td>100</td>
<td>163</td>
</tr>
</tbody>
</table>

867 DPP Prosecutor Survey Question 5: The police currently control the decision to arrest. In most cases the police also decide whether to charge a person with a summary offence. If the DPP is responsible for the prosecution of summary cases, to what extent do you agree with the following propositions?
The opposition to DPP involvement in deciding the charges to proceed in summons matters was weaker, at 49.7%, than opposition to the DPP deciding whether charges are to be laid in all cases at 80.4%. And yet, the percentage of prosecutors who agreed or strongly agreed that the DPP should decide what charges are to proceed by way of summons was only 22.1%. Whilst this indicates a low level of support among the respondents to the survey, it is just over double the percentage of those who agreed that the DPP should decide whether charges should be laid in all cases.

It is apparent that prosecutors distinguished between charge and summons matters. At least in New South Wales, the decision to proceed with a summons is not made directly by the investigating officer. The investigating officer is obliged to submit a report recommending that a summons issue and the decision is made by another officer. The officer who advises on the issue of a summons or another officer may then act as a common informant in summons cases, laying an information before the Local Court to found the issue of a summons. The differences in response levels between summons and arrest cases suggests that a number of respondents picked on the practical differences between arrest cases and summons cases to agree to DPP involvement in summons cases as opposed to arrest cases. This means that the opposition to DPP involvement was not entirely a matter of principle to do with the decision to charge, but also reflected practical concerns about DPP involvement.

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868 An indication of the lack of existing police prosecutor involvement in the decision to issue a summons came to light during the Summary Prosecution Pilot when DPP prosecutors were not given a copy of the summons for the prosecution of these cases. This presented difficulties for the prosecutor on the mention of the summons case in court in making sure that the charge in the summons was an appropriate one. See Bailey, C., ‘Pilot Notebook’, 1996b. 29/7/96 at p. 8.

869 If the matter proceeds by summons then the police officer may lay an ‘information’ before the Local Court. In many instances the information is laid by a ‘common informant’ who is a police officer dealing with hundreds of routine cases. This officer swears to the necessary belief to found the laying of the information (based on the details provided in the breach report of the original investigating officer). The practice of using a common informant was criticised by the Law Commission in New Zealand on the basis that common informants cannot be said to be truly swearing to a matter within their knowledge. The Commission recommended that the procedure for laying informations be changed to allow for an automated computerised system for generating a charge to go before the court. See New Zealand Law Commission, ‘Criminal Prosecution’, New Zealand Law Commission, Wellington, 2000. At pp. 23-24. During the Summary Prosecution Pilot, the DPP prosecutors advised whether summonses should issue in matters where the informant officer submitted a breach report.
6.E.i.b.1.1 The CPS - A policy turnaround

In 1981, the Philips Royal Commission had recommended a prosecution system for England and Wales, where 'the point of charge or the issue of summons should mark the division of responsibilities between the police and the prosecutor.' In this the Philips Royal Commission saw the separation of the prosecutor from the charge decision as being essential to the maintenance of a proper relationship between investigator and prosecutor. The division of investigator and prosecutor based on the police decision to charge is premised on the belief that if the prosecutor becomes involved in the investigation of a case, then the prosecutor may become committed to a particular line of inquiry and lose objectivity in assessing that case. Elsewhere, it has been noted that DPP involvement in the prosecution of offences and 'fair trial values' in...
the courts have not been a check on major miscarriages of justice in England and Wales.\textsuperscript{872} Indeed, it is said that:

Police, forensic experts and prosecution lawyers (deliberately or inadvertently) failed to disclose material that would have collapsed, or substantially weakened, the prosecution case.\textsuperscript{873}

In a commentary in 1984, Lidstone looked at the proposition that the introduction of the CPS in England and Wales appeared ‘to be a radical reform breaking the monopoly which the police had enjoyed over pre-trial decision-making since the creation of modern police forces in the nineteenth century.\textsuperscript{874} However, Lidstone saw that the police control over information flows to the prosecutor would severely constrain prosecution discretion:

Independent decision-making, which is what is required of the prosecutor, is impossible so long as he remains dependent upon the police for the relevant information. In deciding whether to involve the prosecutor before a charge is made or in deciding what and how much information the prosecutor should be given, the police will be guided by their law enforcement concerns which are not necessarily the same as those of the prosecutor.\textsuperscript{875}


\textsuperscript{873} Whitty, N., et al., \textit{Civil Liberties Law: The Human Rights Act Era}, Butterworths, London, 2001. At pp. 163-5 and p. 197. In the USA context see Fisher, S. Z., ‘The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England” (2000) 68 \textit{Fordham Law Review} 1379-1452. Fisher discusses the Supreme Court authorities of \textit{Kyles v Whitley} 514 U.S. 419 (1995) and \textit{Strickler v Greene} 119 S.Ct 1936, 1946-47 (1999) in which it was held that the prosecutor has a ‘duty to learn of any favourable evidence known to the others acting on the government’s behalf in the case, including the police’ and that failure to discover such evidence, for whatever reason, will justify the overturning of a conviction. (See at p. 1380). Fisher criticises these authorities for assuming that the prosecution can control the flow of information from the police; ‘Do prosecutors actually have this ability?...state and local police agencies generally operate independently of prosecutors, and answer to different constituencies. As a result, prosecutorial access to information known to the police is a matter of persuasion and negotiation, rather than authority. The relationship is governed by informal practices about which little is known.’ See at p. 1382-1383.


\textsuperscript{875} ibid. At p. 311.
Lidstone argues that the failure to give the prosecutor control over investigations meant that the control over prosecutions would actually stay with the police.\footnote{ibid. At p. 312.}

The division between investigation and prosecution proved to be problematic and the CPS developed a guideline on the investigator-prosecutor divide in 1994. In that document it was noted that there was a divergence between CPS Areas concerning 'the nature and level of prosecutorial assistance to the police'. The guideline saw the functional division as more important than the point in the criminal process that marks the division:

> The dividing line between the prosecution and investigation is less than distinct. However, this paper endeavours to define that border by indicating the \textit{proper function} of the prosecutor, rather than referring to, for example, temporal limits, such as charge or court appearance.\footnote{CPS Policy Group, 'Investigation/Prosecution', Crown Prosecution Service, London, 1994. At p. 1.}

Speaking of the CPS in England and Wales, Fionda questioned whether the relationship between the police (with the power to charge) and the prosecutor (with the power over prosecution) was a 'loveless marriage' marked by antagonism and hostility as the CPS 'usurped a major function of the police'. In Fionda's analysis the retention by the police of the power to charge had the effect of giving the Crown Prosecutor a secondary decision-making power 'to continue proceedings or even institute proceedings where appropriate (\textit{Prosecution of Offences Act} 1985 (UK), s.3 (2)(b)), change the charge, refer cases back to the police for cautioning, or drop the case.'\footnote{Fionda, J., 'The Crown Prosecution Service and the Police: A Loveless Marriage?' (1994) 110 (July 1994) \textit{The Law Quarterly Review} 376 - 379. At p. 376. Fionda reviews the case of \textit{R v Croydon Justices, ex p. Dean} [1993] Q.B. 769. In that case, the police made representations to the defendant that were not within their power. In relation to the defendant's involvement in a murder case the police said he would not be prosecuted if he gave evidence against the others involved in the murder. The CPS decided to prosecute Dean in any event. The prosecution following the police representation was held to be capable of constituting an abuse of process and to be stayed for that reason. Fionda quotes the court (from p. 135 of the judgment) 'If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage.' Fionda continues: 'This is cold comfort for a service with an uncertain degree of independence and discretion and which has no supervisory powers at the investigation stage in order to prevent the police giving such undertakings to defendants. If the CPS or the police were confused about the precise limits and extent of their respective prosecution roles before, surely this judgment has only served to enhance such confusion and reopen the old wounds of hostility and antagonism.' At p. 378. See footnote 114.}
In 1987, Sanders argued that if the prosecutor controlled the decision to charge the police could recommend more cautions and the CPS could do more to control the volume of cases, consistency and fairness:

If all decisions on whether or not to prosecute were to go through the CPS, the police could recommend more cautions without taking on a judicial role. This could become one of the roles of the CPS; it could then substantially control the three crucial elements of volume, consistency and safeguards for suspects.\textsuperscript{879}.

The ambiguity of the role of the CPS is reflected in the demand that it be more independent of the police\textsuperscript{880} whilst at the same time there have been managerialist pressures on the CPS to work more cooperatively with police.\textsuperscript{881} Addison sums up the position for the CPS in 1998 in assessing evidential sufficiency:

Nobody, not the legal profession, not the media and certainly not the politicians; nobody has tried to be fair to the CPS, to understand what the service exists to do or to explain the purpose of the CPS to the public. The CPS is put constantly in a no win situation, if it prosecutes someone and they are acquitted then the CPS is criticised for bringing the case to court, but, when the CPS decides that there is insufficient evidence to bring a case to court it is criticised for being weak on crime.\textsuperscript{882}

The Narey Report recommended that prosecutors be placed permanently in police stations as a means of ensuring that appropriate decisions are made for the prosecution of cases from the start.\textsuperscript{883} However, this reasoning did not take into account the potential for the prosecutor to lose objectivity by working too closely with police and thereby potentially being absorbed into the culture of the police station, particularly as the police retained control of the decision to charge. In reporting on a review of the ‘Lawyers at Police Stations Scheme’ Baldwin and Hunt concluded that CPS lawyers were being used inefficiently to provide oversight and guidance to police officers that


should have been available within the police service. In other words, police were not being required to internalise the demands of the CPS for the prosecution of cases. Indeed, the authors concluded that the introduction of the CPS meant that police prosecution files received less internal police review than had been the case prior to the introduction of the CPS.884

In 2001, in response to the problems of police over-charging and of subsequent failed prosecutions, the Auld Report recommended that the responsibility for deciding whether to lay a charge should be transferred from the police to the CPS885 and the British Government has indicated that it intends to implement this recommendation.886

6.E.i.b.2 Pre-court diversion

The decision to charge very often involves consideration of other methods of case disposal that do not involve the criminal court.887 Regarding diversion, the NSW DPP Prosecution Policy and Guidelines states:

It is recognised that the resources available for prosecution are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution, including diversionary procedures, should always be considered.888

However, most diversionary schemes currently operate at the instigation of the police as an alternative to charging or at the instigation of the court after a charge has been laid.

884 ibid. At p. 522. In the end, Baldwin and Hunt point out that the role of prosecutors in the decision to charge had been overlooked as an area of study.
886 See footnote 844.
In New South Wales the police have a number of pre-charge options to consider, particularly for juvenile suspects.

In the survey of DPP prosecutors, respondents were asked whether the DPP should decide who is to be offered pre-court diversion. The results are shown in Table 9. This question was framed in terms of pre-court diversion so as not to confuse the question of diversion with the question of charge responsibility (the subject of question 5 in the DPP prosecutor survey, discussed above). Question 6 therefore presupposes that there is a system in place for pre-court diversion. Table 9 shows that 43.5% of 2001 DPP Prosecutor Survey respondents agreed that the DPP should decide who is to be offered pre-court diversion, with a similar percentage undecided. The percentage that disagreed was 18.6%.

Table 9 Whether DPP prosecutors agree that if the DPP is prosecuting summary cases, then the DPP should also decide who is to be offered pre-court diversion

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<tr>
<th></th>
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<th>%</th>
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<tbody>
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<td>37.9</td>
</tr>
<tr>
<td>Total</td>
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</tr>
</tbody>
</table>

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891 DPP Prosecutor Survey Question 6: If the DPP is prosecuting police summary cases, should the DPP also decide who is to be offered pre-court diversion?
Diversion from court process is an appropriate option in a number of situations. One is where the offending behaviour is so minor that it is thought inappropriate to proceed with a criminal charge at all, and yet it is thought necessary to mark the offending behaviour in some way without the need for formal court adjudication.\(^{892}\) A reason for diversion may be to enhance the rehabilitation of the offender. However, in a negative sense diversionary schemes may constitute an inducement to admit guilt without full consideration of the prosecution case.\(^{893}\) A negative aspect is that diversion may be applied to ‘offending behaviour’, which is so marginal that the appropriateness of labelling it as criminal is questionable and no action should be taken. The informality of the sanction may also widen the net in law enforcement. In this way, increasingly more marginal behaviour is criminalized, only to be diverted from the court system. This process builds up the criminal record of the defendant who becomes labelled as criminally deviant with the potential for increased police attention.\(^{894}\) Seen in this light, diversion may be likened to simply placing a handle on the courthouse door.\(^{895}\)

6.E.i.c Prosecutor involvement in investigation

The division between the investigator and prosecutor and the appropriate role of the prosecutor in investigation\(^{896}\) has been a long-standing issue for prosecutors.\(^{897}\) In 1977,\(^{898}\) and the decision to charge.

\(^{892}\) See Ashworth, A., et al., ‘The New Code for Crown Prosecutors: (1) Prosecution, Accountability and the Public Interest.’ (1994) (December 1994) Criminal Law Review 894 - 903. At p. 899. ‘Good reasons for promoting diversion are not difficult to find: it may be a properly proportionate response to less serious offences, it may reduce the risk of reoffending and it is less expensive.’


\(^{894}\) Diversionary schemes may not be offered as readily to members of marginalised social groups. Where the members of marginalised social groups are dealt with by diversionary schemes, the result may be to squander the value of strategic diversion from the court system on matters that involve police harassment or intolerance, or behaviour on the part of the defendant that is arguably on the margins of criminality, and which therefore should not be prosecuted. At the same time, the defendant is drawn into a negative relationship with police only to be denied the opportunity for diversion in relation to more appropriate cases arising out of subsequent police interactions See for example, Harding, R., ‘Justice and Injustice’, Proceedings of the Benchmarking Workshop, Council for Aboriginal Reconciliation, 1998.


\(^{896}\) And the decision to charge.

Edwards prepared a discussion paper for a meeting of Commonwealth Law Ministers. In that paper, Edwards says that the degree of separation of the investigator and prosecutor was then a common issue for Commonwealth Attorneys General and that there was 'a marked disinclination to rescue a case that has been mishandled by the police and a preference for acting as guide and mentor in the early stages of investigation'. According to Edwards 'various Attorneys General and Directors of Public Prosecutions' expressed the view that lawyers should 'guide the investigation' to ensure that cases are 'properly presented in court'.

The functional investigator-prosecutor divide is difficult to maintain in practice. For example, the prosecutor is required to review the case once it has been presented by the police and may request that the police undertake further inquiries or answer requisitions concerning that case. The dividing line between the work of the investigator and prosecutor can become difficult to delineate in the process. In evidence before the RCPS, Mr Cowdery was asked if he saw 'any role for the DPP in the investigative phase of (child sexual assault) cases' Mr Cowdery replied that the prosecutor could give advice on the sufficiency of evidence obtained and appropriate charges but otherwise rejected any role in 'the investigative phase' however, he said that the prosecutor could give advice on further investigations that might be undertaken to remedy a defect in the evidence.

Not all approaches for advice are made formally through the Director's Office and information and advice are exchanged on a local level in informal ways, such as by direct telephone contact and sometimes on the basis of the urgency or sensitivity of the situation being addressed by the police. At times for example, during a high profile investigation advice may be sought from, and given by, DPP prosecutors without formality. These localised police-prosecutor exchanges are another example of the

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diffusion of DPP authority and prosecutorial discretion in ways that are not readily controlled from the centre. \(8^{900}\)

6.1.1.1 The Commonwealth DPP experience

There is a strong argument to be made in favour of DPP supervision of police investigations in all matters involving reactive policing as these involve a degree of deliberation that makes DPP intervention both practical and important in terms of accountability and the avoidance of case construction. \(9^{901}\) This would enable the agency with the task of prosecuting any subsequent charge to conduct an early review of the evidence and monitor the police investigation. In a Canadian report in 1989, Edwards recommended the adoption of the Commonwealth DPP model (including a specific DPP power to issue directions in individual cases) as a means of ensuring effective DPP supervision of the prosecution process. \(9^{904}\) Edwards says ‘Only in most exceptional situations should the DPP seriously contemplate becoming actively involved in a particular case.’ \(9^{905}\) However, Commonwealth DPP intervention in the investigation of individual cases and making major prosecution decisions is not exceptional. Commonwealth DPP control over charging and the giving of advice to investigative agencies prior to charging is routine. \(9^{906}\)

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\(9^{900}\) For example, in the murder case that ended with the Cangi siege on the north coast of New South Wales, a Crown Prosecutor from Lismore gave telephone advice to the police detectives investigating to assist them to focus their inquiries. The facts and legal issues in the case were complex and included a claimed defence of necessity to the charge of murder. See R v Bassett Unreported, NSWCCA, 2 November 1994. There had been three suspects, but one died in the siege at Cangi. The case involved a series of killings and the suspected abduction of two children, beginning in Queensland, with two men shot near Armidale, and the eventual siege at Cangi. Even in terms of the narrow view of the investigator-prosecutor divide, it is arguable that the involvement of the Crown Prosecutor was justified on the grounds of the extraordinary circumstances of the case and that to require the request for advice, and the advice itself, to be in writing, would be inappropriate in the circumstances. However, the Crown Prosecutor’s involvement remained invisible and unaccountable. (This account is based on the personal recollection of the author who was the instructing solicitor in the prosecution of the two accused, Bassett and Steele).

\(9^{901}\) This is not to suggest however, that DPP involvement would eliminate the potential for case construction as the DPP may itself become involved in that process. For an examination of the qualities of reactive and proactive policing see Chapter One.

\(9^{902}\) Prepared for the Royal Commission into the Donald Marshall Jr prosecution.

\(9^{903}\) See the discussion of the operation of the Commonwealth DPP in Chapter Two.


\(9^{905}\) ibid. At p. 187.
Of all the Australian DPPs, the Commonwealth DPP works most closely with investigative agencies from an early stage of the investigation. The involvement of the Commonwealth DPP in investigations evolved quickly from 1993 to 1994 in a period when the DPP was in dispute with the Australian Securities Commission (ASC). In 1993, Michael Rozenes QC noted that the Commonwealth DPP did not have an investigation function but had sought to gain advisory involvement in investigations. On the need to stand apart from investigations, Rozenes said 'in order to be able to bring an independent assessment of the prospects in any given cases the prosecutor must maintain a sufficient distance from the investigation'.

However, conflict between the Australian Securities Commission (ASC) and the Commonwealth DPP over the role of the DPP in investigations led in 1994, to the establishment of agreed guidelines for prosecution decision-making. The making of this agreement was prompted by a direction from the Commonwealth Attorney General to each agency. Rozenes commented that simply 'sending a brief to the prosecutor' created 'destructive and unproductive tension'. Rozenes stressed the importance of balance in determining the involvement of the DPP prosecutor saying 'a balance had to be achieved between retaining the independence of the prosecutor and ensuring that the prosecutor had appropriate input into a matter during the investigative phase'.

It should be noted that the Commonwealth DPP is not involved to any great extent in the prosecution of offences detected through pro-active policing. Also, the Commonwealth DPP has the power to direct the police to take action in a particular case whereas State DPP prosecutors do not have that power.

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906 See footnote 932 and accompanying text.
907 The then Commonwealth DPP.
The benefits of early DPP involvement in the investigation include the potential to restrain case construction by the police and to ensure that appropriate inquiries are made in a timely fashion. The prosecutor can ensure that comprehensive investigations are undertaken at the earliest possible stage rather than leaving matters to be pursued in response to a DPP requisition years after the investigation commenced and thus avoid having the prosecutor 'locked into' a particular case view. The current system of DPP detachment from the investigation and charging process leaves open the opportunity for the police to conduct investigations that become skewed by case construction leading to the charging of persons in circumstances where the DPP would not proceed. The Blackburn prosecution is one example of this.912 The charging of Judge Bell of the District Court of NSW is another, where the DPP criticised the police for not seeking advice from his office before deciding whether to charge or not.913

6.E.ii Pro-active policing and the point at which the prosecutor intervenes

Unlike cases revealed by reactive policing which are generally characterised by deliberation in the conduct of an investigation, the independent prosecutor cannot possibly have a direct case-by-case input into matters characterised by the immediacy of police pro-active decision-making, particularly cases involving the use of the street arrest. It is simply not possible for the prosecutor to supervise the police officer’s decision on the street and in the heat of the moment whether to arrest or not. In any event, the decision to arrest is not always tied to the decision to prosecute.914 For example, the decision to arrest may be based on limited information. However, once an arrest is made, there is a danger that any further investigation (if there is any) will be skewed by the arrest decision itself unless there is some form of independent oversight. There is therefore no practical means of prosecutor involvement in street policing decision-making and it is for that reason that the investigator should remain distant from

912 See footnotes 159 and 224 and accompanying text.
914 Nor is the arrest an appropriate point of entry for the prosecutor as the test for an arrest is reasonable suspicion rather than a reasonable prospect of conviction.
the street arrest but then may be in a position to take control if the police officer wishes to proceed to charge a defendant. Whether the prosecutor should then be involved in the investigation of police summary criminal cases prior to charging, or in deciding whether to charge or not, is largely a question of the resources to be applied to summary prosecutions. In many instances the police may be the only witnesses and for the most part there simply may not be any further investigation. However, it is equally possible that there are other witnesses available but because of the nature of summary matters the police may not obtain statements from these other potential witnesses (as in the case of B and W referred to in Chapter Three). The question then becomes one of the extent to which the police ought to be required to prepare a brief for the prosecutor in summary cases that are likely to end up as a plea of guilty even without a brief being produced.

6.E.iii The prosecution imperative: Prosecution as a mechanism for the review of police action

The prosecution of a criminal charge is sometimes seen as a mechanism for ensuring judicial review of police action. In Handley’s criticism of paragraph 8 (by then withdrawn) of the Commonwealth DPP’s guidelines she says:

Employing the power of arrest for this purpose lays it open to abuse. If charges are not pursued, unless the person arrested chooses to institute a civil action claiming damages for unlawful arrest which given the disincentives involved is likely to be a rare event, the arresting officer will never be called on to justify the arrest in accordance with the law. This is barely consistent with the common law which, while endowing police officers with an individual discretion by virtue of their office of the Crown requires them to be accountable to the law.

However, as Freckelton and Selby comment there are limits to the usefulness of the criminal court as a mechanism for the review of police action:

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915 A clear separation of the arrest from the decision to charge would allow the prosecutor to intervene following arrest to decide whether a charge should be laid. However as Tombs notes, the prosecution supervision of the charge process in minor cases becomes routinised and cursory, see footnote 924 and accompanying text. This suggests that there is a need to prioritise the types of matters that the DPP should have greater involvement in the decision to charge. This could be related to those more serious charges that have been removed from the jurisdiction of the trial courts to the court of summary jurisdiction. See footnote 150 and accompanying text.

916 87% of cases in the Local Court are dealt with by plea of guilty. See footnote 206.

Many police confidently assert that they are ‘accountable’ because their errors will be corrected by the courts. While it is true that some police errors will entail that evidence is ruled inadmissible or will prompt adverse judicial comment or an award of costs against the police, the primary function of the criminal courts is to determine the guilt or innocence of defendants, not the probity of police actions. Furthermore, a significant proportion of police work has no court implications with the consequence that there is no opportunity for judicial oversight of police actions.919

Presser has also shown how there is judicial reluctance to find police action illegal or to ‘exclude’ evidence notwithstanding illegality in the way in which it was obtained.920 In cases in which there is no prospect of conviction, or where it is otherwise not in the public interest to proceed, prosecution of a police criminal charge should not take place simply to enable court review of police action.921 Alternative means of reviewing police action and of making police accountable for arrest decisions, (that do not require the defendant to be prosecuted) are by way of civil action and complaint using mechanisms such as the Ombudsman and the Police Integrity Commission. In the nineteenth century the magistrate reviewed the sufficiency of the police officer’s warrant.922 The review of the charge now falls for consideration by the prosecutor. Should the prosecutor decide to withdraw a charge against a defendant there may still be a need to provide a form of redress for any unlawful or improper police action.923

918 The then guideline for the prosecution of public order offences. At the time, the Commonwealth DPP had responsibility for prosecutions in the ACT, before the introduction of the ACT DPP. See footnote 646 and accompanying text.


920 See Presser, B., ‘Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly Obtained Evidence.’ (2001) 25 Melbourne University Law Review 757. Presser’s study included cases from New South Wales. Section 138 of the Evidence Act 1995 (NSW) is framed so that improperly or illegally obtained evidence is not admissible unless judicial discretion is exercised to admit it. The section states inter alia ‘evidence that was obtained improperly or in contravention of an Australian law ... is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained’.

921 See however, the possibility of the public interest in prosecuting certain cases such as with the prosecution of Judge Bell of the District Court (See footnote 224) in the face of deficiencies in the evidence. See New Zealand Law Commission, ‘Criminal Prosecution’, New Zealand Law Commission, Wellington, 2000.


923 An individual defendant or citizen (where no police charge is laid) may institute a civil action for improper police behaviour such as unwarranted strip searching or unlawful detention. Such civil action operates on a case-by-case basis as a ‘defensive’ remedy. Such an action is additional to the possible contesting of illegally or improperly obtained evidence (under s. 138 of the Evidence Act 1995
6.E.iii.a Limited opportunity for review

Any assessment of the role to be played by the DPP as an independent prosecutor of police summary cases needs to take into account the fact that the DPP cannot assess every case in the same way that it currently does for indictable offences. In any event, the scrutiny of all cases is likely to become routinised and meaningless. This is so because the process for the prosecution of summary cases is based on the entry of guilty pleas in the majority of cases, without the preparation of a prosecution brief of evidence. Indeed, this jurisdiction historically has been characterised by an unwillingness of police prosecutors to reveal aspects of the prosecution case, to provide a brief to the defence, or to provide particulars. Bugg notes that over the last twenty years or so, advances have been made in each of these areas. However, during the Summary Prosecution Pilot at Dubbo, the DPP became aware that the NSW Probation and Parole Service did not provide a statement of the facts to the defendant in proceedings for breach of probation and parole orders, unless the defendant had agreed to plead guilty. Effectively, those accused of a breach (and who were thereby placed in jeopardy of breach action) were required to admit guilt before being told the details of the allegation. DPP intervention led to the abandonment of that policy.

There may be no evidence presented to the prosecutor before the entry of a plea of guilty or not guilty by the defendant. The problem of ascertaining the ‘facts’ and reviewing cases at short notice is illustrated in the following accounts. These show the need to scrutinise police information carefully and the difficulty of working ‘on the run’ in a system that values the efficient processing of cases. They also point to the short-term and immediate police goals in the tactical use of charges (often concerning bail).

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Indeed, the Police Prosecutors’ Training Course notes the particular problem of obtaining sufficient information for the conduct of bail hearings.\footnote{927} An area of regular difficulty in terms of instructions is in the domain of bail determinations. Often, particularly on the first appearance at court of an accused person, a police prosecutor will not have had direct contact with the informant. The prosecutor should at least have some type-written instructions within the fact sheet, but otherwise may have only a copy of the Form 7 prepared by the authorised bail officer.\footnote{929} It goes without saying that a few police may see the question of bail as an opportunity to engage in either of two corrupt practices: a) obtaining money from an accused person in respect of the police attitude to bail, or b) refusing or imposing a disproportionally harsh bail as a means of punishing, harassing or of leverage upon a defendant.\footnote{930}

As Tombs\footnote{931} notes the police officer, as investigator, determines the flow and accuracy of information to the prosecutor. Any lack of information is compounded by the fact that in each Australian State the DPP is unable to give police directions in individual cases and can only recommend that the police take certain action.\footnote{932}

The following examples are taken from the Summary Prosecution Pilot at Dubbo and an example is taken from the CPS in England. These examples show some of the difficulties that can arise with the flow of information from the police to the prosecutor and also the ways in which police actions are affected by their desire to achieve an immediate outcome that does not necessarily relate to an eventual prosecution.

\footnote{927} See the criticisms of the inadequate information before the courts in bail applications in NSW Aboriginal Justice Advisory Committee, ‘Aboriginal People and Bail Courts in NSW’, NSW Aboriginal Justice Advisory Committee, Sydney, 2002.

\footnote{928} The Auld Report in England in 2001 also noted the lack of information in relation to bail applications and called for reform in this area to ensure that bail decisions were made based on more substantial information. See Auld, R., ‘Review into the Workings of the Criminal Courts’, Home Office, London, 2001. At Chapter Four.

\footnote{929} The ‘Form 7’ referred to, is the record of bail refusal made by the authorised officer who has refused bail at the police station.


6.E.iii.a.1.1  Dubbo Pilot example A – no case for prosecution

Charges of break, enter and steal were laid against a young Aboriginal man. The charges were reviewed by the DPP prosecutor on the initial bail hearing and the arresting police officer (a detective) admitted that the case against the defendant was based on no more that the presence of the defendant in the area where a house had been broken into, and that he was suspected (again on the basis of speculation) of being involved in a number of house burglaries. The officer explained the decision to charge in the circumstances by saying ‘I had to do something, he was running hot’.933

6.E.iii.a.1.2  Dubbo Pilot example B – laying a charge to oppose bail

In another Pilot case at Dubbo, a detective was seeking that bail be refused against a defendant for break and enter charges because the defendant’s fingerprints had been identified by a forensic officer in another break and enter investigation. However, only one forensic officer was able to make the identification and police service guidelines required a second positive opinion before a charge on that matter could be laid. The DPP solicitor would not raise the ‘identification’ of the defendant in the uncharged matter on the bail hearing for the original charges, as the court would expect a charge to be laid. The officer then disregarded police guidelines and charged the defendant for the additional matter. The bail review proceeded with the additional charge before the court and the defendant was refused bail.934

This example also highlights the significance of the police officer’s control of the decision to charge, in order to obtain bail refusal. The DPP prosecutor was aware of the motivation of the police officer, but powerless to override the police officer’s charging decision, and irrespective of whether the DPP prosecutor would recommend that the charge proceed or not proceed, the bail hearing went ahead on the basis of the existence of the additional charge.

933 Bailey, C., Personal communication, June 1996.
934 Bailey, C., ‘Pilot Notebook’. 1996b. At pp. 14-15. Bailey does not indicate whether the issue of there being only one expert’s opinion was raised before the court on the bail review.
6.E.iii.a.1.3  Dubbo Pilot example C – inadequate disclosure

The Pilot also highlighted the problem of inadequate disclosure certificates provided by police with the brief of evidence in defended cases. In filling out the certificate the police officer is supposed to indicate any additional material known to the officer that has a bearing on the case. In the case study of B and W in Chapter Three, the police provided a disclosure certificate but did not advise the prosecutor of the presence of civilian witnesses known to police. This may have been because of the officer’s inadvertence or because of confusion regarding the duty of disclosure, or the police officer simply decided what was relevant or what was required to prove the case.

6.E.iii.a.1.4  Dubbo Pilot example D – obtaining statements from reluctant victims

Some police demonstrated their adversarial culture by adopting the view that in assault matters it was not for them to obtain statements from alleged victims who did not wish to proceed in assault cases (mostly in domestic assaults). Whether the failure of complainants to attend is voluntary or not, has not been comprehensively studied. The failure of the victim to appear is known colloquially among police prosecutors and magistrates on the western Local Court circuits as the ‘Bourke’ or ‘Brewarrina’ or Wilcannia’ (depending on the township) ‘defence’. In the Pilot, the Dubbo Patrol Commander intervened to require police to assist in the taking of statements from reluctant victims. It is probably significant that the general duties police ordinarily had little contact with the DPP and were used to pursuing domestic violence offences

935 The disclosure certificate is a pro-forma document that the police informant is required by Commissioner’s Instruction to fill out and attach to the brief of evidence when it is forwarded to the DPP. Bugg refers to this procedure as though it were a non-problematic assurance of disclosure. However, the disclosure certificate is a routine form that may not be given much attention by police officers. The police officers may misinterpret what is required to be disclosed or simply fail to provide the certificate. See Bugg, D., ‘The Role of the DPP in the 20th Century’, Judicial Conference of Australia, Melbourne, 1999. At p. 7. See also footnote 216 and accompanying text.

936 The presence of these witnesses was not mentioned in the police officer’s statements or their notebook entries made after the arrest, but was admitted in the course of a defended hearing before the court.

937 The officer’s disclosure certificate stated (in part) that there was no other ‘non-sensitive document/material/information … which might be relevant to the prosecution or defence.’ This is the wording on the pro-forma disclosure certificate. See the case study of B and W below at footnote 356 and accompanying text.
without regard for the victim’s wishes. It was noted by the DPP prosecutor that police detectives who are used to dealing with the DPP and with victim sensitive cases such as sexual assault generally appeared to have no problem collecting evidence of the victim’s unwillingness to proceed with a prosecution.

6.E.iii.a.1.5  An English CPS example – police and bail

A former CPS lawyer, Chuck Nduka-Eze gives an example of the pressures placed by police on a CPS in the prosecution of a bail hearing in the Magistrates’ Court in England. The police wanted the defendant kept in police custody. By controlling the flow of information and pushing for the case to be dealt with quickly, the police officer sought to avoid judicial consideration of the problems with the prosecution case. When that case collapsed, the police officer wanted to lay another charge for another offence against the original defendant, arising from the same incident but which had not been disclosed to the CPS and to ‘punish’ the original complainant for wasting police time.

The prosecutor’s non-compliance meant that this did not take place, but the CPS hierarchy allegedly gave no support to the prosecutor concerned.

The incident occurred in 1994 whilst Nduka-Eze was prosecuting in London. The defendant had been in police custody for two days, on charges of assault and living off immoral earnings. The police officer pressed for a remand in custody and wanted Nduka-Eze to proceed straight away without recourse to reading the papers. When Nduka-Eze ignored police pressure and commenced to study the brief the informant brought an ‘Inspector’ who insisted that Nduka-Eze present the case and object to bail. Subsequently Nduka-Eze presented the bail case on the basis that he had not been able to read a brief. Bail was refused and in a defence appeal to the Central Criminal Court,

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938 The positive aspect of such a policy is that the victim is quarantined from blame for the matter proceeding as it is effectively out of his or her hands. On the other hand this same policy leads to prosecutorial vindictiveness and cases collapsing because the victim does not turn up to give evidence.
941 The police desire to punish complainants for wasting their time is referred to by Alvares in her study. Alvares, E., ‘Police Charging in Bourke 1980 -1992’, Masters of Laws thesis, University of Sydney, 1998. and Alvares confirms that she has come across similar attitudes among police in her work
the CPS was asked to review the case. The officer then reported that the victim was now reluctant to proceed and that no evidence was available from the three other witnesses originally reported. The matter was withdrawn and the defendant released after spending five days in custody.

Despite the police officer believing the truth of the original allegation, the officer then sought to take proceedings for wasting police time against the complainant. Nduka-Eze rejected that option. The police officer then sought to charge the defendant with possession of an imitation firearm for which offence they had evidence from the original arrest. Nduka-Eze suggested the officer obtain advice from the CPS. Instead the police complained about Nduka-Eze, which led to the CPS transferring Nduka-Eze to a different area. Following that, Nduka-Eze sued the CPS for breach of contract. Nduka-Eze says that his complaints to CPS supervisors of police manipulation in relation to the original bail application received no CPS support.

These case studies demonstrate the enormous increase in resources required to enable the prosecutor to review every case in the summary jurisdiction to the standard generally applied in indictable cases. This would require the additional production of briefs in the approximately 87% of cases that are disposed of other than by way of defended hearing in the Local Court. In many instances, the prosecutor will be reliant on the defence to indicate aspects of the police case that are in dispute, or to enter a not guilty plea and thereby require the police to create a brief and a prosecutor to prepare the case for hearing. The prosecutor’s preparation for hearing is itself necessarily limited as Head indicates in relation to the operations of the Victorian Police Prosecutor in 1990:

> Although the number and type of briefs that a prosecutor must ‘hold’ varies on a daily basis, he or she typically must prepare for up to fifteen hours of contested matters each day. He or she will be mindful of the fact that several of those contests will resolve to pleas, but is often unaware which of those cases will be so resolved. On the eve of the court, the prosecutor will prepare by reading through the briefs, listening to tapes and liaising with informants. Usually, this activity

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942 See footnote 206 and accompanying text.

943 See footnote 490 and accompanying text.
extends to the morning prior to the court. In a short period of time, he or she must identify and analyse potentially contentious issues and conduct research in preparation for submissions, a process which can involve up to twenty briefs of evidence.\textsuperscript{944}

The DPP Prosecution Survey contained a question to find out how DPP prosecutors might approach the test of balancing the options of calling for a full brief, withdrawing a charge, or accepting a plea of guilty (should it be offered by the defendant). The results are shown in Table 10 \textit{The circumstances in which DPP prosecutors would ask for a brief, consider withdrawal of a charge, or accept a plea of guilty}. Among the respondents to the survey, the strongest reaction was to the prosecutor’s view that a more serious charge should be laid and 98\% said the prosecutor should ask for a brief if the prosecutor believes that a more serious charge should be laid. Just 1.3\% was prepared to consider withdrawal and 0.7\% was prepared to accept the plea from the defendant.

\textsuperscript{943} Justices Act 1902 (NSW) Section 66B. See footnote xi in relation to Table 3 in Chapter One and accompanying text.

Table 10 The circumstances in which DPP prosecutors would ask for a brief, consider withdrawal of a charge, or accept a plea of guilty

<table>
<thead>
<tr>
<th>NSW, VIC and WA 945</th>
<th>The prosecutor doubts the offence can be proved</th>
<th>The prosecutor believes that the defendant did not commit the act alleged</th>
<th>The prosecutor believes a more serious charge should be laid</th>
<th>The investigation may have involved illegal or improper police conduct</th>
<th>The victim has told the prosecutor that he/she does not wish to proceed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>Ask for a brief</td>
<td>111</td>
<td>69.0</td>
<td>119</td>
<td>73.9</td>
<td>151</td>
</tr>
<tr>
<td>Consider withdrawal</td>
<td>13</td>
<td>8.0</td>
<td>33</td>
<td>20.5</td>
<td>2</td>
</tr>
<tr>
<td>Accept the plea</td>
<td>37</td>
<td>23.0</td>
<td>9</td>
<td>5.6</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>161</td>
<td>100</td>
<td>161</td>
<td>100</td>
<td>154</td>
</tr>
</tbody>
</table>

945 DPP Prosecutor Survey Question 11: In summary cases it is unusual for the police to prepare a full brief of evidence unless the charge is set down for a contested hearing. Assume the defendant is prepared to plead guilty to a charge. Indicate whether the prosecutor should ask for a brief, consider withdrawal, or accept the plea, in the following circumstances.
The next most common reaction among respondents was to situations where the prosecutor believes that an investigation may have involved illegal or improper police conduct with 76.5% saying that the prosecutor should call for a brief.\textsuperscript{946} The next most common reaction was where the prosecutor believed that the defendant did not commit the act alleged, with 73.9% of respondents saying that the prosecutor should call for a brief. In both these situations more respondents were inclined to the view that the prosecutor should consider withdrawal, rather than accept the plea, at 17.9% and 20.5% respectively. These results suggest that respondents to the survey roughly equated doubts as to guilt with concerns about police behaviour as motivations for considering withdrawal.

Where the prosecutor doubts that the offence can be proved, involving problems of proof, (as opposed to doubt whether the defendant was guilty), 23% of respondents said the prosecutor should accept the plea offered. Fewer respondents were prepared to consider withdrawal at 8%, than those who thought the prosecutor should call for a brief at 69%.\textsuperscript{947} The situation was quite different regarding the reluctant victim who has told the prosecutor that he/she does not wish to proceed. In this situation, the respondents were more evenly divided. There were 36.9% saying the prosecutor should call for a brief, 28.7% saying the prosecutor should consider withdrawal and 34.4% saying the prosecutor should accept the plea.

Overall these results suggest that the survey respondents were most inclined to call for a brief in response to issues of possible corruption and the overloading of charges (even though, at least in New South Wales, the prosecutor is not under an obligation to proceed with the most serious charge). The respondents also treated in similar ways problems that did not affect the question of the guilt of the defendant but were portrayed

\textsuperscript{946} Blake and Ashworth argue that if the prosecutor has ‘reasonable grounds for believing that evidence had been unfairly obtained’ or there are ‘substantial doubts about its admissibility’ then if the prosecutor wishes to use the evidence the defence should be informed of the grounds for believing it was unfairly obtained. See Blake, M., et al., ‘Some Ethical Issues in Prosecuting and Defending Criminal Cases’ (1998) Criminal Law Review 16-34, At pp. 25-26.

\textsuperscript{947} In relation to the actual practice of CPS prosecutors involved in the prosecution of police cases, Leng et al. noted: ‘Because weak cases may produce convictions, there is no reason to drop a case when it is first reviewed purely on grounds of weakness. It pays the prosecutor to bide his or her time, and to consider dropping the case only if it appears that the defendant intends to plead guilty and is not willing to bargain.’ At p. 136.
as doubt that the offence could be proved and victim reluctance. In these situations the largest proportions of respondents considered that the prosecutor should accept the plea. Almost a third of the respondents said in relation to the reluctant victim that the prosecutor should consider withdrawal. This response shows the willingness of one-quarter of respondents to allow the victim’s wishes to determine the outcome of the case without the need to call for a brief.

Not all of the evidentiary defects in police summary cases can be anticipated even if the police were able to provide a full brief of evidence to the prosecutor at an early stage. There are many possible reasons other than victim reluctance for a summary prosecution to be unsuccessful. There may be insufficient evidence to prove the case to the standard of beyond reasonable doubt or there may be an unanticipated specific evidentiary problem, such as the loss of a witness or a change in the witness’s evidence. The DPP’s statistics on no-bills948 (although limited) and the experience of the Summary Prosecution Pilot949 both show the importance of the victim’s willingness to proceed with a prosecution.950 While the victim’s wish not to proceed does not automatically lead to the withdrawal of a prosecution, the prosecutor must balance the public interest in prosecuting against the particular wishes and circumstances of the victim and any potential harm to the victim in being required to attend to give evidence.951

In the prosecution of public order offences, the typology of public order cases developed in Chapter One is a starting point for the identification of problems in these cases. Another on-going source of useful information will be the monitoring of cases overall. For example, the DPP can profile cases to identify repeat offenders and repeat

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948 Discussed below. See footnote 747 and accompanying text.
949 Discussed below. See footnote 349 and accompanying text.
950 As already mentioned, the effect of victim reluctance to proceed on a prosecution was also the reason relied on by the Police Minister Mr Griffiths to restrict the award of costs against police informants. See footnotes 670 and 672 and accompanying text. Not all unsuccessful prosecutions would fall into the category of cases properly brought only to fail because of the failure of the victim to attend or co-operate. The Summary Prosecution Pilot showed that there were an almost equal number of cases considered for withdrawal on the basis that the evidential test i.e. a reasonable prospect of conviction was not satisfied. See footnote 352 and accompanying text.
951 In particular the prosecutor needs to consider the possibility of a victim in a domestic violence matter making an application to the court to be excused from giving evidence against their spouse. See sections 18 and 19 Evidence Act 1995 (NSW).
informants and overall patterns of the use of arrest and of charging. In this way both the police and the prosecutor can begin to be held accountable according to defined criteria and quantifiable evidence.

6.F Prosecutor attitudes affecting the assessment of cases

6.F.i The definition of crime

The first aspect of the prosecutor's discretion is interpretive. The prosecutor must ask what are the elements of the offence before considering the evidence available to prove each of those elements. This requires the prosecutor to consider the definition of the offence charged (and any other possibly relevant charges) first. For the offences of offensive language and offensive behaviour, the police are effectively free to label marginal behaviour as criminal. For example, as already indicated, the police officer has a wide interpretive discretion to include words or behaviour under loosely defined offensive behaviour and language charges in contrast to other offences that are more clearly defined. This initial interpretive discretion effectively allows the police to determine the elements of the offence on a case-by-case basis.

In New South Wales the jurisdiction is geographically dispersed with enormous social and political differences between the major cities and rural communities. Given the

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952 What is found to be criminal depends on a number of factors, such as, the historical circumstances, the social setting in which the behaviour complained of takes place and the attitude of the decision-maker. On the importance of context in the historical interpretation of the enforcement of the criminal law, see Linebaugh, P., '(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein' (1985) 60 (May) New York University Law Review 212-243.

953 In Chapter Five, looks at the importance of police detection of public order offences and the immediate policing concerns that may operate in the enforcement of these offences. See footnotes 616 and 667 and accompanying text.

954 Weatherburn points to the difficulty of determining 'whether higher levels of police activity produce low crime rates or vice versa.' Weatherburn, D., 'What Causes Crime?' Bureau of Crime

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correlation between the proportions of Aboriginal people in rural Local Government Areas and the rates of charging for public order offences, there is a distinctly localised geographical clustering of charge patterns. The division between central and local values is likely to lead to conflict over the definition of offences and the appropriate use of prosecution discretion in response to police action. Just as opinions might differ among judicial officers on what may constitute offensive language or behaviour there will be a major problem to prevent or resolve disparities in prosecution decision-making.

There is the prospect of diverging opinions within the prosecutor’s office concerning the definition of public order offences that are widely drafted. The variability in attitudes to offensive language is shown in the survey of DPP prosecutors where the question was asked ‘Do you consider the use of the words “fuck off” in a public place to be an offence?’ The allowed responses to that question were (1) ‘yes’, (2) ‘no’, and (3) ‘it depends on the circumstances.’ The results are shown in Table 11 Whether DPP prosecutors think that the use of the words ‘fuck off’ in a public place is an offence. This question was asked to find out how many respondents thought that the use of the words ‘fuck off’ was or was not an offence and how many felt it was necessary to have regard to the circumstances. The question seeks to gauge the attitude of prosecutors

Statistics and Research, Sydney, 2001. At p. 7. The problem (given the open texture of the criminal law) may lie with the definition of crime.


In England and Wales the Philips Royal Commission had emphasised the role of an independent prosecution agency to provide consistency and fairness in prosecutions. See Royal Commission on Criminal Procedure, ‘Royal Commission on Criminal Procedure Report’, HMSO, Cmd 8092-1, London, 1981. The CPS was later criticised for its centralised bureaucratic control of prosecutions and so there emerged a split between the centralised setting of policy to ensure consistency and fairness and the perceived need to be ‘locally responsive.’ This division in attitude eventually led to the Glidewell Report recommendations that required greater local co-operation between CPS prosecutors and police. See Glidewell, ‘Report’, Home Office, London, 1998. Which inter alia recommended that CPS prosecutors be collocated with police in police stations. See footnote 870 and accompanying text.

Where the police informant disagreed with a proposal to withdraw a charge the matter was referred to the Director’s Chambers during the Summary Prosecution Pilot. It is unlikely that the Director and Deputy Directors would be in a position to supervise personally all applications for discontinuance if the DPP were to conduct police summary cases (even if restricted to matters contested by the police). The DPP would therefore have to consider what accountability mechanisms are required to ensure conformity (if that was thought desirable).
following the decision by Heilpem LCM in Police v Shannon Dunn\textsuperscript{959} that ‘fuck off’ could no longer be considered offensive.\textsuperscript{960}

Table 11 Whether DPP prosecutors think that the use of the words ‘fuck off’ in a public place is an offence

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW, VIC and WA\textsuperscript{961}</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>21</td>
<td>12.8</td>
</tr>
<tr>
<td>No</td>
<td>44</td>
<td>26.8</td>
</tr>
<tr>
<td>It depends on the circumstances</td>
<td>99</td>
<td>60.4</td>
</tr>
<tr>
<td>Total</td>
<td>164</td>
<td>100</td>
</tr>
</tbody>
</table>

In the 2001 DPP Prosecutor Survey 26.8% of respondents said that they did not think that the use of the words ‘fuck off’ in a public place constituted an offence. In contrast, 12.8% responded by saying ‘yes’ and more than half of the respondents thought that it depended on the circumstances. Only one respondent from Western Australia offered additional comment on this point, saying:

I have no major issues with the status quo. I think offensive language is a ridiculous offence and it is not in the public interest to proceed with such prosecutions.\textsuperscript{962}

6.F.ii Conformity of DPP prosecutor and police attitudes

The existence of separate prosecution discretion does not mean that the prosecutor will necessarily be in opposition to the police. For instance the independent prosecutor may

\textsuperscript{959} Dubbo Local Court, unreported, 27 August 1999. See footnote 584 and accompanying text.

\textsuperscript{960} See also Hortin v Rowbottom (1993) 68 A Crim R 381 (at p. 389) for the proposition that the words ‘fuck’ and its derivatives, of themselves (and where not directed at police officers) are not necessarily indecent (as opposed to offensive) under the Summary Offences Act 1953 (SA). See also the exclusion of evidence of subsequent offences on the basis of the police officer’s inappropriate use of arrest leading to those offences in Director of Public Prosecutions v Carr [2002] NSWSC 194.

\textsuperscript{961} DPP Prosecutor Survey Question 13: Do you consider the use of the words ‘fuck off’ in a public place to be an offence?

\textsuperscript{962} 2001 DPP Prosecutor Survey response.
share the values of the police that underpin aggressive policing strategies and so agree with related police practices. Equally, of course, the police may share the values of the prosecutor on a given matter and in the absence of conflict this will probably go unnoticed. However where the prosecutor seeks to un-do a prosecution commenced by a police officer that officer is unlikely to agree with the prosecutor’s view.

The sharing of attitudes may be coincidental or it may be that the prosecutor falls into line with criminal law policy that is set at a political level or special obligations may be imposed by legislation. As an example of the latter, the CPS in England and Wales was criticised for making changes to its CPS Code for Crown Prosecutors immediately following changes to policy directives for the police announced by the Home Secretary. The criticism basically was that the CPS was forced or acquiesced to change its policies on cautioning to reflect changes made by the Home Office in the interests of providing consistency, even though the established CPS policy was much more liberal regarding cautioning:

One of the ideals when introducing the Crown Prosecution Service was that it would produce greater consistency of prosecution policy, but there is no evidence that the Home Secretary’s change of policy on cautioning was the product of genuine consultations with the Attorney General or Director of Public Prosecutions. The whole sequence of events raises questions about the standing of the CPS as an independent element in the criminal justice system. It is desirable that all parts of the system should have a coherent policy, but who should call the tune?

For example, the DPP was the authority empowered (by section 5 and section 7) to make an application under the Community Protection Act 1994 (NSW). The Act was found to be an attempt to exercise judicial power contrary to the provisions of Chapter Four of the Constitution and was declared unconstitutional by the High Court in Kable v Director of Public Prosecutions for New South Wales (1996) 189 CLR 51. See also section 5D Criminal Appeal Act 1912 (NSW) which empowers the DPP or the Attorney General for NSW to appeal a sentence in a criminal case in which the crown was a party, and Part 8 of the Criminal Procedure Act 1986 (NSW) which gives statutory authority for the scheme of guideline judgments. The guideline judgment has developed as a tool to deflect critical comment concerning sentences that are publicly perceived to be unduly lenient. See, for example, Ackland, R., ‘Uninformed Stunts Leave Legal System Crying Rape’, The Sydney Morning Herald, 3 September 2001, Sydney. Anonymous, ‘Carr to Put Judiciary on the Spot over Sentencing Powers’, The Sydney Morning Herald, 25 August 2001, Sydney. The High Court has recently overruled one guideline judgment concerning Federal drug offences. The guideline judgment was overturned on the basis that it was too inflexibly based on the quantity of drug involved and used an inappropriate two-stage sentencing approach of overall penalty subject to a discount, thus infringing the principles of sentencing discretion. See Wong v R and Leung v R (2001) 185 ALR 233, per Gaudron, Gummow and Hayne JJ, Kirby J agreeing.

Summary prosecutions cover a far wider field of offences than the narrow focus of this thesis which has been concerned primarily with public order offences involving Aboriginals and other marginalised peoples. This may be seen to be a weakness in formulating recommendations for change. However, public order offences illustrate an important aspect of the summary jurisdiction that has not been given much attention, namely, the role of the independent prosecutor. These types of offences have been used to highlight problems that arise where police authority is challenged by marginalised members of society. In turn, this raises the issue of the conflicting interests of the wider community versus marginalised social groups. This has been, and continues to be, a major issue in the Australian criminal justice system and it is all the more important in the context of ‘law and order’ politics. This thesis points to the need for more research into this neglected area of public policy.

This thesis has also concentrated on the work of the independent prosecutor and on attitudes and practices within the offices of the DPP. In part this reflects the information on the public record and the preparedness of the DPP’s involved to support the research undertaken in their offices. In contrast, there is almost no publicly available material to properly review the work of the police prosecutors working in the NSW Police Service. My requests to the NSW Police Service to undertake research were not successful. Other than self-serving comments made by police prosecutors, there is a lack of information on their work, particularly in New South Wales. Consequently, it is not feasible to evaluate the arguments that might be made in support of the police retaining this prosecution function.

7.A A summary of the arguments for the independent prosecution of police summary cases

Overall, the independent prosecution of police summary cases is an important and valuable step towards delivering the formal attributes of justice in the summary courts namely ‘independence’, ‘impartiality’ and ‘fairness’ on the part of the prosecutor. The

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965 Particularly in relation to ‘zero tolerance policing’.
966 For example, see footnotes 50 and 266.
967 See, for example, footnote 704.
arguments in favour of the independent prosecution of charges commenced by police in courts of summary jurisdiction can be summarised as follows:

1. DPP prosecution of summary cases will ensure consistency in the application of prosecution standards between the summary and indictable jurisdictions.
2. Consistency in prosecution decision-making is more likely to lead to the withdrawal of cases that ought not proceed, with consequent efficiency gains.
3. An independent prosecutor is more likely to ensure that the prosecution process is independent from the investigation process compared to a police prosecutor.
4. Consequently, an independent prosecutor is well positioned to give an impartial assessment of police cases.
5. An independent prosecutor can enhance the fairness of prosecutions, particularly where fairness imperatives challenge police decisions.
6. An independent prosecutor allows for improved accountability of both police and prosecutors to the public and to each other.
7. An independent prosecutor can provide feedback to individual police and to the Police Force so as to improve police practices.

These arguments were canvassed in Chapter One. There is no doubt that the transfer of prosecution responsibility from the police to an independent prosecutor is an important and necessary step towards achieving these goals. However, there is no certainty that these outcomes will be secured by the simple act of transferring responsibility. There are a number of priority areas for action to better secure the benefits of independent prosecution. The first of these is to undertake a detailed study of the current workings of the police prosecutor, so that we might know how this work is currently conducted. We may then be in a position to properly prepare for the transfer of responsibility for police prosecutions and have a consistent basis to evaluate the impact of independent prosecution. An initial step by way of trial could be for the DPP to take-over the prosecution of police cases in the Children’s Court. In this court police currently prosecute cases against children despite the fact that it is considered necessary for the DPP to prosecute the same types of cases against adults independently of the police.
We should also not lose sight of the process limitations (in terms of police control of the commencement of proceedings and control over the flow of information to the prosecutor) which may stand in the way of achieving the benefits of independent prosecution. The sheer volume of cases disposed of is likely to be a constraint on independent prosecution scrutiny and effectiveness and the Director of Public Prosecutions (DPP) will need to be fully resourced to achieve an appropriate level of scrutiny of summary cases. When addressing the issue of ‘efficiency’ it is therefore necessary to examine what is meant by the term. ‘Efficiency’ is often viewed as economy, namely the simple capacity of the criminal justice system to rapidly process a large volume of cases and over many years there has been a steady growth of ‘efficiency’ initiatives such as the forcing of more serious criminal cases that formerly were dealt with as indictable offences into the Local Court. In the end, we must define ‘efficiency’ not only in terms of the fast disposal of large numbers of cases, but also in terms of broader goals for the fair and just resolution of criminal cases. This will require the prosecutor to work outside simplistic ‘law and order’ models of police prosecutions as not all cases ought to be prosecuted and qualitative decision-making is required. ‘Efficiency’ may then be understood as the accuracy and appropriateness of results rather than simply the dollars and resources spent in finalising cases. The independent prosecutor can be expected to increase efficiency by withdrawing those cases that ought not to proceed (for evidential or public interest reasons) and by increasing the rate of guilty pleas through charge-bargaining or by providing greater prosecution disclosure. However, whilst this would be unlikely to translate into greater economy, or a capacity on the part of the independent prosecutor to do more with less, the goals of justice and fairness would be more likely met.

968 A measure that takes no account of the soundness or quality of the decision-making involved.
969 See footnote 150 and accompanying text.
970 See, for example, Weinberg, M., ‘The criminal trial process and the problem of delay’, Criminal Trial Reform Conference, Melbourne, Australian Institute of Judicial Administration, 2000
971 Whether this would lead to an overall lower demand for resources to maintain the criminal justice system is essentially a matter of speculation and would be difficult to quantify. See however, KPMG Management Consulting Pty Ltd, ‘Project Pathfinder: Re-Engineering the Criminal Justice System - Stage 2 - Design’, Department of Justice, Melbourne, 1998.
7.B Finding a way forward

I have suggested that where a prosecutor encounters disproportionately greater prosecutions of certain public order offences, proper scrutiny of these cases requires consideration of the fairness of this high rate of prosecutions. However, a counter-argument may arise that the police and in turn, the prosecutor, must be responsive to local needs and that there is a balance to be achieved between centralised and localised decision-making. There are however, no clear answers to the questions thrown up in this area, as can be seen by contrasting the arguments put by Cunneen regarding over-policing of Aboriginals and by Pearson regarding under-policing of Aboriginals. Pearson’s argument is based on the premise that the criminal law can provide an appropriate mechanism for addressing problems arising from substance abuse. Implicitly, both Cunneen and Pearson recognise a dividing line between the use of the criminal law to oppress and to protect in terms of whether the marginalised community is genuinely involved in the setting of police objectives.

The subjective concerns of the members of the marginalised community come together in complaints regarding under-policing and over-policing. To the extent that over-policing and under-policing occur they therefore represent opposite extremes of too much attention on street policing and too little attention to other crimes affecting the members of marginalised communities. The problem then for the prosecutor is to

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975 Cunneen, ibid.
976 Pearson, ibid.
978 The terms over-policing and under-policing must be used with caution. They may present too simplistic a view of police-defendant and police-victim interactions. For example, there is a relationship between criminalisation and victimisation noted in statistics for Aboriginal offending. See Hunter, B.,
decide to what extent local differences ought to be accommodated in the prosecution of police charges, insofar as marginalised Aboriginal communities have a vested interest in maintaining law and order.\textsuperscript{979} The difficulty is that the law loses its normative force where it is unfairly applied and so there is a need to synthesise Pearson’s view of the need for law and order with Cunneen’s analysis of the distancing of marginalised Aboriginal communities from the setting of the policing agenda.\textsuperscript{980} Importantly the re-appraisal of police summary cases requires the independent prosecutor to make explicit the public interest as a factor in the decision whether to prosecute or not.\textsuperscript{981} Defining the public interest in the prosecution of police summary cases is a complex problem and an inescapably political exercise, and the denial of this political aspect is itself a barrier to ‘effective public scrutiny and regulation’.\textsuperscript{982} Part of any strategy to achieve greater fairness, without necessarily sacrificing efficiency, would be for the DPP to prioritise the cases to be given greater scrutiny, such as those involving the pro-active policing of street offences, and for the DPP to use statistical measures and analysis to identify trends and exceptions\textsuperscript{983} in relation to police action rather than relying on detailed consideration of individual cases.

The results of the 2001 DPP Prosecutor Survey show that there is a range of views held by DPP prosecutors relevant to the over-representation of Aboriginal people in criminal justice statistics. Some DPP prosecutors are also able to accommodate and respond to the conflicting narrative understandings held by the police and those being policed.


\textsuperscript{981} Where the NSW DPP has provided information on no-bills (see Chapter Six - Table 7 NSW DPP no-bill statistics 1987-88 – 1994-95) the DPP has attributed decisions to no-bill cases principally under the headings of lack of sufficient evidence or no prospect of conviction.


\textsuperscript{983} Such as the NSW Ombudsman’s profiling of complaints against particular police officers to identify risk. See NSW Ombudsman, ‘Improving the Management of Complaints’, NSW Ombudsman, Sydney, 2002.
Perhaps more importantly, most DPP prosecutors appreciate the symbolic value of the independent prosecution of police summary cases as an end in itself. Prosecutors are also clearly cognisant of the practical hurdles to be faced in conducting these prosecutions. Overcoming the restraints of summary process will be a major challenge for these prosecutors should they be given the responsibility to prosecute police summary cases.

Chapter Two canvasses the calls made for the transfer of prosecution responsibility from the police to an independent prosecutor in summary cases. We have seen it argued that the transfer of prosecution responsibility in the Local Court from the police to the DPP is a step towards achieving greater levels of fairness and also of achieving greater efficiency in the criminal justice system. These twin outcomes appear mutually incompatible; so how can transfer of responsibility for prosecutions achieve either or both outcomes? The answer lies in understanding that the qualities described, may broadly be considered at two different levels, of ‘rhetorical’ or symbolic effect, or of ‘reality’ or practical effect.

Given that the processes of the Local Court limit the capacity of the independent prosecutor to review police cases, the notion of ‘fairness’ presented by Corns is, in my view, largely symbolic. It emphasises the formal separation of the police and prosecution agencies. This notion of ‘fairness’ by symbolism may be achieved without necessarily sacrificing the efficiency of Local Court prosecutions in terms of the speed and volume at which cases are processed. Potentially there is value in this formal separation because it can assist in redressing the profound power imbalance in the relationship between the police and defendants, (where police currently control all

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984 See, for example, footnote 195 and accompanying text.
985 See, for example, footnote 26 and accompanying text.
986 See, for example, footnote 323 and accompanying text.
987 This discussion of symbolic and practical levels of analysis mirrors the discussion of the rhetoric and reality in relation to ‘due process’ protections in the criminal law referred to by McBarnet. See, McBarnet, D., Conviction-Law, the State and the Construction of Justice, McMillan, London, 1981.
988 Corns, C., ‘Police Summary Prosecutions: The Past, Present and Future’, History of Crime, Policing and Punishment, Canberra, Australian Institute of Criminology, 1999. Corns appears to accept the police-prosecutor divide, where the prosecutor is not involved in charge decision-making and as we have seen that model has been rejected by the Auld Report in England and Wales, see footnote 844 and accompanying text.
989 A potential danger of reliance on change at a symbolic level is that it covers up ‘reality’.
aspects of the summary criminal prosecution process from control and surveillance, through to arrest and charge, then to the presentation of the case at court). It adds a level of potential scrutiny that allows for the superintendence of an otherwise invisible\footnote{To the extent that the bulk of summary cases are disposed of by pleas of guilty. See footnote 206 and accompanying text.} and effectively unreviewed aspect of policing.\footnote{In the sense that the courts are reluctant to become involved in the review of prosecution decision-making. See footnote 801 and accompanying text.} Importantly, a separate prosecution agency also creates an audit trail that is external to the Police Service for the review of information flows from the police to the prosecutor. This audit trail minimises the opportunity for hiding corrupt conduct or for the ‘burying’ of police mistakes.\footnote{See footnote 41 and accompanying text.}

However, of itself, the formal separation of police and prosecutor does not necessarily address the practical requirements of ‘fairness’ in terms of individual prosecutions and also in broader terms, such as whether the law is being oppressively applied against a marginalised section of society. Chapter Four highlights the overrepresentation of Aboriginal people in crime statistics and argues that in the light of the public order policing issues raised, to be ‘fair’ in practice requires the prosecutor to consider the wider context in which allegations are made against particular defendants and to specifically consider whether police action is oppressive, unreasonable, or disproportionate, and whether there is simply no prosecution case at all. Short of an evolutionary process whereby the prosecution review achieves the impact of influencing and reforming police charging practices, it is inevitable that greater ‘fairness’ in this practical sense is likely to come at the expense of ‘efficiency’ in terms of the speed and volume of cases that are processed.

7.B.i Taking into account police behaviour and context

In the survey of DPP prosecutors a series of questions sought to elicit whether there was a difference in the way prosecutors would treat the possible withdrawal of an offensive language charge depending on various hypothetical contexts in which the language was used. Among the seven scenarios the one in which the most prosecutors would be more likely to recommend withdrawal of the charge was that involving ‘words used by a defendant when very drunk’. In contrast, the scenario where most respondents would be
less likely to recommend withdrawal of the charge was one involving ‘words directed at
police without any prior police action’. In each of the remaining five scenarios involving
police action in circumstances ranging from ‘a disturbance involving a large crowd’,
‘words used in an industrial protest’, ‘words used in a political protest’, ‘questioning
without apparent cause’ and ‘stop and search without apparent cause’, there were more
prosecutors who were more likely to recommend withdrawal than those who were less
likely to recommend withdrawal. Table 12 shows the responses in ascending order in
terms of the likelihood of recommending withdrawal. Importantly, the respondents to
the survey graded their responses on the basis of the level of police intrusiveness and
the justification for police action. More respondents were likely to withdraw a charge
following a stop and search without apparent cause at one end of the scale (49%)
compared to circumstances where there was no prior police action at the other (23%).
This indicates that DPP prosecutors are prepared to consider the nature of the police
defendant interaction with an appreciation of the rights of defendants.
Table 12 DPP Prosecutor responses to context in offensive language charges

<table>
<thead>
<tr>
<th>NSW, VIC and WA</th>
<th>No prior police action</th>
<th>A disturbance involving a large crowd</th>
<th>Words used in a political protest</th>
<th>Words used in an industrial protest</th>
<th>Questioning without apparent cause</th>
<th>'Stop and search' without apparent cause</th>
<th>Words used by a defendant when very drunk</th>
</tr>
</thead>
<tbody>
<tr>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>More Likely to withdraw a charge</td>
<td>28</td>
<td>23</td>
<td>52</td>
<td>43</td>
<td>56</td>
<td>46</td>
<td>58</td>
</tr>
<tr>
<td>Neutral</td>
<td>28</td>
<td>23</td>
<td>36</td>
<td>29</td>
<td>40</td>
<td>33</td>
<td>38</td>
</tr>
<tr>
<td>Less Likely to withdraw a charge</td>
<td>66</td>
<td>54</td>
<td>34</td>
<td>28</td>
<td>26</td>
<td>21</td>
<td>25</td>
</tr>
<tr>
<td>Total</td>
<td>122</td>
<td>100</td>
<td>122</td>
<td>100</td>
<td>122</td>
<td>100</td>
<td>121</td>
</tr>
</tbody>
</table>

993 The main question was: 'Assume that the use of certain words by a defendant prima facie constitute an offence. Assume also that there are some subjective features of the case that cause you to consider whether it is in the public interest to proceed. Indicate whether you would be more or less likely to recommend that an offensive language charge be withdrawn in each of the following circumstances.'
994 Words directed at police without any prior police action.
995 Words used during a disturbance involving a large crowd.
996 Words directed at police in response to police questioning without apparent cause.
997 Words directed at police in response to a 'stop and search' without apparent cause.
Table 13 DPP Prosecutor responses to the unequal application of the law

<table>
<thead>
<tr>
<th>NSW, VIC and WA</th>
<th>The DPP should decline to prosecute a police summary case on the basis of unequal application of the law across the State</th>
<th>The DPP should decline to prosecute a police summary case on the basis of unequal application of the law in the one incident</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N %</td>
<td>N %</td>
</tr>
<tr>
<td>Agree</td>
<td>42 31</td>
<td>50 40</td>
</tr>
<tr>
<td>Neutral</td>
<td>44 32</td>
<td>34 27</td>
</tr>
<tr>
<td>Disagree</td>
<td>51 37</td>
<td>40 33</td>
</tr>
<tr>
<td>Total</td>
<td>137 100</td>
<td>124 100</td>
</tr>
</tbody>
</table>

Table 13 shows that at least some of the respondents to the DPP Prosecutor Survey were prepared to treat differently the possible withdrawal of summary charges depending on the way in which the law has been unequally applied. A larger percentage of respondents (40%), were prepared to withdraw police summary charges where the law was being unequally applied across the State, compared to the percentage of respondents (31%), prepared to withdraw charges where the law was being unequally applied in the one incident. This suggests that prosecutors are prepared to accept that localised factors may properly determine whether charges should be laid and prosecuted. In this way variations between districts may be tolerated whilst variations in treatment of different offenders and potential offenders may not be so readily tolerated in relation to the one incident.

The DPP Prosecutor Survey responses show that some DPP prosecutors are capable of making assessments concerning the appropriateness of police conduct and to use those assessments to inform their decision whether to proceed with a summary charge or not. Of course the situation in real life may be influenced by a myriad of other factors such

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998 Should the DPP decline to prosecute police summary cases on the basis of unequal application of the law a) across the State or, b) in the one incident?
as the working relationship between the prosecutor and the police and the political sensitivity of a particular case or law enforcement issue. In England and Wales, the strain of negotiating local police prosecutor relationships has meant that there has been a movement away from a centralised control model to a more decentralised prosecution decision making structure. For the State DPP’s in Australia there is a need to balance the demands of working with police on a local level with the creation of common standards for the assessment of cases within each jurisdiction. As can be seen from the DPP Prosecutor Survey responses there is also a range of views held by prosecutors\textsuperscript{999} that will also need to be discussed, considered and dealt with, if the DPP is to achieve any internal consistency in the application of prosecution standards for the conduct of police summary cases.

7.C Politics and ‘law and order’

The twin themes of this thesis are fairness and efficiency in prosecutions. Both these values may be subverted in a ‘law and order’ environment. Viewed narrowly, ‘efficiency’ is very often considered in terms of the number of cases processed. However, if the case is one that ought not to be prosecuted (because there is no case or the prosecution is against the public interest), disposal of such cases, no matter how fast, cannot be considered ‘efficient’. Despite this, a premium is placed on speed and ‘efficiency’ with little concern for the examination of the merits of summary prosecutions and in the current political policy-making environment there is little respect for the value of the formal independence of the prosecutor.\textsuperscript{1000} Indeed, recent reform initiatives indicate that there is little interest in ensuring review and external accountability for the processing of police summary cases despite the findings of the Police Royal Commission.\textsuperscript{1001} The imperative of removing ‘unnecessary paperwork’\textsuperscript{1002} has driven the change to an extended range of offences for which the police may issue ‘on-the-spot’ fines. In New South Wales, the police can now issue ‘on-the-spot’ fines

\textsuperscript{999} See in particular, Tables 11, 12 and 13.
\textsuperscript{1000} See footnote 767 and accompanying text.
\textsuperscript{1001} Referred to in Chapter Two.
\textsuperscript{1002} The Police Minister, announced the introduction of an extended range of on-the-spot fine offences saying this ‘would reduce processing time [for the police] from more than three hours to just minutes’. See Gibbs, S., ‘On-the-spot Fines for Theft and Assault’, \textit{The Sydney Morning Herald}, 4 June 2002, p. 1.
for a range of offences including stealing,\footnote{Where the property stolen is valued at under $500.} assault and using offensive language.\footnote{See, Gibbs, S., ‘On-the-spot Fines for Theft and Assault’, The Sydney Morning Herald, 4 June 2002, p. 1.}

On-the-spot fines mean out-of-sight\footnote{These cases will be ‘out-of-sight’ in the sense that these matters will not automatically involve court or prosecutor purview.} prosecutions with no scrutiny of illegally obtained evidence, inappropriate charging or policing practices. This last initiative strips away even the pretence, the symbolism in fact, that a court will deal with issues of justice and legality in matters that carry a criminal sanction unless and only insofar as, the defendant is able to elect to have the matter referred to the court for hearing.

The political importance of summary offences is beyond doubt.\footnote{See the discussion of public order offences in Chapter Five.} As previously indicated, in New South Wales, the political agenda for the police intersects with ‘law and order’ politics.\footnote{See, for example, footnote 289. For a discussion by the Royal Commission into Aboriginal Deaths in Custody of police-media relations affecting the coverage of issues affecting Aborigines in Western Australia see ‘Police and the News Media’ in Royal Commission into Aboriginal Deaths in Custody, in ‘Regional Report of Inquiry into Underlying Issues in Western Australia’, Australian Government Publishing Service, Canberra, 1991.}

Public order offences in particular, are an important instrument of police power and the retention and exercise of this power is closely connected to the political agenda for police.\footnote{See, for example, Egger, S., et al., ‘The Politics of Police Discretion’, in M. Findlay et al (Eds.), Understanding Crime and Criminal Justice, Law Book Company, Sydney, 1988.}

The re-criminalisation of minor disorder, the growth of aggressive street policing and policies of so-called ‘zero tolerance’,\footnote{See also, the retreat from the exclusionary rule in the USA. See Bloom, R. M., ‘Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases’ (1993) 84 (3) Journal of Criminal Law & Criminology 462-501. Bloom notes that in the United States Supreme Court there has been a retreat from the exclusionary rule, the court’s exercise of supervisory powers, and due process protection (under the due process clause of the Fourteenth Amendment). See pp. 466-467. Bloom argues that the guiding principle of judicial integrity has been abandoned in favour of the ‘Court’s reluctance to suppress reliable evidence’. (At p. 475). In Bloom’s analysis ‘the doctrine of judicial integrity has re-emerged and gained force’ in Australia and New Zealand. See p. 467. The background judicial treatment of illegality or impropriety in the United States is therefore moving away from a blanket exclusionary rule or from restraining police discretion as in Atwater et al v City of Lago Vista et al 532 U.S. (2001). (See the discussion below). See also Crocker, L., ‘Can the Exclusionary Rule Be Saved?’ (1993) 34 (2) Journal of Criminal Law & Criminology 310-351. The approach in Australia in relation to the protection of the doctrine of judicial integrity has increased the role of the court in overseeing the criminal justice process and disallowing evidence that has been illegally or improperly obtained. In New South Wales the provisions of Section 138 of the Evidence Act 1995 (NSW) appear to strengthen that role further by making illegally or improperly obtained evidence inadmissible unless the judicial officer exercises the discretion to admit the evidence. However, the judiciary appear to be reluctant to find that the police have acted illegally or improperly or are prepared to admit tainted evidence in the exercise of their discretion. See Presser, B., ‘Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly Obtained Evidence.’ (2001) 25 Melbourne University Law Review 757.} and now the
growing irrelevance of courts and prosecutors, are examples of a backlash\textsuperscript{1010} against the civil rights movement and the liberalisation of the criminal law in the period from the 1960s to the 1990s. This backlash can be seen as part of a process to obtain a new equilibrium of domination over the marginalised in society. The underlying causes and symptoms of poverty, isolation, dispossession, poor education, and poor health are largely not addressed by the apportionment of formal civil rights, and the marginalised remain in a position of being dominated and controlled within society. The first step in the process of backlash was the retreat from the welfare state with new policies of self-reliance and the privatisation of welfare agencies. Wacquant argues that the criminal law is now relied on to maintain order in the era of the post welfare state\textsuperscript{1011} and claims that poor urban blacks in the USA, and non-European foreigners in Europe, are identified as a ‘symbol and target for all social anxieties’:

This process (the criminalisation of immigrants in Europe) is powerfully reinforced and amplified by the media and by politicians of all stripes, eager to surf the xenophobic wave that has been sweeping across Europe since the neoliberal turn of the eighties by making an amalgam, sincerely or cynically, directly or indirectly, but with ever more banality, of immigration, illegality, and criminality. Ceaselessly blacklisted, suspected in advance if not in principle, driven back to the margins of society and hounded by the authorities with unmatched zeal, the (non European) foreigner mutates into a ‘suitable enemy’ – to use the expression of the

\textsuperscript{1010} The idea of a backlash against reform was popularised by Susan Faludi in relation to feminist issues. See Faludi, S., \textit{Backlash: The Undeclared War against Women}, Chatto & Windus, London, 1991. Delgado refers to the transition from the language of rights to the language of imposition whereby ‘the court system, like society generally, deploys terms of imposition at key moments in the history of a reform effort such as blacks’ struggle for equal opportunity, women’s campaigns for reproductive rights, or the effort of the institutionalised to win humane conditions in confinement. Before reaching that point, society tolerates or even supports the new movement. We march, link arms, and sing with the newcomers, identifying with their struggle. At some point, however, reaction sets in. We decide the group has gone far enough. At first, justice seemed to be on their side. But now we see them as imposing, taking the offensive, asking for concessions they do not deserve. Now they are the aggressors, and we the victims.’ See Delgado, R., \textit{et al.}, ‘Imposition’ (1994) 35 (Spring) William & Mary Law Review 1025-1059. At p. 1026.

Norwegian criminologist Nils Christie\textsuperscript{1012} – at once symbol of and target for all social anxieties, as are poor African Americans in the major cities of their society. Prison and the branding it effects thus actively participate in the fabrication of a European category of ‘sub-whites’\textsuperscript{1013} tailor-made to legitimize a drift towards the penal management of poverty which, thanks to a halo effect, tends to apply to the ensemble of working-class strata undermined by mass joblessness and flexible labour, regardless of nationality.\textsuperscript{1014}

Ultimately this aspect of the criminal law draws into question the nature of democratic governance, the divide between local and central power in determining standards of behaviour and the balancing of individual liberty and the interests of wider social groupings. To the extent that under classes exist in society, these questions can be expected to arise (in varying degrees depending on the level of social division) in all jurisdictions.\textsuperscript{1015} In Australia, Aboriginals and the non-European or eastern European foreigner are the focus of social anxieties. A new direction in the demonisation of difference has been set in the rhetoric concerning certain groups who enter the nation-State illegally and the resultant treatment of such people. Following the terrorist attacks on the USA on 11 September 2001 it can be expected that religion and Arabic ethnicity will become a renewed focus of law enforcement attention.\textsuperscript{1016}

At the same time as the old cultural and social apparatus that maintained economic, social and political hierarchies based on formal exclusion have been dismantled; the members of marginalised communities have developed greater expectations from the rhetorical promises of civil rights and non-discrimination. Wherever the individual


\textsuperscript{1013} Wacquant says ‘The notion of “sub-white” is borrowed from the sociologist Andrea Rea (who borrows it from the French rap band IAM), See, ‘Le racisme européen et la fabrication du “sous-blanc”’, in Andrea Rea (ed.), Immigration et racisme en Europe, Brussels, Editions Complexe, 1998, pp. 167-202’. This etymology reinforces the importance of popular culture in defining the decision making environment.


\textsuperscript{1016} With, at the same time, greatly expanded powers of the State to undertake ‘anti-terrorist measures’. See, for example, Williams, D., New Counter-Terrorism Measures, (2001a), Attorney General, <www.ag.gov.au/aghome/agnews/2001newsag/1057%5F01.htm> 18 February 2002. See also footnote 172.
defendant's expectations of civil liberties are not met, conflict may be expected. This is particularly so in street level policing, where the police target community members on the basis of 'race', 'place', 'face', and 'trace' (as discussed in Chapter One). And yet, in the context of individual police-defendant encounters there is a strong tendency to deny the subjective circumstances of the interaction or to identify with the imperatives of the police,\textsuperscript{1017} or to ignore, deny or isolate the problem unless incontrovertible evidence is produced of police malpractice.\textsuperscript{1018} At times, the label of criminal behaviour is too readily accepted when applied to the individual police-defendant interaction. As an example, Whitty \textit{et al.} discuss public disorder offences as though individual interactions between defendants and police are properly classed as 'criminal', whereas community discontent expressed in riotous behaviour is 'non-criminal' because it is seen as having an overtly political dimension.\textsuperscript{1019} This mass action is then seen to excite concerns regarding the freedom to protest. Detailed consideration of the police-defendant interaction reveals that many individual police-defendant encounters are just as political and involve a contest over the legitimate limits of police control and the extent of individual liberty.

And yet, in terms of the public perception of law and order, summary police offences are often seen simplistically as important crime-fighting tools that enable police to do their job (generally by those who are not marginalised members of the community).\textsuperscript{1020} Many proponents of 'law and order' also readily accept that the suppression of minor

\textsuperscript{1017} Police imperatives may reflect the demands of those outside the marginalised community and less often the demands of minority community members. The problem is to design a model of policing where the members of marginalised communities can be genuinely involved in decision-making. See Cunneen, C., \textit{Conflict, Politics and Crime}, Allen & Unwin, Sydney, 2001. At pp. 229-252.

\textsuperscript{1018} Such as where video evidence of police brutality in street policing is produced. See footnotes 409 and 632 and accompanying text.

\textsuperscript{1019} Whitty \textit{et al.} point to a blurring of the distinction between criminality and political protest: 'A second issue regarding the currently troubled status of public order law and practice...is the popularisation and continued ascent of 'law and order' in party-political, pressure group and media circles. This development has further compromised the already precarious standing of public protest; it has also extended the criminalisation of low-level disorder. As Downes and Morgan explain, it has done this largely by blurring the boundaries between public order transgression and straightforward criminality, or between order-defiance and law-breaking, making it much harder to argue for the democracy-enhancing capacities of public protest.' Whitty, N., \textit{et al.}, \textit{Civil Liberties Law: The Human Rights Act Era}, Butterworths, London, 2001. At pp. 57-58. Perhaps the real problem lies in the concept of 'straight forward criminality'. We need to scrutinise the labelling of the behaviour of the individual defendant who contests police authority as criminal. See Hemmens, C., \textit{et al.}, 'Resistance Is Futile: The Right to Resist Unlawful Arrest in an Era of Aggressive Policing' (2000) 46 (4, October 2000) \textit{Crime and Delinquency} 472-496.
street offences is causally related to the reduction of other offending. A subsidiary argument that is heavily influenced by popular notions of so-called ‘zero tolerance’ policing is that the prosecutor should vigorously support police practices, in order to ‘uphold the law’, as has been suggested regarding the CPS in England and Wales:

There is an argument, advanced in New York, that crime should be controlled at the lowest level. The general low-life and flotsam who now foul the streets, camping out, defacing and damaging property, begging in an aggressive manner and offering spurious services such as car window cleaning - so the argument goes - lead to a general deterioration of standards and so allow more sinister forms of anti-social behaviour to flourish. Years ago, provisions against such conduct as begging, cycling on the pavements to the danger of pedestrians and public urination were enforced. This does not appear to be the case nowadays. It is regarded as governmental responsibility and the fault of society that such behaviour is necessary, and it therefore should be tolerated, even - as a protest against Conservative policies - encouraged. However, where laws are flouted, there will be a perceptible expansion of more serious misconduct. The Crown Prosecution Service should be part of a policy of law and order making in ensuring that laws which are passed are enforced.1022

DPP prosecutors may feel constrained not to interfere in police law enforcement strategies on the basis that these are the product of political or policy decisions. At least one respondent to the 2001 DPP Prosecutor Survey expressed the view that there is no role for the prosecutor in addressing inequality in law enforcement. In part this response appears to be based on the view that the prosecutor should defer to the police and the parliament, and that subjective considerations are ‘personal’ and not ‘professional’:

As to inequality in the enforcement of the law, it is not for a lawyer to usurp the roles of the police and the parliament, but rather police should be required to enforce the law and to properly use their discretion as to whether to charge or not.1023

With due respect, this quote reflects naïve views. It denies that there is any role for the independent prosecutor concerning the possible unequal application of the law because, so it is assumed, the law is taken as a given and the police are identified as the

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1021 ibid. See however, Weatherburn, D., ‘Does Australia Have a Law and Order Problem?’ Public Lecture, University of New South Wales, 2002.
1023 2001 DPP Prosecutor Survey response. There was only one response specifically on this point. The majority of survey respondents simply stated that the police should remain responsible for the decision to charge. See the discussion in Chapter Six.
appropriate holders of the discretion whether to charge (and hence subsequently
prosecute) or not. However, the survey respondent does not state how the police are
to be ‘required to enforce the law and to properly exercise their discretion.’ Nor does he
or she address the different contexts in which offences are policed. Comments such as
these ignore the complexity and political dimension of police discretion. There is no
doubt that the role of the ethical prosecutor extends beyond ‘prosecuting criminals’ and
there is little controversy in the assertion that a prosecutor has obligations to the court
and to defendants. The extent of those obligations may be unclear, but the prosecutor
has a role in ensuring both fair trials and fair prosecutions including a duty to prevent an
abuse of court process. This comment also merges in police decision-making the two
models of law enforcement, combining a legality model of law enforcement with the
discretion expected in an opportunistic model of prosecutions. When the two opposing
models are confused in this way, the subjectivity of law enforcement by the police
officer is hidden and the importance of prosecution review is denied.

In many ways the problems for the independent prosecutor lie in the mismatch between
adversarial theory and the reality of prosecution practice as well as the deliberate
disregard for the political context in which the police officer and the prosecutor
operates. In Canada, it has been observed that ‘traditional’ concepts of prosecutorial
authority and accountability based on adversarial process do not meet the reality of
modern prosecution practice, which is based on trial avoidance:

[T]he traditional conceptions of prosecutorial authority, and of adversary criminal process
cannot easily be reformed, or even transformed, to accommodate the modern realities of plea

1024 This approach is not unlike that expressed in the majority opinion of the Supreme Court of
the United States in Atwater et al v City of Lago Vista et al. 532 U.S. (2001). In this opinion we see
exemplified the denial of, and disregard for, the impact of street level police decision-making. In its
reasoning, the US Supreme Court placed the need for efficiency in street policing and the disposal of
police cases, above any concern for the dignity of the defendant or the creation of any court imposed
requirement for the police officer to act reasonably. In reaching this opinion, the Supreme Court relied on
the political accountability of police in the USA. Even putting aside concerns regarding the nature of
political accountability in the USA, no police officers are elected to their post in Australia and despite
existing mechanisms for ensuring police accountability (Such as Police Internal Affairs, the Police
Integrity Commission, the Ombudsman’s Office, and the Independent Commission Against Corruption
(ICAC)) the problem of unequal law enforcement and the targeting of marginalised members of the
community has not been addressed.

1025 See, for example, Aronson, M., and J. Hunter, Litigation: Evidence and Procedure, 6th
bargaining, and of ‘trials’ which consist of no more than a guilty plea and a sentencing hearing.\textsuperscript{1026}

In this environment, there is merit in turning away from notions of adversarial justice and process protections simply because they do not apply in the bulk of criminal cases prosecuted and so in calling for a radical rethink of conceptions of prosecutorial authority, Stenning argues:

An alternative ... is to produce a new conception which is not associated with traditional adversarial process. That is, rather than trying to guide the prosecutor back into the traditional conceptions of his role as that of ‘advocate-officer-of-the-court-minister-of-justice’, to redefine his role as that of ‘negotiator-facilitator-social-activist’. Instead of attempting, as we currently do, to isolate the prosecutor from the political environment in which he functions, an alternative conception of his role might seek to reconnect him with it, and to recognise that the prosecution function can never be a ‘non-political’ one, except in the narrowest sense of that term.\textsuperscript{1027}

Even so, there are those who seek to apply traditional conceptions of adversarial justice and the ‘advocate-officer-of-the-court-minister-of-justice’ role to the Local Court. If it has ever been a defensible conception, which is doubtful, it is arguably inappropriately positioned in the reality of modern Local Court practice. Despite this, it is sometimes argued that the role of the independent prosecutor is limited because the prosecutor should not be relied on to supervise the police, even where illegal or improper police practices are involved. For example, speaking of the CPS in England and Wales, Addison says:

The purpose of a prosecution service is to prosecute criminals. It is not there to supervise the police, it is not inherently a defender of civil liberties, it does not exist to devise new and imaginative ways of dealing with offenders. All of those things are important, and they need to be done, but not by the CPS.\textsuperscript{1028}

According to this view, the role of the prosecutor is simply to present unquestioningly the cases put forward for prosecution by police. The idea that the prosecutor’s role is confined to ‘just prosecuting’ is at best overly simplistic, and at worst pernicious.

In the end, we must define ‘efficiency’ not only in terms of the fast disposal of large numbers of cases but also in terms of broad goals for the fair and just resolution of

\textsuperscript{1027} Ibid. At p. 367-8.
criminal cases. This requires an appreciation that not all cases ought to be prosecuted and that qualitative decision-making is required,\textsuperscript{1029} so that 'efficiency' is measured not simply in dollars and resources spent but also in the accuracy and appropriateness of results and that in turn, the prosecutor must work outside simplistic 'law and order' models of police prosecutions.

It may be expected that the independent prosecutor's involvement in summary cases will involve a degree of conflict with some police officers and perhaps institutional conflict between the Police Service and the DPP. The DPP will have to be clear in setting its objectives for the prosecution of these cases and must be prepared to account for, and report on, the conduct of prosecutors. The independent prosecutor has an important role in both educating the public and providing information to properly assess and evaluate the operation of the criminal justice system. The provision of a greater degree of transparency and accountability to make explicit the nature of 'opportunity discretion' in the criminal justice system is the realistic promise of the DPP. In so doing, the prosecutor will be fulfilling the role of properly reviewing executive action that would otherwise be unlikely to be properly reviewed or even recognised. There can be no doubting the importance of such a role in preserving the integrity of the rule of law.

\textsuperscript{1029} See, for example, Weinberg, M., 'The criminal trial process and the problem of delay', \textit{Criminal Trial Reform Conference}, Melbourne, Australian Institute of Judicial Administration, 2000
Appendix A – The Survey of DPP Prosecutors August-October 2001

Introduction

Summary criminal charges commenced by police are routinely prosecuted by other police officers in each Australian State. The Australian Federal Police and its predecessors have not had the capacity to prosecute Commonwealth offences in the States. In the Australian Capital Territory and the Northern Territory of Australia the local divisions of the Commonwealth Police developed police prosecution units for summary cases. However in 1974 the responsibility for prosecuting police summary cases in the ACT was transferred to the Crown Solicitor’s Office. In 1998 in the Northern Territory the responsibility for police staff prosecuting police summary prosecutions was transferred to the NT DPP by an administrative arrangement between the DPP and the Police Commissioner.

Various State DPPs have expressed the view that police summary cases should eventually be transferred to their office.\(^{1030}\) However, the attitude of DPP prosecutors to the possible transfer of responsibility has not been assessed.

Empirical Research

There is very little empirical research available on the exercise of prosecution discretion in Australia. Studies that have been undertaken tend to concentrate on specific issues such as the right to silence in the study by the NSW Law Reform Commission\(^{1031}\) and on issues relating to juries and sexual assault cases.\(^{1032}\) In Australia, little attention has been given to the empirical study of the exercise of discretion by police prosecutors.\(^{1033}\) In England and Wales, research was undertaken on the attitudes of prosecutors then

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\(^{1032}\) Associate Professor Sandra Egger from the University of New South Wales is currently undertaking such a study.

\(^{1033}\) A review of the literature failed to locate any empirical or attitudinal studies of police prosecution units in Australia.
prosecuting police summary cases, by Weatheritt and MacNaughton\textsuperscript{1034} prior to the introduction of the Crown Prosecution Service for the Royal Commission on Criminal Procedure.\textsuperscript{1035} The Weatheritt and MacNaughton study involved a survey of chief prosecuting solicitors outside London, a survey of chief constables for those forces where there was not a prosecuting solicitors' department, and a review of evidence given to the Royal Commission by the Metropolitan Solicitor's Department officers for the City of London.\textsuperscript{1036} The study reported on administrative arrangements and the sense of independence with which the chief prosecuting solicitor operated. The authors noted that:

While most of the information elicited in the survey was factual and aimed at providing basic description, we also tried to gain some idea of the kind of relationships that exist between prosecuting solicitors and the police, particularly the extent to which both felt that solicitors are encouraged or are able to exercise a discretion independent of their clients. There are obvious difficulties in using a formal postal questionnaire for this purpose. Asking the right question is not easy and what people say they do is not always what they do in practice. A further difficulty is that we asked questions only of chief constables and chief prosecuting solicitors. Although many of them had consulted colleagues lower down their respective hierarchies, their replies may not always have adequately reflected the difficulties that arose there. The emphasis of the questionnaire was on relationships at the top, and the findings reflect that.\textsuperscript{1037}

The survey revealed a variety of systems operated for administrative and financial accountability. Regarding the exercise of discretion by prosecuting solicitors, the study found:

Perhaps not surprisingly, chief prosecuting solicitors and chief constables take rather different views of the matter (withdrawing all charges or dropping some charges to secure a guilty plea). Both emphasise that the decision to drop a charge is normally reached after consultation, but whereas almost all chief officers regard the police as having the final say in the matter only half of the chief prosecuting solicitors do. It would be unwise to exaggerate the importance of this


\textsuperscript{1036} Weatheritt, M., \textit{et al.}, 'The Prosecution System', Royal Commission on Criminal Procedure, Her Majesty's Stationery Office, London, 1980. At p. 5. There were (and are) forty-three separate police forces. Eleven forces did not have a prosecuting solicitors' department. Sixteen of the chief prosecuting solicitors were answerable to the local police authority and twelve to a local council authority. One was administered by the police authority but had a budget approved by the local authority and three were responsible to the local authority but their budget was allocated by the police authority.

\textsuperscript{1037} ibid. At pp. 5-6.
difference in outlook. Of much greater significance are the statements of several respondents that
disagreements between the police and prosecuting solicitors are extremely rare or even
inconceivable. As in other matters, the over-riding impression is that prosecuting solicitors
exercise their discretion on a basis of co-operation and consensus with the police, and, except on
rare occasions, to the satisfaction of both.\textsuperscript{1038}

Since the introduction of the CPS there has been limited study of the attitudes of CPS
prosecutors to issues affecting police summary cases. An example is the study by
Mhlanga\textsuperscript{1039} and the follow-up report by Barclay and Mhlanga on ethnic differences in
decisions on young defendants dealt with by the CPS.\textsuperscript{1040} In the latter report the authors
note:

For all offences white defendants dealt with by the CPS were more likely to be convicted than
ethnic minority defendants. This will reflect differences in the likelihood of cases being
terminated early and being acquitted. The combined figure for all offences dealt with by the CPS
indicated that black and Asian defendants were more likely to have their cases terminated early.
Looking only at the property crimes, black and white defendants showed lower (and similar)
rates for cases terminated early, although the rate for Asians was still high. This change may in
part reflect variations in ethnic groups in the cautioning rates, but does suggest that there are
significant differences in early termination rates by offence. For all ethnic groups evidential
grounds are the main reason for early termination.\textsuperscript{1041}

**Purpose of this research**

The 2001 DPP Prosecutor Survey was designed to provide an insight into the attitudes
of prosecutors from the levels of Crown Prosecutors, instructing solicitors and solicitor
advocates. Lawyers at each of these levels in the hierarchy of the office of the DPP
could be expected to be involved in the processing of police summary cases should
responsibility be transferred to the DPP. Importantly, the solicitors would have the
frontline role of screening and reviewing cases and referring doubtful matters to Crown

\textsuperscript{1038} ibid. At p. 14.
\textsuperscript{1039} Mhlanga, B., ‘Race and the Crown Prosecution Service’, Crown Prosecution Service,
\textsuperscript{1040} Barclay, G., et al., ‘Ethnic Differences in Decisions on Young Defendants Dealt with by the
\textsuperscript{1041} ibid. At p. 5. The authors also note at p. 1, that ‘[D]ecisions made by the Crown Prosecution
Service and the courts reflect decisions made at earlier stages of the criminal justice process including
charging, cautioning and also the circumstances of the offences. It is therefore not possible to say whether
differences found in this analysis are the outcome of these decisions or reflect the result of discrimination
in the criminal justice system.’ The authors also caution that ‘sample size has limited the depth of the
analysis possible.’
Prosecutors and other senior lawyers for possible withdrawal. The purpose of this research was to obtain information about the attitudes of these DPP prosecutors to a number of issues concerning the possible transfer of responsibility for police summary cases to the DPP. The information sought falls into the following five categories:

1. **Attitude to DPP prosecution of police summary cases.**

   Whilst various DPPs have actively sought to take-over police summary cases, the support for that proposal among DPP staff has not been assessed. The Survey included a question to gauge support among DPP lawyers for the proposition that the DPP should prosecute police summary cases.

   The Survey asked what were necessary pre-conditions for the DPP to properly do the job of prosecuting police summary cases. There is a strong possibility that responses to this question would be based on the existing work of the DPP or reflect uncertainty about the nature of the work to be done. Even if the concerns of some DPP prosecutors are not well founded, it is reasonable to assume that those concerns would flow into the enthusiasm or optimism with which the prosecutors would approach their task. An assessment of these concerns would also assist in developing an implementation strategy for any proposed take over.

   I also sought to find out whether prosecutors were optimistic or pessimistic about specific challenges in taking over summary prosecutions. This question seeks to assess the understanding of DPP prosecutors regarding the impact of a transfer of responsibility. The questions of the ‘resources needed’ and the ‘volume of work to be performed’ are raised to gauge the sense of scale of the job. ‘Training’ is highlighted to gauge familiarity with the jurisdiction. ‘Career opportunities’ and ‘job satisfaction’ are both highlighted to assess the sense of opportunity for advancement relative to job satisfaction.
2. **The extent to which the prosecutor should be involved in the decision to charge a suspect.**

DPP prosecutors were asked who should be allocated responsibility for the decision to charge. A series of questions sought to elicit the degree to which prosecutors think the DPP should be involved in the decision to charge according to various scenarios. The sense of prosecutor-investigator division is also explored by a question on the possible role of the DPP prosecutor in pre-court diversionary schemes.

3. **The role of the DPP.**

Under this heading questions were directed at finding out prosecutor attitudes to the unequal application of the law across the State and in the one incident. A question was included to find out the extent to which respondents relied on various reasons in their current practice when recommending that charges be withdrawn. Prosecutors were also asked whether they thought a plea of guilty should be accepted, or a brief should be called for, in circumstances where some doubt was cast over the prosecution case, in terms of either, the evidence available, or the propriety of police action.

4. **Summary offences.**

The questions under this heading sought to ascertain three things. The first was the acceptance by prosecutors of various explanations for Aboriginal over-representation. The question asked allowed the respondent to nominate any of six explanations offered for disproportionate rates of apprehension of Aboriginal people for summary offences. Three of the explanations attribute rates of apprehension with features linked to Aboriginal people and three attribute the rates of apprehension to features of policing.

Secondly, in light of the wide definition of police summary offences concerning offensive behaviour and like offences, I asked a question whether prosecutors thought that the use of the words ‘fuck off’ in a public place was an offence. The question gives no context to the use of the words as it is concerned with eliciting an attitude to the use of the words as such, however, the question did allow respondents to answer that ‘it depends on the circumstances’. Thirdly, this question was followed by another to help elicit more detail concerning how prosecutors weighed the circumstances of an offence such as the use of offensive language. It asks the prosecutor to assume that the use of
certain words is an offence and that there is some reason in the public interest to consider withdrawal. Respondents are then asked whether they would be more or less likely to recommend that charges be withdrawn in various circumstances, ranging from aggressive behaviour of the defendant, to police action that appears unwarranted.

5. Apprehended personal violence proceedings.
The fifth category had a single question with multiple scenarios to elicit attitudes to various circumstances where a victim was seeking to withdraw an application for an apprehended personal violence order. It is important to have an understanding of the attitudes of prosecutors, as these attitudes will necessarily affect the possible transfer of responsibility for the prosecution of police summary cases.

Methodology

Development of a questionnaire
A draft questionnaire was produced in April 2001. This was sent for comment to the following people:

- Karen Freeman, Senior Research Officer, NSW Bureau of Crime Statistics and Research
- Dr Gregor Urbas, Research Analyst, Sophisticated Crime and Regulation Program Australian Institute of Criminology
- Associate Professor Sandra Egger, Faculty of Law, University of New South Wales

Originally it was envisaged that the Survey of DPP prosecutors would be conducted on a national basis to elicit any regional differences and to act as a baseline survey for the possible transfer of summary prosecutions, which could take place in any one of the States. Accordingly the questionnaire was also sent to each DPP in Australia with a request to give approval for the survey to be administered within their respective offices. Comments were received from the Office of the Queensland DPP, which were incorporated into the questionnaire design.
The draft questionnaire was then subjected to a pilot study among the eight lawyers at the Dubbo office of the DPP. A final version of the questionnaire was created incorporating the comments received from the circulation of the draft. A copy of the final form of the questionnaire, as used in the survey, is shown at the end of this appendix.

The following DPPs gave approval for the survey to be administered in their offices:

- New South Wales,
- Northern Territory of Australia,
- Western Australia, and
- Victoria.

The survey was administered in the Northern Territory through the Office of the Director of Public Prosecutions. The response rate was very low with three responses received. It was decided to abandon the survey of Northern Territory prosecutors given that the transfer of police prosecution had recently taken place in that jurisdiction, and that this might confound the results of the survey generally. The low response rate suggested that a semi-structured interview would be appropriate to canvass opinion in this jurisdiction.1042

The same questionnaire was used to survey prosecutors in each jurisdiction. However, the method by which the survey was delivered varied. The Survey was initially developed as an electronic survey instrument following negotiations with the NSW DPP. Initially the NSW DPP had given approval for a circular to be distributed in his office inviting respondents to contact me to obtain a copy of the survey instrument to complete and return to me. I thought that this would generate a very low response rate. In order to make the survey proposal more attractive in terms of convenience, anonymity and ease of use, I proposed that the whole survey instrument be delivered on-line with responses made directly on-line. This method could ensure anonymity by being routed through a website in such a way that the response could be identified as

1042 See also footnote 82 and accompanying text.
coming from the NSW DPP’s Office but without identifying the sender. The NSW DPP agreed to this amended proposal and the survey was prepared in this way. However, the other jurisdictions that agreed to participate could not support an electronic survey of their prosecutors and the survey instrument was posted to these Offices based on a printout of the electronic survey.

The survey instrument was developed using a software package produced by Perseus Survey Solutions. The software enabled responses to be downloaded directly from the website hosting the survey into a database developed from the survey instrument. The software also allowed duplicate responses to be cleaned from the database. In the case of paper-based survey responses these were entered as responses to the web survey by me and added to the database separately.

New South Wales

Distribution of questionnaires

In the Office of the NSW DPP there are a total of 350 prosecutors. Of these 82 are Crown Prosecutors and 268 are Solicitors. These prosecutors are employed in eleven offices across NSW. The NSW DPP gave approval for the survey to be administered within his office on the condition described above. An alternative proposal accepted by the DPP, was to allow DPP prosecutors electronic access to the questionnaire. Initially this presented difficulties as DPP prosecutors use an intranet that did not support an e-mail survey. Finally it was agreed that DPP prosecutors would be allowed access to a web-based survey and that the office e-mail would be used to ask them to complete the survey.

The Assistant Solicitor, Craig Smith, forwarded details of the survey by e-mail to all NSW DPP prosecutors. This e-mail asked the prosecutors to complete the survey at a web address that they could access by a hyperlink in the e-mail message. The prosecutors were told that the survey had the support of the Director.

1043 <www.perseus.com>
Follow-up process
In the initial period there were 30 survey responses. The survey responses were anonymous and it was not possible to identify those who had completed them. A reminder was sent by e-mail forwarded by the Assistant Solicitor. Without access to a mailing list for the DPP prosecutors, the first follow-up action was to send a personally addressed letter to the Lawyer-Manager of each working group in the DPP drawing attention to the survey and asking that they encourage the prosecutors in their group to complete it. Coffee bags and tea bags in individual sachets (with a flier for the survey attached) accompanied this letter. The Lawyer-Manager's were asked to make these available to members of their group. Following the sending of this letter a further 35 responses were received. Finally, the Solicitor for Public Prosecutions forwarded a further request to complete the survey with his personal endorsement of the survey. This resulted in a further 48 responses.

Response rate
Most survey responses were received electronically, however, some completed printouts of the web-based form were received by mail. These written responses were manually entered into the database. The total number of individual responses was 112 from a population of 350. The response rate was thus 32%.

Western Australia
Distribution of questionnaires
The Western Australian DPP provided a mailing list for 58 prosecutors in his office. Personalised letters were sent to each person on the mailing list with a copy of the questionnaire and a self-addressed reply-paid envelope. Also included was a coffee or teabag as an incentive to 'take a break and complete the survey'.

Response rate
A total of 29 completed questionnaires were returned. The response rate was thus 50%.
Victoria

Distribution of questionnaires
The Victorian DPP agreed to distribute the survey within his office. The survey population was 130 Crown Prosecutors and Solicitors. However, a mailing list was not provided. As a result, generic letters addressed ‘DPP prosecutor’ were forwarded for distribution in the internal mail for the DPP’s Office. Enclosed in each letter was a copy of the questionnaire and a self-addressed reply-paid envelope. Also included was a coffee or teabag as an incentive to take a break and complete the survey.

Response rate
A total of 32 completed questionnaires were returned. The response rate was thus 24%.

The overall response rates
The original plan to administer a national survey was abandoned given the lack of support from Queensland, Tasmania and South Australia. Attention was placed on pursuing the response rate in New South Wales as the Summary Prosecution Pilot had been conducted in that State. The response rate achieved in NSW was (32%), in WA (50%) and in Victoria (24%).

The responses from all three jurisdictions have been combined for analysis. The combined population size is 537 and the combined sample size is 173. The overall response rate was thus 32%. This compares favourably with the response rate reported by The Law Reform Commission of New South Wales in its survey into the Right to Silence and Pre-Trial Disclosure conducted in 1998 (25%).1045

Alternative research strategies
The focus of this thesis is the prospect of State DPP prosecutors taking over police summary cases. The results of this survey provide a basis for further more focused

1045 Law Reform Commission of New South Wales, ‘Research Report 10 (2000) - the Right to Silence and Pre-Trial Disclosure in New South Wales’, Law Reform Commission of New South Wales, Sydney, 2000. The survey was administered to police prosecutors and a number of prosecutors briefed at the private bar. The response rate is as reported by the Law Reform Commission. The report does not indicate the response rates broken down between the police prosecutors, Crown Prosecutors and private
research using semi-structured interviews and the detailed examination of current practice concerning prosecution withdrawals.

The Commonwealth DPP does not provide a suitable model for the examination of the issues that arise in a State-policing context, particularly, street policing issues. The ACT DPP's Office is worth studying as police summary cases have been independently prosecuted since 1973. However, the ACT DPP works in a jurisdiction with the one Local Court complex, serving a jurisdiction that is small in terms of the population and geographical spread. In addition, the current DPP, Mr Richard Refshauge SC, has indicated in discussions that there is a high degree of concordance between his Office and ACT Police concerning street policing and public order issues.  

The most important source of information concerning the prosecution of police summary cases is police prosecutors. A survey of the work and attitudes of police prosecutors is an obvious area to concentrate further research into the prosecution of police summary cases.

Results of survey – examples of comments on specific issues.

Survey respondents were given two opportunities for entering free text responses. The first was in response to question 3: 'If you have any views, one way or the other, about the DPP prosecuting police summary cases please note them here.' The second was in response to question 16: 'Please add any comments you have in relation to the prosecution of police summary cases generally, or the issues raised in this survey.' Of the 112 respondents from New South Wales, 59 made a comment in answer to question 3 and 21 made a comment in answer to question 16.

barristers to whom the survey instrument was sent. See Table 2.7 and accompanying text within the Commission's Research Report. Twenty prosecutors other than police prosecutors completed the survey.

1046 Refshauge, R., Personal communication, 29 August 2001.
All of the responses to these two opportunities for comment were collated and organised according to the issue raised by the respondent. *Table 14 Additional comments made by survey respondents* shows the issues raised and the number of respondents who provided a comment.

**Table 14 Additional comments made by survey respondents**

<table>
<thead>
<tr>
<th>Issue</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>The need for prosecution independence</td>
<td>16</td>
</tr>
<tr>
<td>The same office should not investigate and prosecute</td>
<td>10</td>
</tr>
<tr>
<td>The DPP can prosecute police summary cases more efficiently</td>
<td>7</td>
</tr>
<tr>
<td>All the circumstance must be considered in the decision to prosecute</td>
<td>7</td>
</tr>
<tr>
<td>The DPP is not likely to be more efficient</td>
<td>6</td>
</tr>
<tr>
<td>Points against a DPP take over of police summary cases</td>
<td>6</td>
</tr>
<tr>
<td>Prosecuting is the work of a trained lawyer</td>
<td>6</td>
</tr>
<tr>
<td>Police summary cases are better prosecuted by police prosecutors</td>
<td>4</td>
</tr>
<tr>
<td>DPP prosecution would ensure uniformity and consistency</td>
<td>4</td>
</tr>
<tr>
<td>It is not appropriate for DPP lawyers to become involved in apprehended personal violence orders</td>
<td>4</td>
</tr>
<tr>
<td>Police will not give up their budget for prosecutions</td>
<td>3</td>
</tr>
<tr>
<td>One prosecutor would remove an ‘us and them’ approach between DPP and police prosecutors</td>
<td>3</td>
</tr>
<tr>
<td>The Summary Prosecution Pilot was under-resourced</td>
<td>3</td>
</tr>
<tr>
<td>There should be a phased transfer of responsibility</td>
<td>2</td>
</tr>
<tr>
<td>The transfer of responsibility represents enhanced career opportunities</td>
<td>2</td>
</tr>
<tr>
<td>There is no benefit to be obtained/Neutral attitude</td>
<td>2</td>
</tr>
<tr>
<td>Table 1 offences would be better handled</td>
<td>2</td>
</tr>
<tr>
<td>Positions in the DPP would need to be re-graded</td>
<td>2</td>
</tr>
<tr>
<td>The prosecutor should be independent of witnesses</td>
<td>1</td>
</tr>
<tr>
<td>Prosecuting is important to the police career structure</td>
<td>1</td>
</tr>
<tr>
<td>Aboriginal people are more likely to get caught for summary offences</td>
<td>1</td>
</tr>
<tr>
<td>Total responses offered on all identified issues</td>
<td>92</td>
</tr>
</tbody>
</table>

---

1047 The number who provided a response was 80. The total number of responses shown here (92) reflects the doubling up of responses where a comment was offered in relation to more than one issue.
• **The need for prosecution independence (16 responses)**

Most respondents commenting on this issue simply stated that the prosecutor should be independent of the police. A respondent linked independence with the division between prosecution and investigation saying:

> Having worked as a prosecutor with both the CPS in England and the DPP in NSW, I feel that the DPP prosecuting police summary cases would be a very positive change, especially in terms of it providing excellent early experience for DPP lawyers, and for the community perception of independence of the prosecution body, even in respect of relatively minor matters. It is these police summary matters that are, after all, the sort of criminal matters that have most direct impact on most citizens. The same office should not investigate and prosecute.

• **The same office should not investigate and prosecute (10 responses)**

The tenor of these comments is summed up in the following example:

> [It is] clearly inappropriate for [the] police to both investigate and prosecute criminal matters. [There is] High potential for both actual and / or perceived bias, misconduct, corruption. Doesn’t necessarily have to [be] ODPP, but any criminal prosecution should be conducted by a body independent of the police service.

• **The DPP can prosecute police summary cases more efficiently (7 responses)**

Two respondents cited the Summary Prosecution Pilot as proof that the DPP would prosecute summary cases more efficiently. The remaining responses made a general claim to greater efficiency. One respondent said:

> DPP prosecutions would involve faster disposal, more convictions, independence. This is shown from [the] recent ODPP Summary Prosecutions Pilot Program.

• **All the circumstances must be considered in the decision to prosecute (7 responses)**

One respondent expressed the hope that decision would be made by people who ‘possess an armory of life experiences, and base the decisions on common-sense, reason and an endeavour to achieve justice between the parties.’ Two respondents thought that a brief would be required in all cases. Overall the response can be summed up as follows:

> Each individual case has to be considered on the facts to make a decision as to whether the matter should continue or should be withdrawn. It is unrealistic to make a decision as to whether you are more likely or less likely to withdraw a matter without reading a brief of evidence and even conferencing victims/witnesses.
- **The DPP is not likely to be more efficient (6 responses)**

Responses falling in this category emphasised the need for a brief, the difficulty for the DPP servicing country courts and the requirement for disclosure by the DPP. The question of efficiency was summed up in terms of existing DPP practices for indictable cases:

> There is an enormous amount of police prosecution work which would require vast resources to do at the standard that the DPP currently operates - we evaluate the evidence carefully, research law, conference witnesses before the hearing - none of this is done by police and thus it would need much more resources than the police currently use to take over police prosecutions. The DPP is hard up getting the resources necessary to do what we do now without increasing the demands for more money. This will lead to low service, low morale, etc.

- **Points against a DPP take over of police summary cases (6 responses)**

Among the issues raised that relate to this heading were that the DPP would find the job difficult because of negative police attitudes, the distances to be covered would present logistical problems and the police have the advantage of co-location with operational police as well as sharing a hierarchical arrangement of responsibility. The police prosecutor’s advantage through timely access to information is summed up in the following response:

> Police prosecutors are better situated to prosecute summary matters because they have better access to information at short notice (within the confines of the police station, on the morning of court). They are more accessible for police officers who have last minute information about related matters such as AVO’s, recently charged or recently missing co-offenders, results of on-going enquiries, fresh charges, etc. This information exchange is not as efficient between DPP and Police. DPP prosecutors, particularly in the country, do not have the accommodation that would be required for DPP summary prosecutions to work effectively. Most of the up-dated information that Police Prosecutors receive comes to them IN the Police Station. DPP prosecutors don’t operate from within the Police Station.

- **Prosecuting is the work of a trained lawyer (6 responses)**

Lawyers should prosecute criminal cases (no matter how humble). We complain about conveyancing going to unqualified staff but seem to accept that the question of whether or not a person is convicted of a crime be left in the hands of unqualified policemen.

Responses under this heading emphasised the importance of a professional duty to the court. One response expressed the view that if police prosecutors were legally qualified they should be seconded to the DPP.
• **Police summary cases are better prosecuted by police prosecutors**  
  *(4 responses)*

Some responses emphasised the advantages derived from the use of police prosecutors:

Police prosecutors have an extensive knowledge and expertise in the area of summary offences. This knowledge also acts as an invaluable intelligence-gathering tool within the Service. Police should continue to prosecute summary matters.

Other responses were more concerned with the trivial nature of police summary cases as being a waste of a lawyer’s time:

The types of cases, which are prosecuted summarily, are such as not to require the experience of lawyers to conduct them. It would be a waste of resources and tedious for those allocated to do them. The present system whereby any serious/complicated summary matters are prosecuted by the DPP is far more preferable. That said, I think an acceptable alternative is to make the Police Prosecutors and the DPP operations work more closely together to eliminate confusion and doubling up.

• **DPP prosecution would ensure uniformity and consistency** *(4 responses)*

Two contrary views emerged. In the first, the DPP was seen as being able to ensure consistency:

It is the only way to ensure impartiality and some consistency across the judicial system in criminal cases.

The second view disavowed any role for the lawyer in making ‘personal judgments’:

As to the section dealing with inequality in the enforcement of the law, it is not for a lawyer to usurp the roles of the police and the parliament, but rather police should be required to enforce the law and to properly use their discretion as to whether to charge or not. Many of the questions appear to confuse professional and personal judgments, especially in the area of racism and general community attitudes.

• **It is not appropriate for DPP lawyers to become involved in apprehended personal violence orders** *(4 responses)*

Four respondents did not want to have to do AVO matters. One respondent stated ‘[I am] not necessarily looking forward to the mundane work’ and also said:

I consider there is a problem with the DPP doing AVO matters as these are not really criminal matters and we have a different duty to the court than does a solicitor acting for a client and this distinction sometimes causes problems when we appear in the matters on appeal in the District Court. These types of matters should be run by solicitors acting personally for the complainant, possibly through Legal Aid.

• **Police will not give up their budget for prosecutions** *(3 responses)*

I have doubts that the NSW Government will come up with the large amount of funding necessary for the changes. At one stage some complete fools believed that the Police budget
could simply be reduced by about $20 million with the money transferred to the DPP budget. Like trying to prise a bone from the jaws of a savage Rottweiler! The police have enough money problems as it is and it overlooks the fact that Police Prosecutors are serving officers entitled to transfer within the service. There would be no cost savings there, at least for some time.

- **One prosecutor would remove an ‘us and them’ approach between DPP and police prosecutors (3 responses)**

  At present there is an "us" and "them" mentality between many Police Prosecutors and the DPP. It does not foster but hinders the proper administration of the Criminal Justice System. A uniform prosecuting body would alleviate much of this tension.

- **The Summary Prosecution Pilot was under-resourced (3 responses)**

  The DPP should prosecute such matters [police summary cases], but only if it can be done properly. The report done some years ago, which suggested that the DPP could replace the Police Prosecuting Branch, with little more than half their staff in reality, was and is laughable.

- **There should be a phased transfer of responsibility (2 responses)**

  Any "take over" should be carefully phased in. Initially, the Police Prosecutors should remain under the administration of the Police Service but answer to the DPP and be subject to DPP directions on legal matters only. Over a period of some years Police Prosecutors could be phased out progressively with legally qualified officers having the right to transfer (or be seconded) to the DPP. This would go some way to reducing police opposition to a DPP take over.

- **The transfer of responsibility represents enhanced career opportunities (2 responses)**

  There were two responses along these lines. The first was from a former CPS lawyer who said prosecuting police summary cases would provide ‘excellent early experience for DPP lawyers.’ The other comment was along similar lines:

  Prosecuting summary cases would be a good starter for new prosecutors/graduates rather than being thrown in the deep end, which is what occurs now.

- **There is no benefit to be obtained/Neutral attitude (2 responses)**

  I cannot envisage any benefit the DPP would get from conducting summary prosecutions; we still have enough scope to properly screen most of the more serious allegations.

- **Table 1 offences would be better handled (2 responses)**

  I consider that all prosecutions should be independent of police and elections would be more efficiently and properly made if DPP had matters from beginning.

- **Positions in the DPP would need to be re-graded (2 responses)**

  Re-grading of all positions prior to DPP taking over summary prosecutions is essential.

- **The prosecutor should be independent of witnesses (1 response)**

  DPP should prosecute summary cases, as the independence of the prosecutor from the witnesses is vital to the way in which our system of justice operates.
- **Prosecuting is important to the police career structure (1 response)**
  
  In many ways I think that if the DPP takes over the role much needed talent, opportunity and scope (in terms of where police officers can go with their careers) will be lost from the police service and I don’t necessarily think that that is a good or desirable thing for the police service.

- **Aboriginal people are more likely to get caught for summary offences (1 response)**
  
  I believe aboriginal people are more likely to GET CAUGHT for summary offences, committed due to dispossession, family breakdown, social/educational/employment disadvantage, etc.
NATIONAL DPP PROSECUTOR SURVEY

This survey contains a total of 17 questions in 6 sections. It should take about 10-15 minutes to complete. The questions are based on research into the Summary Prosecution Pilot in New South Wales and the Crown Prosecution Service in England and Wales.

This survey is being administered nationally as part of research being conducted at the University of New South Wales by Tony Krone. Tony can be contacted by e-mail at a.krone@student.unsw.edu.au

Your participation will assist to provide a balanced representative assessment of how DPP prosecutors see their role in relation to police summary prosecutions. In turn, this will contribute to the debate about the independent prosecution of police summary cases and assist in the development of DPP policies and practices.

All survey responses are anonymous. Please complete the survey and return it in the enclosed reply paid envelope. The survey closes on 2001.

A. ATTITUDE TO DPP PROSECUTION OF POLICE SUMMARY CASES

1. To what extent do you agree with the proposition that the DPP should prosecute all police summary cases (except parking and minor traffic cases)?

- Strongly Agree
- Agree
- Neutral
- Disagree
- Strongly Disagree

2. Are there any pre-conditions for the DPP to properly do the job of prosecuting police summary cases? What are they? Please list them in order of importance.

pre-condition 1
pre-condition 2
pre-condition 3
pre-condition 4
pre-condition 5

3. If you have any views, one way or the other, about the DPP prosecuting police summary cases please note them here.

4. Do you feel optimistic, neutral or pessimistic about how the following issues affecting the DPP prosecution of police summary cases will be dealt with?

<table>
<thead>
<tr>
<th>Issue</th>
<th>Optimistic</th>
<th>Neutral</th>
<th>Pessimistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>the resources given to the DPP</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>to do the job</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>training to do the job</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>the volume of work to be</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>processed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>career opportunities</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>job satisfaction</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

7/20/01
B. THE POINT OF TRANSFER OF RESPONSIBILITY FOR PROSECUTIONS

5. The police currently control the decision to arrest. In most cases the police also decide whether to charge a person with a summary offence.

If the DPP is responsible for the prosecution of summary cases, to what extent do you agree with the following propositions?

<table>
<thead>
<tr>
<th>Proposition</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neutral</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>The police should continue to be responsible for the decision to charge.</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>The DPP should actively give charge guidelines to police for specific types of cases.</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>The DPP should be able to indicate which charges must be referred to the DPP before charges are laid.</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>The DPP should decide whether charges are to be laid in all cases.</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>The DPP should decide what charges are to proceed by way of summons.</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
</tbody>
</table>

6. If the DPP is prosecuting police summary cases, should the DPP also decide who is to be offered pre-court diversion?

- Yes
- No
- Undecided

7. If you have any views about the division of DPP and police responsibilities, prior to a court hearing in summary cases, please note them here.

C. THE ROLE OF THE DPP

8. To what extent do you agree that the DPP should DECLINE to prosecute a police summary case on the basis that the law is being applied unequally across the State for no apparent reason?

- Strongly Agree
- Agree
- Neutral
- Disagree
- Strongly Disagree

9. To what extent do you agree that the DPP should DECLINE to prosecute a police summary case on the basis that the law is being applied unequally in the one incident for no apparent reason?

- Strongly Agree
- Agree
- Neutral
- Disagree
- Strongly Disagree
10. Have you ever recommended that charges be withdrawn, at least in part for any of the following reasons?

<table>
<thead>
<tr>
<th>Reason</th>
<th>never</th>
<th>once</th>
<th>2-10 times</th>
<th>11 times or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>the triviality of the alleged offence</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>the anticipated rejection, by the court, of evidence because it was</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>illegally or improperly obtained</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>the anticipated rejection, by the court, of evidence for any other</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>reason</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>because there was no apparent reason for singling out any one</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>defendant from a number of identified potential defendants</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

11. In summary cases it is unusual for the police to prepare a full brief of evidence unless the charge is set down for a contested hearing.

Assume the defendant is prepared to plead guilty to a charge.

Indicate whether the prosecutor should either ask for a full brief, consider withdrawal, or accept the plea, in the following circumstances.

<table>
<thead>
<tr>
<th>Circumstance</th>
<th>ask for a brief</th>
<th>consider withdrawal</th>
<th>accept the plea</th>
</tr>
</thead>
<tbody>
<tr>
<td>the prosecutor doubts that the offence can be proved</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>the prosecutor believes that the defendant did not commit the act alleged</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>the prosecutor believes a more serious charge should be laid</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>the investigation may have involved illegal or improper police conduct</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
<tr>
<td>the victim has told the prosecutor that he/she does not wish to proceed</td>
<td>☐</td>
<td>☐</td>
<td>☑</td>
</tr>
</tbody>
</table>

D. SUMMARY OFFENCES

12. Indicate which of the following statements (if any) you think best explain disproportionate rates of apprehension of Aboriginal people for summary offences?

☐ Aboriginal people are more likely to be in public places
☐ Aboriginal people are more likely to challenge police authority
☐ Aboriginal people are more likely to commit a summary offence
☐ Disproportionate rates of charging are the result of overpolicing
☐ A form of zero tolerance policing is applied to Aboriginals
☐ Disproportionate rates of charging are the result of racist attitudes

13. Do you consider the use of the words 'fuck off' in a public place to be an offence?

☐ Yes
☐ No
☐ It depends on the circumstances
14. Assume that the use of certain words by a defendant prima facie constitute an offence. Assume also that there are some subjective features of the case that cause you to consider whether it is in the public interest to proceed.

Indicate whether you would be more or less likely to recommend that an offensive language charge be withdrawn in each of the following circumstances.

<table>
<thead>
<tr>
<th>Words Directed</th>
<th>Strongly Likely</th>
<th>More Likely</th>
<th>Neutral</th>
<th>Less Likely</th>
<th>Strongly Unlikely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Action</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Police Questioning</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Stop and Search</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Political Protest</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Industrial Protest</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Drunk</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Disturbance</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
</tbody>
</table>

E. APPREHENDED PERSONAL VIOLENCE PROCEEDINGS

15. Proceedings for protective orders constitute a significant part of summary prosecutions. On occasions the person in whose favour the order is being sought (the victim) may ask for the case to be withdrawn.

Assume in the following unless otherwise stated:

The parties are in a domestic relationship, the respondent does NOT have a criminal record, and the respondent has NOT previously been accused of domestic violence.

Would you be more or less likely to withdraw an application at the request of the victim in each for the following circumstances?

<table>
<thead>
<tr>
<th>Circumstances</th>
<th>More Likely</th>
<th>Neutral</th>
<th>Less Likely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim is a medical practitioner</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Both the victim and the respondent are Aboriginal</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Victim has previously been the victim of violence from the respondent</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Allegation includes an assault on the victim (not charged) which resulted in a minor physical injury (a minor bruise on the arm)</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Allegation includes the respondent holding a knife in a threatening manner</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Respondent has a criminal history unrelated to violence</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>Violence complained of took place in front of young children of the relationship</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
</tbody>
</table>

16. Please add any comments you have in relation to the prosecution of police summary cases generally, or the issues raised in this survey.
Appendix B - The Survey of Summary Prosecution Pilot Discontinuances

Appendix B – The Survey Of Summary Prosecution Pilot Discontinuances

The Summary Prosecution Pilot
In New South Wales during the period from 1 July 1996 to 31 December 1996, the DPP and the Police Service conducted a trial project whereby DPP lawyers took the place of police prosecutors at Campbelltown and Dubbo Local Courts. This is known as the Summary Prosecution Pilot (the Pilot). The Pilot was conducted following a suggestion by the DPP at the request of the Royal Commission into the NSW Police Service (RCPS).

Pilot procedure
An agreement was negotiated between the DPP and the NSW Police Service for the conduct of the Pilot. This agreement provided that for the Pilot period, the DPP would take over all new summary police charges in the Campbelltown and Dubbo Local Courts, as well as police matters that had already been listed for hearing (in which a police prosecutor was not already part-heard). The number of cases processed at each centre is shown in Table 15 Number of cases processed at Campbelltown and Dubbo Local Courts during the Pilot.

Table 15 Number of cases processed at Campbelltown and Dubbo Local Courts during the Pilot

<table>
<thead>
<tr>
<th>Centre</th>
<th>Local Court</th>
<th></th>
<th>Children’s Court</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>New cases</td>
<td>Finalised</td>
<td>New cases</td>
<td>Finalised</td>
</tr>
<tr>
<td>Campbelltown</td>
<td>2093</td>
<td>2641</td>
<td>343</td>
<td>429</td>
</tr>
<tr>
<td>Dubbo</td>
<td>764</td>
<td>706</td>
<td>155</td>
<td>142</td>
</tr>
</tbody>
</table>

1048 The DPP therefore required early access to the briefs for those defended matters that were already listed to be heard in the Pilot period.
There were two major constraints on the DPP realising the efficiency gains expected from the take over of police summary cases. In the first place, the DPP was required to maintain the manual recording systems kept by the police. In addition, the DPP was required to manually maintain two sets of records for every matter, so that the police service could continue to hold a record of each case. This was necessary for the brief handling manager in the local police station to have a record of each matter so as to advise informant officers of the status of their cases. This meant that throughout the Pilot, the police generated, and DPP teams maintained, two sets of papers for each matter. Secondly, non-Pilot staff in the Local DPP offices continued to be involved in the processing of indictable charges from charge to committal before the Local Court.

The independent review of the Pilot drew attention to the initially poor relationship between the DPP Pilot staff and the police. The evaluation referred to this problem under the heading of ‘The clash of cultures between the police and the ODPP’:

Whilst the Pilot is showing different approaches and work practices between different agencies, there is a more fundamental dynamic at work. There are strong cultural differences between the way Police Prosecutors work and the ODPP solicitors work. These differences have been manifested in various ways including distrust and misunderstandings.

The Report states that police felt that their priorities were not being treated seriously, and that police stated ‘the DPP is not working with us, they are working against us’. It was also reported that ‘police officers identify strongly with the victims and are keen to see the perpetrator or offender punished’ and that there was personal animosity towards individuals in the Police Service or ODPP.

**Summons applications**

During the Pilot, the police at Dubbo and Campbelltown referred to the DPP cases where a summons was being considered, for the DPP to decide whether a summons

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1049 See also, Waller, K., et al., ‘Prosecuting Summary Matters in New South Wales’, NSW Premier’s Department, Sydney, 1996. The report notes ‘There are many work practices being undertaken by ODPP staff in the Pilot Projects that ordinarily would not be required or undertaken and which appear to have limited the performance of the Pilot to some degree. Some of these work practices are required under the terms of the Pilot Project’s Memorandum of Understanding, whilst others could be removed with improvements in IT or other organisational changes.’ At p. 14.

1050 ibid. At p. 21.

1051 ibid. At p. 21.
should issue, and for what charge(s). This is undoubtedly an important area to consider in terms of the investigator-prosecutor divide, referred to in Chapter Six. However, the small number of cases referred for consideration and the difficulty of tracing these cases through the physical files of the Pilot, ruled out using them as the basis for study.

**Apprehended personal violence proceedings**

A major feature of Local Court prosecutions is appearing in apprehended personal violence order (AVO) cases. Prior to the Pilot the DPP had the power to conduct proceedings for offences. Legislative authority was therefore required to take over and conduct AVO cases and the *Director of Public Prosecutions Act 1986* (NSW) was therefore amended. The AVO cases raised issues that could not be easily accommodated within those existing guidelines and new policy was being developed by the DPP during the course of the Pilot.

**DPP procedure for the withdrawal of charges**

The Pilot was designed to allow the DPP to apply the existing prosecution policy and guidelines to the consideration of summary cases. At Campbelltown, the procedure adopted to deal with requests for withdrawal was to have a first solicitor's report, which was reviewed by another solicitor before being considered by the solicitor in charge of the Pilot team. If the police objected to the course of action proposed to withdraw a charge, the matter had to be referred by the solicitor in charge to the Director for decision. If the police did not oppose the course of action proposed, then the solicitor in

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1052 As the application for an order does not involve an offence.

1053 A major issue for the DPP quickly emerged in relation to cross-applications for apprehended personal violence orders in terms of potential conflicts of interest. See, for example Favretto, J., ‘Conflicts of Interest: Contracting Prosecutions, Functional Conflicts, ‘Chinese Walls’ and ‘Grapevines’”, Office of the Director of Public Prosecutions, Sydney, 1997.

1054 In considering the withdrawal of indictable charges, the existing policy of the DPP is to require a solicitor to prepare a report for consideration by a Crown Prosecutor. The Managing Lawyer for the relevant Office or Unit reviews the first Solicitor’s report, before it is passed on to a Crown Prosecutor. Certain Crown prosecutors in each Office hold a delegation from the Director to withdraw indictable charges (except for murder or manslaughter) before a committal takes place. If the matter has proceeded to a committal (or involves a charge of murder or manslaughter) any application for withdrawal has to be made to the Director or a Deputy Director. Whilst a request for withdrawal following committal can be initiated by a solicitor in the Office or by a Crown Prosecutor, a report from a Crown Prosecutor to the Director is required.
charge could deal with the matter. A similar procedure was adopted at Dubbo. However, the smaller size of the team there meant that a second solicitor’s report was not required before the solicitor in charge would consider a matter.

This study
During the course of the Pilot, 111 cases were considered for termination by DPP Pilot solicitors at Campbelltown Local Court. At Dubbo, 18 cases were considered for termination by the DPP Pilot staff. This thesis draws on the range of cases considered for termination at Campbelltown for analysis. While there were fewer cases considered at Dubbo, there were two in particular, that exposed the usefulness of narrative understanding in interpreting police-citizen and police-prosecutor relationships.

The NSW DPP, Mr N Cowdery QC, generously allowed me access to the discontinuance register for the Summary Prosecution Pilot at Campbelltown. During the period of the Pilot, I was the managing lawyer of the Dubbo office of the DPP and I participated in the planning for the Pilot within the Office of the DPP and oversaw the conduct of the Pilot at Dubbo Local Court. Because of my involvement as Lawyer Manager, I have not presented a review of the records for the Pilot at Dubbo. However, I have drawn on two Dubbo cases in Chapter Three as the only Pilot examples to illustrate the interplay of police concepts of deviance and the defendant’s experience of high levels of police surveillance.

My study of the Pilot was based on a review of the DPP Pilot records at Campbelltown. The records were accessed in December 1996, in the last month of the Pilot period. At Campbelltown I was given access to the DPP’s Discontinuance Register, which was made up of lever arch folders containing the records for each matter that the DPP Pilot staff had considered for withdrawal. The Register was kept as a separate record from the court files for each case. As a result, the Register was an incomplete account of the case.

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1055 This hierarchy of prosecution discretion is schematically represented in Figure 5 The prosecution decision-making hierarchy for the Summary Prosecution Pilot.

1056 I ceased working as the lawyer manager at the Dubbo office in September 1997, when I resigned from the DPP. I had been employed by the DPP in Lismore and Dubbo from 1992 until 1997. Prior to working for the DPP, I was employed as solicitor and principal solicitor at the Western Aboriginal Legal Service in Dubbo in the period from 1987 to 1992.
Sometimes the only record was a cover sheet generated within the Pilot office. However, most entries consisted of the cover sheet, two reports prepared by DPP solicitors, and either the report by the solicitor in charge of the Pilot, or that of the Director or Deputy Director in cases referred for the Director’s decision.

Later, in January 1997, I again inspected the Campbelltown Discontinuance Register at the head office of the DPP and checked that I had noted every case listed in the Register. It is possible that there were other cases involving discontinuance of charges that did not get reported in the Register. The Discontinuance Register also does not capture those cases where the prosecutor exercised general prosecution discretion to fact-bargain or to charge-bargain (such as where the prosecutor takes a plea to some, but not all, of the charges against a defendant in a particular incident).

The Discontinuance Register contained a distilled record of cases at the time they were considered for discontinuance and the register was kept separately from the prosecution file that recorded what happened in court. Given the number of cases generated during the Pilot, time and resource constraints did not allow me to conduct a check of the physical prosecution files kept in these matters and so it was not feasible to check the Discontinuance Register entries against the prosecution file.

**Campbelltown Local Court**

There were 111 matters considered for withdrawal during the Campbelltown Pilot in 23 charge categories. The category with the most number of withdrawals considered was assault (with 42 cases considered). The next most common was traffic (with 13 cases). Followed by breach of apprehended violence order (8), malicious damage (6) and assault occasioning actual bodily harm (5). The remaining 18 categories involved 3 or

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1057 See the cases of B and W presented as a case study in Chapter Three.
1058 The register itself contained entries that were incomplete. This meant that either the defendant, or the charges involved, could not be identified.
1059 3070 cases were finalised during the Pilot at Campbelltown in the Local and Children’s Courts. See Table 15 Number of cases processed at Campbelltown and Dubbo Local Courts during the Pilot.
1060 During the period of the Pilot the records of the police, the DPP and the Local Courts were all maintained manually and it was not practicable to trace the history of each matter that had been considered for discontinuance.
fewer cases considered. The total number of cases considered in assault or related categories was 57, being just over half of all cases considered for withdrawal.

Cases considered for withdrawal were assigned to the following four categories: 1) factual, there being no case, 2) the public interest, 3) evidential problems (such as loss of a witness or witness incompetence) and 4) the victim’s request as shown in Table 4 Reasons for considering cases for withdrawal - Campbelltown Pilot (in Chapter Three). Importantly, the Pilot discontinuance records show that despite the limits on the provision of a copy of the brief in summary cases, DPP prosecutors were able to identify cases in which to consider withdrawal. In 41% of cases withdrawal was considered because of the victim’s request not to proceed. In another 41% of cases factual problems were identified. Table 16 Campbelltown Pilot cases where the DPP decided to proceed and Table 17 Campbelltown Pilot cases where the DPP decided to withdraw indicate all of the matters in the discontinuance records for Campbelltown organised into two lists according to whether the matter was directed to proceed or was directed to be withdrawn. Within these lists the matters are further divided according to the principal reason for considering withdrawal (discussed above) being no case, the public interest, evidential problems (such as loss of a witness or witness incompetence) and the victim’s request.

**Police requests to the DPP to withdraw charges:**

In four instances the request to consider withdrawal originated with the police. Three of the police requests led to the withdrawal of the charge. In the one police application to withdraw a matter that was refused, this was for technical reasons. That case involved an application for a personal violence order. Police could not locate the victim and the police had initiated the application. Although there was power for the police to make an application on behalf of another person there was no similar power to withdraw an application on behalf of another person.

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1061 Given the limited nature of the discontinuance records it is not possible to determine in which matters the DPP had access to a brief of evidence. A focused study would need to be conducted in relation to police summary cases currently prosecuted by the police to determine to what extent the prosecutor can identify doubtful cases.

1062 Matter 5 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.
One police application involved a charge of negligent driving where the defendant had been involved in a collision.\(^{1063}\) The defendant’s vehicle had gone into a spin whilst changing lanes. The police officer in charge had established that the road had been affected by an oil smear following a truck overturning in the area of the accident. In a charge of failing to stop after an accident, the police sought withdrawal because there was no evidence that the reporting threshold had been reached (namely damage to the other vehicle in excess of $500).\(^{1064}\) In one instance the police applied for the withdrawal of a charge of offensive behaviour for urinating in the charge room. The police accepted that the charge room was not a public place or within the view or hearing of a public place.\(^{1065}\)

**Defence requests to the DPP to withdraw charges:**

In ten instances the request to consider withdrawal originated with the defence, five involved factual issues, in two it was argued that the offence was trivial, in another two it was argued that the defendant did not have the requisite intention, and one raised factors personal to the defendant. In an alleged breach of an apprehended violence order, the defence claimed there was an inconsistency between the apprehended violence order and Family Law Court orders. The DPP took the view that there was no such inconsistency.

The account allegedly given by the defendant to investigators when first questioned was used to decline to withdraw charges in two matters as the defence applications were based on claims that were contrary to the alleged admissions. One of these was a case of not complying with the conditions of a restricted licence where the driver of a manual vehicle had a licence to drive only automatic cars.\(^{1066}\) Whilst it was common ground that there were others in the vehicle when the defendant was stopped, the police claimed that when the defendant was asked about the presence of an accompanying driver, he said ‘no comment.’ This was seen to be inconsistent with the subsequent claim to having been accompanied by a fully licensed driver. The other instance of apparent

\(^{1063}\) Matter 61 in *Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.*

\(^{1064}\) Matter 68 in *Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.*

\(^{1065}\) Matter 75 in *Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.*

\(^{1066}\) Matter 14 in *Table 16 Campbelltown Pilot cases where the DPP decided to proceed.*
conflict between admissions and the defence submission was a charge of cruelty to animals. The DPP noted that the admissions were inconsistent with the later defence account and declined to withdraw the charge.\footnote{Matter 16 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.}

In one case involving factual dispute, the charge was one of possessing goods suspected of being stolen (goods in custody). The defence produced a receipt to the DPP for some of the property charged. That was accepted for that part of the charge only and the matter proceeded on the basis of the remaining property for which the defendant could not reasonably account.\footnote{Matter 18 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.}

The defence claimed that an assault charge was trivial where the allegation involved neighbours and the defendant had grabbed the victim hit him to the chin and pushed him. The DPP proceeded with the case.\footnote{Matter 19 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.}

In one charge of offensive language, the defence claimed the language was used in reaction to police delay in answering a call to investigate an incident. The matter had progressed to the stage where the defendant had lodged formal complaints against the police involved.\footnote{Matter 21 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.}

The defence in one case of drive whilst disqualified claimed honest and reasonable mistake of fact.\footnote{Matter 10 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.} The DPP allowed the matter to proceed. In another case the defence argued that the prosecution could not prove intent as the evidence showed their client was merely present in relation to an allegation of malicious damage. The DPP took the view that common purpose was available, as there was evidence that all four defendants had been involved in damaging the vehicle.\footnote{Matter 13 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.}

In the one defence application based on considerations personal to the accused, the charge was one of stealing batteries worth $8.50. The defendant was 72 years of age and
it was claimed he was in poor health. The DPP took the view that there was a prevailing public interest in the prosecution of the defendant.\textsuperscript{1073}

**DPP Officer requests for withdrawal by charge category.**

In 96 instances the request to consider withdrawal was made by a DPP review officer. Of these requests, 65 led to the withdrawal of the charge. These cases are considered below according to the principal charge category.

**Assault charges considered for withdrawal by DPP officers**

There were 41 assault charges considered by DPP officers for withdrawal. In 17 of these cases the charge proceeded. In 24 cases the charge was withdrawn. The single most reported reason for considering withdrawal was the request of the victim not to proceed. This was reported in 28 cases. Of those 28 victim requests, 14 were successful and 14 were not. The following section details the cases where the victim was seeking the withdrawal of assault charges.

- **Assault charges withdrawn according to the victim’s wish**

In assault cases reviewed by the DPP and subsequently withdrawn, there were two in which the victim resiled from the evidence they were expected to give. In matter 48, the victim’s retraction amounted to an admission of having made a false allegation. In matter 106, the victim was the wife of the defendant and she claimed that her police statement was false and had then lodged a complaint to the Attorney General against the DPP for alleged intimidation in seeking to withdraw the original complaint.

Two matters (46 and 49) were withdrawn because police could not locate the victim at the time of the hearing. In matter number 47 the defendant was developmentally disabled the victim claimed to have no recollection of the matter and the police had not obtained a statement at the time of the arrest. Matter number 56 involved a long-running Family Law dispute where there had been pushing and punching between the defendant and victim. It was decided that there was no way of telling who was the aggressor as there was no independent witness.

\textsuperscript{1073} Matter 22 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.
The Director resolved matter number 104 on the basis that the defendant consented to the making of an apprehended personal violence order. The victim had sought to have the matter withdrawn and described getting a bloody nose in a struggle with the defendant following his entry into her home by breaking. No mention had been made of the bloody nose in her original statement to police. The police informant opposed the withdrawal of the charge.

The victim was incapable of giving evidence in matter 50. The victim was a 6-year-old developmentally disabled girl. There was no other witness to the assault and the defendant had not made any admissions.

In matter number 57 the defendant (A) was with a friend (B) when the friend’s father (C) assaulted the friend (B) and the defendant (A) intervened by grabbing the father (C) while the friend (B) hit his father (C). No action had been taken against the father or the son and it was decided that it was unfair to proceed against the defendant alone.

Matter number 55 involved a cross-action for assault by a male spouse. He had been discredited in related proceedings where he was the defendant concerning the same incident.

- **Assault charges proceeded with over the victim’s application to withdraw**

Of the three other assault charges considered for withdrawal and directed to proceed, one matter was reviewed on the basis that there was no statement from the victim. The charge was to proceed as a neighbour had witnessed the assault.\(^{1074}\) In two cases each victim resiled from their police statement. In matter number 27 the victim gave a different account of the incident in a bail application on behalf of the defendant. In matter number 6 the victim produced a second statement inconsistent with the police statement. In both cases the defendant had a long history of violence and the cases were to proceed.

\(^{1074}\) Matter 4 in *Table 16 Campbelltown Pilot cases where the DPP decided to proceed.*
• Assault occasioning bodily harm charges considered for withdrawal by DPP officers
There were five charges of assault occasioning actual bodily harm considered and in four of these the charge was withdrawn.

• Apprehended Violence Order matters considered for withdrawal by DPP officers
There were five allegations of breach of apprehended personal violence orders considered for withdrawal. Four involved victim requests for withdrawal and of these two were directed to proceed and two were withdrawn. The other case involved a charge, which had been wrongly laid, as the original AVO had not been served at the time of the alleged breach.1075

The victim in matter 109 requested that breach action be withdrawn in circumstances where the defendant had been admitted to the premises in the past under the terms of an order, which was replaced by a more restricted order one week prior to the alleged breach. The defendant had attended the premises to obtain keys and clothes.

In matter 110 words were used against the victim in breach of an order. The victim wanted the matter withdrawn and it was on the basis that a fresh order was made. The breach action was directed to continue in matter 38 where pressure on the victim was suspected and in matter 39 where there was a history of abuse.

Driving charges considered for withdrawal by DPP officers
Of the ten driving related charges, seven were withdrawn and three proceeded. The reasons for withdrawing were that in two cases the issues were decided otherwise.1076 The other cases involved the wrong defendant,1077 no victim statement,1078 change in evidence,1079 no way of determining the truth,1080 and no proof.1081 Of the three matters

1075 Matter 58 in Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.
1076 Matters 62 and 83 in Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.
1077 Matter 64 in Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.
1078 Matter 54 in Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.
1079 Matter 71 in Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.
proceeded with, two concerned issues personal to the accused\textsuperscript{1082} and one the status of driving in exiting a private car park.\textsuperscript{1083}

**Malicious damage charges considered for withdrawal by DPP officers**

There were four malicious damage charges considered by the DPP for withdrawal. Two were considered because the victim did not wish to give evidence and these were to proceed on the basis in one case, that the police observed the offending behaviour,\textsuperscript{1084} and in the other, that there was another independent witness.\textsuperscript{1085} Two cases were withdrawn on the basis that the offending behaviour was accompanied by an intention to assault rather than to damage property.\textsuperscript{1086}

**Other charge categories**

The other matters considered for withdrawal by DPP officers fell into the following charge categories: drugs, intimidation, parking, fare evasion, break and enter, and fail to appear.

One matter to be withdrawn following defence representations involved a charge of breach of an apprehended violence order. It was perhaps, not surprising that the application was successful. The magistrate had commenced hearing the case and suggested that the defendant make the approach after evidence was presented that the defendant had moved to Queensland. The defendant and the protected person had been neighbours and they had been in dispute because of an allegation of an affair by the protected person with the spouse of the defendant.

**Matters decided by the Director or Deputy Director.**

In those matters considered for withdrawal where the police objected to withdrawal of a charge (or for some other reason police agreement could not be obtained) were referred
to the Director or Deputy Director. Nearly half the matters requiring this level of intervention were for assault with six out of fourteen cases, followed by traffic charges with three cases. There was one case referred to the Director for each of the charge categories of larceny, offensive language, ride bicycle negligently, stalk and intimidation. In all, thirteen of the fourteen cases referred to the Director’s Office were withdrawn and one was directed to proceed. The offensive language charge was directed to proceed. This was a charge referred to above, where the defence had sought withdrawal on the basis that the defendant only used the language at the police because of the delay in the police attending an incident.

1087  Matter 89 in Table 17 Campbelltown Pilot cases where the DPP decided to withdraw.
1088  Matter 21 in Table 16 Campbelltown Pilot cases where the DPP decided to proceed.
### Table 16 Campbelltown Pilot cases where the DPP decided to proceed

<table>
<thead>
<tr>
<th>No.</th>
<th>EFPV(^{1089})</th>
<th>Charge category</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>not indicated</td>
<td>not indicated</td>
<td>not indicated</td>
</tr>
<tr>
<td>2</td>
<td>not indicated</td>
<td>not indicated</td>
<td>identification sufficient to proceed</td>
</tr>
<tr>
<td>3</td>
<td>not indicated</td>
<td>E assault</td>
<td>no victim statement, neighbour disturbs defendant hitting victim whilst lying over her, striking face, defendant returned to his premises screaming heard</td>
</tr>
<tr>
<td>4</td>
<td>F AVO</td>
<td>victim unable to be located, police application, no power to terminate on police application</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>F assault</td>
<td>victim produces second statement inconsistent with first, long history of domestic violence</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>F BEI (steal)</td>
<td>defendant found in premises and says it is a friend’s place which he entered to have a sleep, window broken, could not name friend</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>F br AVO</td>
<td>inconsistency alleged between AVO and family court orders – DPP rejected that there was any inconsistency</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>F drive</td>
<td>defendant leaving car park and ran into path of vehicle in street</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>F dwd, o/l</td>
<td>defendant indicate honest and reasonable mistake, defendant says he could drive</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>F exceed speed</td>
<td>170 kph alleged, defendant admits 150, radar evidence, history of speeding</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>F mal dam</td>
<td>mistaken identity, other witness states identity of perpetrator</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>F mal dam assault</td>
<td>common purpose available all 4 involved in damage to vehicle</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>F not comply with restricted licence (automatic)</td>
<td>defendant claims accompanied by fully licensed driver, others in car but police say defendant said ‘no reply’ to questions about accompanying driver</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>F RSPCA</td>
<td>‘grave allegation’ by RSPCA, no reason to withdraw on what defendant says</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>F RSPCA</td>
<td>defendant application - inconsistent with admissions, no basis to distinguish</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>F unlawful entry</td>
<td>defendant found asleep in a classroom, gives account of his bag being stolen and of him chasing the offender to the schoolroom and falling asleep there</td>
<td></td>
</tr>
</tbody>
</table>

\(^{1089}\) The symbols used and their meaning are: E = Evidential difficulty, F = Factual difficulty, p. = Public Interest Issue and v = Victim request.
<table>
<thead>
<tr>
<th>No.</th>
<th>Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>18.</td>
<td>F</td>
<td>receipt and statutory declaration accepted in relation to video only, other property charge to proceed</td>
</tr>
<tr>
<td>19.</td>
<td>P</td>
<td>assault defendant application, trivial, neighbour dispute, grabbing, hit to chin and pushing</td>
</tr>
<tr>
<td>20.</td>
<td>P</td>
<td>drive accident with no injuries, defendant had long history without offences</td>
</tr>
<tr>
<td>21.</td>
<td>P</td>
<td>offensive defendant application, abuse in reaction to police delay in attending scene, complaints against police</td>
</tr>
<tr>
<td>22.</td>
<td>P</td>
<td>stealing health of defendant raised, 72 yr. old, public interest in prosecution - Batteries $8.50</td>
</tr>
<tr>
<td>23.</td>
<td>V</td>
<td>aoabh defendant punched victim to face knocking out tooth, victim saying matter should be left in pub</td>
</tr>
<tr>
<td>24.</td>
<td>V</td>
<td>assault previous assault on same victim, grabbed hair dragged to ground held hammer in a threatening manner</td>
</tr>
<tr>
<td>25.</td>
<td>V</td>
<td>assault domestic violence, victim 18 yr. son of defendant, intervened in fight between parents, father kicked and punched, history of family violence son seeking not to proceed</td>
</tr>
<tr>
<td>26.</td>
<td>V</td>
<td>assault defendant pushed wife down on bed went to hit her but struck infant son, intoxicated, victim reluctant, admissions to assault on wife, criminal history</td>
</tr>
<tr>
<td>27.</td>
<td>V</td>
<td>assault victim unfavourable, gives different account on bail application, defendant history of violence</td>
</tr>
<tr>
<td>28.</td>
<td>V</td>
<td>assault victim not wishing to take time off work, police observed assault</td>
</tr>
<tr>
<td>29.</td>
<td>V</td>
<td>assault victim request, evidence available from victim’s father, victim pregnant at time, grabbing victim’s arms and pushing to ground</td>
</tr>
<tr>
<td>30.</td>
<td>V</td>
<td>assault victim grabbed by defendant, bitten on forearm, grabbed to throat, attempted to swing around, blouse ripped, victim request to withdraw, history of violence</td>
</tr>
<tr>
<td>31.</td>
<td>V</td>
<td>assault victim application, not isolated instance, hands around throat to choke, attempt to hit - striking baby being fed at time</td>
</tr>
<tr>
<td>32.</td>
<td>V</td>
<td>assault victim application, assault on granddaughter 16, slap, punch scuffle, grabbed ankle, victim refused to go to bed at 7.30, police objects</td>
</tr>
<tr>
<td>33.</td>
<td>V</td>
<td>assault victim request to withdraw, history of violence, victim compellable, called victim disgusting pig, whore and liar, spat at her, and threw a pot plant showering dirt on baby being held at the time, pulled hair, slapped to head kicked to shin</td>
</tr>
</tbody>
</table>

1090 Deputy Director 1.
<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>34.</strong></td>
<td>V</td>
<td>assault</td>
<td>x 2, br AVO</td>
</tr>
<tr>
<td></td>
<td></td>
<td>history of violence victim 9 months pregnant, pushed, grabbed by arms shaken, pushed, hit to arms and chest, alleged by defendant that victim reluctant to proceed, victim told by defendant would be given permission to take son to Philippines if charge dropped, threatening behaviour at court</td>
<td></td>
</tr>
<tr>
<td><strong>35.</strong></td>
<td>V</td>
<td>assault</td>
<td>x 2, resist, o/l</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2 daughters assaulted, mother seeking withdrawal, alcohol involved 6 yr. old plate pushed into chest and thrown by neck, 13 yr. old grabbed and thrown down stairs, public interest in protecting children</td>
<td></td>
</tr>
<tr>
<td><strong>36.</strong></td>
<td>V</td>
<td>assault</td>
<td>AVO</td>
</tr>
<tr>
<td></td>
<td></td>
<td>62 yr. old step father victim not wishing to proceed, knife produced, striking</td>
<td></td>
</tr>
<tr>
<td><strong>37.</strong></td>
<td>V</td>
<td>assault</td>
<td>AVO</td>
</tr>
<tr>
<td></td>
<td></td>
<td>victim reluctant, head injuries involved</td>
<td></td>
</tr>
<tr>
<td><strong>38.</strong></td>
<td>V</td>
<td>br AVO</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>victim not wishing to proceed, harassment alleged locking away clothes and locking doors, pressure on victim suspected</td>
<td></td>
</tr>
<tr>
<td><strong>39.</strong></td>
<td>V</td>
<td>br AVO</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>victim application, argument - threw key at victim, order made in August, for 2 years, history of abuse, statement available</td>
<td></td>
</tr>
<tr>
<td><strong>40.</strong></td>
<td>V</td>
<td>mal dam</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>victim mother of defendant, seeking to withdraw, police witnessed some damage</td>
<td></td>
</tr>
<tr>
<td><strong>41.</strong></td>
<td>V</td>
<td>mal dam</td>
<td>unlawful entry, possess offensive implement</td>
</tr>
<tr>
<td></td>
<td></td>
<td>65 yr. old owner not wishing to proceed, could continue with evidence of other boy present</td>
<td></td>
</tr>
<tr>
<td><strong>42.</strong></td>
<td>V</td>
<td>resist, intimidation, assault</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>victim request to withdraw, defendant 17 yr., assault on 3 occasions</td>
<td></td>
</tr>
</tbody>
</table>
### Table 17 Campbelltown Pilot cases where the DPP decided to withdraw

<table>
<thead>
<tr>
<th>No.</th>
<th>EFPV</th>
<th>Charge category</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>43.</td>
<td></td>
<td>not indicated</td>
<td>not indicated</td>
</tr>
<tr>
<td>44.</td>
<td></td>
<td>not indicated</td>
<td>not indicated</td>
</tr>
<tr>
<td>45.</td>
<td></td>
<td>not indicated</td>
<td>victim wishing not to proceed, related to AVO matter</td>
</tr>
<tr>
<td>46.</td>
<td>E</td>
<td>Aoabh</td>
<td>victim not able to be located</td>
</tr>
<tr>
<td>47.</td>
<td>E</td>
<td>Assault</td>
<td>17 yr. old developmentally disabled defendant pushed niece to floor, no statements from witnesses at time, no recollection</td>
</tr>
<tr>
<td>48.</td>
<td>E</td>
<td>assault</td>
<td>retraction amounting to admission of false allegation</td>
</tr>
<tr>
<td>49.</td>
<td>E</td>
<td>assault</td>
<td>victim unable to be located by police</td>
</tr>
<tr>
<td>50.</td>
<td>E</td>
<td>assault</td>
<td>6 yr. old developmentally disabled victim, incapable of giving evidence</td>
</tr>
<tr>
<td>51.</td>
<td>E</td>
<td>assault</td>
<td>victim 14 application to withdraw, victim in custody no process issued, hearing re assault on mother proceeded</td>
</tr>
<tr>
<td>52.</td>
<td>E</td>
<td>assault</td>
<td>victim not located, no statements</td>
</tr>
<tr>
<td></td>
<td></td>
<td>x 2, br AVO x 2, enter encl. lands</td>
<td></td>
</tr>
<tr>
<td>53.</td>
<td>E</td>
<td>BES</td>
<td>no statement from owner who did not attend on hearing date</td>
</tr>
<tr>
<td>54.</td>
<td>E</td>
<td>driving</td>
<td>no victim statement, self defence raised</td>
</tr>
<tr>
<td></td>
<td></td>
<td>mal dam1092</td>
<td></td>
</tr>
<tr>
<td>55.</td>
<td>F</td>
<td>assault</td>
<td>cross assault in domestic situation, on hearing against male defendant he was discredited, this female defendant’s version preferred</td>
</tr>
<tr>
<td>56.</td>
<td>F</td>
<td>assault</td>
<td>pushing and punching, long running Family Law dispute no way of determining who was aggressor, no independent witnesses</td>
</tr>
<tr>
<td>57.</td>
<td>F</td>
<td>assault</td>
<td>defendant with friend when friend assaulted by father, son hitting father, defendant grabbed father saying no more, no action against son, mal dam to proceed</td>
</tr>
<tr>
<td>58.</td>
<td>F</td>
<td>br AVO</td>
<td>charge wrongly laid, AVO not served</td>
</tr>
</tbody>
</table>

1091 E = Evidential difficulty, F = Factual difficulty, p. = Public Interest Issue and v = Victim request.
1092 Deputy Director 1.
59. F custody of an offensive implement (others) bat allegedly used in assault not located, injury not consistent with bat, subsumed in assault charge

60. F drive manner dangerous causing GBH, negligent driving causing GBH1093 defendant entered intersection on amber light and collided with car turning across her path, conflicting evidence

61. F drive negligently causing GBH police application, road affected by oil smear from truck overturning, collision when defendant was changing lanes and got into a skid

62. F drive negligently causing GBH convicted of attempt to pervert the course of justice - claiming driver when wasn't

63. F drive negligently unlicensed no proof driver, no prospect of conviction

64. F driving wrong defendant

65. F evade fare no id evidence

66. F fail to appear warrant issued twice, this was second

67. F fail to appear charged in error, on CAN (court attendance notice) not bail

68. F fail to stop and report accident no evidence of damage in excess of $500, minor damage

69. F fare evasion ticket lost and later found and produced to SRA

70. F GIC defendant produces evidence by statutory declaration and receipt for purchase at auction

71. F illegal use1094 owner changed evidence, permission conceded

72. F larceny1095 insufficient evidence, admission equivocal, mere presence 1/2 hr after stealing

73. F mal dam bundle of papers thrown at worker in Intensive Care Unit, hit window Kippist v Parnell (1988) 36 A Crim R 18 no case

74. F mal dam br AVO assault - breach of existing order, following argument defendant kicked victim, then threw car seat at her smashing window

1093 Deputy Director 2.
1094 The charges of drive in a manner dangerous, negligent driving, unaccompanied driver, no licence, larceny, plates calculated to deceive.
1095 Deputy Director 1.
75. F  offensive conduct  urinated in charge room following arrest for mal dam, not appropriate charge charge-room not enclosed land visible to the public

76. F  on SRA premises SRA inspector left service not able to be contacted SRA seek withdrawal
interfere with comfort of passengers

77. F  possess equipment to administer a prohibited drug in prison
other person admits ownership of property and to be charged

78. F  possess prohibited drug. plea accepted to possession by another, joint possession not alleged, no evidence of actual possession GIC

79. F  stand contrary to notice vehicle sold, now out of time

80. F  stand in bus zone informant no recollection, defendant claims reps lost by police, no way to prove case

81. F  supply pd no offence, no representation by defendant that material was a drug and material tested and found not to be a drug - magnesium sulphate - plea reversal

82. F  take or be carried in stolen car Defendant was in a vehicle that was subsequently identified to him as being stolen,

83. F  unreg./ uninsured previous cases of PCA and drive disqualified dismissed same issues

84. P  assault police (other charges) plea of guilty to other charges of mal dam and resist

85. P  br AVO neighbours - allegation of affair, defendant transferred to Queensland, Magistrate invited consideration

86. P  intimidation AVO in lieu, minor offence, defendant chronic paranoid schizophrenic

87. P  intimidation mutual AVO made, calling on phone, driving past, threats to kill, following victim.

88. P  offensive Language resist (other charges) other charges in lieu

1096 Deputy Director 2.
<table>
<thead>
<tr>
<th>No.</th>
<th>Verdict</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>89.</td>
<td>P</td>
<td>ride negligently bicycle trivial, 17 yr. old, hit median strip and fell from bike</td>
</tr>
<tr>
<td>90.</td>
<td>V</td>
<td>aoabh black eye, threat with knife, domestic situation victim unwilling to proceed, jeopardise family reunification, one-off incident</td>
</tr>
<tr>
<td>91.</td>
<td>V</td>
<td>aoabh, assault victim male Dr seeking to withdraw, domestic dispute with wife who swung at him with plate and hit him</td>
</tr>
<tr>
<td>92.</td>
<td>V</td>
<td>aoabh, assault 26 yr. old son of victim, long history of domestic violence between parents, violent behaviour of father at mother's home, hit with iron bar stitches to head</td>
</tr>
<tr>
<td>93.</td>
<td>V</td>
<td>AVO victim threw slipper at defendant, defendant screamed at victim, trivial, victim unwilling to proceed</td>
</tr>
<tr>
<td>94.</td>
<td>V</td>
<td>assault minor incident, victim not wishing to proceed, victim holding car as defendant attempted to leave, car moved victim fell to ground</td>
</tr>
<tr>
<td>95.</td>
<td>V</td>
<td>assault domestic assault on victim outside police station by punching through window of car, pulling from car and kicking, victim reluctant fearing repercussions and saying would return to UK</td>
</tr>
<tr>
<td>96.</td>
<td>V</td>
<td>assault victim not wishing to proceed, punching, pushing, victim split lip, AVO entered</td>
</tr>
<tr>
<td>97.</td>
<td>V</td>
<td>assault victim wishes, pulling hair, hitting with phone, defendant has Alzheimer's mother of victim</td>
</tr>
<tr>
<td>98.</td>
<td>V</td>
<td>assault defendant father of victim (17), pulling, pushing, throwing to ground, reconciled</td>
</tr>
<tr>
<td>99.</td>
<td>V</td>
<td>assault defendant flicked knife at victim, no injury, victim not wishing to proceed</td>
</tr>
<tr>
<td>100.</td>
<td>V</td>
<td>assault victim 16 yr. seeks withdrawal, assault by father of another boy with whom defendant involved in scuffle, victim's father in de-facto relationship with defendant's former spouse. custody dispute ongoing, pushing hands around throat - &quot;if you ever touch my kids again you're dead&quot;</td>
</tr>
<tr>
<td>101.</td>
<td>V</td>
<td>assault victim pushed from stopped car, abused, pushed down stairs, juice poured over and spat in face, victim not wishing to proceed, isolated incident</td>
</tr>
<tr>
<td>102.</td>
<td>V</td>
<td>assault victim seeking termination, argument victim trying to flush defendant's clothes down toilet, defendant grabbed victim pulling at her, she fell to floor and struck head, minor assault</td>
</tr>
</tbody>
</table>

---

1. Deputy Director
103. V assault  
victim request, isolated incident, apparently genuine reconciliation, concern re history of defendant, push and punch to face

104. V assault  
victim request, AVO application sought, bloody nose alleged in hearing - no previous suggestion of this

105. V assault  
assault by daughter spitting in mother's face, reconciled, victim application to withdraw, informant objects

106. V assault  
victim wife of defendant, slap to mouth and striking to head, evidence of pressure on victim at court from family, victim claims her statement is false, complaint to AG about alleged DPP intimidation for warning victim re saying she gave a false statement

107. V assault  
victim suicidal, suffering cancer, had had surgery to breast and throat, this assault by striking in area of mastectomy scars

108. V assault  
victim wishes, minor assault, grabbing to throat

109. V br AVO  
victim sought withdrawal, defendant allowed in by victim under order revoked 1 week prior to breach, defendant attended to get clothes

110. V br AVO  
minor breach, victim not wishing to proceed, words "you are a red-headed fucking bastard, I'll kill you", further AVO made

111. V stalking  
victim not wishing to proceed, minor incidents, relationship re-established, other charges recognizances

1101 Decided by the DPP.
1102 Decided by the DPP.
1103 Deputy Director 1.
1104 Deputy Director 1.
The Summary Prosecution Pilot - Dubbo Local Court – some general issues

The Dubbo police also expressed substantive concerns during the Pilot such as that informant officers should control their own cases because they were potentially liable should the charge fail.\textsuperscript{1105} The legitimacy of DPP review and withdrawal of cases was challenged on the basis that the court was the only proper authority for deciding whether a case is proved or not. The DPP was criticised for not taking into account local policing demands. The police were also concerned that the DPP did not protect police interests. There were conflicts concerning the police decision to charge and the exercise of police discretion on the street leading to charges.

Process

In preparing for the Pilot the Dubbo police court process unit had difficulty getting ready and did not have the briefs available for those cases listed for hearing during the Pilot period prior to the Pilot starting.\textsuperscript{1106} As indicated earlier, the police did not supply a copy of the summons in summons cases and it was confirmed with police prosecutors that this often led to problems with defective summonses.\textsuperscript{1107} It was also discovered that notations on police prosecutor’s papers did not always come to the attention of the OIC so that in one case, arrangements were not made for witnesses to attend.\textsuperscript{1108}

The police-DPP relationship

A police officer reported to the DPP that he had been told that the DPP ‘required all police in all matters to attend at court.’\textsuperscript{1109} This was not the case. In one case involving an indictable charge, the DPP had substituted a charge of possess offensive weapon with intent to commit an indictable offence for a charge of use weapon both under section 33B of the \textit{Crimes Act 1900} (NSW). The officer in charge formerly from Cobar (but then stationed in Dorrigo) had been forwarded a form to fill out a complaint to the Special Operations and

\begin{itemize}
  \item \textsuperscript{1105} Bailey, C., ‘Pilot Notebook’, 1996b.
  \item \textsuperscript{1106} ibid. 25/6/96 at pp. 1-3.
  \item \textsuperscript{1107} ibid. 29/7/96 at pp. 8.
  \item \textsuperscript{1108} In this case it was a requirement that Dr Perl of the Forensic Evidence Unit attend. ibid. 10/9/96 at pp. 8-9.
  \item \textsuperscript{1109} ibid. 2/7/96 at p. 3.
\end{itemize}
Projects Division of the Premier’s Department (SPOD) concerning the conduct of the Pilot, even though the matter proceeded and in any event, concerned an indictable offence.\footnote{ibid. 31/10/96 at p. 17.}

The Police forwarded at least one request for operational advice during the Pilot. The request for advice concerned a person who was being prosecuted by the DPP but was for operational advice in matters not subject to a charge. The request for advice was forwarded to the Police Legal Services Branch.\footnote{ibid. 4/11/96 at p. 18.}

**Disclosure**

Traffic Technology Section personnel based at Parramatta would not provide statements of their evidence but would attend court in failure to provide sufficient breath sample cases and listen to the evidence before giving an opinion.\footnote{ibid. 12/7/96 at pp. 4-5.} In that particular matter one of the officers involved had left the service and would not attend court as he was not issued a subpoena in time and the other officer was on sick leave. The police officer assigned the case agreed that the DPP offer to accept a plea to negligent driving.\footnote{ibid. 17/7/96 at p. 5.} Later, on the day before the case was to be heard the Forensic Medicine Section contacted the DPP to confirm that Dr Perl would attend the next day. There was no indication to the DPP that Dr Perl was to be called and there was no witness statement from her.

In another case a disclosure certificate indicated there was ‘no other document, material or information relevant to the prosecution or defence’ when the police were aware of a civilian witness who could give evidence of the defendant being in certain premises at the time of an alleged burglary.\footnote{ibid. 22/10/96 at p. 17.}
Other police practices

In a case involving the highway patrol, the officer had made a notebook entry of a conversation on which the prosecution case was based. The officer had not sought that the notebook entry be adopted. When the DPP advised the officer to do this as a matter of course the officer said that it had never been suggested that he should do that.1115 In another case the police officer alleged the defendant had made an admission to the effect ‘that’s all that I took’ in relation to larceny and goods in custody and receiving charges. The ‘admission’ was recorded in the ‘facts’ prepared by the officer but not in his own statement of evidence.1116

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1115 ibid. 18/7/96 at p.7.
1116 ibid. 14/10/96 at p. 12.
Appendix C - Extract from the Prosecution Policy and Guidelines of the NSW DPP

Appendix C – Extract from the Prosecution Policy and Guidelines of the NSW DPP.

‘5. The Decision to Prosecute

[Guideline 3]

The prosecution process is usually enlivened by a suspicion, an allegation or a confession. Not every one, however, will result in a prosecution.

‘It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute ‘wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.’ That is still the dominant consideration.’

(Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951.)

That statement applies equally to the position in New South Wales. The public interest is the paramount concern.

The primary question is whether or not the public interest requires that a matter be prosecuted. That question is resolved by determining:

1. whether or not the admissible evidence available is capable of establishing each element of the offence;

2. whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not

3. whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

The first matter requires no elaboration: it is the prima facie case test.

The second matter requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the Crown case in light of the anticipated course of proceedings, including the circumstances in which they will take place. It is a test appropriate for both indictable and summary charges.
The third matter requires consideration of many factors which may include the following:

a) the seriousness or, conversely, the triviality of the alleged offence; or that it is of a ‘technical’ nature only;

b) the obsolescence or obscurity of the law;

c) whether or not the prosecution would be perceived as counter-productive, for example by bringing the law into disrepute;

d) special circumstances that would prevent a fair trial from being conducted;

e) whether or not the alleged offence is of considerable public concern;

f) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts;

g) the staleness of the alleged offence;

h) the prevalence of the alleged offence and any need for deterrence, both personal and general;

i) the availability and efficacy of any alternatives to prosecution;

j) whether or not the alleged offence is triable only on indictment;

k) the likely length and expense of a trial;

l) whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory;

m) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

n) whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh and oppressive;

o) the degree of culpability of the alleged offender in connection with the offence;

p) any mitigating or aggravating circumstances;

q) the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim;

r) the alleged offender’s antecedents and background, including culture and language ability;

s) whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
t) the attitude to a prosecution of a victim or in some cases a material witness;

u) any entitlement or liability of a victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken; and/or

v) whether or not the Attorney General’s or Director’s consent is required to prosecute.

The applicability of and weight to be given to these and other factors will vary widely and depend on the particular circumstances of each case.

A decision whether or not to proceed must not be influenced by:

i. the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the alleged offence or should otherwise be taken into account objectively);

ii. personal feelings of the prosecutor concerning the offence, the alleged offender or a victim;

iii. possible political advantage or disadvantage to the government or any political party, group or individual; or

iv. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct.

It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution, including diversionary procedures, should always be considered.'
Appendix D – European Prosecution Arrangements

A survey of European systems of summary prosecution based on the study *Victims of Crime in 22 European Criminal Justice Systems*[^1117]

<table>
<thead>
<tr>
<th>Country</th>
<th>Principle</th>
<th>Judicial Pros</th>
<th>Police Pros</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Legality[^1118]</td>
<td>Executive</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>Legality[^1119]</td>
<td>Judicial</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>Expediency</td>
<td>Executive</td>
<td>Yes</td>
<td>Uniformed police officer with a law degree moving to control of AG’s</td>
</tr>
<tr>
<td>Denmark</td>
<td>Expediency[^1120]</td>
<td>Executive</td>
<td>Yes</td>
<td>Answers to DPP and local Chief of Police</td>
</tr>
<tr>
<td>England and</td>
<td>Expediency[^1121]</td>
<td>Executive</td>
<td>No</td>
<td>CPS introduced in 1986</td>
</tr>
<tr>
<td>Wales</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Expediency</td>
<td></td>
<td>Yes[^1122]</td>
<td></td>
</tr>
</tbody>
</table>


[^1118]: With increasing use of diversionary methods from 1999 for adult offenders.

[^1119]: De-facto operation on principle of expediency.

[^1120]: The criminal process is described as being a search for the truth.


[^1122]: Although not mentioned by Brienen *et al.*, Commissaires de police prosecute in the Tribunal de Police (which is roughly equivalent to the Local Court). See also the procedure for using a diversionary ‘penal order’ *ordonnance penale* where a prosecutor submits a proposed penalty to a judge for approval and this penalty may be accepted by the defendant to avoid court proceedings.
<table>
<thead>
<tr>
<th>Country</th>
<th>Legality</th>
<th>Expediency</th>
<th>Executive</th>
<th>Judicial</th>
<th>Prosecution Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>Legality</td>
<td>Judicial</td>
<td>No</td>
<td></td>
<td>Police work at the direction of the public prosecutors</td>
</tr>
<tr>
<td>Iceland</td>
<td>Expediency</td>
<td>Executive</td>
<td>Yes</td>
<td></td>
<td>ODPP for serious cases. Police prosecutors with law degrees re-introduced in 1997 on the basis of the efficiency of one agency handling minor cases</td>
</tr>
<tr>
<td>Ireland</td>
<td>Expediency</td>
<td>Executive</td>
<td>Yes</td>
<td></td>
<td>DPP oversees the State Solicitor who briefs private counsel in serious cases</td>
</tr>
<tr>
<td>Italy</td>
<td>Legality, adopting adversarial principles</td>
<td>Executive</td>
<td>No</td>
<td></td>
<td>Public prosecutor gathers evidence, pre-trial magistrate controls judicial investigation and judge pronounces sentence</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>Legality</td>
<td>Executive?</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Expediency</td>
<td>Executive?</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td>Expediency?</td>
<td>Executive</td>
<td>Yes</td>
<td></td>
<td>Magistrate has an investigative role</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Expediency</td>
<td>Judicial</td>
<td>No</td>
<td></td>
<td>Prosecutor may always waive the right to prosecute</td>
</tr>
<tr>
<td>Norway</td>
<td>Expediency</td>
<td>Executive</td>
<td>Yes</td>
<td></td>
<td>Police prosecutors are located with the police but are under the authority of the Director General of Public Prosecutions</td>
</tr>
<tr>
<td>Portugal</td>
<td>Legality</td>
<td>Executive</td>
<td>No</td>
<td></td>
<td>Division into public, semi-public and private crimes</td>
</tr>
<tr>
<td>Scotland</td>
<td>Expediency</td>
<td>Executive</td>
<td>No</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1123 Diluted by the court's power to sanction the prosecutor to not proceed with charges where the guilt is minimal and it is not in the public interest to prosecute, or where the accused meets a stipulated requirement for non-prosecution, or where a sentence bargain takes place.
1124 There is also a procedure for using a diversionary 'penal order' *Stafbefehl* where a prosecutor submits a proposed penalty to a judge for approval and this penalty may be accepted by the defendant to avoid court proceedings. See Joachinski, J., 'Criminal Procedure in Germany' Lecture delivered in Vilnius, Lithuania, February 1999. <www.joachinski.de/StPO/Rechtsvergleich/rechtsvergleich.html> 16 October 2002.
1125 Except unofficially for petty offences. There is no plea-bargaining.
1126 An adversarial system based on trial avoidance.
1127 Although called the 'judicial police.'
1128 Search for the truth.
1129 Adopting accusatorial proceedings.
<table>
<thead>
<tr>
<th>Country</th>
<th>Legality</th>
<th>Executive</th>
<th>Status</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spain</td>
<td>Legality</td>
<td>Executive</td>
<td>No</td>
<td>Prosecutor are separate from the examining magistrates and have no real discretionary powers</td>
</tr>
<tr>
<td>Sweden</td>
<td>Legality 1130</td>
<td>Executive</td>
<td>No</td>
<td>At a local level the District Attorney is an elected office and legal qualifications are not required</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Legality</td>
<td>Executive</td>
<td>No</td>
<td>Prosecutors are under the authority of the Minister of Justice or of City Governors</td>
</tr>
</tbody>
</table>

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1131 With a mix of adversarial and inquisitorial processes.

1132 With a mix of adversarial and inquisitorial processes.
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