

Law and Regulation

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19. Law and Regulation

Mark Finnane

Legal institutions were scarcely visible at the founding of New South Wales. It was nearly half a century before the scope of the legal authority claimed by the British settlers over the country's Indigenous inhabitants was determined.¹ Law meant different things to settlers and Indigenous peoples. For the latter, as settlers were only slowly to discover, life and law intersected, over-lapped, and were inseparable. Law was comprehensive and normative in ways that settlers could not imagine and failed to appreciate. For settlers, law was mutable, its claims over lives and ways of living expanding and contracting as modernity was in process. It was also a weapon that individuals could wield against each other, a shield that might repel the harms directed by others, even by those in authority, against those who had few of the world's resources. Law also meant different things to those in power and those without. In the first century of Australian settlement law was the twin of government, sometimes its critic, at others its instrument. The nineteenth century proved a creative era for law in the scope of regulation, in the reform and refinement of its penalties and in the design of its institutions. But that was only possible after the taking of the country from its first peoples.

Martial Law

Dispossession proceeded with the aid of military force, and occasionally under the warrant of that emergency act of executive government, martial law. While even in a penal colony, the military remained accountable to law for their actions, martial law rendered immune from prosecution the actions of agents of government. Its deployment against both Indigenous resistance and rebellious settlers signalled the fragility of authority at critical stages of the

colonial period. In March 1804 a rebellion west of Sydney by mainly Irish convicts was put down by soldiers despatched by Governor King under a declaration of martial law. The extraordinary conditions created by a marauding gang of bushrangers in Van Diemen's Land in 1814, prompted Lieutenant Governor Davey to a declaration of martial law, to the pleasure of suffering settlers and the dismay of Governor Macquarie. The declaration was illegal since only Macquarie had such power, and the episode helped bring Davey's posting to an end. When bushranging next became a major problem for colonial government, in New South Wales in the 1830s, the government responded not with martial law, but with criminal statutes to be enforced through newly-created mounted police. At Ballarat late in 1854 Lieutenant Governor Hotham proved very reluctant to declare an emergency, putting his faith initially in conciliation and then in the use of combined police and military forces to enforce the collection of licence fees from protesting miners. When more forceful action seemed inevitable to combat what he saw as an increasingly revolutionary challenge to his authority he declared martial law. The position had been reached, so Hotham later told the Secretary of State for Colonies, when 'a Riot was rapidly growing into a Revolution, and the professional agitator giving place to the man of physical force'.² Hotham repealed the martial law declaration after three days.

Later crises and conflicts involving a challenge to government were more confidently met without resort to martial law – in part because self-government enabled coercive legislation, and the creation of large colonial police forces facilitated early repression of rebels and agitators. There was an element of bluff in the politics of emergency in colonial Australia. While Queensland premier Sir Samuel Griffith called out the defence forces and issued a proclamation outlawing assembly under arms during the 1891 shearers' strike he also admitted that the proclamation 'has of course no legal effect but it is not, I think, unusual for the head of state in case of emergency to exercise his influence in such a manner'.³

There was no bluff when martial law was deployed against Indigenous resistance in the first half of the nineteenth century. Typically a martial law declaration was preceded by an attempted conciliation; in some cases it was accompanied by measures that presumed a restoration of amicable relations, but on white terms and in an expectation of gradual acculturation. In 1826 Governor Darling opposed his Attorney-General Saxe Bannister who had suggested the necessity of martial law to repress Aboriginal resistance. Darling thought 'Martial Law could not be necessary to put down a few naked Savages', but his reluctance was also informed by his sense that 'the Natives had not been altogether unprovoked'. And indeed he prosecuted Lieutenant Lowe whose murderous behaviour in the Hunter Valley included the shooting of prisoners.⁴ But two years earlier Saxe Bannister's advice to declare martial law in the Bathurst region had been favourably received by Governor Brisbane, a resort to emergency against sustained resistance by the Wiradjuri.⁵ Facing prolonged and damaging resistance on the Cumberland Plain, Macquarie did not declare martial law in 1816 but instead proclaimed that ten named Aborigines were outlaws and so subject to exceptional measures, to be arrested or killed, through prolonged military action.⁶ In South Australia, on the other hand, Governor Gawler confessed he was led by the 'principles of martial law' in directing reprisals against Indigenous people thought responsible for a massacre of the survivors of the *Maria* shipwreck in 1840. Even so, he was reluctant to tarnish the colony's reputation as a favoured destination of free emigrants by actually making the declaration.⁷ Such a misgiving had not been a consideration for Governor George Arthur in Van Diemen's Land in 1828. Following an earlier drawing of boundaries for 'settled districts,' Arthur proclaimed martial law in November 1828 to facilitate the suppression of Aboriginal resistance within those districts. In 1830 he extended this to the whole island, facilitating the military operation known as the Black Line for the removal of Aboriginal people into an enclave.⁸

Martial law was law's extreme, exposing the force that lay behind the more mundane exercise of the common law and its institutions. In regretting its necessity the colonial governors who deployed it spoke to the violence of colonial settlement and the possibility of that violence being displaced by a rule of law and legal institutions they also brought with them.

Legal Institutions and Authority

The imperial statutes framing the establishment of the successive Australian colonies authorised the establishment of courts for the adjudication of civil disputes and the prosecution of criminal law. The *New South Wales Act* (1823) established Supreme Courts in both Sydney and Hobart, with a chief justice in each colony. The Supreme Courts of the other colonies came later, in South Australia in 1837, just a year after its establishment as a free colony, in Victoria (1852) and Queensland (1861) following their constitution as self-governing colonies, and in Western Australia only in 1861, more than three decades after the founding of the Swan River Colony. In comparison with England, the courts of the colonies were unified, with the Supreme Court jurisdiction encompassing civil and criminal matters as well as equity and chancery.⁹

The delay in establishing Supreme Courts did not mean an absence of legal remedies or the familiar forms of legal combat. In both New South Wales and Van Diemen's Land the governor from the outset established military courts sitting under a civilian judge advocate, with trial by juries of military officers. The later colonies were free of the aggravation of military justice, though not of the sense of justice subordinated to the authority of the governor: at Swan River one of the Governor Stirling's first acts was the establishment of a court of civil jurisdiction and, not much later, a criminal court. In each, justice was administered by a legally qualified advocate. But in the years before the establishment of the

respective Supreme Courts appeals were only to the governor of each colony, assisted by his judge advocate. Appeals in civil cases in early New South Wales could, and did, proceed to the Privy Council in London, a line of authority that endured for almost two centuries until the *Australia Act* in 1986.

What kind of law and what kind of authority did such institutions exercise? Some have considered the judiciary an excessively powerful presence in the Australian political landscape, even an 'invisible state' constraining democratic possibilities.¹⁰ In another view, Australia was a 'Benthamite society', utilitarian and legalist in its political culture, a place where there was less interest in the language of rights than in what governments might deliver to the people, through bureaucratic institutions.¹¹ Law was never monolithic, however, in institutions, norms or personnel; it was shaped by, as well as shaping, colonial social relations and increasingly by colonial political interests.¹² The common law of England (judge-made law, moulded by precedent over centuries of court-room practice) influenced the forms and procedures, the reasoning, remedies and punishments available in the colonial courts. That tradition weighed heavily on the colonial judiciary. As an historian of Australian administrative law has observed, 'the freedoms enjoyed by the colonists in erecting their governmental systems were not given to the judges in regulating it'.¹³ But the first century of Australia's European settlement was also an era in which the common law was increasingly modified by the creation by parliament of statutes for the government of the people. The new regulatory state was adding and taking away rights and liberties, expanding the reach of government through new agents such as the police and public medical officers.¹⁴ In colonial Australia those new agents were the product of statutes passed by colonial parliaments, only in some respects on models framed at Westminster. Even after Federation it remained unclear quite what the scope of the law might be – with the High Court of Australia being called to judge whether offences created by the British parliament did or did not hold in Australian

jurisdictions. This was in spite of what appeared to be clear authority for defining what law prevailed in Australia when the *Australian Courts Act* (1828) declared that the law was what the common and statute law provided at that date in England.¹⁵

The Colonial Office exercised a close watch over colonial law-making after 1828, disallowing statutes it considered infringed the equal status of Aborigines for example.¹⁶ Although the imperial hand loosened its grip after self-government, there were some areas of legislative innovation (divorce law a notable example) that still provoked Colonial Office objection.¹⁷ Correlatively an extraordinary display of judicial activism by Justice Boothby in South Australia provoked imperial action to *validate* colonial legislative powers. Boothby had insisted that a succession of statutes passed by the South Australian legislature were invalid, being repugnant to English law. His determined campaign against local lawmakers and eventually his fellow judges brought his own removal from the bench. The imperial *Colonial Laws Validity Act* of 1865 sharpened the definition of repugnancy, clarifying the scope of colonial self-government.¹⁸

The move from Crown colony to self-government in Australia was mirrored by a transformation in the relation of the judiciary to the executive. While many early colonial judges asserted their autonomy, the constitutional structures before self-government did not respect such ideals. For one thing, the governor was the final court of appeal, and the authority of law in the early colonial period was therefore a gubernatorial authority. For another, judges were typically intimately involved in the exercise of government broadly considered, advising on or drafting new statutes, and in some colonies serving as members of the governor's executive council. By the end of the colonial era such overlapping of roles would be long past, and judicial autonomy more jealously guarded. That did not prevent some traffic between the different arms of government. Although their careers were exceptional in this respect, two of the most influential colonial politicians, George

Higinbotham (Victoria) and Sir Samuel Griffith (Queensland), made the move from politics to the bench, becoming Chief Justices in their respective jurisdictions and Griffith later becoming the first Chief Justice of the High Court of Australia.

The administration of justice did not lie with judges alone. Within each jurisdiction the Supreme Court was the pinnacle of a court system that was dependent on the work of magistrates and justices of the peace. In the British homeland local justice had long been the preserve of unpaid justices of the peace. In the colonies, too, governors from an early date appointed justices with a variety of functions: attestation of oaths; conduct of inquests; and hearing of minor criminal cases. Colonial conditions constrained both the efficiency and fairness of such a system. In the frequently chaotic conditions of colonial expansion, the patrician hierarchies of local order in English counties were but a memory. In consequence, from the time of Governor Macquarie there developed a system of paid magistrates, variously known as Police or Resident Magistrates and eventually as Stipendiary Magistrates. What Golder describes as a 'dual system' of amateur and stipendiary magistrates developed as a characteristic feature of colonial justice systems.¹⁹ The stipendiaries were officers of government as well as law – especially they were responsible for overseeing local constabularies of police, from as early as 1810 when Governor Macquarie made D'Arcy Wentworth a salaried superintendent of a Sydney police force. Even after police administration was centralised from the 1850s (and gradually detached from the control of the magistrates), these officers continued to function as key agents of administration, the representatives at local level of the reach of government into the remote spaces of settlement. Their role did not displace the function of local justices of the peace, who continued to be appointed by colonial governments, but the stipendiary system spoke to the centralised character of colonial administration before and after self-government. Only in Tasmania did a

system of local administration of policing survive to the end of the colonial period, before in turn it adopted the Australian model and displaced the guiding role of local magistrates²⁰.

Authority in the administration of law and justice derived not simply from the possession of office, an appointment as judge or magistrate. It was a cultural construct, visible in the accoutrements of office, in the garb of the office-holder and the architecture of spaces in which an office-holder performed his duties – his, for appointment of a woman was never imagined in the nineteenth century. Judicial robes on the English model were widely adopted in the colonies, although wigs were dispensed with during trials in north Queensland in deference to the extremities of the climate.²¹ The donning of a black cap accompanied the pronouncement of a death sentence, while at the opening of judicial terms and on circuit in the country districts the formalities of an English assizes were mimicked with the reading of the 'Queen's proclamation against vice and immorality'.²² These archaic forms were vulnerable to mockery when even the staidest urban newspapers wondered about the language of such 'commands' as were contained in the proclamation, whose 'new' form in 1860 exhorted 'all our loving subjects, of what degree or quality soever, from playing on the Lord's day, at dice, cards, or any other game whatsoever, either in public or private houses, or other place or places whatsoever'.²³

Authority was also the product of architecture, colonial courthouses displaying the central role of law in the imagination and government of colonial society. More than 300 courthouses were built in New South Wales after European settlement, the great majority of them during the nineteenth century. Not without exaggeration, the Chief Justice of New South Wales congratulated the inhabitants of Goulburn in 1887 on 'the possession of so splendid a court... which takes rank amongst the best in any part of Her Majesty's dominions'.²⁴ The extravagance of some of these buildings reflected the prosperity of the sporadic boom decades of the different colonies. In leaner times judges and magistrates had

to make do with makeshift accommodation – an adapted gaol in Perth, complete with leaking roof, for many years served as the Supreme Court established in Western Australia in 1861,²⁵ while public houses frequently provided the setting for justice and inquests administered in rural outposts. The determination to secure a standard of accommodation that respected the dignity of proceedings was a telling signal of the authority thought to lie in the performance of law.

Authority was above all the product of the rhetoric and discourse of legal proceedings. The reporting of trials and civil disputes contributed to the daily diet of those who consumed the myriad colonial newspapers. Sensational trials were reported and then reproduced in all newspapers from one colony to the next, while local police offences and civil disputes were routinely recorded in every town's local outlet. To a degree unknown today, the transcripts of evidence and examination in both criminal and civil trials were published; judicial observations, reasoning and judgment all were carefully noted. Law and litigation saturated colonial society, providing entertainment, instruction and moral tales that defined identities, boundaries and norms.²⁶ Was there a better illustration of this than the field of reference invoked by a Queensland Supreme Court judge in 1870 when he presided at the Toowoomba assizes over successive trials in which the first defendant had bitten off part of a man's ear and a second did the same to another man's nose? In such conditions the deterrent function of criminal proceedings was, said Justice Lutwyche, to 'prevent the colony becoming another Nebraska or another Kansas'.²⁷ Such ambition imagined a people moulded to a mode of civility that conditions in a new society might undo, without law's guiding or disciplinary hand.

Boundaries

The nineteenth century was a period of enormous expansion in law's capacity to shape populations, define the boundaries of acceptable behaviour and express preferences for a certain style of urban order. The Australian colonies shared in this revolution in ordering, sometimes prompted by the imperial government, at other times readily adapting the legal frameworks and institutions that constituted a new and intensive management of some populations. While self-government (of state and individual) was an abiding precept of colonial settler society, the paradigm of the liberal subject capable of managing his or her own life in a condition of steady work and respectable behaviour highlighted the deficiencies of those who could not match the high ideal. Laws, institutions and policing created and governed a variety of populations defined by boundaries of exclusion, rarely permanent, but always conditional. Lunatics, street urchins, larrikins, orphans, prostitutes, vagrants and criminals, were named in legislation or constructed in colonial discourse as demanding the attention of police. In part, these boundaries operated as norms that helped define what urban order was, and what it must not be. But the jurisdictions that governed social life in the Australian colonies were geographically vast. The policing of these boundaries was one that extended far beyond the cities and main towns of the colonies, not least in respect of the Indigenous populations that were progressively caught in the web of administrative expansion that characterised the developing colonial state.

Law's commanding presence was found in the exercise of criminal jurisdiction. Prior to the foundation of Supreme Courts, there were courts of criminal jurisdiction before which offenders were brought, tried and punished when convicted. In the earliest decades charges in the criminal jurisdiction were laid by the victims of offences, acting as complainants. As the elements of a bureaucratic justice system were put in place, complainants were typically displaced from this role in the courtroom by police constables and later public prosecutors. The expansion of a criminal justice bureaucracy did not however result in an increase in

prosecutions.²⁸ The proportion of police to population numbers decreased over time (see Table 1)..

Table: Police to Population Ratios, 1861-1901²⁹

	NSW	Victoria	Qld	SA	WA	Tas
1861	265.8	247.9	516.3	120.6	na	366.8
1871	166.8	137.6	358.0	102.4	na	278.7
1881	160.3	124.0	309.6	131.3	399.1	255.0
1891	148.2	134.1	239.8	120.7	433.3	210.7
1901	158.9	122.8	173.6	99.5	271.0	148.5

Improved economic and social conditions may have contributed to declining prosecutions over the century, but the official statistical picture was also shaped by a shift of some offences into summary jurisdiction as well as changing demographics. Towards the end of the century creative lawmakers also contributed to the apparent decline of serious criminality, if that was to be measured by use of imprisonment. The introduction of first offenders probation, and the increasing use of fines in place of imprisonment contributed to aggregate prison populations being lower at 1900 than they had been in the 1880s.³⁰

As in Britain and Ireland, the criminal law was systematised by nineteenth-century statutory innovation. There were two significant developments: the enactment of policing laws expressed in the Police Offences Acts from the 1820s; and the codification of serious criminal offences, from the 1850s. For the most part, the colonies followed and adapted Westminster legislation, sometimes at a distance. Late nineteenth-century media ventilation

of the horrors of baby-farming, with its links to abhorred but widely practiced infanticide, prompted colonial legislation to police private maternity hospitals and adoption, more than twenty years after the English model.³¹ In other matters there was a determined rejection of the example of the British parliament, for example in abolishing capital punishment for rape.³² A powerful factor shaping domestic politics in Australia was an anxiety about the threat of black men, especially to white women. The exemplary use of hanging in inter-racial offences was a sign of that anxiety, though even here the politics of mercy mitigated the heavy hand of white justice.³³ Clemency was also at issue in punishment of women convicted of capital offences, a large number of whom were convicted for infanticide and almost all for killing of intimates, including husbands and lovers. Few went to the gallows; those that did always inspiring a controversy that helped limit the future use of the death penalty³⁴.

The shifting regimes of nineteenth-century penalty were distinguished by their refinement of populations according to particular attributes, of age, gender and race. The convict system itself was a vast exercise in penal experimentation, evident not only in the ticket-of-leave system and secondary punishment settlements, but also in the gender separation that led to the housing of women convicts in their own institutions.³⁵ Complementing the penal institutions were the lunatic asylums, whose design and function only gradually departed from their penal origins.³⁶ The colonial lunacy laws, beginning with that of New South Wales in 1843, were in effect a branch of penal legislation, empowering police to channel a sizable population of men and women from police cells and prisons into the new asylums. Unlike the prisons, asylums and their populations grew steadily.³⁷

The regulatory apparatus of lunacy law and the large financial outlay on lunatic asylums were part of a growing investment in regimes of population management. The convict foundations of settlement, requiring a precise and comprehensive bureaucratic control

system, may be seen as a precursor of later systems for the surveillance of mobility. As islands in remote destinations, the Australasian colonies proved ideal sites for the refinement of immigration controls in the later nineteenth century. The racial discriminations of Chinese restriction legislation were complemented by the refinement of quarantine controls to prevent the spread of infectious diseases, and draconian segregations targeting leprosy.³⁸ In expanding the reach of government in the management of populations, the Australian story shared much with that of other parts of the Empire and beyond. The story of child-rescue is a striking example, with the colonies sharing in the mid-Victorian British anxiety over the status of children in a rapidly changing urban environment. The response in Australia however was characteristically state-directed rather than voluntaristic; indeed child welfare and protection had a history going back to the earliest convict days.³⁹ In the 1860s both the largest colonies, New South Wales and Victoria, enacted legislation for state institutional provision for neglected children and juvenile delinquents.⁴⁰ The development of juvenile reformatories, separating young offenders or those at risk of the criminal underworld from the dangers of contamination by adult prisoners, expressed nineteenth-century liberalism's faith in rehabilitation through separation of vulnerable individuals from malign influences. In New South Wales this institutional solution owed much to the dominant voice of Henry Parkes. His chairing of the 1860 select committee on the condition of the working classes set out a program of social amelioration that presumed a major role for state provision of institutional remedies to poverty, distress and crime.⁴¹ The resulting institutions, industrial schools and juvenile reformatories, proved no panacea and in the longer term became the object of severe criticism and demands for reform. Child saving and rescue was a persistent object of women's philanthropic activism, which did much to shape the later development of alternatives to state institutional provision in the form of the boarding-out or fostering system.⁴² Hence the readiness with which colonial liberal politicians welcomed the globe-

trotting reformers Florence and Rosamond Hill. Before a New South Wales parliamentary committee in 1873 Rosamond Hill advocated at length the merits of the continental family-based provisions at Mettray in France and Rauhe Haus near Hamburg, examples of progressive reform that were frequently appraised in the colonial press.⁴³ In this respect the regulatory apparatus of the nineteenth century was also an imperial legacy, with the debates and moral drivers constantly referring to British example, which in turn mediated European and North American innovation.⁴⁴ The impact in social policy was widespread, and enduring. Its legacy could be found in the institutional design and substantive interventions in Australian Indigenous life through the protection systems and the practices of child removal.⁴⁵

A different kind of imperial context shaped the controversial regulation of prostitution. While the practice of prostitution was not itself criminalised, the category of prostitute was the object of vagrancy legislation that delivered broad discretionary powers into the hands of police. Reputation as a 'common prostitute' was sufficient in the contagious diseases acts of the second half of the nineteenth century to justify police certification for the purposes of medical examination. Originating in a governmental ordinance of 1857 in India, aimed at protecting soldiers of the British Army, from 1864 a series of Contagious Diseases statutes were enacted at Westminster, providing for the medical inspection of women in proclaimed towns, who were identified by inspectors as engaged in prostitution. In the United Kingdom and many colonial legislatures, the legislation was articulated to the felt need to protect the imperial army and navy forces. In the Australian setting, however, where imperial forces were withdrawn in 1870, the legislation was articulated for the protection of the white population.⁴⁶ In Queensland, where an Act for the Prevention of Contagious Diseases was passed in 1868, the regulations could apply in any town proclaimed by the governor. Under such legislation women within defined territorial boundaries might be detained for medical

inspection, and confined in a lock hospital if found to be suffering from a venereal disease.

Only Tasmania followed Queensland's example, with other colonies faltering in their attempts to follow the imperial parliament. In Victoria, a spirited campaign for the enactment of legislation that specifically targeted syphilis (but not venereal diseases generally, as in Queensland and Tasmania) resulted in the *Conservation of Public Health Act* in 1878. Strong resistance to the recognition of prostitution entailed in such legislation was evident in the Victorian government's reluctance to make the Act effective by proclaiming a lock hospital for the purpose of inspections and treatment. Consequently the legislation was never enacted. Attempts in both New South Wales and South Australia failed to result even in a statute, with social reformers in both places opposing the idea of de facto regulation of prostitution.⁴⁷

The uneven colonial response to the threat of 'contagious diseases' is no model for the impact of other modes of population regulation through law. By the late nineteenth century the Australasian colonies were places where ideals of health and purity, of individuals and of race, were marshalled enthusiastically. The regulation of population along dimensions of productive and responsible versus vagrant and idle was imported with English vagrancy law, replicated in the towns and police acts of the early nineteenth century. Egalitarian sentiment in the colonies was comforted by the absence of a poor law, with its detested regimes of workhouse, work test and lesser eligibility – even if colonial governments absorbed some of its principles in their centralised systems of poor relief.⁴⁸ Yet in the hands of urban police the vagrancy statutes were an instrument for surveillance of the criminal and dangerous classes of the Victorian era, among whom prostitutes, 'incorrigible thieves' and other social enemies were the objects of attention. The notorious flexibility of the vagrancy charge, with its reverse onus of proof in a summary jurisdiction, rendered it an alternative to contagious diseases legislation.⁴⁹ Indeed another kind of public order concern shaped policing of prostitution – the concern to limit its visibility, evident in campaigns against street

prostitution.⁵⁰ Social purity campaigns were nevertheless limited in their capacity to shape policing in colonial cities. After the 1850s (except for Tasmania where police administration was centralised only in 1898), the police were not subject to local direction but answerable to central government; their cherished notions of independence and discretion allowed them to resist the demands to eradicate whatever nuisance of the streets happened to exercise various strands of public opinion from time to time. Yet public order and crime control remained important drivers in the use of vagrancy regulation. Criminals congregated around brothels and hotels, making them a constant focus of police surveillance and interference.⁵¹ These powers and their manipulation in the policing of such populations also generated police corruption.

By the end of the nineteenth century no population within colonial jurisdictions was as vulnerable to regulation as the Indigenous. That vulnerability was also a function of particular local histories of contact and of preferred structures of administration, constructed and expressed through legislation. A later review of legal definitions of 'Aboriginal identity' found no less than 67 distinct definitions, reaching back into the 1830s.⁵² Through vagrancy laws, colonial authorities sought variously to limit the debasement of the country's original peoples by those imagined most capable of degrading them (white or Asian, especially Chinese), and to avoid the dangers of a miscegenation that would apparently dilute the vigour of a British population in the Antipodes. Adapting English vagrancy law to the conditions of New South Wales in 1835, Governor Richard Bourke penalised idle associations between the settlers and 'black natives'; in turn that law was adapted in newly self-governing Victoria in 1852, the prohibition now lying against any person not an Aboriginal 'lodging or wandering with any of the Aboriginal Natives'. A residual recognition of the different position of Indigenous peoples lay at the heart of this segregating legislation. A petition to the New South Wales parliament from the New England district sought protection from the local

Aboriginal people by bringing them within the reach of the Vagrants Act and confining them within their own localities, a proposal that gestured towards the domiciliary framework of English poor law and vagrant regimes. The *Sydney Morning Herald* thought the proposition absurd: 'although we have taken the black man's land – although, vagrant-like, we have unauthorisedly settled on his possessions, we have not yet ventured under color of law to seize upon his body or to restrict his personal freedom'.⁵³ This disingenuous characterisation of surviving Aboriginal freedom retains its interest as a sign of colonial uncertainty about the scope and rationale of regulation of the country's Indigenous peoples, a hesitation replaced by certitude about the necessity of total control by the end of the century.

Policing

Police played their role in the violent displacement of the country's original inhabitants. They may also have been the means of averting even worse bloodshed. Colonial policing in Australia was of a type with its contemporaries in other parts of the Empire, and a product of the two-fold influence of British and Irish policing. Police complained of their multiple roles and duties but the development of the capacity of government to administer the vast spaces of Australia was unthinkable after 1850 without the agency of police.

In the early decades policing was a function of the magistracy. Constables were appointed by and overseen by magistrates. Their functions were narrowly defined; thief-taking and murderer-hunting, as well as acting at the magistrates' direction in urban peace-keeping. In the convict colonies their functions were also controversial, especially as governors like Macquarie started to regulate more actively what they expected of local populations. In Sydney there was much resentment at the surveillance exercised by local constables over the free population, aggravated by the fact that some of the constables were

either convicts or emancipated convicts. Even so, it has been observed that constables paid close attention to the evidence required in bringing cases to court during these decades.⁵⁴

The association between policing and government in the penal and crown colonies was consistent with the long-term evolution of police institutions. Governor Macquarie established the Sydney police in 1810, and Governor Stirling appointed police constables at Swan River in one of his earliest actions in 1830. In Van Diemen's Land Governor Arthur established authoritarian and highly centralised policing, with two-thirds of police also being convicts, an arrangement continued by his successors.⁵⁵ Later colonial policing was profoundly shaped by the two models developed at the heart of Empire in the 1820s and 1830s.⁵⁶ The London Metropolitan Police (1829) was the reference point for urban policing in the colonies, while the Irish Constabulary (1836) shaped policing organisation and method in the rural areas. But there was no simple divide between urban and rural policing. For the weakness of local government in Australia meant from an early point that police were controlled from the colonial capitals. In the manner that Dublin Castle controlled the policing of Donegal or Cork, so a police commissioner residing in Perth would exercise remote control over the Kimberleys in the northern parts of Western Australia, or one in Adelaide over the vast expanses of Central Australia and the entire Northern Territory (even down to its cession to the Commonwealth in 1911).⁵⁷

Policing of Indigenous resistance was the second phase of government response, succeeding military action under the orders of the governor. The widespread adoption in imperial policing of recruitment of selected Indigenous people to police their own was the subject of early experiment in Australia.⁵⁸ The earliest Native Police Corps was established in Port Phillip District (later Victoria) in 1837. The aims were more benign than the later history of such forces suggests. The administrator, Captain Lonsdale thought that enlistment of the local Aborigines in a 'Police Corps' would foster the 'desirable objectives of making them

useful to society, of gradually weaning them from their native habits and prejudices, of habituating them to civilised customs'. Enlisting them as police would have the advantage that they would not be tied 'to any definite labor or irksome routine of employment', allowing them to continue some of their traditional pursuits, such as the 'recreation of hunting'. To the Aborigines, of course, hunting was not recreation but work, the necessary means of subsistence. Through the fog of cultural preconceptions there was in Lonsdale's conception a transformative, rather than simply destructive object.⁵⁹ Later colonials were less sanguine, and more brutal in their views of what uses a Native Police would be.

The archetype of brutality in the Native Police was found in Queensland. Dating from 1849 when the colony of New South Wales acted to control conflict between settlers and Aborigines on its northern frontiers, the Queensland Native Police continued after separation to police the expanding borders of settlement to the end of the century. On a principle derived from the Irish Constabulary, a key feature of the Native Police was that the troopers were recruited from districts foreign to those they would be policing. Sometimes they were discharged convicts, having spent time in prisons for previous killings. But their activities proceeded under the authority of officers whose duties were above all to limit the threat of Aboriginal resistance to white settlement. Unlike the regular police of Queensland, replete with the paperwork of the modern constabulary, the Native Police proceeded under limited supervision: historians have often found it difficult to track their activities, and estimates of fatalities remain highly speculative.⁶⁰ The violence of frontier policing was not without its critics, in Queensland and in other colonies. Occasional public inquiries and even prosecutions of some police signalled by the 1890s the tension between two visions of policing, one paramilitary, the other administrative and ambiguously 'protective'. An important outcome, critical to the future development of policy affecting Indigenous

Australians in the twentieth century, was the elaboration during the 1880s of a new policing focussed on the 'protection' of the Indigenous populations in north Queensland.⁶¹

There was another policing of the Australian colonies that was almost as controversial as that controlling and regulating the lives of Indigenous peoples. Much of colonial policing was shaped by the direct transmission of law and regulation from the centre of the Empire. Well before the formation of the New South Wales Police Force in 1862, its antecedent Sydney constabulary was responsible for enforcing the new codes of urban order embodied in the *Towns Police Act* of 1833. This was no less than an amalgam of the powers police in London were then deploying under the *London Metropolitan Police Act* of 1829. The constables were expected to be the moral street cleaners of the growing cities and towns of the colonies, the domestic guardians of secure settler dominions.⁶² In newly self-governing Tasmania after 1856 such a focus was the very principle of police organisation, following a rejection of the Arthur's centralised policing in favour of local police run by each municipal district, a system persisting to 1898.⁶³

The mundane world of patrolling the beat and arresting drunks and vagrants formed a strong contrast to another and more dangerous pursuit. Beyond the town boundaries, in a sparsely occupied land behind the frontiers of white settlement, the small colonial villages and their linking roads were vulnerable to the rural bandits known as bushrangers. From the exploits of the most famous, Ned Kelly, were moulded the mythologies of an Australian vernacular that placed a high value on rebellion and opposition to authority. Kelly's capture and execution in 1880 was, however, the denouement of the bushrangers. Their lives and exploits were shaped by a variety of colonial circumstances, not the least of which was the challenge to police them.

It would be tempting to explain the phenomenon of bushranging in terms of the weakness of colonial government in a large, open land. Yet the exploits of the Kelly gang took place in the relatively small and more densely populated colony of Victoria. The police were by the 1870s well established, more on the Irish model than that of London – not only were more than 80 per cent of the Victorian constabulary of Irish birth, but nearly half of these had already served in the Irish Constabulary.⁶⁴ In spite of this background of administrative and occupational experience, the Victorian police were seriously challenged by the Kelly gang's outlawry.

One reason was that the police found themselves combatting a foe whose strength derived in part from a wider community of support. In north-eastern Victoria many selectors struggling to make a living in the wake of the gold rushes, with their inevitable disappointments, found Kelly's defiance of authority appealing. Rural poverty was only part explanation: family and faction were as likely important here as in rural Ireland. There were other rural areas of Australia too where the police found themselves battling not only the outlaws who robbed banks and stagecoaches but the sympathies of those who supported the bushrangers. Some bushrangers cultivated a style of chivalry, or a flashness of language and dress, that helped to build sympathy.⁶⁵ In New South Wales a decade and more before the Kellys, Ben Hall and Frank Gardiner kept police at bay in a series of adventures that forced a restructuring of police, brought government to its knees and inspired the Chief Justice to draft an 'outlawry' statute, later adopted as the *Felons Apprehension Act* (1865).⁶⁶

For the most part the bushrangers were white. But in 1864 the small coastal town of Mackay (Queensland) was the scene of a bank robbery by a black American named Henry Ford and his Aboriginal bushranging partner, William Chambers. They escaped with £746 and then led a settlers' posse on a fruitless chase, stopping to have a beer on their way to freedom. Nine months later they were arrested after another incident in northern New South

Wales, hundreds of miles away.⁶⁷ Other Aborigines assumed outlaw status when they led local resistance to white settlement or else absconded from service on pastoral stations, taking to stock killing and occasional robbery. The legendary Toby of central Queensland in the 1880s was one such outlaw. A series of stock killings, theft of liquor and abduction of a white woman led to his eventual capture and killing, not before he had killed a constable with a tomahawk he had allegedly held between his toes, concealing it while he was arrested.⁶⁸ Indigenous outlawry and its respondent policing strategies, para-military more than conciliatory, remained a feature of the frontier landscape to the end of the nineteenth century and, in northern Australia especially, into the twentieth.⁶⁹

Aboriginal resistance was a formidable impediment to colonial settlement in some districts, its incidence following the contours of the frontier. Among its most spectacular examples was the late-nineteenth century story of Jandamarra ('Pigeon' as he was long remembered in Bunuba folk-lore) in the Kimberley district of north-west Australia. Like other such outlaws, Jandamarra's initiative and power derived partly from his life bridging two cultures; he had himself been a police tracker. This three-year resistance over 1894-1897 delayed settlement in that region, brought only to an end by large-scale policing operations. The police killed Jandamarra after earlier police massacres of Indigenous peoples across the Kimberley.⁷⁰ Occurring at the same time as police in Queensland were mapping the demise of the Native Police in favour of a new model of 'protection', the Kimberley violence underscored the ineradicable foundation of colonial law in the use of force.

The later colonial allure of bushranging is at odds with the more hostile reception of earlier decades, but the sense of domestic emergency inspired by the bushrangers had a long history in the colonies. The term originated indeed in the early convict decades, with both Van Diemen's Land and New South Wales experiencing earlier crises in authority provoked by rural banditry, as runaway convicts turned to robbing travellers or isolated farms. Since

bushranging originated in a convict society, subject to the autocratic rule of a governor, it was scarcely surprising that responses to it were draconian: as the historian Alan Atkinson has noted, 'in dealing with bushrangers the government [in Van Diemen's Land] was not just putting down outlaws. It was trying to prove that it was in fact the government'.⁷¹ Large numbers were hanged in New South Wales and Tasmania in the penal colony years.⁷² But then and later, more was needed than the governor's command: catching the bushrangers came to be aided by new powers to the police during the very periods of their formation. In New South Wales the 'Bushranging Act' (in fact the 1830 '*Robbery and Firearms Act*') was a drastic statutory response that reversed the onus of proof in criminal proceedings and gave large powers of detention to the authorities. As a symbol of all that was wrong with a colony subject to autocratic and irresponsible rule the repeal of the Bushranging Act became a *cause celebre* for the liberal press of the day. It endured until 1853.⁷³

Enacting such laws and hanging an exemplary lot of bushrangers were methods of response that depended in the long term on the efficiency of the police. It was here that bushranging played an even more significant role. In the 1850s and early 1860s in New South Wales, and again in Victoria in the late 1870s, the police were found wanting. Their skills and organisation proved inadequate in combatting the serious challenge posed by bushranging to rural settlements. The consequence in New South Wales was the centralisation of police and an enhancement of their bush patrolling skills. In Victoria the Kelly outbreak was put down only with an extreme display of police violence at Glenrowan, and led to one of the most extensive inquiries into colonial policing held in Australia. The Longmore Commission scrutinised not only the series of events resulting in the death of police and Kelly's open defiance of authority. The detective force was also shown to have been inept, and was reintegrated in the general police. Improved training and organisation, promotion by examination, and a new police code were among other recommendations.⁷⁴

The resulting changes were predictably partial: a generation later there were further inquiries into corruption, and in 1923 maladministration provoked Australia's only police strike in Melbourne. By that time however bushrangers could not be blamed; although the representation of their exploits in silent cinema of the twenties led to new police powers, this time in aid of censorship of film⁷⁵.

The role of policing in regulating a particular kind of social order was accentuated by these great social conflicts of the colonial period. The dual face of policing – the potential use of ultimate force combined with an accountable and restrained use of it – was shaped by the controversies arising from the policing of Indigenous communities and the failures as well as successes of the battle against bushranging. The organisation of policing as a function of central government in the colonies, operating with an increasing armoury of statutory as well as common law powers, spoke to the ambitions of a society that had a limited tolerance for disorder. But the egalitarian legacy of a society which had allowed convicts to access the law was also evident in the restraint with which police powers were used, which appeared often to be in inverse proportion to the volume of criticism engendered by their use. Colonel Tom Price was notoriously remembered as having ordered his volunteers facing forty thousand protesting at Flinders Park during the Maritime Strike of 1890 to 'fire low and lay them out'. But Price was a military officer; there was no firing from his volunteer military officers and it was police who kept command on the day, earning a parliamentary compliment that 'all the working men who assembled at the great meeting on Sunday regarded the police not as enemies but as brothers'.⁷⁶ This was a different view from that which informed the furious invective of Ned Kelly's Jerilderie letter, which slated the police as corrupt and servile, traitors to the people from whom they came, in the 1870s still largely Irish emigrants. 'I would manure the Elevenmile with their bloated carcasses and yet remember there is not one drop of murderous blood in my Veins', he castigated the police who had threatened his

family. His expressed grievance was with a system that failed to live up to its ideals. '[I]t seems that the jury was well chosen by the Police as there was a discharged Sergeant amongst them which is contrary to law[.] they thought it impossible for a Policeman to swear a lie but I can assure them it is by that means and hiring cads they get promoted', he charged. Even in the midst of Kelly's anger it seemed possible to imagine a policeman who might serve fairly a law that dispensed a justice worth respecting.⁷⁷

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