# The Criminal Foundations of Australian Policing

Many policing histories take as their starting point the idea of policing by consent and the development of a centralised state police as recorded in official settler colonial sources—Sir Robert Peel and the "friendly bobbies" of Scotland Yard, the centralisation and professionalisation of municipal policing in Turtle Island/North America and the emergence of centralised police forces established under the Colonial Acts in the mid 19th century in Australia. These histories tend to position the Mounted, Border and Native police forces as a blip or aberration in the history of the development of the police. In these accounts, the development of the Mounted and Border police is siloed and seen as unique to the history of policing Indigenous peoples and populations. These histories tend to centre state sources, authors and perspectives, often at the expense of Indigenous knowledges and perspectives.

This chapter takes a different point of departure: the absence of consent and legitimacy in the development of the police.[i] Australian policing was founded on crime, criminality and criminal violence, in the sense that it was forged on land theft, kidnapping, massacres and the near annihilation of Aboriginal and Torres Strait Islander peoples. In a word, genocide. The foundations of Australian policing were criminal in the sense that it was founded on racist, colonial and patriarchal violence. Histories of Australian police's involvement in genocide (for example, the mounted and native police) and its role in enforcing legal apartheid (for example, Aboriginal child removal and apartheid protection legislation) is widely recognised (Reynolds, 1987; Johnston, 1991; NISATSIC, 1997; Cunneen, 2001; Owen, 2016; Gorrie, 2021; Perkins, 2022). Australian policing institutions, notably the mounted and native police, were directly involved in massacres of Aboriginal peoples well into the 20th century. Key examples include the Coniston massacre of 1928, the Bedford massacre of 1924 and Skulls Creek in 1975. Historian Henry Reynolds (1987: 27) described the mounted police—a key institution in the development of the police in Australia—as "the most violent institution in Australian history".

The foundations of Australian policing were also criminal in the sense that the earliest police were made up, quite literally, of the best-behaved convicts and frequently involved managing criminality of fellow officers, such as the robbery of the Breeze establishment which resulted in the death of the first Australian police officer in the line of duty, as discussed below. The criminality of Australian policing continues today through a culture of corruption, excessive use of force, deaths in police custody and fatal shootings, especially of First Nation peoples. The 1991 Royal Commission into Aboriginal Deaths in Custody examined 99 individual deaths in custody. Since that time there has been a further 517 deaths. As respected Darumbal and South Sea Islander academic Amy McQuire (2020) has observed, 'there cannot be 517 deaths with no perpetrators.'

This chapter examines the genocidal dimensions of Australian policing, past and present. In this chapter I sketch the criminal foundations of Australian policing, past and

present. I examine crime and criminality in the development of the police and unpack some of the available statistics on Aboriginal deaths in police custody, police fatal shootings, police complaints including domestic violence and excessive use of force. This chapter is organised in three parts:

1. The criminogenic foundations of Australian policing: Criminality and the policing of the colonial frontier
2. Criminal continuities in contemporary Australian Policing: Police fatal shootings, deaths in police custody, excessive use of force, police complaints.
3. Police accountability, past and present

**Part One: The Criminal Foundations of Australian Policing**

The foundations of Australian policing are inextricably linked with the expansion and of the colonial frontier and the protection of white/settler property. Policing developed in the penal colony in a way that can only be described as racially segregated and highly divergent, depending on whether one's place in the colony – whether inside or outside the settler colonial frontier. Inside the civilian settlement, policing developed in a way which was both *ad hoc* and responsive to the needs of the nascent colony known as Sydney cove. Policing *within* the borders of the colony (i.e for civilian population inside the settlement and in the gold fields) was locally-based and developed specialised and ad hoc functions in places like the harbour and the developing colonial settlements (Finnane, 1994). Historian Mark Finnane notes that within a short period of time there was already a proposal, from within convict ranks even, for the appointment of a constable who would assist in the management and prevention of interpersonal disputes such as assault and theft. At least during the initial stages of Australian colonial history, the security of the colony frontier was primarily the responsibility of the military personnel of the British Imperial Army who were sent with the First Fleet. Critically however, the border and mounted police were taking directives from the colonial office (London, United Kingdom) and staff were paid imperial wages.

Wiradjuri activist and philosopher Kevin Gilbert (1978: 2) once observed that, 'the real horror story of Aboriginal Australia today is locked in police files and child welfare reports. It is a story of private misery and degradation, caused by a complex chain of historical circumstance, that continues into the present'. Researching the police is challenging because the police are an especially closed and opaque institution. The current wait time for a Freedom of Information request in the state of Victoria is around two years. Other challenges in researching police criminality include:

- **Non-publication or suppression orders:** orders put in place by magistrates, coroners or judges to limit the publication of any material from the brief of evidence or the trial about a given topic. For example, in the *Inquest into the death of Chad Riley*, Coroner Jenkin (2021) made non-publication orders on the reporting of any details relating to police use of tasers. This is a common practice in the criminal and coronial jurisdictions in Australia—one which significantly impacts news reporting on the violence of policing and Black deaths in custody.
- **Non-disclosure or "gag" orders:** orders put in place in settlement of civil and criminal matters that limit victims' rights to speak on the public record. For example, Palm Island activist and Elder Lex Wotton was banned from speaking

with media or attend public meetings to discuss the death in custody of *Mulrunji* Doomadgee by police officer Sergeant Hurley.

- **Legal privilege:** laws which enable state officials to not give evidence during civil and criminal cases as well as coronial inquests due to fear of self-incrimination.
- **Tendency evidence:** laws in criminal and civil procedure which prohibit the discussion in court and on the public record of prior alleged criminal and civil wrongdoing. For example, and as concerns the case of *R v Rolfe* [2022] NTSC 22, Burns J found in favour of Rolfe and his legal team that Rolfe's prior criminal convictions and 46 recorded instances of excessive use of force was inadmissible in the criminal trial.
- **Contempt of court:** laws which govern the conduct of court officials and experts. These laws prohibit the disclosure of the Brief of Evidence on the public record.
- **Defamation:** laws which prevent publication of information which may damage the reputation of powerful individuals such as police officers and the police union.

Implied in Gilbert's statement is the observation that policing research also requires an awareness of the limitations of what is knowable or discoverable on the public record, in terms of access to state records and information, the reliability of that data and an appreciation of how one's standpoint/position impacts how one relates to knowledge across the cultural interface, including navigating both Indigenous and state records, sources and knowledges, and Indigenous versus settler perspectives and historiographies (Nakata, 2002). Policing research hence requires care and attention in the searching and analysis of both primary and secondary, official and non-official, Indigenous and settler state sources.

### (i) "Nine of the Best-Behaved Convicts": The Night Watch Patrol and the Development of Policing within the Colony

Australia was founded as a penal colony in 1788, though the British settlers did not bring rudiments of a police force when it invaded Gadigal-Bidjigal Country, Sydney Cove in 1788.[ii] This is because the police did not exist in England at the time of First Contact.[iii] The idea of 'the police' and of institutionalised civilian policing were still highly controversial and the subject of intensive[iv] debates in England in the late 18th century. For example, the authors of the first police bill, including Patrick Colqhoun and Jeremy Bentham, who penned the *Marine Police Bill* of 1800 (England), wrote in an anonymous capacity. The purpose of the Thames River Police, the origins of modern policing, was to protect the property (sugar, rum) of the West India Committee who funded the entire service.

Policing inside the boundaries of the white settlement developed informally, in a piecemeal and ad hoc way, in response to the needs of the growing colony. The two earliest forms of informal policing included the rowboat guard and the night watch patrol, both of which were established in 1789. The personnel for both initiatives were drawn from 'nine of the best-behaved convicts', appointed by Governor Arthur Phillip. There was a high turnover in personnel due to resignations and dismissals, and the standard of recruits was poor—in 1854 alone over a quarter of Sydney's 179

constabulary were dismissed for drunkenness (Finnane, 1994). The stated purpose of the informal night watch patrol was to protect the boundaries of the new settlement in Sydney Cove as well as to manage safety of civilians living there. In 1790 the night watch patrol were replaced by the Sydney foot police in 1790 and continued as an organised force (later known as the Sydney police), with many recruits drawn from convict population. The first recorded death of a police officer in the line of duty, for example, was that of constable Luker, who was murdered while investigating the theft of stolen goods from a local brothel—these items were allegedly stolen by fellow night watch officers Joseph Samiel, Richard Jackson and John Russell (Franks, 2017).

From the 1840s onwards there commenced a broad process of centralising and modernising civilian policing throughout the colonies. Colonial statutes were enacted requiring that the police were to be controlled from the central political power, rather than by local political authorities. The colony of South Australia, for example, was the first colony to centralise its services with the enactment of the *Police Act 1844* (South Australia). The colony of Victoria followed suit in 1853, Western Australia in 1861, New South Wales in 1862, Queensland in 1863 and Tasmania in 1898.[v] Following the enactment of the colonial acts, policing was a function for which the state rather than governors and local regiments took responsibility (Finnane, 1994). Critically, however, the experience of policing within the colonial settlement was different from the experience at the colonial frontier.

### (ii) "The Most Violent Organisation in Australian history": The Border Police, Land Theft and the Policing of the Colonial Frontier

On the other side of the colonial frontier, policing took place via three key military institutions: the Border Police (established after the Myall Creek Massacre of 1838), the Mounted Police (paid out of the British military appropriations until 1839), and the Native Police (comprised of political prisoners). The Australian police were directly implicated in massacres until the 20th century, included the Halls Creek massacre of 1928, the Karundi Station massacre of 1928, the Forrest Creek massacre of 1926, the Skulls Creek massacre of 1975 and the Coniston massacre of 1928.

Space precludes an exhaustive listing of the massacres and annihilations associated with Australian policing. The chasm between state records and Indigenous knowledges presents a challenge for police scholarship, past and present. For example, in 1928 the Northern Territory Police (**NTP**) participated in the Coniston massacre of the Warlpiri First Nations people. An official state inquiry was commissioned in the aftermath of the massacre. Oral testimonies estimate the true death toll as in the hundreds (Batty and Jupurrurla-Kelly, 2012; CAAMA Productions, 2001), as documented by survivors of the Coniston massacre and their descendants (Bradley, 2019). The government stacked the inquiry with police appointees including the Commissioner of Police (who was intricately implicated with the killings himself). The inquiry lasted three weeks and delivered an unsurprisingly "blue washed" report, exonerating all police and declaring that all 31 Aboriginal victims had been killed in self-defence, including two who were shot in the back while running from NTP constable Murray.

The function of the Mounted Police was to "serve and protect" the prosperity of the settler colony and the safety of its white population. These organisations were known for their extreme violence and savage acts of brutality and their activities were not supported by legislation. In the British penal colonies of New South Wales, Victoria and South Australia, the role of the police was to advance and protect the interests of the colonial administration. Unlike other British colonies which were colonised for the extraction of resources for export and trade, as was the case in the East and West Indies, the purpose of the penal colony of New South Wales, at least initially, was as a temporary solution to the management of London's crime issues. Importantly and in contrast to the civilian police officers, who were amateur and for the most part frequently intoxicated, the personnel of the Border and Mounted police constituted a trained, professional class who were paid out of British Military appropriations. Initially a division of the British Imperial Army, the Mounted Police was formally established in 1825. Officials of the Mounted Police were recruited from among 'reformed convicts' transported for military offences[vi] and paid out of British Military appropriations until 1839. Broadly speaking, the purpose of the Mounted Police was to extend and defend the settler colony and garrisons by any means necessary, including direct organisation and participation in massacres. The Mounted Police were also responsible for intercepting convict escapees and to control the convict population.

From 1788 up to the enactment in 1836 of the *Squatting Act 1836* (NSW) ('the *Squatting Act*'), and up to the 1930s in other jurisdictions,[vii] the Mounted Police were assisted by armed settler pastoralists. Though it appears that up until the point of enactment of the *Squatting Act*, both the Mounted Police and the settler pastoralists were acting in an extra judicial capacity, or beyond the powers prescribed within the legislation. The Mounted Police were organised into several sections which were subsequently deployed to strategic locations along the colonial frontier. Each strategic location along the frontier was overseen by the Commissioner of Crown Lands[viii] for that district ('Maclean', 'Macleay Valley', 'Wellington', 'Liverpool' and so on), with each commissioner being assigned roughly ten troopers of the New South Wales Mounted Police.

Until early in the 20th century the Mounted Police were aided by the Native Police, a coercive body designed to control and/or kill dissident Aboriginal people. The Native Police were made up of prisoners of war and incarcerated Aboriginal people. The Native Police (sometimes referred to as the 'Native Mounted Police') was established in 1838 and operated until at least 1868. Most divisions of the Native Police were located towards the colony's northern borders. The Native Police also played a role in tracking down labourers and domestic servants who had absconded from squatter capitalists and other powerful individuals.

The first commandant of the Native Police was Frederick Walker (1848-1850), a station manager and court official residing in Murrumbidgee. At this time the Native Police consisted of fourteen native troopers and the initial training and instruction took place at Deniliquin which was followed by the first attack on Aboriginal populations at Fort Bourke. A letter published in the *Sydney Morning Herald* from Commandant Walker to the Colonial Secretary acknowledges that there were "some lives lost" at an outstation near the Macintyre River (Walker 1850: 3). They were then deployed to the Condamine

River where the "Fitzroy Downs blacks" were routed and another group were "compelled to fly" from the area (Walker 1850:3). Commandant Frederick Walker was dismissed in September 1854 and his actions were the subject of an inquiry, albeit one which was closed to the public. The report of the inquiry was suppressed for two years. He was later charged with the embezzlement of £100 and sent to Sydney. Although still operating as late as 1868, based out of headquarters in Thagomindah, the dismissal of Walker was also met with a decline in the funding for the Native Police.

The racist foundations of Australian policing are reflected today in its policies and attitudes regarding Indigenous people. Queensland's *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) was the first in a raft of Australian legislation that gave significant police powers over the everyday lives of Aboriginal and Torres Strait Islander peoples. These include a failure to protect, a failure to exercise duty of care, and a lack of response to the crisis of missing and murdered Indigenous women and girls—as well as a culture of harassment, intimidation, and surveillance. This continues today via harassment, intimidation, over-surveillance, targeting and militarisation of police responses to racialised and minoritised populations, and Aboriginal and Torres Strait Islander populations. The Northern Territory Emergency Response suspended the *Racial Discrimination Act 1975* (Cth) to allow a militarised policing presence in Aboriginal territory in 2004. The militarisation of Australian policing is not new and has historic roots that can be traced to the very foundations of Australian policing.

**Part Two: Criminal Continuities in Australian Policing**

From the nine best behaved convicts through to the dissolution of the Native Police due to embezzlement charges of the settler commander of that service, through to allegations of corruption and embezzlement today, the police were and remain a notoriously closed and insular institution. For these reasons, some of the rare glimpses into everyday police misconduct, police complaints and police accountability law have been provided via royal commissions and state inquiries. Some of the key inquiries include: coronial inquests, the royal commission into Aboriginal deaths in custody ('the RCIADIC') (Johnston, 1991), the Queensland Commission of Inquiry into Police Misconduct ('the Fitzgerald Inquiry') (Fitzgerald, 1989), the royal commission into the New South Wales Police Service ('the Wood Royal Commission') (Wood, 1997), the Tink Review (Tink, 2015), the Queensland Taskforce on Women's Safety ('Taskforce on Women's Safety') (McMurdo, 2021) the Senate Inquiry into Murdered and Forcibly Disappeared First Nations Women and Children, among many others.

The *Wood Royal Commission* of 1997 found that corruption and misconduct was "systemic and entrenched" within the New South Wales Police Force. The Wood Royal Commission uncovered hundreds of instances of bribery, money laundering, drug trafficking, fabrication of evidence, fraud and serious assaults involving excessive and sometimes fatal use of force. Hundreds of police officers were forced to resign as evidence of misconduct and criminal conduct was brought to light. The Fitzgerald Inquiry found a culture of misconduct and corruption that resulted in the resignation of the Queensland premier, Joh Bjelke-Petersen, and the Queensland Police Commissioner Terry Lewis who was charged with corruption. The Fitzgerald Inquiry found that a

combination of factors (namely: loyalty to fellow police officers ('the think blue line'), police not enforcing laws against officers and the failure to listen to whistleblowers) were synonymous with misconduct, inefficiency and contempt for the rule of law. More recently, the Queensland Taskforce found systemic issues relating to police domestic violence responses including that police routinely misidentify victims as perpetrators, especially Indigenous women (McMurdo 2021).

In spite of these royal commissions and state inquiries, reform and transformation remains stagnant due to: (1) the absence of independent police oversight and accountability mechanisms; (2) weak disciplinary measures within the police; (3) the powerful influence of police unions and associations, and; (4) rules of evidence and court processes which tend to favour those with legal representation. Three key topics include deaths in custody, police complaints and police failure to protect murdered First Nations women and children.

### (i) Deaths in Police Custody and Police Fatal Shootings

The RCIADIC is widely recognised as one of the most significant and authoritative documents on Indigenous deaths in police and prison custody in Australia. The landmark inquiry was established in 1987 after a political campaign waged by Aboriginal and Torres Strait Islander families and organisations, including the families of John Pat and David Gundy among many others. In 1983, Yinggarda and Bibbulman woman Helen Corbett co-founded the Committee to Defend Black Rights (**CDBR**) which was at the forefront of a national and international campaign which forced the federal government to establish the Royal Commission into Aboriginal Deaths in Custody. In 1986, Corbett and the CDBR took the issue of Indigenous deaths in custody the United Nations in Geneva. Under mounting local and international pressure including protests and advocacy, a royal commission was established to investigate 99 deaths of Indigenous peoples, almost two-thirds of whom had died in police custody.

The *Final Report* of the RCIADIC was tabled in parliament in May 1991 and included the following collected outputs: five volumes, five regional reports, one interim report, 99 death reports and 339 recommendations. The central findings of the RCIADIC are well known and has been stated many times: Indigenous peoples are arrested at vastly disproportionate rates relative to the non-Indigenous population. The five commissioners found that the high number of Indigenous deaths in custody was directly relative to the over-representation of Indigenous people in police and prison custody. Commissioner Johnston concluded that the failure by custodial authorities to exercise a proper duty of care was a major issue. There was little understanding of the duty of care owed by custodial authorities. There were many system defects in relation to exercising care, and many failures to exercise proper care. In many cases, both the decision to arrest and the failure to offer appropriate care were found to be directly related to prejudicial assumptions about the person's Aboriginality. In many cases, police were found to have made decisions based on assumptions that the individual was drunk when in fact they were seriously ill (for example, the deaths of Mark Quayle, Harrison Day, Charles Kulla Kulla, Barbara Denise Yarrie, Joyce Egan, Deirdre Abigail Short and Muriel Binks). In these cases, key decisions were made based on prejudicial assumptions and stereotypes about Indigenous peoples. The failure to exercise a proper duty of care contributed to, or caused, the death in custody by failing to properly assess

the health of the person in custody. Some cases related to illegal police operations, such as the NSWPF SWOS teams illegal raid on the home of David Gundy, who was killed in his family home in Marrickville (Johnston, 1991[b]).

The discriminatory policing of First Nations peoples, in particular the harassment, intimidation, hyper-surveillance and targeting of Indigenous and Black populations has been acknowledged in royal commissions and official inquiries since at least the late 1970s. The problem was reiterated in the investigations by the RCIADIC where the majority of deaths involved the use of custody for minor offences. More recently, the Law Reform Commission of WA found that police use of move-on powers in Perth were being issued to Aboriginal people in inappropriate circumstances. The Commission found that "in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong" (LRCWA, 2006: 206). The SA Police Ombudsman recently commented on the inadequate disciplinary sanctions imposed on officers where racial abuse against Indigenous peoples was found proven. The use of force is also an ongoing issue (Grant, 2015). Independent inquiries in QLD and NSW found that Indigenous people were more likely to be subjected to both the use of tasers and OC spray than other members of the public (Cunneen, 2022).

Since the RCIADIC, and by conservative estimates, a further 516 Indigenous people have died in custody (Australian Institute of Criminology, 2022). As with the 99 deaths investigated in the RCIADIC, many contemporary Indigenous deaths in police custody arise from people being locked-up for minor offences, and many deaths occur because of a failure to exercise a required duty of care. This failure represents the 'violence of neglect' including the arrest and detention of people for unpaid fines, for public drunkenness, for their own 'welfare' and during police interventions. Despite the findings of the RCIADIC, official statistics recorded 106 deaths in custody from 2021-2022—an increase of 23 deaths recorded in the previous year. Other key findings from this year's report include:

- Of the total 24 Indigenous deaths in custody, eight recorded deaths were in police custody and a further 16 deaths in prison custody.
- The largest number was in New South Wales (five deaths in custody), followed by Queensland (four deaths in custody), Western Australia (three deaths in custody), South Australia (two deaths in custody) and one each recorded in the Northern Territory and Victoria.
- 516 official recorded Indigenous deaths in custody since the RCIADIC
- Of the 516 recorded Indigenous people who died in custody since 1991, 335 were in prison, 177 were in police custody and four were in youth detention.

It is important to emphasise that this data has flaws and underestimates the scale of the emergency. The number of deaths recorded officially as 'deaths in custody' has always been inherently political. Legally speaking, a coronial inquest is mandated whenever a person dies in police or prison custody, whether Indigenous or non-Indigenous. Police unions continue to litigate, for instance, to change the legal definition of a death in custody and, in favour of their preferred categorisation of a "death in police presence" rather than a "death in custody". The determination of these cases, exclusively presided

by white settler judges, impacts the level of investigation and, ultimately, the officially recorded deaths in custody. In some respects, the official statistics are misleading. For example, and by extension, the carceral lobby frequently litigate and tender expert witness reports as part of a strategy to deem the death in custody classified as death by "natural causes".

### (ii) Police Complaints

Due to the insular nature of the police discussed above, it is impossible to quantify the precise number of police complaints in relation to excessive use of force and improper/unlawful arrest in Australian jurisdictions. Not every instance of improper and unlawful police conduct will result in a complaint. But of the thousands of police complaints received in Victoria annually, the Independent Broad-based Anti-Corruption Commission (**IBAC**) investigates less than 2% of complaints they receive. Hence around 98% of complaints IBAC receives about Victoria police are investigated internally by the police (Police Accountability, 2023).

Sexism and racism is well documented problem within Australian policing (Chan, 1997; McMurdo, 2021). The police target Aboriginal and Torres Strait Islander populations and other racialised and minoritised populations. In the words of former police officer Jim Taylor, "The easiest way to inflate the arrest numbers was to target the Aboriginal people, especially those homeless ones who are living in the streets, because they're extremely easy targets. That's the police's bread and butter … targeting Indigenous people and making it look like they are doing a lot of work."

In 2020 there were 84 serving QPS officers named as alleged respondents to a domestic violence protection order. In Victoria data obtained by ABC journalist Matilda Marozzi under FOI reveals that in 2019. show 82 Victoria Police officers were charged with family violence offences. We know that of those might have faced disciplinary action including transferral to other duties, demotion and suspension without pay, none were sacked or dismissed. In the past five years, only one was found guilty and no-one had convictions recorded. Some of the reasons for this include lack of leadership, the weak police discipline systems and the powerful influence of police unions. For example, when asked whether victims of domestic violence could have confidence coming forward to the police, when the police they interact with might hold problematic attitudes or be accused of abuse themselves, QPS commissioner Brian Codd said: "Can I say there's a 100% guarantee that won't happen? Well, I can't". Two weeks ago, Commissioner Codd was suspended on full pay for allegedly failing to report a family violence incident while he was in that leadership role. In the case of senior sergeant Neil Punchard—who has been stood down on full pay since December 2018—police have been unable to sack an officer who pleaded guilty to hacking into a police database and leaking the address of a domestic violence victim to her violent former partner. Similarly, Northern Territory police officer Zachary Rolfe remains in service despite a fatal shooting, as well as 46 recorded incidents of excessive use of force, including 12 complaints before the court system and/or Northern Territory Ombudsman.

**Part Three: Police Accountability, Past and Present**

There are few instances in Australian history of police officers being charged in relation to massacres involving the police, police fatal shootings and deaths in police custody. This is despite the rich evidence of the violence of policing, past and present. Australia was founded as a British penal colony. Australian policing was established on racist, settler colonial and patriarchal violence. A history of the Australian police's involvement in genocide (e.g., the Mounted Police and Native Police) and its role in implementing policies built on institutional racism (e.g., Aboriginal child removal and protection legislation more generally) is widely recognised. The Mounted and Border police participated in racial, settler colonial and patriarchal violence. In this sense, the line between law enforcement and criminality has always been blurred and imprecise.

One of the rare instances in which Australian police officers were charged in relation to the violence of policing was in 1926, when James St Jack and Denis Regan were arrested for their role in the Forrest River Massacre, during which upwards of 100 Aboriginal people were killed by pastoralists and police. The case was never brought to trial, as it was dismissed almost immediately by magistrate Alfred Kidson. Both police officers were later reinstated into the West Australian Police (**WAP**). In 1928, negative international coverage of the Coniston Massacre caused the state government to commission a Board of Enquiry into frontier killings—stacked with political appointees and including the commissioner directly implicated in the massacre—which quickly produced a report exonerating policemen involved in the deaths of 31 Aboriginal people in Central Australia. This was a significant underestimation. The University of Newcastle's frontier massacre database (Colonial Frontier Massacres Project, 2018), which documents colonial violence in Australia, estimates a range of between 60 and 200 Warlpiri deaths. The oral testimonies of Survivors suggest a total closer to 200.

It was not until February 1984 that an Australian police officer faced trial in connection with an Aboriginal death in custody. In this instance, four policemen and one police aide were charged with the manslaughter of 16-year-old John Pat on the night of 29 September 1983. Pat was arrested and violently beaten by police officers and members of the public outside the Roebourne Hotel in the Pilbara region of Western Australia. Hours later the station reported that Pat had been found hanged in a holding-cell. A coronial inquest in November, however, heard that at the time of his death Pat suffered heavy bruising around the head, a fractured skull, torn aorta, and two broken ribs. An autopsy identified his cause of death as major blunt force trauma resulting in a brain haemorrhage. This was the first Aboriginal death in custody to receive coverage in the national press. *The Canberra Times* published five articles on the trial of the officers, in addition to its coverage of the November 1983 inquest into Pat's death. In all instances Pat and his family are discussed in mostly racialised terms—along with the one Aboriginal defendant, a police aide—while the white officers are presented as racially neutral. Furthermore, Aboriginal family members are reported as being unreliable witnesses while police families are described in a sympathetic light. The *Canberra Times*'s coverage of the verdict, for instance, noted "loud sobs" from "wives and family members at the back of the courtroom," and featured quotes from the defendants about "getting our lives back to normal" (No author, 1984: 1)

The second instance in which a white Australian police officer was charged was in relation to the death of *Mulrunji* Doomadgee on Palm Island, Manbarra Country, in November 2004. Chris Hurley, a former Queensland Police Service (**QPS**) officer, was charged with manslaughter and assault in relation to the death of a 36-year-old Aboriginal father of one on Palm Island, Manbarra Country. Hurley and an Aboriginal Police Liaison Officer (**APLO**) were responding to a call for service in relation to a domestic dispute. *Mulrunji* happened to be passing by the scene while walking his dog and asked the APLO what he was doing: 'locking up your own people?' Hurley responded, 'what's your problem with the police?' and proceeded to arrest *Mulrunji* on the grounds of alleged public nuisance. Mr Doomadgee died in police custody 40 minutes later. A coroner found that *Mulrunji* sustained injuries including four broken ribs, a burst portal spleen and a ruptured liver (Clements, 2006: 27). In 2007 Hurley was charged with the assault and manslaughter of *Mulrunji.* He was later acquitted of both charges by an all-white jury in Townsville. He was transferred and promoted to the Gold Coast Local Area Command. In the aftermath of the decision, Palm Island Elder and respected leader Lex Wotton was sentenced to seven years imprisonment, which included a legal suppression order that prohibited Wotton from speaking to the media.

The third criminal charge laid against an Australian police officer in relation to Black deaths in custody was the case of *The State of Western Australia v BW* [2021] WAWC 326. The case involved an unnamed police officer who was charged in relation to the fatal shooting of 29-year-old Yamatji woman JC while responding to a call for service outside a suburban address in Geraldton, midwestern Western Australia, on 17 September 2019. After a three-week trial the officer was found not guilty of manslaughter. The acquittal of the unnamed officer sparked protests in Perth and Geraldton. The case and its aftermath received widespread coverage in the Australian press, most of which focused heavily on JC's medical and criminal history. Typical headlines included, 'Geraldton police shooting victim [JC's] struggles with demons revealed amid community protests' (O'Flaherty, 2019) on the ABC News website and 'Final days of a fragile woman' (Hennesy, 2020) in *The West Australian*. By contrast, no information was provided about the anonymous police officer in the press or on social media. Indeed, the suppression of the police officer's name poses a difficulty for research.

The most recent criminal trial against a white Australian police officer was *R v Rolfe* [2022] NTSC 22. Zachary Rolfe is a police officer with the Northern Territory Police (**NTP**) who was charged with murder, manslaughter and engaging with a violent act following the fatal shooting of *Kumanjayi* Walker in November 2019. The Supreme Court of the Northern Territory sat for five weeks – and heard from over forty witnesses – before an all-settler jury in March 2022 acquitted Rolfe of all three charges. The family of the deceased and the Warlpiri community complained that there were only Kardiya (non-Indigenous people) on the jury. The court had earlier imposed a suppression order, so as 'not to unfairly prejudice court processes and procedures' – which was respected by the Walker family and Yuendumu community, who asked allies to refrain from providing commentary on the individual police officer or the criminal trial itself. Sydney-based Seven News Corp defied the suppression order, screening on 24 October 2021 a sensationalist 60-minute feature on Rolfe – titled 'Life and Death' – which attracted over 46,000 viewers. The primetime feature vilified the deceased and

detailed his criminal history; by contrast, the criminal history of the white officer Rolfe was not discussed, despite previous convictions for assault causing grievous bodily harm, theft, perjury and allegations of murder. The 60-minute documentary also vilified Walker's family and the Yuendumu community, perpetuating racist tropes of a 'violent' and 'dysfunctional' community. In one scene, shock-jock Denham Hitchcock states, 'if he [police officer Zachary Rolfe] is acquitted there will be riots, but if he is convicted there is an entire police force that will feel betrayed'. In addition to fueling stereotypes and prejudice, the Seven News Spotlight documentary failed to respect Aboriginal law (for example, the permit system), Aboriginal cultural practices (for example, Sorry Business) and settler law (for example, suppression orders).

It is important to emphasise that criminal charges are not the only form of police accountability. In addition to the criminal cases listed above, there has been a parallel history of civil suits, police complaints, torts and class actions against the police:

- In the case of *Henry v Thompson* (189) 2 Qd R, an Aboriginal man named Mr Henry sued three police officers, in their individual capacity (i.e. not as members of the Queensland Police Service) for targeting, bullying and discriminatory behaviour. Mr Henry alleged that when he was lying on the ground, Mr Thompson, a police officer, repeatedly jumped on his head and shoulders, while another urinated on his stomach. Mr Henry was awarded $25,000 in compensation including for exemplary damages.
- Another successful civil case is that of Tiffany Paterson, who sued the Northern Territory Police (**NTP**) for an undisclosed amount in 2014. The terms of the settlement forbids Ms Paterson from speaking publicly about her case (Carrick, 2014).
- Each of the key police oversight entities in Australia – the Law Enforcement Conduct Commission (**LECC**) and the Independent Broad Based Anti-Corruption Commission (**IBAC**) – each receives around 2,500 police complaints each year. the only pro bono police powers clinic in NSW. Around 1-2 per cent of these complaints are successful.
- In Victoria data obtained by ABC journalist Matilda Marozzi under Freedom of Information revealed that in 2019, 82 Victoria Police (**VicPol**) officers were charged with family violence offences. We know that of those might have faced disciplinary action including transferral to other duties, demotion and suspension without pay, none were sacked or dismissed. In the past five years, only one was found guilty and no-one had convictions recorded. In Queensland, data obtained under FOI reveals that in 2020 there were 84 serving Queensland Police Service (**QPS**) officers named as alleged respondents to a domestic violence protection order.

There is limited sustained criminological research in Australia into police accountability law and the sociology of police deviancy, with few exceptions.[ix]

## Conclusion

The police are unique public servants because they have remarkable powers. These include the power to arrest, to detain, to strip search, to use force and other powers that

deprive individuals of their liberty. Given the significant and unique powers granted to the police, it is important to reflect on the responsibilities, safeguards and oversight mechanisms associated with the improper and unlawful use and abuse of these powers. Namely, what happens when the police exceed or act beyond these powers? What is a crime, who is criminal—and who gets to decide? Who polices the police? How can the police be held accountability for criminality, past and present?

This chapter has examined the criminal foundations and continuities in Australian policing. As opposed to conventional histories of policing which have centred on the consolidation period and consensus, this essay has centred criminality, deviancy and the lack of consent: the police's involvement in land theft, massacres, enforcing policies of apartheid, deaths in police custody, fatal shootings and excessive use of force, past and present. This chapter has discussed criminality and deviancy among the early police ranks, including the high rates of attrition due to drunkenness and corruption. This chapter has briefly sketched the contours of criminality in Australian policing and lack of police accountability.

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## Endnotes

[i] In Turtle Island/North America, for example, some of the earliest policing models included slave patrols which were responsible for controlling and punishing runaway slaves from the early 1700s onwards. Historian Sally Hadden describes in her book on *Slave Patrols* that in 1837, Charleston (South Carolina), for example, had a slave patrol with over one hundred officers, which was far larger than any northern city police force at that time (Hadden, 2001). Even after the slave patrols were formally dissolved, after the end of the Civil War, law enforcement agencies oversaw the removal of citizens of the Cherokee, Muscogee, Chocktaw and other First Nations as part of the Trail of Tears and continued to police Black Code laws and Jim Crow laws until 1968. Law enforcement agencies simultaneously turned a blind eye to lynching's by failing to intervene and punish perpetrators when African American were being murdered by vigilante mobs. In London, England, the development of the first English police in fact dates back at least 50 years prior to its public formation. Sugar was among the most profitable of trades in the global economy. Sugar was known as "white gold" and the largest cheques of the era were written in sugar not money. Historian Brian Edwards estimates that GBP£13 million was made from trade imports in 1700, rising to GBP£34 million in 1790 (Edwards, 2013: 3). The major contemporary corporations and the bulk of trade came from the East India Committee (which imported tea, spices, textiles, furnishings and other commodities from Bengal and China), the West India Committee (which imported tobacco, sugar, ginger,

rum, cotton, mahogany and commodities from Barbados, Jamaica and St Kitts) and Trans-Atlantic slave ships (which passed in an out of ports of Europe, the Caribbean, Africa and the American colonies). The primary purpose of the Thames River Police was to minimise theft of sugar from the ports and maximise profit of the sugar trade. Descendants of slaves have never been compensated or paid reparations for their primary role in the generation of this wealth. The police was a contentious idea at the time and considered anti-libertarian and anti-British. Popular banners from contemporary anti-police protests include the signs, "Abolish the Police!" and "Peel's Police: Raw lobsters and Blue Devils!"

[ii] In 1770 Captain Cook on the *Endeavour* attempted unsuccessfully to land on the tip of Cape York and later anchored for eight days at 'Kundul', Bidjigal/Gweagal Country or 'Botany Bay', Sydney Cove as it is now known. Lieutenant Cook asserted possession of the entire east coast for the King of England, naming it the 'colony of New South Wales'. Lieutenant Cook attempted to claim the eastern half of Australia, from Cape York to Tasmania, for Britain under the imperialist legal doctrine of 'discovery'. They purported to do so on the grounds the land was *terra nullius* or 'land belonging to no-one', an interpretation which has since been deemed legal fiction by the High Court of Australia. Eighteen years later, on 26 January 1788, Captain Phillip (later Lieutenant, then Governor Phillip) accompanied by eleven ships of the first fleet made the same journey, this time invading Bidjigal/Gweagal, Gadigal and Dharug countries and claiming possession on behalf of the British Crown. In 1788 eleven English ships of the First Fleet arrived at 'Warrane', now known as Sydney Cove to the Crown, with the purpose of establishing a British penal colony. The resistance of Aboriginal peoples and communities to the settlement and regimes—including warriors such as Pemulwuy, Windradyne, and Yagan—was fierce and has been documented elsewhere (Goodall 2008; Reynolds 2013; Allam and Evershed 2019; Behrendt *et al* 2020).

[iii] Although many policing histories like to begin in 1829 with Sir Robert Peel and the bobbies, in fact a more accurate origin story commences in 1789 with the establishment of the Thames River Police. As it happens, the Thames River Police were a private police force funded entirely by the West India Committee of Plantation Owners and Merchants—a political lobbying collective consisting of plantation owners with proprietorial interests in the sugar and slave industries in the Caribbean. The purpose of the Thames River Police was to minimise theft of sugar from the ports and maximise profit of the sugar trade or, in other words, to protect the property (sugar, rum) of the aristocrats or plantocrats who funded the entire service. Descendants of slaves have never been compensated or paid reparations for their primary role in the generation of this wealth.

[iv] The idea of the police was contentious, considered anti-British and antilibertarian at the time of the 19th century. For example, in the inquest into the first death of a police officer in the line of duty, a lay jury found the death was a 'justifiable homicide'. That is, the police officer should not have intervened in what was deemed by the lay jury to be a private matter.

[v] Australian police forces today are distinguished by a particular relation to government which can be traced in its legal form to colonial statutes of the mid 19th century. In contrast to Canada, England and America, policing in Australia today is characterised by its organisation by state-wide jurisdiction. Mid 19th century colonial governments laid foundations of *centralised* bureaucratic policing which have continued in substantially the same form to this day.

[vi] As with the Water Police and Night Watch Patrol of the civilian settlement, the Mounted Police 'troopers' were taken from the population of convicts that existed in the colony for the purposes of minimising costs.

[vii] In 1836 Governor Richard Bourke put forward the *Squatting Act 1836* (NSW) ('the *Squatting Act*') which was enacted in the same year. The Squatting Act allowed squatters to run their cattle on 'New South Wales Crown Lands' beyond the limits of British settlement in exchange for a small fee. The purpose of the *Squatting Act* was to facilitate, persuade and exonerate the role of armed settlers and pastoralists in assisting the Mounted Police in joining forces in armed frontier conflict with Indigenous peoples along the colonial frontier.

[viii] The first Commissioner of Crown Lands in the New England district was George James MacDonald, and was appointed in 1839. Commissioner MacDonald was from Armadale, Scotland, and he set up his headquarters and Border Police barracks on a grassy plain which he called 'Armidale' in honour of his faraway homelands. He soon set out on a punitive expedition against a group of local Gamilaroi people.

[ix] For resources, see Sentas and Pandolfini (2017), Cunneen (2001, 2022), Boon Kuo (2017), Whittaker (2018; 2020).