

CRIMINAL LAW AND COLONIAL SUBJECT  
NEW SOUTH WALES, 1810–1830

### **Studies in Australian History**

Series editors:

Alan Gilbert, Patricia Grimshaw and Peter Spearritt

*Convict Workers* Steven Nicholas (ed.)

*Origins of Australia's Capital Cities* Pamela Statham (ed.)

*A Military History of Australia* Jeffrey Grey

*The Invisible State* Alastair Davidson

*The Price of Health* James A. Gillespie

*The Rule of Law in a Penal Colony* David Neal

*Woman Suffrage in Australia: A Gift or a Struggle* Audrey Oldfield

*Land Settlement in Early Tasmania* Sharon Morgan

# CRIMINAL LAW AND COLONIAL SUBJECT

NEW SOUTH WALES, 1810–1830

*Paula J. Byrne*



## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom  
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India  
 79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9780521403795](http://www.cambridge.org/9780521403795)

© Cambridge University Press 1993

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 1993

First paperback edition 2003

*A catalogue record for this publication is available from the British Library*

*National Library of Australia Cataloguing in Publication data*

Byrne, Paula-Jane, 1959–

Criminal law and colonial subject: New South Wales, 1810–1830.

Bibliography.

Includes index.

ISBN 0 521 40379 0.

1. Criminal law – New South Wales – History – 19th century.

2. Criminal justice, Administration of – New South Wales – History 19th century. 3. New South Wales – Social conditions – 1788–1851.

4. New South Wales – History – 1788–1851. I. Title. (Series:

Studies in Australian history (Cambridge, England)).

345.944

*Library of Congress Cataloging in Publication data*

Byrne, Paula-Jane, 1959–

Criminal law and colonial subject: New South Wales, 1810–1830.

Paula-Jane Byrne.

(Studies in Australian history)

p. cm.

Includes bibliographical references.

ISBN 0 521 40379 0

1. Criminal law – Australia – New South Wales – History – 19th century. I. Title. II. Series.

KUC379.5.B97 1992

345.944–dc20 92-11457

[349.4405] CIP

ISBN 978-0-521-40379-5 Hardback

ISBN 978-0-521-52294-6 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

# CONTENTS

Figures	vii
Tables	ix
Author's Note	xi
Acknowledgements	xiii
Abbreviations	xiv
1 Introduction	1
<i>Part 1: Law and the Person</i>	
2 Labour	19
3 The House	73
4 The Body	106
<i>Part 2: Offence in the Wilderness</i>	
5 The Creation of Bushranging	129
<i>Part 3: Suspicious Characters: Police and People</i>	
6 The Structure and Style of Policing	155
7 Popular Use of Law	208

vi CONTENTS

---

---

*Part 4: The Courtroom*

8	Deciding What Was Good and Bad	265
9	Conclusion	286
	Appendix	291
	Bibliography	292
	Index	299

## FIGURES

1	Map included in the Quarter Sessions case against Thomas Isaacson for receiving stolen goods, 1826 (redrawn).	28
2	Plan of John Brackfield's house included in the murder case against his servants, 1824 (redrawn).	78
3	Plan of James Kirton's house included in the case against him for assault and having a disorderly house, 1821.	79
4	Plan of two houses included in the case against Thomas Welsh for the murder of Mary Rowe, 1811 (drawn from description).	80
5	Plan of kitchen included in the case against John Clegg for murder of his wife, 1825 (redrawn).	87
6	A map of the area in which Kitty Carmen's body was found, included in the case against Charles Butler for her murder, 1826 (drawn from description).	117
7	Activity of John Donohue's gang, 1829.	141
8	Reasons given for arrests by constables, 1820–21.	159
9	Highway robbery on the roads to Sydney, 1819–30: cases appearing in the criminal courts.	213
10	Status and relationships of persons appearing in cases of horse, sheep and cattle theft, Windsor region, 1817–22.	227
11	Status and relationships of persons appearing in cases of cattle theft, Liverpool and Campbelltown region, 1817–23.	228
12	Status and relationships of persons appearing in cases of horse, sheep and cattle theft, Liverpool and Campbelltown region, 1825–28.	230

---

viii FIGURES

---

13	Status and relationships of persons appearing in cases of sheep and cattle theft, Parramatta region, 1818–22.	231
14	Status and relationships of defendants and complainants in assault cases before the criminal courts, 1816–20.	241
15	Status and relationships of defendants and complainants in assault cases before the Police Magistrates' Bench, 1820–21.	243
16	Examples of interactions between small landholders in theft and assault cases before the criminal courts and Quarter Sessions, Windsor, 1818–29.	252



## TABLES

1	Places of employment of convicts appearing before the courts, 1812–28	26
2	Officers reporting convicts absent from government work, 1820–21	27
3	Street arrests and charges during work hours, 1820–21	29
4	Offences of male convicts in government employ appearing before magistrates' benches, 1810–12	32
5	Offences of male convicts in private employ appearing before Police Magistrates' Benches, Sydney, 1810–28	34
6	Structure of households in which female domestic servants lived, Sydney, 1822–24	44
7	Offences by domestic servants heard before Police Magistrates' Benches and country magistrates, 1810–28	45
8	Distribution of female convicts, 1828	46
9	Charges on which male convicts appeared before country magistrates' benches, 1820s	54
10	Relation of accused to victim in cases of house theft appearing before benches and criminal courts, 1812–30	75
11	Cases appearing before the Quarter Sessions of theft from houses and public houses, Sydney, 1824–30	75
12	Relationship of accused to victim in theft cases appearing before magistrates' benches, Sydney, 1810–21	76
13	Structure of Sydney households, 1822–24	77
14	Property stolen from houses and public houses by persons other than servants, 1816–29	85

15	Property stolen by women in cases of theft appearing before magistrates' benches and criminal courts, 1810–29	86
16	Number of bushranging cases sent to trial before criminal courts by committing benches, 1816–31	131
17	Status of bushrangers in criminal cases, 1810–31	133
18	Status of victims of bushranging in criminal cases, 1816–31	137
19	Street arrests by constables in cases appearing before the Quarter Sessions, 1825–30	160
20	Street arrests of free persons for offences other than theft appearing before magistrates' benches, 1820s	161
21	Reasons given for house searches in cases appearing before Sydney magistrates' benches, 1810–21	165
22	House searches by constables in cases appearing before the criminal courts, 1816–30	166
23	Titles of offences in street arrests, Parramatta Bench of Magistrates, 1815–26	173
24	Fines imposed on free persons by the Windsor Bench of Magistrates, 1811–19	189
25	Reasons for appearances of constables before the Windsor Quarter Sessions, November 1824–January 1830	191
26	Reasons given by employers bringing free servants to court for theft, 1816–24	216
27	Reasons given by employers bringing free servants before Sydney Quarter Sessions, 1826–28	217
28	Means of discovery of forgery cases appearing before the Court of Criminal Jurisdiction, 1816–24	220
29	Theft accusations between small landowners, traders and itinerant labourers appearing before Windsor Quarter Sessions, 1824–27	225
30	Reasons given for assaults appearing before Quarter Sessions	250
31	Assaults over boundaries, crops and animals appearing before Windsor Quarter Sessions, 1824–27	251

## AUTHOR'S NOTE

### *Sources*

All of the surviving records of the activities of complainants, constables, magistrates and defendants from the period 1810 to 1830 have provided the basis of this book.

Overall, 5910 cases have been closely examined. I have also examined the records of benches where cases are listed but no depositions remain, particularly records of the Sydney benches and the Parramatta bench for the 1820s.

The records which remain are as follows. For full details, see Appendix.

### **Minutes**

Judge Advocate's Bench, 1810–20.  
Police Magistrates' Bench, Sydney, 1812, 1815–16, 1820–21.  
Liverpool Bench of Magistrates, 1824, 1826.  
Goulburn Bench of Magistrates, 1828–29.  
Argyle Bench of Magistrates, 1826–27.  
Newcastle Bench of Magistrates, 1823–27.  
Bathurst Bench of Magistrates, 1825–26.  
Court of Criminal Jurisdiction, 1810–15.

### **Depositions**

Quarter Sessions, Sydney, 1824–30.  
Quarter Sessions, Parramatta, 1825–30.  
Quarter Sessions, Windsor, 1824–30.  
Quarter Sessions, Campbelltown, 1828–30.  
Quarter Sessions, Liverpool, 1824–28.

Quarter Sessions, Newcastle, 1826–29.  
 Court of Criminal Jurisdiction, 1816–24.  
 Supreme Court of Criminal Jurisdiction, 1824–31.

### Returns

Petty Sessions, Sydney, 1824, 1828 (3 months).  
 Parramatta Bench of Magistrates, 1815–16, 1822, 1824, 1826.

### *Language*

Depositions include words and phrases common to early nineteenth-century New South Wales, e.g. to 'dress' meaning to cook, to 'plant' meaning to hide. I have footnoted these and explained their meaning where necessary.

Depositions were taken by the clerk of the court. They are, then, a transcript of speech. The early nineteenth-century clerk did not play the role of the modern police in deliberating on evidence given, and asking further questions. He simply transcribed the proceedings of the magistrates' bench. If spoken evidence in a later court appearance differed from the initial deposition, the trial was stopped and the speaker was in danger of being tried for perjury. Thus there is close alignment between spoken and written word in these court papers.

I have left the language and spelling of letters and depositions verbatim. In some, it is possible to see accent, hesitation and drunkenness.

The term 'deponent' means 'the person speaking'; 'the prisoner' means 'the person against whom the case is brought'.

### *Currency*

Although many forms of currency circulated in the colony of New South Wales, monetary values were generally expressed in terms of pounds sterling. There were 12 pennies (d.) in one shilling (s.) and 20 shillings in one pound (£). The sum of £1 10s. was also written as 30/-. A half-crown was equal to 2s 6d.

### *Measurement*

Metric equivalents for imperial measures used in the text are as follows.

#### **Length**

1 yard = 0.914 m  
 1 mile = 1.61 km

#### **Mass**

1 pound (lb) = 454 g

#### **Volume**

1 gallon = 4.55 L  
 1 bushel = 35.2 L

#### **Area**

1 acre = 0.405 ha

## ACKNOWLEDGEMENTS

The Clerk for Public Prosecutions allowed me access to the criminal records which provide the basis for this book. Dawn Troy of the New South Wales Archives Office made records awaiting restoration available for my research; she also provided me with lists of cases. Di Rhodes of the Dixson Library assisted me in locating police bench records for Sydney. The staff of the New South Wales Archives Office were also most helpful in locating records, advising copying procedures and tolerating my requests. Though I spent less time in the Mitchell Library, staff there were similarly helpful.

Beverly Kingston supervised this work as a thesis and I am most grateful for her assistance and criticism. This book has also been assisted by Marion Aveling's advice. Alan Atkinson suggested the order of chapters. These historians were involved in assessing the thesis. Over the years there have been numerous people who encouraged me to persist. Many useful discussions were had with Australian and English legal historians, particularly Alex Castles and David Neal. Though this is not a work of legal history, it is they who were most familiar with the territory of this research. I have also received valuable feedback from my colleagues at the Australian universities where I worked.

I also thank Phillipa McGuinness and Robin Derricourt of Cambridge University Press. This book was carefully typed by Linda Maynard and she was most helpful in design of tables and diagrams. Linda has worked patiently for many years on this project and I am most grateful. Janet Mackenzie, a freelance editor for Cambridge University Press, edited this book; I wish to thank her for the extensive work she put in.

This book is dedicated to Jimmy Byrne.

## ABBREVIATIONS

A.B.M.	Argyle Bench of Magistrates
C.C.J.	Court of Criminal Jurisdiction
G.B.M.	Goulburn Bench of Magistrates
H.R.A.	<i>Historical Records of Australia</i>
J.A.B.	Judge Advocate's Bench
P.M.B.	Sydney Police Magistrates' Benches
Q.S.	Quarter Sessions
S.C.C.J.	Supreme Court of Criminal Jurisdiction
S.P.S.	Sydney Petty Sessions