A different kind of ‘subject:’ Aboriginal legal status and colonial law in Western Australia, 1829 -1861.

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This thesis is presented for the degree of Doctor of Philosophy of Murdoch University.

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Declaration

I declare this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary educational institution.

Ann Patricia Hunter.
Abstract

A different kind of ‘subject:’ Aboriginal legal status and colonial law in Western Australia, 1829-1861.

This thesis is an examination of the nature and application of the policy regarding the legal status and rights of Aboriginal people in Western Australia from 1829 to 1861. It describes the extent of the debates and the role of British law that arose after conflict between Aboriginal people and settlers in the context of political and economic contests between settlers and government on land issues. While the British government continually maintained that the legal basis for annexation was settlement, by the mid-1830s Stirling regarded it as an ‘invasion,’ but was neither prepared to accept that Aboriginal people had to consent to the imposition of British law upon them, nor to formally recognise their rights as the original owners of the land. Instead, Stirling’s government applied an archaic form of outlawry to Aboriginal people who resisted the invasion. This was despite proposals for agreements in the 1830s.

During the early 1840s there was a temporary legal pluralism in Western Australia where Indigenous laws were officially recognised. However, by the mid-1840s the administration of British law in Western Australia was increasingly dictated by settler interests and mounting settler-magistrate pressure to modify the legal position of Aboriginal people which resulted in the development of colonial law to construct a landless subject status with minimal rights based on their value as a useful labour force for the pastoral economy. This separate legal status deliberately departed from ‘equality’ principles and corresponded with the diminished status of Indigenous laws and the abandonment of legal pluralism in settled districts, during a period of rapid
pastoral expansion in the 1850s. This entrenched discriminatory practice in colonial law would be the prelude to the ‘protectionist’ and discriminatory legislation of the early twentieth century which formalised inequality of legal status.
### Abbreviations

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>APS</td>
<td>Aborigines Protection Society.</td>
</tr>
<tr>
<td>AJCP</td>
<td>Australian Joint Copying Project.</td>
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<tr>
<td>BL</td>
<td>Battye Library, Perth.</td>
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<tr>
<td>BPP</td>
<td>British Parliamentary Papers.</td>
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<tr>
<td>CSR</td>
<td>Colonial Secretary Records, W.A.</td>
</tr>
<tr>
<td>CO</td>
<td>Colonial Office Records, London.</td>
</tr>
<tr>
<td>HRA</td>
<td>Historical Records of Australia</td>
</tr>
<tr>
<td>LL</td>
<td>Law Library, University of Western Australia.</td>
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<tr>
<td>ML</td>
<td>Mitchell Library, Sydney.</td>
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<tr>
<td>NLA</td>
<td>National Library of Australia, Canberra.</td>
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<tr>
<td>RL</td>
<td>Reid Library, University of Western Australia.</td>
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<tr>
<td>SRO</td>
<td>State Records Office of Western Australia</td>
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<tr>
<td>SRP</td>
<td>Swan River Papers.</td>
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<tr>
<td>WAGG</td>
<td>Western Australian Government Gazette.</td>
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<td>WL</td>
<td>Wellcome Library, London.</td>
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Chapter 1

Introduction

This thesis examines the nature and application of policy regarding the legal position and rights of Aboriginal people in Western Australia from 1829 to 1861. It investigates the extent of the role of British law and the debates in the context of political and economic contests between settlers and government. The legal position of Aboriginal people was at times a focus of debate, but more often it was peripheral to other debates among settlers in Western Australia. The thesis includes an examination of motivations, intentions and outcomes, which were not necessarily the same as in other Australian colonies. In Western Australia the role of settler and official was more closely intertwined. Captain James Stirling was a Governor who convinced a pressed British government of the benefit of a settler colony and encouraged naval, military and civilian officials to take up land grants. Therefore, when reference is made to settlers it includes the military and civil officers.

The study extends from the establishment of the Swan River Colony in June 1829 until the period when a formal Supreme Court was established on 18 June 1861. This was the period during which European settlement was largely confined to the Southwest region, but there was also some expansion as far north as Victoria Plains and Champion Bay in the 1850s. In 1850, Western Australia became a penal colony with the

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1 Known alternatively as Swan River Colony from June 1829.
2 For example, in New South Wales in the 1820 and 1830s there were contests between Emancipists and Exclusives which were not a feature of early Western Australia. B. Kercher, *An Unruly Child, A History of Law in Australia*, St Leonards, Allen and Unwin, 1995, Ch.4; D. Neal, *The Rule of Law in a Penal Colony*, Cambridge, Cambridge University Press, 1991, pp.18-19.
3 A Bill for an Ordinance to constitute a Supreme Court with common law and equity jurisdictions similar to English superior courts was passed by the Council and assented to on 18 June 1861. J.M. Bennett, *Sir Archibald Burt*, Sydney, The Federation Press, 2002, p.29.
4 Aboriginal people, refers to people of the Southwest region and Aboriginal peoples, to the rest of Western Australia and Australia.
introduction of the first convicts to make up the labour shortfall that was becoming more acute by the late 1840s at a time of rapid pastoral expansion.\textsuperscript{5} Even though pastoral expansion continued in Western Australia until the 1920s, expressions of official policy and debates on Aboriginal legal status had narrowed by the late 1840s and early 1850s. There were also regional differences that influenced policy in the Northwest.\textsuperscript{6}

Surprisingly, there has been little research carried out on the early nineteenth century, which was a period when legal and policy innovation by the colonial government was taking place, during a period of economic and political uncertainty. The thesis examines this innovation in the political and economic context of the period. This context includes the encounters between Aboriginal people and settlers and the extent to which British law was employed as one of the means of regulating those encounters. This focuses on how the law was defined, perceived and understood by officials and settlers at the time. This examination is based on the assumption that the legal position of Aboriginal people was shaped by political and economic events as well as by legal principles.\textsuperscript{7} As such, this is a political and legal history. Ward has highlighted the value of contextualizing the study of law and policy in Imperial and colonial political contexts.\textsuperscript{8} Many of these influences affected the options being debated by settlers in the Swan River Colony. Therefore, while my focus is on Western Australia, some comparison is made to other jurisdictions where relevant.

\textsuperscript{5} The last convicts arrived in January 1868.
\textsuperscript{6} P. Hasluck, \textit{Black Australians, a survey of native policy in Western Australia}, Melbourne, Melbourne University Press, 1970, pp.31, 62. This was first published in 1942.
\textsuperscript{7} A. C. Castles, \textit{Australian Legal History}, Sydney, Law Book Company, 1982, p.517.
The only major work on the legal position of Aboriginal people in Western Australia in the early nineteenth century was undertaken by journalist, politician and historian Paul Hasluck in 1942. Hasluck surveyed the attitudes of settlers as reflected by changes in the development and implementation of colonial policy, legislation and regulation relating to Aboriginal peoples from 1829 to 1897. He undertook a survey covering practically the whole nineteenth century, and therefore did not undertake a more detailed examination of the period from the 1830s to 1850s and the range of settler debate that was taking place.

Hasluck examined the history of colonial administration and the legal status of Aboriginal peoples as British subjects and emphasised the variation between intention and practice. Settler attitudes towards Aboriginal peoples were governed by efforts to enforce what settlers regarded as their right to defend their property through lobbying colonial and British governments and through punitive actions. The manipulation of British law and policy was one aspect of the political and economic armament, including the civil and criminal courts where interests were often in conflict with Indigenous peoples over land and resources.

Hasluck’s basis for comparison between intention and practice was the duty inherent in British colonial policy of regarding Aboriginal peoples as British subjects with full rights and protection under British law. This responsibility of guardianship included plans for civilisation through education, labour and Christianisation. The implementation of the ideal of equality under British law which included rights and obligations was more formally impressed upon the colonial government by the then Secretary of State, Lord Glenelg in July 1835, coinciding with the appointment of a

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9 Hasluck, *Black Australians.*
10 Ibid.
11 Ibid., Ch.1.
British parliamentary select committee on the treatment of indigenous peoples in British settlements. Hasluck concluded that the ideals largely failed and were gradually abandoned by the 1850s where the intention was limited to protecting Aboriginal peoples from physical harm. The ideals failed because the nature of contact between Aborigines and settlers made implementation impractical and because settlers were prejudiced in favour of their own interests and were therefore unlikely to assist Aborigines to adapt to the changes brought by colonisation. Since Hasluck takes this official policy as his starting point for examining the legal status of Aboriginal peoples, he does not critique the British government’s official fiction underlying the territorial acquisition of Western Australia, of settled occupation and the problems that this created, which were even recognised by a few settlers at the time, such as Advocate General George Fletcher Moore. The violent conflict that followed in the early 1830s caused Stirling to acknowledge that the reality was more like that of an invasion.

The main espousal of values encompassing the English notion of ‘rule of law’ was made by humanitarian advocates such as Saxe Bannister and reflected in Colonial Office policy from the mid-1830s to early 1840s. Evans examines the nature, purpose and contradictions of the rule of law, by investigating its ‘suspension,’ through examples of summary justice in Western Australia and South Australia. An examination of the Stirling period indicates that summary justice through the device of outlawry and use of the mounted police and military was a feature, almost immediately after Stirling’s proclamation of the protection for Aborigines under British law as for other British subjects. The thesis examines the local impetus for the early and rapid development of

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13 Hasluck, Black Australians, p.59.
the departure from the Colonial Office policy of equal legal status in Western Australia which culminated in discriminatory laws based on race and which institutionalised legal inequality. The colonial policy of summary justice that excluded the principle of equality under British law was legitimised in the late 1840s when Colonial Office officials departed from their earlier policy of equality before the law, more in favour of settlers who wanted to more rapidly acquire Indigenous lands for the pastoral economy.\textsuperscript{15} Ward argues that British law was applied to indigenous peoples as a benchmark by which indigenous laws and society were judged, as both a means and measure of civilisation.\textsuperscript{16} My thesis examines this earlier and more rapid departure from equality principles in Western Australia which was due to the political and economic context, informal legal system and close alliance between officials, settlers and magistrates, which lasted longer than even the Colonial office expected.

Hasluck argued that the framework for developing a policy on Aboriginal administration and welfare was based on the attitude that settlers and officials regarded the Aboriginal presence as a problem which required a solution.\textsuperscript{17} This attitude has been confirmed generally by historians writing on other Australian colonies and in the comparative context, arising from settler-colonialism’s focus on land acquisition.\textsuperscript{18}

\textsuperscript{17} Hasluck, \textit{Black Australians}, p. 59.
While the outcome of Aboriginal peoples being denied equal legal status and rights in Australia is well known, the history in relation to Aboriginal people in the early nineteenth century in the Southwest of Western Australia is less known. This thesis examines in greater detail the rationale and debates surrounding the intention and implementation of colonial law and policy, including why the ‘humanitarian’ movement as exemplified by the 1837 Aborigines Committee, was unsuccessful in lobbying for indigenous rights to be incorporated in law.

Laidlaw investigated the interplay of networks between the central government and the colonies during the 1830s and 40s, uncovering the motivations behind the 1837 Aborigines Committee and the range of debates within the humanitarian movement.\(^\text{19}\) Hannah Robert has explained this failure in the context of the contests between coloniser and humanitarian networks by comparing the intentions and outcomes on Aboriginal land rights in South Australia and Port Phillip.\(^\text{20}\) She argued that humanitarian rhetoric was employed by coloniser companies as a ploy to gain British government approval for colonising projects. However, there has been very little research undertaken on the attempts to enshrine rights in Imperial law such as those by former New South Wales Attorney General, Saxe Bannister and other members of the Aborigines Protection Society.\(^\text{21}\) In recognising the need for situating Western Australia in an Imperial historical framework, a chapter has been included on the humanitarian movement in England in the 1830s and 40s, and the range of the debates. The chapter

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then assesses the humanitarian impact on British colonial policy. This has previously been examined in relation to South Australia and New South Wales, but not Western Australia.

The literature confirms that the ‘equality’ policy enunciated by the Colonial Office in the 1830s and 40s following the humanitarian influence, was a failure in other jurisdictions in that it was not realised in practice. Similar conclusions have been made even for South Australia, which was supposed to reflect the highest standard of Colonial Office policy regarding Indigenous rights. Pope examined the South Australian Supreme court cases of the early nineteenth century to find out how and why the policy failed to be translated into practice. He concluded that despite the humanitarian ideals in the mid-1830s, there was little difference between the outcome in South Australia and other Australian colonies such as New South Wales. Since then, others have focused more on the complexities of the debates surrounding indigenous status and rights, comparing South Australia to other jurisdictions within the wider political context of debates among settlers and officials. Colonial Office officials often referred to British law in the context of pragmatic policy objectives.

Hasluck pointed out that the cause of settler prejudice was based on negative attitudes and assumptions about Indigenous society and laws. This flowed from ideas of cultural superiority which were reflected in the official policy of guardianship which assumed that Indigenous peoples would disappear before the advance of settlement. Reynolds reinserted Indigenous agency into the historiography of race relations in the early

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24 Pope, ‘Aborigines and the Criminal Law in South Australia,’ Ch.1.
25 Ibid.
nineteenth century, and argued that violent resistance by Indigenous peoples was a feature that had previously not been acknowledged.\(^{28}\) The purpose of examining settler debates is also to find out whether there was any regard to the Indigenous person’s ‘own notion of right,’ as Kercher puts it.\(^{29}\) There were also differences of opinion among settlers regarding government policy, especially during the 1830s and early 1840s, which has not previously been examined nor analysed.\(^{30}\)

The thesis assumes that cultural, social and racial values did influence and underpin the way that British law was developed and applied by colonial authorities. Rowley wrote about the assumptions of racial prejudice that underpinned colonial actions and were embodied in institutions and law in the nineteenth and twentieth centuries.\(^{31}\) Reynolds examined the way that social status was perceived by Europeans as part of a framework of a racial and class hierarchy that discriminated against Aborigines as ‘other.’\(^{32}\) Since writing this article in 1983, Reynolds has tended to divorce the legal status and rights discourse from those underlying racial and cultural assumptions, and prejudices.\(^{33}\) However, he recognised the importance of the relationship between the history of Aboriginal legal status and governments’ failure to recognise land rights in Australia.\(^{34}\) Reynolds has also drawn attention to the fact that there were some settlers and commentators who criticised public policy on Indigenous status and rights.\(^{35}\)


In the 1980s, when Reynolds was writing on Aboriginal resistance to the European invasion, Green was writing on the nature of the relationship between Aborigines and settlers in the Southwest of Western Australia. Like Reynolds, he emphasised the importance of Indigenous perspective and agency, and argued that the encounter between Aborigines and settlers was not uniform in all situations. He pointed out that contact was affected by regional variations and compared the relatively peaceful accommodation at the military outpost of King George Sound in December 1826 where there were no planned settlement on Indigenous lands, to the more violent conflict that arose (after an initial cautiousness on both sides) at the Swan River Colony in the early 1830s. Regional differences are acknowledged where possible, within the overall objective of examining the policy and extent of the debate on the legal status and rights of Aboriginal people among settlers. A more detailed study would need to be done to uncover subtle differences.

Green highlighted for the first time the contests between Aboriginal people and settlers in the Southwest of Western Australia drawing on settler accounts. He also emphasised the importance of the contribution of Aboriginal labour to the agricultural and pastoral economy at a time of acute labour shortages, which has previously been underplayed in other histories of Western Australia. The thesis examines how this economic need, particularly in the 1840s, influenced policy decisions about the legal status of Aboriginal people. There has been no systematic study of the debates regarding official

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38 Green, *Broken Spears*, pp 142-149; Green, ‘Aborigines and White Settlers,’ pp 72-123.
policy or the role of colonial law during the period, that utilises a wide range of archival sources. This thesis therefore fills a very significant gap in this area.

Western Australia was similar to South Australia in that it was originally intended to be a self-funding chartered colony, but was changed to a Crown colony virtually at the last minute. However, unlike South Australia, the colony had a more haphazard establishment which affected its ability to raise revenue, and it continued to be financially dependent on the British government for a much longer period than other Australian colonies. Contests between settlers and the British government over land regulations dominate the policy debate in Western Australia in the 1830s and 40s, and had a major impact on the debates on Aboriginal status and rights during this period. This financial dependence, and the fact that the British government considered the colony too thinly populated to generate sufficient revenue and fund its own institutions, meant that Western Australia did not gain representative government until 1870 and responsible government in 1890.

These economic constraints affected the number of colonial officials approved by the Colonial Office and the extent of the legal expertise available in the colony, and it was not until 1861 that a Supreme Court with closer adherence to English legal procedure and forms was established with greater judicial independence. Up until the late 1850s the administration of colonial law was applied by an untrained magistracy appointed from among the settlers (although there were a few lawyers) under the legally trained Chief Magistrate, William Mackie, who held that position from December 1830 until

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1857. From 1841, Mackie was an ex-officio member of the Legislative Council, which extended his influence on the development and interpretation of colonial law and policy in relation to Aborigines.42 In some respects the operation of a magistracy and the adaptation of British law to local conditions was similar to the earlier experience in New South Wales and Van Diemen’s Land prior to the formal establishment of a Supreme Court in 1824, although in New South Wales there had been military juries rather than grand juries for criminal trials with the objective of controlling the convicts.43

Tilbrook assessed the impact of colonisation on Aboriginal people in the Swan River Colony from 1829 to 1840 using an anthropological perspective of the archives.44 She argued that they were economically displaced by settlers and that the inequality of economic power was established relatively early. Atkinson suggests that this was a more gradual process where settler’s needs for assistance from Aboriginal people facilitated a ‘more even-handed conversation’ in the 1830s.45 The main development of language dictionaries at official government level in order to facilitate ‘conversation’ did not happen until the Hutt period from 1839 to the early 1840s when the economic need for Aboriginal labour was felt. Western Australia’s settler population did not extend beyond 5300 in 1850 and 15,227 in 1860.46 During the early 1830s, both physical and economic security was an issue among individual settlers where they were scattered over a wide region at a time of economic and political uncertainty.47 This

46 Hasluck, Black Australians, p. 19.
47 G. F. Moore, Diary of Ten Years’ Eventful Life of an Early Settler in Western Australia, (1884) facsimile edition, Nedlands, UWA Press, 1978, p.35.
coincided with a wider political debate on options for dealing with what the majority of officials and settlers regarded as the Aboriginal ‘problem.’

During the 1830s and 1840s, governors played a greater role in the development and implementation of policy and law relating to the relationship between Aboriginal people and settlers. Therefore this thesis pays greater attention to the first two governors of Western Australia, Captain James Stirling who was a naval captain and John Hutt who had worked as a colonial administrator and magistrate for the East India Company in Madras, and as Secretary to the South Australian Commissioners in London. Statham-Drew’s biography of Stirling is just as much a political and economic history of Western Australia in the 1830s as it is a biography, and provides insight into the economic and political tensions. However, while she makes some reference to Stirling’s policy regarding Aboriginal people there is little critical analysis, or much detail of his relationship with other officials, notably Captain Frederick Irwin who was Acting Governor while Stirling was in England from September 1832 to September 1833. There is no biography of John Hutt who more than Stirling was influenced by the humanitarian movement and developed systems and principles which he applied in Western Australia from 1839 to 1846. Shortly after his arrival in the colony, Hutt would also depart from Colonial Office policy of legal equality and become more of a settler-governor in the early 1840s.

Castles concluded that the legal position of Aboriginal peoples in colonial Australia was a mixture of ‘policy determinations’ and ‘administrative directives’ in the form of

49 Statham-Drew, James Stirling.
governors’ proclamations and instructions.\textsuperscript{51} The period of the thesis covers the whole of the magistracy under a Chief Magistrate with its focus on more informal legal processes, elements of natural law, administrative instructions, Executive Council policy, or what McHugh calls ‘pre–modern law’.\textsuperscript{52} However, by the 1840s there was a shift to the use of colonial statutes and the courts in relation to Indigenous people. Formal law was not static in any one period, but was often resisted by settlers who developed their own informal rules or norms in colonies.\textsuperscript{53} An example of settlers developing their own form of legalism in Western Australia which was tolerated by Stirling in the 1830s was the increasing reliance on the right to shoot Aboriginal people in order to secure private property. The endorsement of this policy by the colonial government who sided with the settlers of York in the late 1830s was a source of dispute with the Secretary of State, Lord Glenelg, who sought a more restricted and legal interpretation of ‘self-defence’.\textsuperscript{54} Both settlers and magistrates modified British law to suit their own economic and political objectives, and employed British constitutional and Blackstonian ideals of subject status, to justify their own status and rights.\textsuperscript{55} An example in Western Australia is the introduction of a system of outlawry of Aborigines by Mackie and Stirling following a coroner’s verdict\textsuperscript{56} These insights are useful in ascertaining the causes of the modification of British law.

\footnotesize
\begin{itemize}
\item \textsuperscript{51} Castles, \textit{Australian Legal History}, p. 517.
\item \textsuperscript{52} P. McHugh, \textit{Aboriginal Societies and the Common law: A History of Sovereignty, Status and Self-Determination}, Oxford, Oxford University Press, 2004, Ch.1.
\item \textsuperscript{55} This was similar in New South Wales. Kercher, \textit{An Unruly Child}, p.xii.
\item \textsuperscript{56} See Chapter 2.
\end{itemize}
Sources

The method employed in the thesis follows a contextual historical approach by situating the law in the wider political and economic contests.\(^{57}\) The thesis examines the interactions between politics and law, drawing on local and external influences on Western Australia. A wide range of archival and documentary sources were examined in order to ascertain the extent of the debate on the legal position and rights of Aboriginal people and on the implementation of law and policy. This has also made possible a more comprehensive picture of the early legal development of the Swan River Colony. The archival and documentary sources comprise despatches between the governors and Colonial Office officials, minutes of the Legislative and Executive Councils, court cases, legislation, regulations, government gazettes, Colonial Secretary Office records, British Parliamentary Papers, newspapers, and the diaries and correspondence of settlers and officials.

The thesis has involved an examination of court records including criminal indictment files and newspaper reports of the Court of the Quarter Sessions and a survey of magistrate court cases, where available. In addition, reference has been made to Gill’s unpublished notes from cases in the Court of Quarter Sessions that he collated from the criminal record books and criminal indictment files for the period, 1830 to 1861.\(^{58}\) The cases were examined with a qualitative rather than a quantitative purpose in mind in order to highlight questions and debates on Aboriginal legal status and rights, and to gain an understanding of the operation of the colonial law in the period under study. A wide range of sources also allowed for the court cases to be situated within the wider context of relationship between Indigenes and settlers.

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\(^{57}\) Ibid.

\(^{58}\) A. W. Gill, *Files of the Crime and Society in Western Australia (1829-1911) Project*, BL, MN 1469, ACC 4382A/12 to 21.
It is acknowledged that the archives do not provide an Indigenous perspective on events. However, the thesis highlights Indigenous agency where it affected the development of policy and law and the actions of the settlers. It is quite likely that there was mediation and private agreements between settlers and Aborigines that were not recorded in the archives. From time to time, Indigenous agency and responses are revealed through the records. These were framed by Europeans who recorded and interpreted events and statements made by Aboriginal people, or in settler diaries such as those of George Fletcher Moore who was a settler as well as a significant colonial official.

**Thesis structure**

The first part of the thesis focuses on the period of the 1830s and 1840s and the role of the first two governors, Stirling and Hutt. This was a period when most innovation and debate was taking place regarding the legal position and rights of Aboriginal people. The remaining chapters follow a thematic structure which examines the humanitarian influence of the 1830s and early 1840s, the origins of the Aboriginal Evidence Acts, the debates on land and Indigenous land rights, the status of Indigenous laws, and the implementation of a decentralised criminal legal system in the 1850s, which resulted in a different and inferior legal status for Indigenous people.

The role of the governors, the Chief Magistrate and other officials was important to the development and implementation of policy, particularly in the 1830s and 1840s. Stirling and Hutt mediated official policy while responding to instructions from the Colonial Office in England and to pressure from the settlers. However, they were heavily influenced by the settler-magistrate oligarchy that developed. Even Hutt’s idealism would be affected by the early 1840s.
Chapter 2 examines the whole period of Stirling’s governorship from 1829 to 1838 when early conflict between Aborigines and settlers gave rise to innovative responses. This took place during a period of economic uncertainty when settlers lobbied the British government to provide financial assistance and revise the land regulations, resulting in Stirling returning to England in September 1832 on an unauthorised mission to plead their case. Stirling was a settler-governor who developed a more pragmatic response in relation to conflict between Aborigines and colonists than his successor Hutt, who was more idealistic and a colonial theorist. He worked with his Executive Council, including his legal adviser, Mackie, to implement legalistic devices such as outlawry and semi-military methods in response to the conflict between Aboriginal people and settlers. While Stirling was in England, some settlers recognised that the cause of the conflict was their impact on Indigenous land and subsistence and the failure of the British government to acknowledge that reparation should be made, and they proposed that agreements be negotiated with Aboriginal people.

Chapter 3 examines the humanitarian movement in England and the 1837 Aborigines Select Committee. It was not until the late 1830s that the Committee’s recommendations had any impact on Colonial Office policy in relation to Western Australia. Much of the impact had occurred earlier in the mid-1830s in relation to other colonies. The chapter will examine the attempts made to enshrine rights in Imperial legislation by the Aborigines Protection Society right up to the Australian Colonies Government Act of 1850.

Chapter 4 examines Governor Hutt’s vision and his policy from 1839 to 1846 during a period when the humanitarian influence focused on attaining a higher standard for Indigenous rights. Hutt’s vision reflected principles arising from the 1837 Aborigines Committee. However, he inherited the problems of his predecessor regarding the land regulations, and insufficient colonial revenue from the sale of lands, which lasted until the late 1840s when pastoralism provided the main source of revenue and economic wealth to the colony. Hutt concluded, as Stirling had before him, that Aboriginal people could not be regarded in practice or even in theory as having the full rights and protection of British subjects as Glenelg had instructed him. Hutt’s ideals were compromised by other official instructions and settler demands soon after he arrived in the colony in January 1839.

Chapter 5 examines the divergence between Hutt’s policy and that of the new Secretary of State, Lord John Russell, and Permanent Undersecretary James Stephen in the 1840s by examining the origins, motivation and implementation of Aborigines Evidence Acts. The second Evidence Act was probably the only victory for the principle of formal legal equality. The different motivations for the Act ironically resulted in the replacement of the primary humanitarian objective of protecting Aborigines from the reprisals of unscrupulous settlers, with a primary objective through legislation of protecting settlers’ property, which resulted in a modified legal position for Aboriginal people as a different kind of economic subject.

The reason for this irony can be traced to the inability of the British and colonial governments to negotiate with Aboriginal people over their land which took place in Western Australia during the 1830s. This largely arose from the British government fiction of a settled occupation of the colony which many officials did not really believe.
This gave rise in the early 1830s to some debate on the consequences of this official policy which failed to compensate or negotiate with Indigenous peoples over their lands. There were proposals for agreements to purchase Indigenous land which came to the fore in 1836, when further direction was expected by Stirling from the Colonial Office on Indigenous rights and when protests from the Aboriginal tribes of the Swan district called for a solution to problems of encroachment and ‘trespass.’ This chapter examines this proposal and the shift in British government policy in the mid 1830s arising from the launch of the Aborigines Committee, the ‘Batman treaty’ of 1835 and events in South Australia that led to the view that such a measure might be possible. However, by 1837, once settlers learned of the outcome of their petitions for the reform of the British government’s land regulations, Aboriginal people were increasingly regarded as ‘criminals’ or ‘trespassers’.

While the Executive Council was the primary focus of any policy and legal issues relating to Indigenous people in the 1830s, the jurisdictional question of whether Aborigines should be subject to British law for *inter se* offences arose in the criminal courts in the early 1840s. Chapter 7 examines the status of Indigenous laws and how they were dealt with by the colonial legal system. The magistrates and Executive Council in Western Australia were less certain about *inter se* policy and the jurisdiction of the courts than the application of British law governing their own lives and property. There was a practical perception that the colony’s immediate economic survival was not dependent on what many settlers regarded as private feuds among Aboriginal people in the 1830s and early 1840s. This was acknowledged by the government’s non-interference policy which received formal recognition from the Colonial Office despite the official position that Aboriginal people were to be protected under British law as British subjects. The question of legal status was raised and the jurisdiction of the courts
was contested by lawyer Edward Landor on behalf of Wewar in January 1842. This also raised the question of whether the territory of Western Australia had been acquired by conquest, or by occupancy as the British government maintained.

Chapter 8 looks at the impact of senior officials such as Mackie who justified the departure from Colonial Office policy of equality before the law by predicting a radical shift in that policy in relation to New Zealand in 1847. It examines the circumstances that gave rise to the modification of colonial law in debates regarding Aborigines in the 1850s. By 1850, temporary legal pluralism was disappearing where Aboriginal people and settlers came into contact particularly where Aboriginal labour was utilised in the expanding York district. In remoter regions a modified British criminal law was being extended to supplement the military, as a form of governance to further settlers’ pastoral expansion. The conclusion brings together the main themes and relates them to the assertion that there was a significant modification of the legal status of Aboriginal people that departed from the original intent of Stirling’s proclamation in 1829 and Glenelg’s policy of upholding the equal legal status of Aboriginal people as British subjects. The conclusion will highlight that there was a deliberate strategy of avoiding giving effect to the recognition that Indigenous people had pre-existing rights in land through the employment of legalistic devices such as outlawry, and nominal British subject status. Consequently, apart from the brief period alluded to in the 1830s, negotiation with Indigenous owners for their lands and resources was never considered by either the British or colonial governments.
Chapter 2

Aboriginal legal status in the Stirling period (1829 to 1838).

The violent conflict between Aboriginal people and settlers that took place in the early 1830s highlighted the dilemmas arising for Aboriginal legal status and rights by the act of colonisation of Indigenous lands. Firstly, it gave rise to a semi-military policy by Stirling and his Executive Council that used the device of outlawing Aborigines who resisted the settler invasion. Secondly, the political uncertainty that resulted from the conflict galvanised some settlers to criticise the lack of government policy governing the relationship between the two parties. These settlers raised moral and pragmatic objections to the British government’s declaration that the legal status of the territory of Western Australia was based on the principle of ‘mere occupancy’, which presumed that the land was ‘wild and unoccupied,’ and which denied the presence and rights of Aboriginal people.

In March 1827, Captain Stirling persuaded the British government to support the establishment of a self-supporting, settler-based agricultural colony in Western Australia. The British government subsequently approved the venture as a Crown colony on the assumption that land grants could be obtained by the settlers without negotiating with Aboriginal people. On 18 June 1829, in the absence of an official commission, Lieut-Governor Stirling issued a proclamation that Aborigines were to be regarded as protected under British law as for other British subjects. However, he soon

1 Russell, A History of the Law in Western Australia, p.329; 10 Geo. IV, c. 22, 1829. passed 14 May 1829.
3 Russell, A History of the Law in Western Australia, Appendix 2, p.331; Sir George Murray’s instructions to Stirling, 31 December 1828, were brought with Stirling to the Swan River Colony.
departed from this principle after conflict between Aboriginal people and settlers broke out, and his focus shifted towards the protection of settlers’ lives and property.\(^4\) Despite the proclamation, Stirling and Irwin chose to deal with problems as they arose rather than to deal with the question of Indigenous rights.

This chapter examines the nature of the response by the colonial government (which was largely the Governor in Executive Council, which included Mackie) to the Aboriginal presence, during a period of economic uncertainty for the colony. It argues that there was an unusual period of innovation that employed the device of outlawry to deal with ‘troublesome’ Aboriginal leaders, which was later extended to the use of the military to control tribes who resisted British colonisation. The chapter also examines conciliatory proposals made by some settlers in an attempt to avoid the escalation of conflict. Chapter 6 examines the nature of proposals regarding the purchase of Indigenous lands during the 1830s.

**The legal status of Aborigines**

The British government made no reference to Aboriginal people at the establishment of the colony following declarations of possession of their territory. The small military outpost at King George Sound had been established in December 1826 with some convicts and was legally part of the jurisdiction of New South Wales until March 1831 when it officially became part of Swan River Colony.\(^5\) Captain Charles H. Fremantle


had taken formal possession of Western Australia in the name of the British Crown on 2 May 1829, and an Imperial Act of Parliament was passed in the same month that effected a ‘Settlement’ upon lands declared to be ‘wild and unoccupied.’ The Act provided Stirling with the power to establish the government of Western Australia and courts of law. However, Stirling did not know that the Act had been passed until February 1832 when he received a copy from Secretary of State, Viscount Lord Goderich. Therefore, all Stirling had when he arrived in the Swan River Colony on 31 May 1829 shortly before the first settlers, was brief instructions from family friend and Secretary of State, Sir George Murray, which contained no reference to the establishment of legal institutions nor to conduct with Aboriginal people. The instructions gave Stirling the power to allocate land to settlers, with a caution to proportionally allocate river frontage (with its benefits of water transport) to as many settlers as possible. Stirling also received a copy of part of Governor Darling’s instructions based on the system in New South Wales.

On 18 June 1829, without the benefit of a regular Commission or Charter, Stirling issued a proclamation which the Military Commandant, Captain F. C. Irwin, read to the civil and military establishment near Fremantle:

The Laws of the United Kingdom as far as they are applicable to the circumstances of the case...do immediately prevail and become security
for the Rights, Privileges of all His Majesty’s Subjects found or residing in such Territory.  

His proclamation stated that Europeans would be tried for any offences against Aborigines as if they had committed them against any other British subject:

And whereas the protection of law doth of Right belong to all people whatsoever who may come or be found within the Territory aforesaid, I do hereby give notice that if any person or persons shall be convicted of behaving in a fraudulent, cruel, or felonious manner towards the Aborigines of the Country, such person or persons will be liable to be prosecuted and tried for the office, as if the same had been committed against any other of His Majesty’s subjects.

Stirling was familiar with New South Wales Governor, Arthur Phillip’s instructions, having carefully read his correspondence. However, he made no reference to that part of Phillip’s instructions which referred to opening ‘an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them.’ By the mid-1830s, Stirling was describing in his speech to the Legislative Council that the physical occupation of Indigenous lands was an invasion or conquest.

On 10 September 1829, Stirling sent a despatch to Murray explaining that he had made the proclamation in the absence of ‘a law being declared among Persons at such a distance from authority’, because he feared that settlers might break the law if they

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9 Ibid., pp.136-7.  
11 Instructions to Phillip, 23 April 1787, McHugh, *Aboriginal Societies and the Common Law*, p.159.  
13 Speech by Stirling to Legislative Council, 23 June 1837, *The Perth Gazette*, 1 July 1837, p.928; Stirling to Glenelg 12 July 1836, PRO, CO 18/16, p. 239; Cameron (ed.), *Millendon Memoirs*, 17 September 1834, p.350. Moore stated that ‘they were never made amenable to the strictures of our law, they have the protection of the British law, but are judged by the law of nature intelligible to all.’
believed that the government had no legal authority or the power of punishment.\textsuperscript{14} He added that this was based on the former declaration that the country had been taken possession of in the name of the King of England whereby the country became subject to British laws ‘as far as they are applicable.’ \textsuperscript{15} Stirling concluded: ‘how far this doctrine be strictly accordant[ sic] to the principles of law, or consistent with your views I submit to your consideration and request instructions as to the future enforcement of the rules.’\textsuperscript{16}

Although Stirling had not received his commission and instructions by May 1830, he established a magistracy to apply British law to disputes among the settlers.\textsuperscript{17} Therefore, the first courts were not designed to apply to Aboriginal people, but to deal with the problems faced by colonists, namely the maintenance and enforcement of indentured labour agreements and civil disputes. Ensuring a supply of cheap labour would be of critical importance to the economic future of the colony in the 1830s and 40s.

In December 1829, Stirling appointed eight Justices of the Peace based in Fremantle, Perth and the Canning to hear complaints, and 13 constables.\textsuperscript{18} Legally trained William Henry Mackie was appointed Chairman of Quarter Sessions from 9 December 1829 and Stirling’s legal adviser until July 1834, when Irish barrister George Fletcher Moore took over the role. Mackie was related by marriage to Irwin, with whom he held a land grant.

\textsuperscript{14} Russell, \textit{A History of the Law in Western Australia}, pp.8-12. Stirling’s commission did not arrive until later, casting doubts on his powers of authority to establish legal institutions.

\textsuperscript{15} Stirling to Murray, 10 September 1829, Schedule 2. Colonial Office, Original Correspondence, [CO 18/3], Reel 293, p.33; Confirmed by Goderich. Goderich to Stirling, 28 April 1831, CO 397/2, Reel 304, p.78; Russell, \textit{A History of the Law in Western Australia}, p.63.

\textsuperscript{16} Ibid.


on what was regarded as good agricultural land in the Upper Swan.\textsuperscript{19} From July 1834, Mackie was both Commissioner of the Civil Court (after the position was vacated by Moore) and Chairman of the Quarter Sessions until 1857.\textsuperscript{20} William Temple Graham was appointed Coroner in July 1830.

In his proclamation, Stirling directed that settlers enrol in a militia or yeomanry to supplement the regular troops in case of an emergency in order to ensure the ‘safety of the territory from invasion,’ from foreign powers, and ‘from the attack of hostile native tribes.’\textsuperscript{21} However, Stirling was not expecting violent conflict with Aborigines, having reported that they were largely peaceable.\textsuperscript{22}

When Stirling's formal commission and instructions eventually arrived in February 1832, the last paragraph of his instructions (para 34) directed him to promote religion and education amongst Aboriginal peoples, and

\begin{quote}
\textit{take care to protect them in their persons and in the free enjoyment of their possessions and that you do by all lawful means prevent and restrain all violence and injustice which may in any manner be practised or attempted against them and that you take such measures as may appear to you to be necessary for their conversion to the Christian Faith and for their advancement in Civilization.}\textsuperscript{23}
\end{quote}

By that time however, conflict had already broken out between Aboriginal people and settlers.

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\textsuperscript{19} M. J. Bourke, \textit{On the Swan, A History of the Swan District, Western Australia}, Nedlands, UWA Press, p.51
\textsuperscript{20}Statham Drew, \textit{James Stirling}, p.158; Russell, \textit{A History of the Law in Western Australia}, p.18.
\textsuperscript{21} Russell, \textit{A History of the Law in Western Australia}, p.335.
\textsuperscript{22} Private Letter from Stirling to Horace Twiss, 26 August 1829, CO 18/3, Reel 293, p.23.
\textsuperscript{23} Russell, \textit{A History of Law in Western Australia}, p.350.
\end{flushleft}
Conflict between Settlers and Aborigines – May 1830

The colonial attitude towards the legal position of Aboriginal people was influenced by contests over economic resources, notably land. Initially, conflict was avoided partly because Aboriginal people included Europeans in their belief system as *djanga* or the spirits of the departed dead. 24 However, a year after settlement the first major conflict took place around the Swan River near Perth.

The first Aboriginal tribes encountered by settlers were those inhabiting the flats of the Swan and Canning rivers, and on whose land settlers built their houses. This was where most of the settlers were concentrated from June 1829, near to water, transport, and alluvial soil where they could grow vegetables and keep livestock. By the end of the first year, there were 652 settlers clustered around Perth, Fremantle, and Guildford on narrow ribbon grants along the rivers. 25 Transport costs and other practical difficulties meant that settlement did not extend much further until the mid-1830s. About 1500 settlers arrived in the Swan River Colony between June 1829 and December 1830 attracted by the generous conditions, which placed pressure on the colonial administration to allocate land grants, even before they were surveyed. 26 The Indigenous tribes of the Swan and Canning Rivers were directly affected because they found their movements and access to land and rivers increasingly restricted, and the initial caution on both sides soon gave way to conflict.

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26 Statham-Drew, *James Stirling*, p.181 Stirling had agreed to no salary in exchange for grant of 100,000 acres in the Southwest.
Figure 1-. Places, Names and Territories as told to Lyon by Yagan in 1832. (Green, *Broken Spears*, p.50)
The first major confrontation between Aboriginal people and settlers occurred west of
the town of Perth on 3 May 1830. Both Irwin and Mackie provide an account of the
clash from the perspectives of the European witnesses who were present. During the
morning, some very curious Aborigines returned to the region with their children (some
for the first time since the British arrived the previous year) to find huts built by the
settlers and military personnel, not far from the Mooro people’s camping ground at Mt
Eliza, and near to the lake system at the west end of Perth.

Both Irwin and Mackie recorded how Aboriginal people went from place to place lifting
objects such as wood and tools, and taking some of them away with them. When
settlers resisted this action, some of the Aborigines raised their spears against them.
After a while, individuals broke into a settler’s hut that was not inhabited at the time and
carried off a blanket, which was dropped as they fled from the approaching settlers.
They then returned to the huts, where they clashed with settlers, and a series of spear
volleys were met with gunfire. An Aborigine was killed and the remaining people
retreated towards Lake Monger. In the meantime, soldiers had arrived, the first party
being led by Ensign Robert Dale and the second by Irwin. In his subsequent report from
eyewitness accounts, Mackie stated that the soldiers had disobeyed instructions and
fired on Aboriginal people at Lake Monger, whereas Irwin reported that they had fired
in self-defence when a volley of spears was thrown at them from the direction of the
lake. Dale was injured and several Aboriginal people were wounded or killed in the

27 The Perth Gazette, 20 April 1833, pp.63-64
28 Ibid.
29 W. H. Mackie to Colonial Secretary, ‘Report of an Affray with the Natives on 3 May 1830’, SRO,
CSR, ACC 608/1, 6 May 1830; Irwin’s statement, 18th May 1830, SRO, CSR, ACC 36, Vol. 6, p. 146.
30 Ibid.
31 Ibid.; Stirling to Secretary of State Lord Viscount Goderich 17 June 1831, SRO, WAS 1180, CONS
42/1; Irwin’s statement, 18th May 1830, SRO, CSR, ACC 36, Vol 6, p. 146. ‘This daring and hostile
clash, after which they retreated into the reeds, not coming out until the settlers and soldiers had gone. What is clear is that after the settlers had originally driven the Aboriginal people to retreat, the soldiers went after them. Irwin stated in his official report that he intended to make a ‘salutary lesson’ and assertion of power in order to prevent a recurrence.\textsuperscript{32} This event demonstrates the different perceptions of property, the punitive response by the military, and the misunderstanding on both sides that took place. The policy that was adopted by Irwin of exerting superior force would be repeated as a means to deal with similar clashes in the 1830s.

Stirling was absent at the time of the violent conflict but reported the clash to the Colonial Office on 18 October 1830, enclosing Irwin’s account (but significantly, not Mackie’s), and reporting that the settlers were not to blame.\textsuperscript{33} He also reported that Aborigines had killed a soldier in the remote region of the Murray in the Southwest. Goderich supported his position while cautioning him to adopt a policy of ‘forbearance.’\textsuperscript{34}

Further clashes took place towards the end of 1830, one in November which Moore reported in his private journal, where an Aboriginal person was shot dead, another wounded and seven taken prisoner, after which they were released.\textsuperscript{35} In July 1831, an Aborigine was shot by Archibald Butler's servant, Smedley, who had laid an ambush in Butler's garden.\textsuperscript{36} A month later, his death was avenged by Midgegooroo and other relatives, and another of Butler’s servants, Enion Entwhistle was killed, which set the

\textsuperscript{32} Irwin’s statement, 18\textsuperscript{th} May 1830, SRO, CSR, ACC 36, Vol. 6, p.146.
\textsuperscript{33} Stirling to Murray on 18 October 1830, BPP, Report, 1837, pp.126-127.
\textsuperscript{34} Goderich to Stirling, 28 April 1831, CO 397/2, Reel 304, p.64.
\textsuperscript{35} Cameron, The Millendon Memoirs, 12 November 1830, p.1.
\textsuperscript{36} The Perth Gazette, 25 May 1833, p.83.
scene for further confrontation. On 30 November 1831, Stirling reported to Goderich that settler resistance to the theft of their property by Aboriginal people had resulted in further violent conflict and he requested military reinforcements.\(^{37}\) This was approved on 16 August 1832 with the qualification that their role was to protect the settlers from combined attack from hostile tribes, and not to guard private property.\(^{38}\) Goderich also recommended that a ‘friendly understanding’ should be reached with Aboriginal people, and enclosed a copy of Lieut. Governor Arthur’s dispatch which recommended that agreements be entered into with Aboriginal tribes to purchase their land.\(^{39}\) It would be early 1833 before Stirling would learn of this proposal, by which time he was in England arguing the settlers case for colonial revenue and a review of the land regulations.\(^{40}\)

**Economic and political conditions in Swan River Colony**

The first debate on the legal position of Aborigines arose in mid-1832, after settlers realised that the conflict was due to Indigenous protests at the encroachment on their land and resources. The violent conflict had peaked at a time when other problems were occurring as a result of unrealised settler expectations and the haphazard nature of the colonising venture, including the drying up of emigration when news reached England of the problems in the Swan River Colony.\(^{41}\)

The British government proposed to limit total land grants to a maximum of one million acres, half of which was to be allocated after the arrival of the first ship of 400 settlers.

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\(^{37}\) Stirling to Goderich, 30 November 1831, SRO, WAS 1180, CONS 42/1, p.150.
\(^{38}\) Green, ‘Aborigines and White Settlers,’ p.81; Stirling to Goderich, 30 November 1831, SRO, WAS 1180, CONS 42/1, p.150; Goderich to Stirling, 16 August 1832, CO 397/2, Reel 304, pp. 113-118; Goderich to Stirling, 30 May 1831, CO 397/2, Reel 304, p.89.
\(^{39}\) Goderich to Stirling, 16 August 1832, CO 397/2, Reel 304, pp. 115.
\(^{40}\) See Chapter 6.
\(^{41}\) R.W. Hay, Memo to G R Dawson, 21 Dec 1828, SRO, SRP 61/3.
(which took place by early January 1830) and the other half to be gradually allocated to later settlers. The allocation of a free grant was provided either in return for services rendered by members of the forces and civil servants, or based on the value of capital and labour brought into the colony. The system carried conditions relating to improvement and investment capital. By the end of 1831 over one million acres had been allocated on paper. However, unlike New South Wales and Van Diemen’s Land, the European population increased very slowly (and in some years declined), and the supply of labour did not keep up with demand. This retarded settler ambitions and the amount of land that could be ‘cultivated,’ thereby reducing colonial revenue. Subsequently, there was a revision of the land regulations by the Colonial Office which sought to raise colonial revenue by charging a fixed price for the sale of land, and set more stringent conditions of ‘improvement’. This was met with dismay by settlers, who complained that they were not able to meet the conditions to improve or cultivate their land and feared that it would have an inhibiting effect on emigration. On 28 April 1831, Goderich warned Stirling against the wide dispersal of settlers over a large region, but this came too late as settlers had already been allocated land grants from York to as far south as Albany. However, many grants were not physically occupied until the late 1830s.

Anticipating that there would be a dispersal of settlers over a wide range of country, and influenced by the magisterial system in the Cape Colony, Stirling appointed Resident Magistrates in the regional districts from 1830. Their duties were like those of mini-governors, and included the regulation of ‘transactions between the settlers and the

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42 Statham-Drew, James Stirling, p.160.
43 Russell, A History of the Law in Western Australia, p.251.
45 Goderich to Stirling, 28 April 1831,CO 397/2,Reel 304, pp.78-160 ; Statham, ‘Swan River Colony 1829-1850,’ pp.186-7.
Natives. Stirling (with whom Goderich agreed) anticipated that sheep grazing rather than labour intensive agriculture was likely to be the best source of revenue for the colony, although, most settlers were involved in mixed farming and it was not until the late 1830s that pastoralism became popular and profitable. The colony was importing food to survive, and fresh meat was obtained by taking kangaroo and other animals and birds, relied on by Aboriginal people.

On 28 April 1831, Goderich provided Stirling with a copy of the Charter of the Supreme Court (and other courts) of the Cape Colony and advised Stirling to use it as a model, because it was closer to English legal procedure than the New South Wales Charter whose legal system was geared towards convicts. This Charter referred to grand juries, legal procedures for civil and criminal courts and rules for magistrates. In Goderich’s opinion, a simpler and cheaper system was more conducive to the circumstances of the colony and consistent with the dispersal of settlement over a large extent of territory. He concluded that magistrates appointed by Stirling in May 1830 from the wealthier part of colonial society would be temporarily suitable, and that judges could be appointed from their ranks, even though they might make mistakes from time to time because of their lack of legal training. This meant that the adaptation of British law to local conditions would be a greater departure than envisaged in other colonies. Judicial independence and formal legal processes would not be a feature of the colonial legal system until the arrival of two judges from England, in 1857 and in 1861. In July 1832,

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46 The first appointments were in April 1830 in Fremantle, Guildford and Kelmscott, and Augusta and then in March 1831 in King George Sound when the latter came under the Swan River Colony. ‘General Report on the Progress, Condition and Prospects of His Majesty’s Colony in Western Australia up to 31 March 1831’; Stirling to Goderich, 30 November 1831, SRO, WAS 1180, CONS 42/1; CO 18/7, Reel 296, p. 14; Statham-Drew, James Stirling, p.129; Bourke, On the Swan, p.48.
47 Goderich to Stirling, 28 April 1831, CO 397/2, Reel 304, p.64; Statham-Drew, James Stirling, p.161.
48 Ibid. A copy of the NSW charter was also provided.
49 Ibid.
50 Goderich to Stirling, 28 April 1831, CO 397/2, Reel 304, pp.79-80; Charter for Cape of Good Hope Supreme Court, 6 August 1827, SRO,CSR, ACC 38/1. The charter also contained rules for the lower civil and criminal courts run by justices of the peace and resident magistrates.
the first act of the new Legislative Council (comprised of the same official members as the Executive Council) was the establishment of the Court of Quarter Sessions and Court of Civil Judicature. All this laid the basis for a close-knit oligarchy of local officials with land interests who would dominate finance, land, and Aboriginal policy for the next 30 years.

By the middle of 1832 the majority of settlers had petitioned Stirling to return to England to obtain financial assistance from the British government and the abolition of Goderich’s 1831 land regulations that established a minimum upset price of five shillings per acre for the sale of ‘Crown’ lands. They also sought the relaxation of ‘improvement’ conditions in order to gain title to land, additional soldiers or police to protect their property from Aboriginal attacks, and a representative assembly.

The Agricultural Society meeting – June 1832.

In June 1832 the escalating conflict and problems arising from Colonial Office policy regarding the protection of settlers’ property became the subject of heated debate, at a public meeting of Swan settlers at Guildford, 24 kilometres from Perth. The Middle and Upper Swan where seventeen grants totalling 69,771 acres had been allocated was one of the first regions occupied by settlers for the purpose of agriculture. This was Weeip’s land, where Weeip was regarded by settlers as the leader of the tribe of the ‘Upper Swan’ or ‘Weeip’s tribe’.

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51 Goderich to Stirling 28 April 1831 enclosing Act 10 Geo 4 Cap 22 establishing the Courts and Legislative council. (received in Feb 1832), CO 397/2, Reel 304, pp.78-160.
52 Goderich to Stirling, 8 March 1833, CO 397/2, Reel 304, p.139.
53 Statham-Drew James Stirling, pp.148, 158.
54 Bourke, On the Swan, p.67. The ‘tribe’ was referred to by settlers as ‘Weeip’s tribe’ (from the name of its ‘chief’) or the Daren.
On 30 May 1831, Goderich instructed Stirling that military force should not be used to protect settlers’ property over a scattered region and that their role was to be confined to defend the colony from combined or serious attacks by Aborigines. This meant that settlers had to protect their own property from ‘petty assaults of a predatory nature.’ Settlers were advised to concentrate their strength in towns and ‘villages’ instead of scattering over a large extent of country. This policy, coupled with the taxation on land caused settler resentment against the British government which continued into the 1840s.

On 26 June 1832, the Agricultural Society discussed ‘the best means of checking the depredations of the natives’ who were taking livestock. The Society had been established in June 1831 with support from Stirling (as Patron), Irwin (a Director) and Colonial Secretary Peter Brown who all had farms in the Upper Swan region. The Society acted as a settlers’ lobby group at a time when there was no elected Assembly.

One of its members, the charismatic Robert Menli Lyon, raised the question of Aboriginal rights. Lyon was a farmer, born in Scotland, educated in European classical history, and a self-appointed Anglican evangelist. He was one of the first colonists to arrive in August 1829, and therefore in a position to receive one of the better grants of land in the Upper Swan of 3813 acres, which he later exchanged for

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55 Goderich to Stirling, 30 May 1831 CO 397/2, Reel 304, p.89.
56 Ibid.
57 Ibid.
58 Stirling to Goderich 20 September 1832, SRO, WAS 1180, CONS 42/1, Enclosure, ‘Decisions of meeting to alleviate settler-native conflicts’, 26 June 1832; SRO, SRP 11/10.
59 The Journal of the Agricultural and Horticultural Society of Western Australia, 1842, Vol. 1. The Agricultural Society was established on 30 June 1831 at the Upper Swan and the York branch in August 1840.
61 Green, Broken Spears, p.184.
land closer to the Swan River settlement.\textsuperscript{62} A year earlier, in July 1831, he addressed one of the first meetings of the Society and convinced those present, including the staunch Anglican Irwin, that a missionary was required to minister to Aboriginal people and settlers.\textsuperscript{63} By June 1832, Lyon felt compelled to address a public meeting of the Society because he feared that ‘sanguinary measures’ would be taken against Aboriginal people. Employing his best oratorical style, he argued that Aborigines had rights that were being disregarded:

\begin{quote}
Gentlemen – have you a father land? So have the aboriginal inhabitants of this country. Have you wives and little ones? So have they. Have you herds and flocks, and fowls? So have they the kangaroo, the opossum, the Swan, the pelican, the duck, the cockatoo, the pidgeon, the quail. Have you the rights of men? What has expunged theirs from the book of nature? Have you lands that have descended to you by inheritance? So have they. These lands have descended to them from their forefathers from time immemorial. And their title deeds require no wrangling of lawyers to provide them to be correct. They bear the seal of heaven the sanction of Him who divided to the nations their inheritance. They are indisputable – Reflect you have seized upon a land that is not yours. Beware, and do not as a people, add to this the guilt of dipping your hands in the blood of those whom you have spoiled of their country.\textsuperscript{64}
\end{quote}

The meeting resolved that action against Aboriginal people would only be taken in self-defence, but Lyon had doubts that given the high level of hostility, calm would be the result.\textsuperscript{65} The Chair of the Society was farmer and Wesleyan, Michael Clarkson, who was related to Thomas Clarkson of the Clapham Sect and may have been sympathetic to Lyon’s views because of this connection.\textsuperscript{66} The Secretary of the meeting was George Fletcher Moore, an Irish barrister who had a large farm in the Swan district and had

\textsuperscript{62} Bourke, \textit{On the Swan}, pp.50-51, 54.
\textsuperscript{63} Lyon to Goderich, 1 January 1833, CO 18/11, Reel 298, pp.140-144; SRO, SRP 107/10.
\textsuperscript{64}Ibid.
\textsuperscript{65}Ibid.
\textsuperscript{66} H. Rumley and W. McNair, \textit{Pioneer Aboriginal Mission}, Nedlands, UWA Press, 1981, p.2. Barnard Clarkson arrived after his sons Michael and James Clarkson, in the Swan River Colony. They were Methodists and related to Thomas Clarkson who was involved in the anti-slavery cause in Britain.
been appointed Commissioner of the Civil Court in April 1832. According to Moore, Colonial Office policy regarding the protection of settlers’ property was unrealistic, and he noted in his journal that on the way to the meeting he had lost pigs worth £30 to the Aborigines, and outlined the dilemma:

I dare say the natives think that they have as good a right to our pigs as we to the kangaroos and the argument is a strong one, but if I caught them in the act of killing I would not answer for the force of it. We have few or no soldiers to protect us. If men are employed to watch for Aborigines who will do the work and what will become of the colony. ...We are gravely told that the military are not to be called out unless in case of a systematic attack.

While Moore thought that a systematic attack was uncharacteristic, he speculated that if an attack was made at the head of the Swan River it would take twelve hours for soldiers to get there: ‘Yet this is the way they legislate for us at home’, he continued. ‘Are there no friends of the colony there who would point out such extravagant absurdities? I wish we had some of the legislators here in the situation of settlers for a little while.’

Many settlers had some insight into the possible causes of the conflict with Aboriginal tribes but disagreed on what to do about it. While there was very little understanding of Indigenous societies and laws at the time, there was a general awareness that Aboriginal people resented the taking of their land and resources. On 26 June 1832, merchant William Shenton wrote to Moore (as Secretary of the Agricultural Society) giving his opinion on possible solutions to the problem. Shenton recommended that Aboriginal people be removed to an island such as Rottnest, similar to the first removals to Flinders

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67 Cameron, Millendon Memoirs, p.123. Moore had 20,000 acres and 1000 sheep.
68 Ibid., pp.87, 90.
69 Cameron, Millendon Memoirs, 28 June 1832, p.127.
70 Moore, Diary of Ten Years Eventful Life of an Early settler, 12 November, 1830, pp.22-23.
Island from Van Diemen’s Land in the early 1830s. Like Moore and Lyon, Shenton attributed the cause of the conflict to the ‘destruction of their natural food’ as a result of kangaroo hunting and ‘usurpation of their country’ through the exclusion of access to the Swan and Canning rivers, but believed that there could only be one winner from the contest. Although Shenton was not present at the meeting he echoed the opinion of the majority of settlers that if a solution was not found, then ‘we shall be driven from this country through conviction that the comforts to be obtained will not compensate for the continual danger to which our lives and property are exposed.’ Moore did not forward Shenton's plan to Stirling but did send details of his other proposal for a warning system to alert isolated settlers from attacks by Aborigines.

The resolutions of the Society meeting, signed by 25 wealthier farmers, were that a ‘misunderstanding’ existed between the settlers and Aboriginal people that called for the ‘immediate interference’ of the local government by ‘conciliatory or coercive’ means. They resolved that if something was not done, then the advantages of remaining in the colony would be outweighed by the ‘danger to which lives and property’ were being exposed. They also resolved that an ‘agent’ be immediately appointed ‘to go among the natives to endeavour to conciliate them with a view to the adoption of such collective measures as shall appear desirable.’ The next day, Moore forwarded the resolutions to Stirling, who would take them to England along with other petitions regarding the colony’s economic crisis.

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71 L. Ryan, *The Aboriginal Tasmanians*, St Leonards, Allen and Unwin, 1981, p.166; H. Reynolds, *Fate of A Free People*, Ringwood, Penguin, pp.131-32. There were six expeditions between 1830 and 1834. By the end of 1834 all but one group had been transferred to Flinders Island. Rottnest Island is about 10 kilometres from the coast of Fremantle.
73 Ibid.
74 Stirling to Goderich, 20 September 1832, SRO, WAS 1180, CONS 42/1, Enclosure, Decision of the Meeting 26 June 1832, p.170.
75 Ibid.
76 Ibid.
On 31 July 1832 (two weeks prior to Stirling’s departure for England on 12 August), the Governor in Council approved the request for government assistance by establishing a mounted police force to ‘secure effectually the lives and property of the whites in the least injurious way’ to Aboriginal people. Stirling envisaged that it might be necessary to ‘apprehend and bring to punishment any native or native tribes committing outrage,’ but he made no reference to their trial by jury as for other British subjects. Captain Ellis was appointed Superintendent of Native Tribes and Charles Norcott, Assistant Superintendent, with soldiers to accompany them until ‘Hottentots’ with horses from South Africa could be employed to track the movements of Aborigines. In September, while on the ship to England, Stirling wrote to Goderich requesting approval for a police force of up to thirty men.

Most of the debate regarding Aboriginal rights and conciliatory proposals would take place at a time of settler anxiety in mid-1833, while Stirling was in England.

Local proposals for agreements with the Aborigines

The resolution calling for an agent to enter into a peaceful agreement with Aboriginal tribes was the focus of discussion among magistrates and farmers at a meeting held on 29 July 1832 at magistrate Henry Bull’s farm on the Upper Swan. Those present included senior magistrate William Locke Brockman (who had the largest sheep flock

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77 Ibid.
78 Minutes of the Executive Council, 30 July 1832 and 31 July 1832, CO 20/1, Reel 1117-1118, p.75; Statham, ‘Swan River Colony’, p.188.
79 Minutes of the Executive Council, 31 July 1832, CO20/1, Reel 1117-8, p.76 ‘The duty of the Superintendent will be to protect as well as control the natives, allowing no act of hostility unsanctioned by the law but in the event of resistance or shew of resistance to his authority as a magistrate he will of course be justified in proceeding to extremity.’
80 Stirling (on board ship) to Secretary of State, 20 Sept 1832, SRO, WAS 1180, CONS 42/1, p.170.
81 Cameron, Millendon Memoirs, 28 July and 29 July 1832, p.135; Lyon to Secretary of State, 1 January 1833, CO 18/11, Reel 298, pp.140-144.
and land of any colonist), William Tanner J.P., Moore, William Shaw, David Thompson
and other Upper Swan settlers. By this stage it was public knowledge that Irwin would
be Acting Governor, and this gave Lyon renewed confidence that his proposal would be
accepted. Lyon persuaded the wealthier settlers that it was in their interests to send a
proposal to the Governor in Council because the success of Stirling’s appeal to the
Colonial Office might not be known for some time. He later reported on the meeting:

I stated that, on account of the perilous situation in which the settlement
stood, I was willing to devote myself to the acquisition of the native
language, in order to negotiate a peace with the native tribes. I offered
also to bear the expences [sic] myself; a proposal to mortgage a part of
my estate for this purpose; provided the local government would make the
necessary arrangements.

Lyon appealed to the self-interest of the settlers by arguing that the large economic and
physical costs of a war would follow each new conflict as it had in Van Diemen’s Land,
with Aboriginal tribes as settlement spread, and that they would be forced to pay the
cost themselves. It was agreed by those present at the meeting that Brockman would
forward Lyon's proposal to the Executive Council, which was done on 20 August, the
day before the first meeting of the Council under Irwin’s leadership.

In his letter enclosing Lyon's proposal, Brockman reported that he and other farmers in
the Upper Swan believed that the earliest opportunity should be taken to ‘open a
friendly communication with the natives’ and that someone should be sent amongst
them to learn their customs and language with the ‘view to an amicable arrangement
with them.’ He also attached Lyon’s letter which proposed that if no one could be

82 Ibid.
83 Lyon to Goderich 1 January 1833, CO 18/11, Reel 298, p.140; SRP 107/10, p. 111.
84 Ibid.
85 W. Locke Brockman to Governor in Executive Council 20 August 1832, attaching Lyon’s letter dated
28 July 1832, SRO, CSR, ACC 36, Vol. 24, pp. 94-98.
found, Lyon himself would volunteer to act as agent, meeting the costs by renting his farm to the colonial government. Irwin met with Lyon prior to the meeting of the Executive Council in order to find out more about his proposal to ‘conciliate and convert the native tribes.’

Lyon proposed that reparation should be made with the Aboriginal people for the loss of their land:

Further still, we ought to reflect that our plundering these people of their country- qualify it as we will, this is the thing we have done -and then killing them as if they were so many wild beasts, is contrary to the law of nations and to the usages of war; and that if we delay making reparation for this gross and flagrant injustice their blood that is spilt upon the ground will assuredly be against us for vengeance.

Lyon anticipated that this would take three to five years to achieve and provided examples where peaceful agreements had been obtained with indigenous peoples in other colonies, such as where the British government had made presents to the indigenous peoples of Guiana of £1000 every couple of years, and how a similar course had been adopted in North America. He estimated that the colonial government would save £2000 per annum that would otherwise be spent in an ‘exterminating war’ with Aboriginal people such as had taken place in Van Diemen’s Land, which would take place each time settlers physically occupied new territory.

On 31 August 1832, at the meeting of the Council attended by Irwin, Colonial Secretary Peter Brown, Surveyor General Septimus Roe and Mackie, Brockman's letter was...
formally presented. The minutes of the Executive Council contain little detail on what was discussed other than referring to Brockman's letter and recording that Lyon offered 'his services as a missionary to conciliate and convert the native tribes.'

Irwin and the Council informed Brockman that a mounted police force had been established to monitor Aboriginal tribes in order to protect settlers’ lives and property, thereby continuing the plan that Stirling had initiated. In expressing his disappointment at this decision, Lyon pointed out that a contradiction existed between a military force appointed to repel aggressions and protect settlers’ lives and property, and the capacity to enter into a friendly intercourse with Aboriginal people. Lyon then revised his proposal by offering his services purely as a missionary rather than as an agent and negotiator for a peaceful agreement with the Aborigines.

**Official policy- The question of being an Outlaw or a Patriot**

The colonial government developed a policy to respond to the increasing conflict with Aboriginal people by making an example of particular individuals believed to be leaders, such as Yagan, Midgegooroo and Munday, proclaiming them outlaws and offering a reward to settlers for their capture dead or alive. This policy would later be expanded to encompass whole tribes or groups. It was a device not based on any local statute or common law but derived from a mixture of sources that combined military and medieval law whereby an outlaw could be shot on sight. Under the common law, outlawry was normally a process that was applied to a person who failed to appear in

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90 Minutes of Executive Council, 31 August 1832, CO 20/1, Reel 1117-1118, p.86.
91 ibid.; SRO, CSR, ACC 36, Vol. 23, p.197.
92 Ibid.
93 Lyon to Governor in Council, 22 September 1832, SRO, CSR, ACC 36, Vol 24, p.100.
court when called upon to do so. However, while the common law process was applied to some Europeans who escaped from custody after trial, it was not used in relation to Indigenous people in the Stirling period. Lyon even posed the question whether Aboriginal people should be regarded as outlaws acting against colonial society, or patriots defending their country against the invader.

The device of outlawry was used in conjunction with coronial inquests and the Executive Council, rather than courts of law and magistrates. Stirling’s 1829 proclamation that Aborigines were to be protected under British law did not extend to inquests into Aboriginal deaths. However, there were coronial inquests (with juries) into the deaths of Europeans which were used like a criminal court to prosecute, convict and sentence absent Indigenous leaders and later groups for ‘wilful murder,’ while in the process making presumptions about their legal status. On 6 August 1831 an inquest was held into the death of Enion Entwhistle and evidence was taken from European witnesses, in this case his sons. The jury was comprised of labourers from the adjacent town of Fremantle who concluded that ‘certain Aborigines whose names were unknown but several of whose persons can be identified’ should be convicted of wilful murder. Concluding that they did not have ‘any goods or chattels, lands or tenements within the colony aforesaid or elsewhere to their knowledge,’ they requested that the Coroner, Temple Graham, recommend to the Governor that the whole tribe (to which Yagan and Midgegooroo belonged) be proclaimed outlaws and

95 Ibid; in the early 1830s, outlawry was used to catch escaped European offenders after they had been tried in WA. Eg; G.Leake to Colonial Secretary, SRO, CSR, ACC 36, Vol. 26, p.36. Hutt also used it after Weban escaped from prison after a trial in the court for an inter se murder in 1839.
96 Lyon to Goderich, 1 January 1833 enclosing extract of letter to the Lt. Governor dated 22 October 1832, CO 18/11, Reel 298, p.145; Lyon, Australia: An Appeal to the World on behalf of the younger branch of the family of Shem, Sydney, 1839, p.84.
97 W. Temple Graham, Coroner’s Report, 6 August 1831, SRO, CSR, ACC 36, Vol. 17, pp.45-46. The inquest was held on 5 August 1831.
therefore be sentenced to be shot on sight, thereby putting them outside the law’s reach or protection. 98

Yagan was the son of Midgegooroo and was described by Lyon as from the ‘Beeliar tribe,’ whose land was bounded on the North by the Canning River, by the sea on the West, by the Darling scarp on the East and by a line, due East, from Mangles Bay on the South. 99 While on this occasion Stirling did not take this advice, perhaps fearing retaliation, Mackie would later recommend the application of outlawry as a legalistic device to troublesome Aboriginal ‘chiefs,’ following the killing of a settler or soldier. 100 In this instance, Stirling placed detachments of soldiers under the control of government residents in the districts of King George’s Sound, Guildford, York, Kelmscott, Augusta and Fremantle. By October 1831 a yeomanry had been established in the Swan district from the ranks of settlers under the direction of farmer and magistrate Henry Bull. However, this was disbanded as settlers were too busy tending to their farms. 101

On May 1832, William Gaze was fatally speared at Kelmscott on the Canning River, and European witnesses identified Yagan as the principal ‘murderer.’ 102 Stirling proclaimed Yagan an outlaw and a reward of £40 (the equivalent of one year’s wages for many labourers) was offered for his apprehension dead or alive. 103 On September 1832, Yagan was captured in an ambush by some settlers, taken prisoner along with

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99 Ibid., The Perth Gazette, 20 April 1833, p.64.
100 Minutes of Executive Council 15 May 1833, CO 20/1 Reel 1117-8, p. 204. Mackie was Stirling’s legal adviser from December 1829 to July 1834. The Executive Council was not formed until February 1832.
101 Bourke, On the Swan, pp.69-70; Stirling to Goderich, 30 November 1831. Bull was appointed magistrate in August 1830.
102 Bourke On the Swan, pp.67, 71.
103 Irwin states that a proclamation was issued by Stirling offering a reward for the capture of this ‘native’ dead or alive. Irwin to Secretary of State 26 January 1833, WAS 1180, CONS 42/1, p.222; SRP 18/56.
Dommera and Ningena (who had not been declared outlaws), and lodged in Perth gaol.\textsuperscript{104} Lyon, who was in Perth at the time, proposed to Irwin that Yagan's capture was an opportunity for conciliation and learning Indigenous languages and customs. He argued that Yagan, Dommera and Ningena ‘were guilty of no crime but that of fighting for their country,’ and should therefore be regarded as patriots not outlaws.\textsuperscript{105}

Lyon suggested to Irwin that it would be better to go to Albany where Aboriginal people were more familiar with the British and could facilitate an agreement with Yagan. On an assurance from Irwin, Lyon booked a passage on the government ship for this purpose.\textsuperscript{106} However, on 4 October 1832 the members of the Executive Council decided that the three Aborigines should be sent as prisoners to Carnac Island.\textsuperscript{107} Irwin proposed that this was an opportunity to implement the ‘royal instructions directing the promotion of education and religion among the native inhabitants.’\textsuperscript{108} However, Brown argued that it was too early, and that he did not believe that the ‘prisoners’ would make suitable candidates. Roe and Mackie agreed that some effort should be made and Lyon was allowed to go with them accompanied by two soldiers, in order to learn their language and customs as well as teach them the English language, ‘civilisation’ and customs.\textsuperscript{109}

Six weeks later, Yagan, Dommera and Ningena escaped by boat to the mainland. While the Executive Council blamed Lyon for allowing them to escape, there was no attempt

\textsuperscript{104} Green, ‘Aborigines and White Settlers,’ p.219.
\textsuperscript{105} Lyon to Secretary of State, 1 Jan 1833, CO 18/11, Reel 298, pp.140-144; Reynolds, \textit{This Whispering in our Hearts}, p.79.
\textsuperscript{106} Lyon, \textit{Australia: An Appeal to the World}, pp. 33-34.
\textsuperscript{107} Ibid.
\textsuperscript{108} Minutes of Executive Council for 4 October 1832, CO 20/1, Reel 1117-8; p.100; Irwin to the Secretary of State, 26 January 1833, WAS 1180 CONS 42/1, pp.212, 222.
\textsuperscript{109} Ibid.
to recapture them. On 26 November 1832, Lyon reported his experiences in the local newspaper, exclaiming regretfully that ‘A few weeks longer and a treaty of peace might have been concluded through them, with all the native tribes; and this accomplished they would have become exceedingly useful in exploring the country.’ In addition to the knowledge that he had gained about Aboriginal society from Yagan, Dommera and Ningena, much of Lyon's assessment of the likely success for a ‘treaty’ was based on comparisons with the ancient Britons who had independent chiefdoms. Lyon described Yagan as ‘the Wallace of the Age,’ or patriot defending his land from the invader. (Wallace was a Scottish patriot of the 13th century who had attempted to bring the clans together in a war against the English). Irwin continued with the establishment of a mounted police force which he supplemented with soldiers, until confirmation from the Colonial Office was received for the appointment of up to 30 police. This was conditional on the costs being provided from colonial revenue, which would inhibit the size of the force.

It was not long before further clashes resulted again in Yagan, his father Midgegooroo and brother Munday, being declared outlaws by Irwin, following a series of retaliations involving the deaths of settlers and Aborigines. A proclamation was published offering a reward in The Perth Gazette on 4 May 1833 and the three were described as the acknowledged ‘Chiefs’ more deeply implicated in the ‘crimes.’ This was not the

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110 Minutes of Executive Council, 21 November 1832, CO 20/1, Reel 1117-1118, pp.117-8; G. Leake to Colonial Secretary, 16 November 1832, SRO, CSR, ACC 36, Vol. 24. Memorial from Lyon to Colonial Secretary, 16 August 1833, CSR, ACC 36, Vol. 27, p.44.
112 Green, Broken Spears, p.84.
113 Goderich to Stirling, 8 March 1833, CO 397/2, Reel 304, p. 139.
115 Ibid.
first time that Aboriginal leaders had been proclaimed outlaws in Australia.\textsuperscript{117} In July 1816, in New South Wales, Governor Macquarie had declared ten Indigenous leaders as outlaws. Similar in effect to Western Australia, he stated in his proclamation that they were now regarded more as enemies of colonial society whose former protection as British subjects had been removed.\textsuperscript{118} However, Macquarie also later offered the same leaders an indemnity if they surrendered, and had addressed his formal notices to both settlers and ‘friendly Aborigines’ in order to encourage them to inform on or apprehend the outlaws.\textsuperscript{119} The trend of outlawry became more common practice in Western Australia than New South Wales. In Tasmania, outlawry generally was applied to bushrangers but not to Aboriginal people who were regarded more as enemies and where individuals could not be targeted because it was considered by colonial authorities too difficult to achieve during a period of continual warfare, until 1828 after which martial law had been declared.\textsuperscript{120}

Irwin regarded the sentence of outlawry as punishment for the deaths of Thomas and John Velvick who had been killed by Aborigines on 30 April 1833.\textsuperscript{121} This was in retaliation for the death of Domgum, Yagan’s brother, who had been shot by a settler while breaking into a store.\textsuperscript{122} However on 16 May, Midgegooroo was captured alive, along with his young son, Billy.\textsuperscript{123} Four days later the Executive Council concluded that Midgegooroo was an accessory to the murder of the Velvick brothers and that there was evidence to prove that he had been one of the main perpetrators involved in murdering

\textsuperscript{118} Gazettal of Macquarie containing list of Aborigines declared outlaws, on 20 July 1816, Macquarie to Earl Bathurst, 4 April 1817, \textit{Historical Records of Australia}, Vol 7, pp.342-349, 362-365. There was also an earlier proclamation in 1816 that banned Aborigines from coming into towns armed with spears.
\textsuperscript{119} Ibid.
\textsuperscript{120} Martial law was declared on 1 November 1828. H. Reynolds, \textit{Fate of a Free People}, p. 107.
\textsuperscript{121} Green, \textit{Broken Spears}, pp.82, p.206; Minutes of Executive Council, 20 May 1833, CO 20/1, Reel 1117, pp.220.
\textsuperscript{122} Ibid.
\textsuperscript{123} Cameron, \textit{Millendon Memoirs}, 20 May 1833, p.233.
Entwhistle two years earlier. 124 At a second meeting the question was raised whether Midgegooroo should be executed or perpetually banished which was favoured by Irwin, but settlers were demanding his execution.125 Mackie argued that Indigenous laws of retaliation justified the use of ‘terror’ through the execution of the most ‘notorious offenders,’ in this case Midgegooroo.126 A day later on 21 May 1833, Midgegooroo was shot by a military firing squad outside Perth gaol; there had been no trial, no jury, no right of defence.127

The new Secretary of State, Lord Stanley, reprimanded Irwin for authorising capital punishment without considering that retaliation might be the outcome, the very ‘evil’ that they wanted to remove.128 Irwin replied that the intention had been to demonstrate to other Aboriginal people ‘that the colonists were not like them separated into tribes and families unconnected with each other, but being all under one head an injury done to one of the colonists in any part of the settlement would be considered an attack on the community.’ 129 Midgegooroo’s young son who had been captured with him was held as a hostage for four months to prevent retaliation against Europeans for the execution and was eventually released in September 1833. 130

By the end of 1834, news of Midgegooroo’s execution reached London by means of the publication of Moore's diaries.131 Colonel Charles Napier, one of Britain's most celebrated war heroes, had turned down the first governorship of South Australia

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124 Irwin to Stanley, 1 June 1833, CO 18/12, Reel 299, p.262; *The Perth Gazette*, 4 May 1833, p.70.
127 Bourke, *On the Swan*, p.73.
128 Stanley to Irwin, 19 November 1833, Irwin to Stanley (while in England), 19 February 1834 after meeting Hay and Lefevre to peruse despatches, CO 18/14, Reel 300, p.362.
129 Ibid., p.363.
130 Minutes of Executive Council, 16 September 1833, CO 20/1, Reel 1117-8, pp.255-56.
131 Bourke, *On the Swan*, p.73.
because of the perceived lack of support from the British government for the establishment of the colony, and the absence of a policy regarding Aboriginal peoples.\textsuperscript{132} In 1835, Napier published a book which criticised British government policy, referring to mistakes made in the Swan River Colony and Van Diemen’s Land.\textsuperscript{133} He questioned the morality and legality of the action against Midgegooroo, believing that he had not broken military or civil British laws because he had confined his acts to retaliation. He argued that ‘Retaliation, by a native, in revenge for a most atrocious aggression on the part of the INVADERS, was \textit{not} a crime in him.’ \textsuperscript{134} Midgegooroo’s death was also reported in the Eastern colonies’ press as more like a military execution.\textsuperscript{135}

On 31 May 1833, when unprovoked attacks by settlers were at their height, Irwin re-issued Stirling's proclamation reminding soldiers and settlers that Aboriginal people were to be protected like other British subjects and not shot in a ‘wantonly unprovoked’ manner, a practice that appears to have been common while a state of outlawry existed.\textsuperscript{136} He also issued a circular to magistrates pointing out the consequences of such attacks on Aboriginal people and authorising them to investigate accused persons, and if the charge was proved, to commit them to the Court of Quarter Sessions.\textsuperscript{137} The word ‘unprovoked’ was not defined. However, it was unlikely to include theft, trespass or attempted theft by Aborigines of settlers’ property which was viewed as provocation. There were instances where Aborigines in Perth had been encouraged by Francis Armstrong to bring complaints of assault, one against a soldier in November 1834, and

\begin{footnotes}
\item[133] Napier, \textit{Colonization}, pp.94-7, 103.
\item[134] Ibid., p129.
\item[135] \textit{The Perth Gazette}, 4 January 1834, p.211, 18 January 1834, p.218, 220.
\item[136] \textit{The Perth Gazette}, 1 June, 1833, p.85, Government Notice, 31 May 1833 and copy of Circular to Magistrates.
\item[137] Ibid.
\end{footnotes}
the other when Stirling ordered the arrest of John McKail in July 1835 for the manslaughter of Gogalee, a son of Yellagonga (regarded as the peaceful chief of the ‘Mooro’ people by the settlers). At the preliminary hearing before Mackie, Gogalee’s brother Narral had been the only witness and his complaint had been admitted. McKail also confessed to the crime. However, prior to the planned trial by jury at the Court of Quarter Sessions, the Executive Council decided not to go ahead, because of fears that the grand jury would reject the indictment, because it relied solely on Aboriginal evidence which at the time could not lawfully be admitted. This meant that McKail would have been released, thereby incurring probable retaliatory action by the Mooro people. Instead, McKail was granted a conditional pardon on condition that he was banished from the colony and that he make reparation in blankets and flour. This was agreed to, but only after an Aboriginal man came forward, possibly Yellagonga, with whom the others acquiesced. After this attempt there was no trial or conviction against settlers who assaulted or killed Aboriginal people until July 1842. Even this limited right of protection for Aboriginal British subjects was not achievable under British law.

A month later, on 11 July 1833, Yagan was killed by a youth, William Keats (not far from other Aborigines nearby), who with his brother James set a trap for him in order to claim the £30 reward. James then shot Heegan who was about to reach for his spear and in return Weeip speared William to death. After a short magisterial inquiry, James claimed the reward and was sent away from the colony because of the fear of

138 Green, Broken Spears, p.114.
140 Minutes of Executive Council, 7 July 1835, SRO, WAS 1620, CONS 1058/2, p.80.
141 *The Perth Gazette*, 6 June 1835, p.506, 11 July 1835, p527. The banishment however was to Albany in the Southwest.
144 Cameron, *Millendon memoirs*, 8 September 1833, p.275.
retributary attacks. Under medieval law outlaws could be shot on sight but under the common law, the actions of the Keats brothers of entrapping and shooting Yagan were illegal as no resistance had been offered by Yagan.\textsuperscript{145} The Secretary of State, Lord Stanley, did not comment on the legality of the outlawry of Indigenous leaders but criticised the use of outlawry which encouraged settlers to claim a large reward for the capture of individuals dead or alive in order to assist the military.\textsuperscript{146} Stanley added that if the mounted police were not sufficient, settlers should ‘give their services gratuitously when called upon to defend their property or lives in cases of emergency.’ This policy did not extend to entrapment as had happened in the case of Yagan, and in Stanley’s opinion his killing would not have taken place if this other policy had been employed.\textsuperscript{147}

In August 1833, two months after Yagan's death, Munday and Miago (described as representing Yellagonga and Yagan’s tribe) requested a meeting with Irwin.\textsuperscript{148} The Editor of \textit{The Perth Gazette} reported that Munday was seeking an ‘amicable treaty’ on behalf of Aboriginal people.\textsuperscript{149} The military officers were told to stay away from the meeting and only the civil officers including Moore were present. Francis Armstrong volunteered his services as Interpreter, one of the few Europeans who had gained some trust from the Aboriginal people of the region.\textsuperscript{150} Munday outlined in great detail the soldiers and settlers who had killed sixteen of his kin and wounded others since

\textsuperscript{145} \textit{The Perth Gazette} 13 July 1833, p.110. The inquiry found that the ‘deceased met with his death in an affray with the natives after having killed the outlaw Yagan in pursuance of the Government Proclamation’; Eburn, ‘Outlawry in Colonial Australia’, pp.88-89.

\textsuperscript{146} Stanley to Irwin, 19 November 1833, (No 12), CO 397/2, Reel 304, p.206; Stanley to Stirling, 20 January 1834, CO 397/2, Reel 304, p.206.

\textsuperscript{147} Stanley to Stirling, 20 January 1834, CO 397/2, Reel 304, pp. 212-3. (Acknowledging receipt of Irwin’s despatch of 10 August 1833).

\textsuperscript{148} \textit{The Perth Gazette}, 7 September 1833, p.142; Irwin’s report to Stanley, 19 February 1834, CO 18/11, Reel 298, p. 362, Statement in further explanation of certain acts of Captain Irwin, 19 February 1834; G. F. Moore, ‘Brief Chronicle of the principal events which have occurred, connected with the colony of WA, since the first settlement within its limits in the year 1829’, September 1843. \textit{The Journal of the Agricultural and Horticultural Society}, 1842-3, p.xxxvii.

\textsuperscript{149} \textit{The Perth Gazette} 7 Sept 1833, p.142; Cameron, \textit{Millendon Memoirs}, 11 September 1833, p.273.

\textsuperscript{150} Bourke, \textit{On the Swan}, pp.2-4. From the 1830s the term ‘Swan district’ was a customary phrase used to denote the area stretching from north of the Flats at the site of the Perth Causeway as far as the Darling Ranges at Walyunga. In 1838 it denoted a Government Resident’s district.
settlement, and wanted to know if any more would be shot. In particular, he objected to the punishment of his relatives for the attempted theft of settlers’ property that had resulted in the punishment of death, including his brother Domgum, which under Indigenous law would have attracted a spearing in the leg or banishment. As late as October 1836 (after he had been officially appointed Government Interpreter), Armstrong would report that he had trouble explaining to Aborigines how ‘going to a place for the purpose of robbery’ was regarded as ‘the same as though the robbery had been committed under British law.’

Irwin acknowledged that some ‘atrocities’ had occurred where Aboriginal people had been shot on the outskirts of settlement, but distracted blame from the soldiers by attributing this to the ‘labouring class of settlers.’ He encouraged Munday and the others present to report future injuries to the civil officers, assuring them of protection from neighbouring tribes as well as the benefits of ‘civilisation.’ However, in relation to theft, Irwin did not compromise and replied that the government had a strong desire to be their friends if they would only stop stealing property and injuring settlers. This was at about the time when there was a shift to summary punishment by magistrates in Perth.

Munday also protested loudly at the encroachment and interference by Europeans who had taken kangaroo and prevented members of his tribe from walking freely on their own country. Munday’s appeal resulted in his outlawry being withdrawn. A month later an area was set aside near Mt Eliza overlooking the Swan River, informing settlers that

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151 The Perth Gazette 7 September 1833, p.142.
152 Ibid.
154 Irwin’s Report to Stanley, 19 February 1834, CO 18/11, Reel 298, p. 362; The Perth Gazette, 7 September 1833, p.142.
the area was not to be used as a public thoroughfare when inhabited by Aboriginal families. 156 Prior to his return to England (and the arrival of replacement troops) in September 1833, Irwin relayed the details of the agreement that had been made with Munday to the new Acting Governor, Captain Richard Daniell, who had just arrived from Tasmania with part of his regiment. 157 On 14 September, the same day that Daniell was made Acting Governor, the Executive Council discussed the agreement ‘of amity’ that had been made with Munday. 158 It concluded that daily rations of wheat (imported from Tasmania) would be provided to each man, woman and child in the ‘settled districts,’ as reparation for the loss of their traditional foods and to make them dependent on the government in order to keep them away from settlers stores. 159 It was also proposed that Aboriginal people around the Swan and Canning be employed on public works in order to make themselves useful and pay their own way.

The settler debate on Aboriginal rights

The period following the meeting with Munday saw a wider public debate on the legal status of Aborigines and policy in relation to conduct between settlers and Aborigines. The lack of British government policy acknowledging Aboriginal rights was criticised by some settlers who believed that Indigenous protests at the gradual dispossession of their land raised moral and legal questions. In July and August 1833, following Yagan’s death, Moore wrote a series of letters to the Editor of the *Perth Gazette* under the

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156 This was to encourage ‘friendly intercourse’ with the Aborigines so that families could establish themselves on the spot. *The Perth Gazette,* 5 October 1833, p 157, Government Notice, 25 September 1833.


158 Irwin’s departure had been delayed due to illness but it is highly probable that he and Daniell discussed the plans commenced by Irwin after the meeting with Munday and Weep.

159 Minutes of the Executive Council, 1 October 1833, CO 20/1, Reel 1117-8, p.265. Rations of wheat were proposed of 12oz for a man per day, 8 oz to a woman, and 6 oz per child.
Moore is particularly important because of his influence on the development and implementation of legal policy, both as Advocate General and as a member of the Executive and Legislative Councils from August 1834. He, along with governors and members of the Councils, Irwin, Roe, Brown and Mackie, largely shaped colonial government policy in the 1830s and early 1840s. Moore was anxiously awaiting Stirling’s decision on his appointment as Advocate General or to another official role, and his concern for his career prevented him expressing his unpopular views openly. However, this did not prevent him questioning the moral and legal validity of British government policy on the treatment of Indigenous peoples.

In May 1833, Moore reported in his journal a chance conversation with Yagan (at a time when Yagan was regarded as an outlaw), who visited his farmhouse:

I regret that I could not fully understand it. I thought, from the tone and manner that the purport of it was this: You came to our country- you have driven us from our haunts, and disturbed us in our occupations. As we walk in our own country, we are fired upon by the white men- why should the white man treat us so?  

In his subsequent letters to The Perth Gazette, Moore referred to an English commentator who had questioned how the British nation could continue its existing unjust policy in relation to indigenous peoples. On 13 July, he wrote:

How far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or christianity, deserved well to be considered by those, who have rendered their names immoral by thus civilising mankind.  

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161 Cameron, Millendon Memoirs, 27 May 1833, p.235.
162 The Perth Gazette, 13 July 1833, p.111.
And on 27 July:

The British nation has deservedly acquired a high name for justice and honor in its national dealings. But the treatment of the original owners and inhabitants of several countries, which have from time to time been taken possession of under its sway, is singularly at variance with this character, and forms an unfavourable exception against the national honor. In the first attempts at colonising America, the utter disregard of the title of the owners of the soil seems a remarkable trait in the character of a people peculiarly jealous of their own property, liberty, rights and privileges.  

Moore noted that the proper standard had been implemented by Quaker, William Penn in Pennsylvania, who had acknowledged the rights of the indigenous owners of the land by purchasing their lands through treaty or cession of their territory. Moore's opinion preceded those of the 1837 Aborigines Committee and in some ways was similar to those of former Attorney General of New South Wales, Saxe Bannister, who had published a book in 1830 entitled *Humane Policy*. Using Africa as an example, Bannister called on the British government to make reparation for the taking of indigenous lands. After discussing the history of the British government's approach to colonising indigenous countries, Moore turned his attention to policies adopted in New South Wales and Tasmania:

Let us now turn to another hemisphere and see what occurred at the first colonising of New South Wales. Here again was no appearance of open and avowed recognition of the rights of the native inhabitants. No preliminary attempt to obtain their consent, or amicable acquiescence in the measure. No preconcerted plan of conciliation. No well-directed efforts for mutual explanation. A large proportion of the population, with

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164 It is possible that Moore had a copy of Saxe Bannister’s book or had been told about it by his brother Thomas Bannister who was a member of the Agricultural Society in July 1831. Thomas arrived in WA in 1829, became Government Resident of Fremantle and left the colony in 1832 for Tasmania. J. L. Burton Jackson, *Frowning Fortunes*, Victoria Park, Hesperian Press, 1993.
whom the natives were likely to come in contact, were the very outcasts from civilised society.  

In his second letter to *The Gazette* on 27 July 1833, Moore wrote from the perspective of an unsuspecting colonist who had just arrived in Swan River Colony. He queried how, despite Stirling’s proclamation which sought to guard Aboriginal people from ‘wanton outrage,’ no forethought was given to the existence of those whom we were about to dispossess of their country. Which of us can say that he made a rational calculation of the rights of the owners of the soil, of the contemplated violation of those rights, of the probable consequences of that violation, or of our justification of such an act?  

Moore stated that the ‘faint whisperings’ of moral conscience experienced by colonists had been overwhelmed by their business interests and that they had failed to take account of Aboriginal rights:  

Did it never occur to us then, that in thus extending the dominion of Great Britain, in thus acquiring a territory for our country whilst seeking a fortune for ourselves, we were about to perpetrate a monstrous piece of injustice, that we were about to dispossess unceremoniously the rightful owners of the soil?  

He argued that if it had been known at the time that Aboriginal people were about to be dispossessed of their country and their rights as the ‘owners of the soil’ violated by the British government, the question would not be: ‘How much land will you give us?…But

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168 Ibid., p119.
169 Ibid.
what right have you to give the land? What consideration have you given for that right? How am I sure that I shall not be disturbed in my possession of the grants?"\(170\)

While Moore believed in the importance of protecting settlers' lives and property as much as the rights of Indigenous peoples, in his view the likely success of the settler (who had to bear the cost of a war of which he had no prior awareness) had been compromised by the British government who had failed to make reparation to Aboriginal peoples for the loss of their lands. This meant that it had been left to the colonists to ‘conquer’ Aboriginal peoples; something Moore believed was really the responsibility of the British government.\(171\) This argument and the resultant blame cast on the British government would reappear during the 1830s and 40s in contests between settlers and the British government in relation to policies regarding the Aborigines.\(172\)

In Moore’s opinion it was the responsibility of the British government to negotiate any treaties with Aboriginal peoples. However, he shied away from openly advocating such a move by the settlers, shifting his focus to recommending proposals for civilising indigenous peoples as had taken place in North America, which he encouraged individual settlers to become involved in. In his last letter to the Editor of *The Gazette* he appealed to the settlers’ conscience on justice and equity grounds, which he acknowledged might result in ridicule and sneers. However, he argued that it was also in their economic self interest to move in a conciliatory direction by encouraging the benefits of civilisation through training and employing Aboriginal people on their farms.\(173\) While Moore did not refer to treaties in his official capacity in 1833, he would

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\(170\) Ibid.


\(172\) Minutes of Executive Council, 15 April 1833, CO 20/1, Reel 1117-8, p.188. Irwin stated that as a consequence of the notice of 31 March 1832 the settlers could no longer seek compensation from the government for attacks by aborigines on their property.

\(173\) *The Perth Gazette*, 10 August 1833, p.127.
refer to them again in 1836 as a Member of the Executive Council and would continue to believe that the British government should formally recognise Aboriginal land rights. A month later, in September 1833, Irwin left for England and published a book in 1835 in which he recommended that Moore would make a good negotiator for any formal treaty with the Aboriginal peoples of Western Australia.

Moore’s ‘civilising’ proposals were supported by the Editor of *The Perth Gazette* who nevertheless sidestepped the reference to legal rights that Moore had raised. The Editor, Charles MacFaull, commended Moore's investigation of the deeper questions during a period of cessation in hostilities:

> we do most sincerely trust that the sentiments and opinions of “Philaleth” will be universally inculcated. The recent possessors of our acquired territory have an indisputable right to our consideration; we term them British subjects, and condemn them by our laws, surely they may demand the protection and immunities of the country to which they are allied!

While settlers largely rejected the idea that they purchase Indigenous land, there were several responses to Moore's letters which focused on proposals for civilising Aboriginal people, such as ‘native villages,’ drawing on examples from North America. Others echoed the view of the Editor of *The Gazette* that it was too late to right the wrongs of ‘our acquired territory.’ The ‘native village’ concept was spoken of by Moore and others in relation to the Upper Swan tribes, and attempts were made to

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174 Chapter 6 takes this further by examining how Moore influenced official policy in September 1836 when Stirling was considering a proposal from Indigenous people for an agreement of co-existence on the land.
177 Ibid.
179 Ibid.
fix Aboriginal people to one spot in order to keep them from bothering the settlers.\textsuperscript{180} This idea formed the basis for the Mt Eliza Institution in Perth that was established informally on September 1833.\textsuperscript{181} It was formally established by Stirling in December 1834 with Armstrong as Superintendent, in order to encourage Aboriginal people to fish and grow vegetables, but it ended up primarily as a ration depot to control Aboriginal people.\textsuperscript{182}

**Contesting the Outlawry of Weeip**

In May 1834, the legality of outlawing Aboriginal people was criticised by a significant group of Upper Swan settlers, after Weeip and members of his tribe were outlawed by the Executive Council following a coronial inquest into the death of a soldier.\textsuperscript{183} On April 1834, a soldier, Denis Larkin, shot Yeedamirra while escaping custody. Yeedamirra had been involved in raids on wheat stores on Lockyer Burges’s farm in the Upper Swan. Weeip, his son Bill-yoo-merry, and others had gone to the military barracks to avenge Yeedamirra, and Larkin was speared to death.\textsuperscript{184} An inquest was held into Larkin's death and the jury (who included two members of the Burgess’ family) recommended that a verdict of wilful murder be brought against seven Aboriginal people who had been present.\textsuperscript{185} Acting Governor Daniell met with his Council on 6 May 1834 and concluded that the military would be more effective in catching the perpetrators if Weeip’s tribe could be lulled into a false sense of security.\textsuperscript{186}

\textsuperscript{180} Cameron, *Millendon Memoirs*, 9 September 1833, pp.275-6. Munday and Weeip were informed about the arrangement of flour distribution depots in a location far from farmhouses, in a place where they could till the land.


\textsuperscript{182} Cameron, *Millendon Memoirs*, 9 September 1833, pp.275-6.

\textsuperscript{183} Minutes of Executive council 6 May 1834, CO 20/1, Reel 1117-8, pp.344-45; *The Perth Gazette*, 6 September 1834, Weeip was outlawed on 30 May 1834, with a reward offered for his capture. The outlawry was revoked on 4 September 1834.

\textsuperscript{184} Bourke, *On the Swan*, pp.78-81.

\textsuperscript{185} *The Perth Gazette*, 10 May 1834, pp.282-3.

\textsuperscript{186} Minutes of Executive Council, 6 May 1834, CO 20/1, Reel 1117-8, pp. 344-5.
It appears that Weeip and other members of his tribe were declared outlaws by the Executive Council, but not until after the soldiers were unsuccessful. On 30 May 1834, Daniell issued a formal notice offering settlers a reward of twenty pounds for apprehending Weeip, rather than continue to attempt to capture members of the tribe because it was considered impracticable. The Council had limited the outlawry notice to Weeip out of concern that they did not have the capacity to capture a larger number of Aborigines as the mounted police force was not yet fully established. However, Weeip’s son was captured as a hostage and placed in gaol.

The formal declaration of outlawry against Weeip was objected to by the Upper Swan farmers because they had doubts surrounding his guilt and the legality of his status as a British subject. Twenty-two settlers (including Bull and Lyon) signed a petition which was sent to the Executive Council in June 1834 questioning the validity of outlawry which assumed that Aboriginal people were British subjects and under the protection of British law.

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Your petitioners have seen with deep concern and regret the proclamation of His Honor Lt Governor Daniell declaring the native Weeip an outlaw, offering a reward for his apprehension and empowering any person to kill him should he resist in the act of securing him. That your petitioners respectfully submit that the Aborigines of this country have never been brought to acknowledge or consider themselves as British subjects answerable to our laws although the local government have declared them as such; that it must be acknowledged the aforesaid Aborigines are in a state of complete barbarism unaided by any Christian knowledge or principle and acting generally under the influence of ungoverned passions from the impulse of the moment. That your petitioners consider therefore the fact of certain of the Aborigines being concerned in causing the death of the soldier Larkins an act of reprisal only on their part in revenge for

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187 Minutes of Executive Council, 30 August 1834, CO 20/1, Reel 1117-8, p.362.
188 Minutes of Executive Council, 6 May 1834; 30 August 1834, CO 20/1, Reel 1117-8, p.362.
189 Ibid.
190 Bourke, *On the Swan*, p.79.
the loss of their countrymen [sic]Yeeteemerry whom they believed to
have been unjustly shot in endeavouring to escape from the custody of the
military the offence viz theft, for which he had been committed being in
their estimation not more than menial.192

Surprisingly, the petition not only questioned the legality of the outlawry, but reflected
unusual sensitivity regarding the punishment of Aboriginal people for attempting to
steal settlers’ property. This was similar to what Munday earlier argued with Irwin in
August 1833, when he protested against the disproportionate punishment of
Aborigines.193 It also reflected Lyon's earlier opinion that Aborigines had not consented
to be British subjects and that they had retaliated under their own laws for the death of
their ‘countrymen’ for an offence that was seen by them as petty.194

On 30 August 1834, the Executive Council decided to revoke the outlawry of Weeip on
condition that his tribe provide an assurance of good behaviour.195 By 6 September 1834
the declaration of outlawry against Weeip was removed by Stirling in exchange for his
cooperation, and because of concerns that the ‘Murray river tribe’ might combine
against the settlers.196 On 3 September 1834, Stirling visited Weeip on the Upper Swan
to obtain his agreement that there would be no further action against the settlers.197 He
warned Weeip that if he or his tribe stole from or attacked the settlers, then no-one
‘would be left this side of the mountains’, a warning that would be repeated a month
later at Pinjarra.198 In exchange for their co-operation, Stirling offered food and medical

192 Ibid.
193 The Perth Gazette, 7 September 1833, p.142.
194 Lyon, Australia: An Appeal to the world, p.78.
195 Minutes of the Executive Council, 30 August 1834, CO 20/1, Reel 1117-8, p.362.
196 The Perth Gazette, 6 September 1834, p. 351; Cameron, Millendon Memoirs, 3 September 1834, p.346.
197 Ibid.
198 Cameron, Millendon Memoirs, 3 September 1834, p.346; The Perth Gazette, 6 September 1834, p.351.
attention and encouraged them to seek protection by approaching Capt. Ellis if they were attacked by settlers.199

Stirling’s punitive expedition (Pinjarra)

By July 1834, even the pretence of legality under formal proclamation notices of outlawry was departed from with the adoption of the informal outlawing of whole tribes, or groups of Aboriginal people.200 In July 1834, Stirling made a resolution to ‘overawe’ the whole Murray River tribe, following the death of a settler, Nisbett, and a series of thefts and killings going back five years.201

In July 1834, Stirling returned from England to receive reports that the Murray River tribe renowned for its warlike nature, was becoming more daring.202 A few months earlier, Daniell approved a memorial from Thomas Peel and Captain J. Byrne (who had large grants along the Murray River) seeking to relocate the military barracks closer to the settlement at Pinjarra in order to protect the settlers from the Aborigines. Daniell also informed Stirling of increasing conflict closer to Perth. On 24 April, there was a raid on Shenton's Mill near Perth where members of the Murray tribe had taken 900

199 Ibid; Bourke, On the Swan, p.80.
200 Even though there was no formal notification, T. Morgan who was Resident Magistrate in Perth in 1834 referred to the party agreeing that Noona be taken dead of alive. The Perth Gazette 11 April 1835, p.475. The despatch of 1 November 1834 from Stirling to Glenelg contains a list of offences of the Murray river tribe and refers to the need to ‘overawe’ the whole tribe which is a word that has been scrawled in different handwriting, SRO, WAS 1166, ACC 390/2. Stirling’s Legislative Council speech on 23 June 1837 stated that depositions of certain individuals had been placed in the hands of the Superintendent as a magistrate with orders to apprehend offenders and that resistance was expected. He shifts his reference from individuals to the whole tribe in his next comment ‘An opportunity, of all others, most suitable for shewing the power and resolution of the whites, for the whole tribe concerned in the previous murders was assembled in open day, and instead of waiting to be apprehended, they commenced the attack by assaulting the police.’ The Perth Gazette, 1 July 1837, p.928.
201 Statham-Drew, James Stirling, p.260; Stirling to Stanley, 1 November 1834, Governor’s Despatches, 14 September 1834 to 6 December 1838, SRO, WAS 1166, ACC 390/2. ‘Resolution to ‘overawe’ the tribe, but in a legal manner by proceeding against the murders of Nesbitt, who would be identified and had been informed against by Barron and others.’ The Perth Gazette, 26 July 1834, pp.326-7.
202 Statham-Drew, James Stirling, p.251.
pounds of government wheat. Sol...4 Soldiers returned from the Murray River with four Aborigines suspected of being involved in the robbery, including Calyute (whose son had been mortally wounded during their arrest). Two Aborigines who were not considered violent were flogged and released, whereas Calyute was regarded as a ‘notorious offender’ and his fate was to be decided by the Executive Council. European witnesses were called to attest to Calyute's character and conduct. Ellis stated that he knew nothing of him personally, but related the opinions of the settlers at the Murray who said that he was a ‘daring, troublesome and dangerous person’ who had been involved in the murder of McKenzie and Private Budge and had resisted the soldiers when apprehended, and that if released would be a ‘most dangerous enemy.’ Norcott, who had been at the Murray for six months, gave a contradictory account, attesting that Calyute was a quiet and well disposed man. He had heard that Calyute had confessed to the murders of McKenzie and Budge, however, many of the Aborigines had told him that they had been persecuted by Europeans in the district who had fired on them without provocation. In May 1834, Calyute was imprisoned and punished with 60 lashes witnessed by three other Aboriginal prisoners. The intention had been that Calyute would be kept as a hostage and executed if there was the ‘slightest aggression’ against the settlers by his tribe, but he was released in May 1834. Stirling had received news of the attack on Edward Barron and the killing of Nisbett by the Murray river tribe at Mandurah. This was regarded as an unprovoked attack and there were calls for punitive action. Ellis and soldiers had been sent after the tribe but had been unsuccessful in finding them.

204 Minutes of Executive Council, 2 May 1834, CO 20/1, Reel 1117-1118, pp.337-40.
205 Ibid.
206 The Perth Gazette, 3 May 1834, pp.278-9; Green, ‘Aborigines and white Settlers’ pp.72-123.
207 Minutes of Executive Council, 2 May 1834, CO 20/1, Reel 1117-1118, pp.337-40.
209 Ibid.
210 Ibid.
Several months earlier, in early February 1834, Peel and Byrne were informed by Aboriginal people of new pasture on which stray cattle were grazing, and on 30 September, Peel applied for full title to his grant near the mouth of the Murray.\textsuperscript{211} Lyon believed that the bad character of the ‘Murray’ or ‘Bangoula tribe’ was being played up to justify Stirling’s move to ‘possess’ prime agricultural land in the area.\textsuperscript{212} It is clear that Stirling had a special interest in the agricultural prospects of the region in addition to protecting Peel and other settlers’ interests.\textsuperscript{213} A year earlier, the Executive Council had debated whether, in order to protect the settlers from Aboriginal people with the limited military and police resources, that it might be better to abandon the Murray settlement.\textsuperscript{214} However, Irwin had pointed out that Stirling had a special interest in this area as it was one of the most fertile in the colony and that he wanted to retain ‘possession’ of the land from the Aboriginal people who had been resisting the presence of the settlers and soldiers since 1831.\textsuperscript{215} As early as 1828 before he left England, Stirling had selected land grants in Geographe Bay further south, which he received from the British government in lieu of salary.\textsuperscript{216}

Stirling was also concerned that the Murray River tribe might collaborate with other tribes against the settlers closer to the Swan River settlement. By late August 1834, he had learned that the Murray River tribe were visiting Weeip’s and other tribes and were making daring raids close to Perth.\textsuperscript{217} Therefore, he shored up his cooperation with

\begin{itemize}
    \item \textsuperscript{211} Cameron, \textit{Millendon Memoirs}, 9 February 1834, pp. 313, 359; \textit{The Perth Gazette}, 8 February 1834, p.230.
    \item \textsuperscript{212} Lyon, \textit{Australia: An Appeal to the World on}, pp.45-46; \textit{The Perth Gazette}, 8 February 1834, p.230.
    \item \textsuperscript{213} Statham-Drew, \textit{James Stirling}, pp.113-4; \textit{The Swan River Guardian}, 6 July 1837, p.201.
    \item \textsuperscript{214} Minutes of Executive Council, 6 May 1833, CO 20/1, Reel 1117-1118, p. 214.
    \item \textsuperscript{215} Ibid.
    \item \textsuperscript{216} Statham-Drew, \textit{James Stirling}, pp.113-4, 336. Stirling was given total land grants of 100,000 acres.
    \item \textsuperscript{217} Green, ‘Aborigines and white settlers,’ p.84.
\end{itemize}
Weeip by revoking his sentence of outlawry, and warning him and others not to take actions against the Europeans. 218

On 25 October 1834, Stirling led an expedition of soldiers and police towards Pinjarra intending to punish members of the Murray River tribe for attacks on settlers and their property, to re-establish the military barracks and to ensure that settlers (including Peel's) land interests and the economic interests of the colony were secure. 219 The violent clash that followed on 28 October 1834 resulted in a massacre of many Aboriginal people, after which Stirling issued a warning to the survivors on the same day: 220

That the punishment had been inflicted because of the misconduct of the tribe; that the white men never forget to punish murder; that on this occasion the women and children had been spared; but if any other person should be killed by them, not one would be allowed to remain on this side of the mountains. 221

The severe example was perceived by many settlers and especially those who called for a punitive expedition, as having successfully asserted colonial authority over the Murray tribe. 222 After Pinjarra, Aboriginal people became increasingly reluctant to retaliate against settlers if an Aborigine was killed. 223 On hearing of the event, the recently appointed Secretary of State, Lord Glenelg (in a despatch dated 23 July 1835), reprimanded Stirling for his actions, in particular his warning to women and children

218 Statham-Drew, James Stirling, p.261; The Perth Gazette, 6 September 1834, p.351.
219 Green, ‘Aborigines and white settlers’, p. 84.
221 Stirling to Stanley, 1 November 1834, SRO, WAS 1166, ACC 390/2. (repeated in the Appendix to the BPP, Report, 1837, pp.12-13).
223 Green, ‘Aborigines and white settlers’, p.84; Bourke, On the Swan, p.82.
which Glenelg concluded was more like retaliatory warfare than an action against British subjects.\(^{224}\) This event and the humanitarian influence in England prompted Glenelg to outline a policy for future conduct:

The real causes of these hostilities are to be found in the petty encroachments and acts of injustice committed by the new settlers, at first submitted to by the natives, and not sufficiently checked in the outset by the leaders of the colonists...It will be your duty to impress upon the settlers that it is the determination of the Government to visit every act of injustice or violence on the natives with the utmost severity, and that in no case will those convicted of them remain unpunished. Nor will it be sufficient simply to punish the guilty, but ample compensation must be made to the injured party for the wrong received. You will make it imperative upon the officers of police never to allow any injustice or insult, in regard to the natives, to pass by unnoticed, as being of too trifling a character; and they should be charged to report to you with punctuality every instance of aggression or misconduct...Whenever it may be necessary to bring any native to justice, every form should be observed which would be considered necessary in the case of a white person; and no infliction of punishment, however trivial, should be permitted, except by the award of some competent authority.\(^{225}\)

Shortly after receiving Glenelg's dispatch, Stirling published an extract from it in *The Perth Gazette* reminding settlers that they were liable to be punished for every act of injustice of violence against Aboriginal people.\(^{226}\) This appeared next to an extract from an earlier despatch from Goderich which required that settlers protect their own property rather than rely on military assistance.\(^{227}\) The deliberate juxtaposition of the two extracts highlighted the dilemma arising from the incompatibility of the two policies: one asking colonists to defend themselves against ‘petty assaults’ on their property, and the other asking the government to punish cases of injustice and settler violence against Aboriginal people, for acts which were often regarded by settlers as justifiable self-defence in protecting their property.

\(^{224}\) Glenelg to Stirling 23 July 1835, CO 397/2, Reel 304, pp.181-4.

\(^{225}\) Ibid.; Report, 1837, p.138.

\(^{226}\) *WAGG*, 30 July 1836, p.38; *The Perth Gazette*, 28 July 1836, 30 July 1836, has extract from 23 July 1835 despatch by itself.

\(^{227}\) Ibid.
Stirling emphasised that the reason why he wanted a civil police force specifically devoted to tracking Aboriginal people, was to protect settlers’ property. However, his initiative met with resistance from the new Legislative Council and the majority of settlers who did not want it funded from colonial revenue but from the British Treasury. These funding problems were also part of a general disenchantment at Stirling’s failure to meet settler demands concerning a revision of the land regulations and financial assistance from the British government. They believed that the soldiers who were already in the colony were sufficient to protect them from attacks on their property by Aborigines. However, from 1835 the Legislative Council (which had gained a new power of vetoing expenditure) led by Moore, resisted Stirling’s attempts to spend £182 on three ‘Superintendents of Native Tribes’ and a police force. Stirling argued that the rights of the Crown to funds for this purpose took precedence; however, Moore disagreed, replying that there were no specific Colonial Office instructions on the matter. Stirling was forced to reluctantly accept the smaller amount of £45 to cover one Superintendent for Perth Capt. Ellis, and some police. By April 1836, the police corps had ceased to function and their role was placed under the control of resident magistrates as ‘conservators of the peace.’ This meant in practice that military detachments were to act under their authority, in this case the 21st regiment led by Lieut. Henry Bunbury and others who had recently arrived from Tasmania.

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228 Minutes of Legislative Council, 24 March 1835, CO 20/2, Reel 1118, p.128.
229 Statham, ‘Swan River Colony,’ pp.188-189.
230 Minutes of Legislative Council, 24 March 1835,, CO 20/2,Reel 1118, p.128; The Perth Gazette, 4 April 1835; Stirling to Spring Rice, 4 May 1835 including extract of Legislative Council meetings, CO 18/15, Reel 777-778, pp.124-5.
231 Glenelg to Stirling, 23 July 1835, CO 18/14, Reel 300, pp.181-4 ; BPP, Papers relative to the Aborigines, p. 138; Glenelg to Lord Hill, 13 June 1838, CO 397/4, Reel 773-774, pp. 162-3.
Ironically, Glenelg's despatch with its demand that Aboriginal people be protected under British law was received in early 1836, at a time when many settlers were pressuring Stirling to undertake a 'second Pinjarra' to deal with clashes in the York region.\textsuperscript{232} In the same year a road was built between Guildford and York which opened up transport, increased sheep numbers to 5000, and facilitated agricultural settlement, especially at Northam and Toodyay. This invasion was resented by the local tribes who found their lands and lifestyle encroached upon.\textsuperscript{233}

**The York District (Avon Valley)**

On 26 June 1836, Anglican missionary Louis Giustiniani arrived in Perth just prior to the outbreak of renewed violence between Aboriginal tribes and settlers in the Avon Valley. He later protested against the call by settlers and the Editor of *The Perth Gazette* for a 'second Pinjarra' example to deal with the conflict.\textsuperscript{234} On 3 November 1836, Stirling reported to Glenelg that further conflict had broken out at York.\textsuperscript{235} In September, a trap was set by settler Arthur Trimmer, which resulted in his employee, labourer Ned Gallop, shooting two Aboriginal men as they crouched down to take flour from the floor of a barn. Giustiniani protested that no investigation had been ordered into the affair and urged that an inquiry be conducted.\textsuperscript{236} Subsequently Moore investigated the matter, but despite evidence that showed that Trimmer and Gallop had not acted in self-defence, no action was taken against them.\textsuperscript{237} Moore reported that:

Dr G is now blaming the Government for not proceeding to try and execute a settler, who shot a native in the act of robbing his masters' barn. The case is one of some difficulty. The master placed the man in the barn

\textsuperscript{232} Ibid.; *The Perth Gazette*, 13 June 1835, p.510; *The Swan River Guardian*, 27 April 1837; *The Perth Gazette*, 13 May 1837, p.901.
\textsuperscript{234} Bourke, *On the Swan*, p.122.
\textsuperscript{235} Stirling to Glenelg, 3 November 1836 (No 153), SRO, WAS 1180, CONS 42/1.
\textsuperscript{236} Bourke, *On the Swan*, p.126.
\textsuperscript{237} Ibid.
to watch the property. The settlers complain that they have not sufficient protection allowed them by the government, and they are thus compelled to defend and secure their property themselves. The government here cannot, and the government at home will not give more, except out of the pockets of the settlers.\footnote{Cameron, \textit{Millendon Memoirs}, 18 June 1837, p.421.}

Two days later a settler, Edward Knott, was killed in retaliation, with the score apparently settled as far as the Aborigines were concerned under their law.\footnote{F. Armstrong to the Colonial Secretary 25 May 1837, SRO, CSR, ACC 36, Vol. 53, p.228.} In a despatch to the Colonial Office on 3 November 1836, Stirling reported that no action had been taken against Gallop. He was of the opinion ‘that [in] cases where the law is necessarily ineffectual for the protection of life and property the right of self protection cannot with justice be circumscribed within any narrow limits.’\footnote{Stirling to Glenelg, 3 November 1836 (No 153), SRO, WAS 1180, CONS 42/1.} This demonstrated that Stirling was prepared to give the settlers increased discretion to retaliate against Aborigines when their property was involved, something that his successor Hutt would battle to keep within the boundaries of British law when he confronted similar problems in York in 1839. Stirling informed Glenelg that he had not taken action against the three Indigenous suspects involved in Knott’s killing because he feared retaliation.\footnote{Green, \textit{Broken Spears}, p.210. Three suspects were Dyatt, Watnupworth and Yeedar.} In addition, any legal warrant for their arrest required a military party which would lead to further deaths and retaliation on ‘unprotected settlers.’\footnote{Stirling to Glenelg, 3 November 1836 (No 153), SRO, WAS 1180, CONS 42/1.} However, there is evidence that Knott’s killing was added to the list of ‘crimes’ as part of the planned official punitive expedition in July 1837.\footnote{Minutes of Executive Council, 11 July 1837, CO 20/2, Reel 1118, p.194.}

Glenelg expressed concern that use of the legal device of ‘self defence’ was being exploited, and instructed Stirling that coronial inquests into the deaths of Aboriginal people be held so that it could be determined whether the settler or soldier was legally
acting in self-defence or not. Glenelg warned that unless an inquest was held it would encourage settlers to ‘learn to set on the lives of their uncivilized neighbours little or no value.’

Glenelg had also requested that Stirling inquire into the death of two Aborigines at the hands of soldiers and provide depositions. Stirling was advised that any retaliation that resulted in the loss of human life would not be tolerated, the assumption being that bringing both Aborigine and settler equally to account under the British legal system would solve all problems of inter-racial conflict. By the time that this despatch arrived on 29 December 1837, Stirling had already carried out his punitive expedition at York, having taken care to list instances of ‘provocation.’

On 19 November 1836, Stirling consulted with Mackie about ways to resolve the problem of Aboriginal people repeatedly robbing settlers of their property in the Swan and Canning regions, and directed that they be prosecuted under the criminal law before the Court of Quarter Sessions and tried by a jury. During 1837 the first cases were heard which resulted in the sentence of transportation being imposed on Aboriginal offenders for the first time. Mackie referred to the latest instructions from Glenelg that required that Aborigines be subject to British law. However, the focus was more on conviction under the criminal law than protection of Aboriginal people from attacks by Europeans, and there remained the problem of being unable to accept Aboriginal evidence in court.

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244 Glenelg to Stirling, 19 June 1837 (No 61), SRO, WAS 178, CONS 41/2.
245 Ibid.
246 Ibid.
247 Stirling to Glenelg, 29 December 1837 (No. 233), SRO, WAS 1180, CONS 342/3.
248 Stirling to W. H. Mackie, 19 November 1836, SRO, CSR, ACC 49/8, p.87.
249 The Swan River Guardian, 5 October 1837, p.229; The Perth Gazette, 7 October 1837, pp. 985-6. The maximum sentence for sheep stealing was generally seven years transportation.
250 See Chapter 5.
In 1837, Stirling made an attempt to prosecute the first Aborigines, Durgap and Garbung from the York district for an attack on a settler. Shortly afterwards, the death of two settlers, Peter Chidlow and Edward Jones was reported in retaliation for the arrests of Durgap and Garbung, who were taken to Perth, but whose trials were postponed. This resulted in the abandonment of any further attempts to arrest other Aborigines from York in accordance with British law. Instead, a method similar to outlawing a whole tribe was employed. Moore provided through Indigenous informants the names of no less than 42 Aborigines whom he claimed were involved in the murder of Chidlow and Jones.

On 16 May 1837, Stirling directed Armstrong to warn Aboriginal people in York about their conduct and that they would be punished severely if found guilty of murder by a ‘proper tribunal.’ He was also to ascertain whether they were amenable to ‘conciliation.’ Armstrong provided a negative report and on 11 July 1837, Stirling proposed to the Executive Council that an expedition be mounted to capture the suspects who were still at large and accused of crimes against settlers. Stirling’s intention was to ‘secure the peace of the York district for a long period as well as intimidate those in the Swan and Canning region who were described as ‘mischievous and turbulent.’ Two parties under the leadership of military officers Lieut. Henry Bunbury and Lieut. Don MacLeod were chosen and the military post at York was

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251 D. MacLeod to Stirling, 7 July 1837, SRO, CSR, ACC 36, Vol. 54, p.119. Durgap was captured on 6 July 1837.
252 The Perth Gazette, 19 August 1837, p.957.
253 Gaden, Northam, p.50.
254 G. F. Moore, ‘Brief Chronicle,’ Journal of Agricultural and Horticultural Society, ML, 1842-3, p.xiv. ‘A clue was obtained by G. F. Moore which led to the discovery and publication of the names of 42 individuals who were concerned in the murder of Chidlow and Jones. Active measures were taken for their apprehension and punishment in which Lt. Bunbury was particularly zealous…natives were completely intimidated’; The Perth Gazette, 19 August 1837, p.957.
255 Colonial Secretary to Francis Armstrong, 16 May 1837, SRO, CSR, ACC 49/8, No. 627; Colonial Secretary to Armstrong, 27 May 1837, SRO, CSR, ACC 49/8, No. 639.
256 Minutes of Executive Council, 11 July 1837, CO 20/1, Reel 1117-1118, p.194.
257 Ibid.
reinforced with additional soldiers to protect farms and stock, the operation taking place in secret to provide an element of surprise.258 On 17 July, MacLeod and Bunbury were ordered to chase suspects involved in the murder of five settlers and associated robberies and were given a great deal of discretion to control the ‘turbulence’ of the Aboriginal tribes at York.259

What the Colonial Office had feared would happen with the use of soldiers took place in the conflict in York, and Stirling would increasingly describe occupation as more like warfare or conquest.260 Giustiniani called it a declaration of ‘martial law’ and the military approach gave it that flavour. However, Stirling was careful to give it the outward appearance of legality. Acting Government Resident Lieut. MacLeod had hastily been made a Justice of the Peace. Those who were not principals in the murders were to be kept on one of the islands off Fremantle and the principals were to be tried and executed.261 A special meeting of the Agricultural Society that was held to urge urgent action from the government and an increased military force, concluded that the district of York was in a ‘state of war.’262 Several Aborigines, including those not directly accused of the offences, were shot by military and settlers, and there were further reports of a vigilante group shooting Aborigines.263 Giustiniani reported that following the death of Jones and Chidlow, Aboriginal informants had told him 18 Aborigines had been shot in a ‘massacre’ instead of the few reported in The Perth Gazette.264 Giustiniani publicly criticised Stirling for his use of coercive force rather than education or prevention, stating that ‘Aboriginal British subjects are very numerous.

258 McLeod was not made a J.P. until 28 July 1837, SRO, CSR, ACC 49/8, p.196.
259 Colonial Secretary to Bunbury and Mac Leod, 17 July 1837, SRO, CSR, ACC 49/8, p.192.
260 Stirling to Glenelg, 29 December 1837, SRO, WAS .1180, CONS 342/3.
261 Colonial Secretary to MacLeod, SRO, CSR, ACC 49/8, p.196.
262 The Perth Gazette, 29 July 1847, p. 945; Special Meeting of Agricultural Society, 27 July 1837.
264 The Swan River Guardian, 16 November 1837, p.249.
in every district. If we shoot them will those who remain be better informed?" He drew attention to the contrast between what was taking place in York, which breached Glenelg’s instructions of equality under British law, and the trials in Perth that were convicting Aboriginal people under criminal law as British subjects.

Durgap was eventually tried in October 1837, however, Mackie anticipated Giustiniani’s objections and addressed the grand jury on the question of the jurisdiction of the court to try Aborigines. Although not legally trained, Giustiniani had read Blackstone’s commentaries and defended Durgap (and two other Aborigines from other districts); Mackie responded:

To know that our Sovereign, by a formal exercise of his Executive Authority, had adopted the Aborigines of this Colony as his subjects; - to reflect that, as Divine Providence had permitted our nation to occupy this country, it was absolutely necessary that there should be some fixed laws to regulate that intercourse of the settler and the savage, which became inevitably consequent upon such occupation. That necessity equally existed, whether the dominion assumed by the British Government over this country was to be considered as merely defacto or dejure [in fact or in law].

Mackie added that there could not be two opinions on the question whether in order to regulate such an intercourse, the laws (if such a term could be applied in such a case) of wandering savages, or the laws and usages of all civilized nations applied, the perpetrator of a crime was liable to be tried, first, according to the laws of that community within whose territories it had been committed, in whatever manner the actual dominion over that territory had been acquired, and whether the offender was, or was not, a subject of such territory. Independently of all such considerations, humanity and a real regard for the interests of the natives would dictate the necessity for subjecting them to the coercion, as well as placing them under the protection of our laws.

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266 R v Durgap (Derricap), Durgap was charged for breaking into a dwelling house in Northam on 16 June 1837. The Perth Gazette, 7 October 1837, pp.984-5; The Swan River Guardian, 5 October 1837, p.229.
267 The Perth Gazette, 7 October 1837, p.985.
268 Ibid, p.985.
Although Mackie referred to the instructions of the Secretary of State, he also concluded that the court had jurisdiction regardless of whether the legal basis for the annexation of the territory was occupancy or conquest, or whether the offender was or was not a subject of the territory. The primary focus was on regulating the conduct between the settler and Aborigine, and Indigenous laws were not considered civilized enough for this purpose. He believed that this was important because a settler had to be confident that he could obtain satisfaction from the courts against Aboriginal people, similar to actions against other settlers, or else he would be likely to take the law into his own hands. Mackie also believed that the jury would provide a fairer verdict than an individual riled at the loss of his property, neglecting to mention that propertied settlers were also jurors.269 After the address by Mackie, the grand jury led by foreman George Leake (a lawyer who had large land holdings at Upper Swan and York) decided that there was sufficient evidence to proceed against the three Aborigines for theft. Durgap had originally been apprehended for wounding William Heal, a farmer near York, even though Heal had made an agreement with the two Aboriginal people who attacked him that they would work on his farm for several months as compensation.270 Instead of Durgap being indicted for the attempted murder of Heal (because Heal refused to be a witness), he was charged with breaking and entering and stealing a lump of dough from John Morrell’s house in Northam in June 1837.271 The petty jury took a few minutes to decide that Durgap was guilty and he was sentenced to seven years transportation.272 Given what had just occurred in York, and the fact that Durgap had been identified as a ‘notorious offender’ by MacLeod, it would have been surprising if Durgap had not been given a lengthy sentence.

269 R v Durgap and others, The Perth Gazette, 7 October 1837, pp.984-5.
270 Green, Broken Spears, p.122; The Swan River Guardian, 20 July 1837, p.206; Garden, Northam, p.50.
271 Ibid.
A month later, Stirling sent Moore to the York district to inform Aboriginal people that he wanted peace. Moore warned them what would happen to those who were still wanted for killing settlers by using the example of Durgap’s trial and imprisonment. He gained an assurance from those who responded to the meeting that there would be no more spearings of settlers lives or stock; adding that: ‘the Governor desires me to say ‘If the Noongar spear no more and steal no more then he will shoot no more with the gun.’

On 29 December 1837, Stirling sent a lengthy despatch to Glenelg explaining his actions at York and attributing the cause of the conflict to the ‘invasion by the whites of the country of a very peculiar race of people, who profess…qualities which render them: extremely formidable, and practised in continual warfare.’ This was the first time he had provided reasons to the Colonial Office (although not the first time he had publicly admitted them within the colony) of why he could not regard Aborigines as British subjects as he had proclaimed in 1829, emphasising that the character of Aboriginal people made this impossible. A year later, in May 1838, Stirling released Durgap as a reward for the reduction in violent resistance by Aboriginal tribes in the York district.

This chapter has shown that Stirling soon departed from his proclamation that Aboriginal people were to be regarded under the protection of British law as for other

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273 Moore’s letter reporting on the meeting is attached to the Despatch of 29 December 1837 and is dated 23 October 1837.
274 Moore to Colonial Secretary, 23 October 1837, attachment to Despatch from Stirling to Glenelg, 29 December 1837 (No 233), SRO WAS 1180, CONS 342/3,p.40. The term used is ‘Goongar’ or ‘Noongar.’
275 Stirling to Glenelg, 29 December 1837 (No. 233), SRO, WAS 1180, CONS 342/3.
276 Ibid.
277 Moore, Diary of Ten Years Eventful Life, 22 October 1837, p.330.
British subjects, when he encountered the first violent conflict with Aboriginal people. Instead his priority was the protection of settlers’ lives and property. Innovative devices were employed to get around the legal problems of dealing with an invaded people who had been given British subject status without their knowledge, and when the act of colonisation had been based on British government policy that presumed that the land was ‘waste and unoccupied.’

During the 1830s, Stirling relied on Mackie’s legal advice that outlawry was a means to address the problem without declaring openly that it was a conquest or an invasion. However by the mid 1830s Stirling would be declaring that it was an invasion of a formidable enemy. The device was primarily applied to encourage settlers to assist in the capture of individual leaders by offering a large reward. If Aborigines were subject in theory to the protection of British law, it was murder for settlers to kill them while apprehending them (unless provoked) and outlawry provided them with indemnity. However, the formal gazettal was unnecessary for Pinjarra, as it was the government that intended to carry out both the apprehension and punishment of Aborigines in a remote region at a considerable distance from Perth. Glenelg had reprimanded Stirling for using outlawry to encourage apprehension by settlers for a reward, stating that a civil police should exercise this role, but by this stage only soldiers were available and they had come directly from the aftermath of the bloody wars with Indigenous peoples in Tasmania in September 1833. However, unlike New South Wales, outlawry was used more often to deal with recalcitrant tribes. In fact the latter clashes in Pinjarra and York were more like martial law (although it was never formally declared) in the end as Giustianiani pointed out, and the Executive Council was more like a quasi-military tribunal than a court. Eventually this device was informally applied to groups of Aborigines as if they were enemies involved in retaliatory warfare.
Several settlers realised that this policy had ignored the causes of the conflict which had resulted from the loss of access of Aboriginal people to their land and food, and speculated on a range of options to resolve what was regarded as the Aboriginal problem which was threatening their physical and economic security. A few settlers questioned the nature of British government policy that failed to negotiate with Aboriginal people. During the course of the 1830s, Lyon argued that Indigenous people should not be regarded as outlaws who had offended against colonial society but rather as patriots defending their country with whom rights should be negotiated. He proposed legislative measures that would recognise Aboriginal rights as for British subjects, and as Indigenous people who were being gradually dispossessed of their hunting grounds. The question of whether there was a justification in the first place for colonisation or invasion was not questioned but the method of colonisation that totally ignored the Aboriginal presence and rights was. Moore had criticised Imperial policy that had not taken into account the moral and legal injustice of dispossessing Aboriginal people from their land without recognising their rights and providing reparation.

The effect of outlawry would establish a pattern which would be developed in the 1840s and the 1850s as pastoral expansion became stronger. This was that Aboriginal peoples were neither patriots with land nor were they British subjects with any goods, lands or chattels that could be forfeited. Lyon’s proposal and the opportunity in September 1836 for Stirling to enter into an agreement with the Aboriginal tribes around Perth will be dealt with in Chapter 6.
Chapter 3

The humanitarian influence, debates on legal rights and impact on Colonial Office policy during the 1830s and 40s.

The debate on the legal position and rights of indigenous peoples in British settlements largely arose as a result of the humanitarian influence in England in the 1830s, and is important as background to understanding the history of Aboriginal legal status in Western Australia. Even though the Swan River Colony was not established until June 1829, the humanitarian movement of the 1830s impacted on the Colony. In July 1834, evangelical M.P., Thomas Fowell Buxton brought the moral question of the treatment of indigenous peoples in British settlements to the attention of the British parliament and public for the first time, which resulted in the Aborigines Committee Inquiry.

The chapter examines the debates that took place, the establishment of the Aborigines Committee, and its effect on Colonial Office policy. It describes the kind of legal rights that were debated, situates Australia and Western Australia within the broader Imperial and colonial historical context and argues that there were attempts to enshrine indigenous rights in law as early as 1835, but that this lobbying was continually resisted in contests among colonising bodies. There were also influences and developments in relation to indigenous land rights that were taking place as a result of trans-national and metropolitan influences on colonial policy in the early 1830s, well before the final report of the Committee was released in June 1837.¹

¹ Laidlaw, ‘Integrating metropolitan, colonial and imperial histories,’ pp.81-84, 90.
The crisis in the Cape Colony.

Buxton was a member of a lobby group of Anglican evangelicals that originated in a social movement known as the ‘Clapham Sect’ and centred on anti-slavery campaigner, William Wilberforce, (which included Under-secretary James Stephen’s father).\(^2\) In 1823, he officially took over from Wilberforce as leader of an alliance of politicians called the ‘Saints’ in the British Parliament, pursuing social and political reforms.\(^3\) Buxton’s greatest achievement was the abolition of slavery in the British colonies in 1833, which involved the passage of an Imperial enactment, which began his association with key Colonial Office officials, particularly James Stephen Jr.\(^4\) In 1813, Stephen was a legal officer in the Colonial Office reviewing colonial legislation and drafting the ‘Abolition of Slavery Bill’ that was enacted in 1833, and which promoted the legal rights of slaves, based on principles of equality under British law.\(^5\) Stephen’s concern for legal rights continued in relation to indigenous peoples in British settlements after he became Permanent Undersecretary in 1836.\(^6\) Stephen consistently invoked principles of English law where possible in order to protect the legal rights of slaves and indigenous peoples.\(^7\)

In 1833, Buxton turned his attention to the impact of colonisation on the rights of indigenous peoples in British settlements and particularly the Cape Colony.\(^8\) In his opinion the British nation and public had a moral responsibility to provide compensation to indigenous peoples for the appropriation of their ‘possessions,’ and to


\(^3\) Laidlaw, ‘Integrating metropolitan, colonial and imperial histories’, p.83.


\(^6\) Ibid., pp. 537-8.


prevent their decimation as a result of colonisation. Buxton’s main contact in the Cape Colony was the director of the London Missionary Society, the Reverend Dr John Philip. It was Philip who pushed for an investigation into the conflict and British government policy in the Cape Colony. Philip also sent Buxton and his family, information on the Xhosa people and pressured him to call for a parliamentary inquiry into policy in South Africa and for British government intervention in late 1833.

The timely information received on the Cape led to interaction between Buxton and particular members of the Colonial Office who had Evangelical sympathies in the early 1830s, which would provide the main opportunity for the reform of Colonial Office policy. In addition to Stephen there was Charles Grant or Lord Glenelg, an evangelical who had been a member of the Church Missionary Society, and was Secretary of State for the colonies from April 1835 until February 1839. Buxton kept in regular contact with both Stephen and Glenelg, and alerted the Colonial Office to the conflict in South Africa.

This conflict in the late 1820s and the parliamentary inquiry on the Cape, influenced former Attorney-General of New South Wales and lawyer in the Cape colony, Saxe Bannister and Quaker, Thomas Hodgkin to lobby and write books in the early 1830s, proposing a new approach to colonisation and the treatment of indigenous peoples.

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9 T. F. Buxton, ‘Heads of resolutions to be proposed at the Aborigines Committee, 26 July 1835’, T. F. Papers, UWA, Vol. 14, Reel 5, R5373, p 73c, 73e. No effort had been made to ‘give them an equivalent for the possessions we appropriate or compensation in the shape of law, knowledge and Christianity for the inevitable evils which our neighbourhood occasions.’
10 Laidlaw, ‘Integrating metropolitan, colonial and imperial histories’, p.82.
11 Ibid., pp.221-2.
13 Laidlaw, ‘Networks, Patronage and Information in Colonial Governance’, Ch.3.
They along with other contacts drew Buxton’s attention to the plight of relations in 
Tasmania, and New Zealand.  

In 1833, Buxton started collecting information for his planned parliamentary inquiry in 
order to highlight the devastating impact of colonisation on ‘aborigines’.  

By this time, racial conflict in South Africa had worsened and a local inquiry in Tasmania together 
with despatches and papers published by the British Parliament in 1831 had revealed the 
extent of the killing of indigenous people that was taking place.  

On 1 July 1834, Buxton introduced a motion in the British Parliament which called on the British 
government to act on principles of justice and humanity, to protect civil rights, to 
promote civilisation and the Christian religion.  

He also formally called for the 
production of correspondence on South Africa, New South Wales, Tasmania and North 
America going back 10 years.  

While he focused attention on South Africa, Buxton 
also received despatches on New South Wales and Tasmania including the one sent by 
Lieut-Governor Arthur to Secretary of State Viscount Lord Goderich on 7 January 
1832, recommending that agreements be negotiated with Aboriginal tribes in Western 
Australia.  

These dispatches were published in the British parliamentary papers of 
August 1834.  

At the time of Buxton’s motion, Thomas Spring Rice was temporarily 

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15 ‘aborigines’ was a collective term used by inquiry and the APS to denote all indigenous peoples in or 
near British colonies.  
16 BPP, Report of the Aborigines Committee, Van Diemens Land, 1830, PP No 259; Arthur to Goderich 7 
January 1832 was included in these papers: BPP, Correspondence and other papers relating to 
Aboriginal Tribes in British Possessions, 14 August 1834,(617) Vol. 3, Shannon, IUP, 1969, pp.162-3 ; 
17 Debate on the Motion of Fowell Buxton for Protecting the Civil Rights and imparting Civilization and 
the Christian Religion to the Native Inhabitants of the British Colonies in the House of Commons’, 1 July 
18 Ibid.  
19 Arthur to Goderich, 7 January 1832 which was sent to Stirling by Goderich on 16 August 1832, BPP, 
Correspondence and other papers relating to Aboriginal Tribes, 1834, Vol. 3, pp. 162-163.  
20 Bannister would probably have read these and this may be what influenced his treaty recommendations 
for Australia.
Secretary of State. Rice supported Buxton’s motion, but added that he did not think that any new system of law or government would restrain the acts of ‘men’ against indigenous peoples, and advocated ‘persevering in that system which has already been laid down by the Government.’ The approved statement was sent around by the Colonial Office as a circular to the colonies on 1 August 1834.

A year later, in March 1835, Buxton reminded Parliament that the government had still not provided all the information, and successfully called for a parliamentary inquiry. What he wanted were measures that would protect indigenous peoples from systematic massacres and exploitation, notably the protection of their civil rights and the prevention of fraudulent taking of their lands. Buxton’s lobbying and well informed networks convinced Glenelg to change Colonial Office policy in relation to indigenous peoples in South Africa, but also heightened interest in the welfare of indigenous peoples in other colonies. Laidlaw concludes that this was a period where events in the Cape piqued Colonial Office interest in other colonies such as New South Wales, Southern and Western Australia, and was a period when much of the impact on the Colonial Office took place well before the report was finalised.

Buxton criticised the actions of the Cape’s Governor, Sir Benjamin D’urban, and convinced the Colonial Office to adopt a different policy after the 1834-5 war between

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21 Spring Rice was Secretary of State for War and Colonies from 5 June 1834 to 15 November 1834, after which Charles Grant, known as Lord Glenelg took up the position from April 1835 to February 1839.
22 Ibid., p.10.
23 Spring Rice to Governor Bourke (circular despatch which was also sent to Stirling), 1 August 1834, HRA, Series 1, Vol. XVII, pp.491-492.
25 Buxton, ‘Heads of resolutions to be proposed at the Aborigines Committee’, 26 July 1835, RL, Reel 5 Vol. 14, R5373, pp. 73c, 73e.
the Xhosa people and the settlers of the Cape Colony. Captain Andries Stockenstrom (who was a major witness to the parliamentary inquiry) supported by Philip and others in London, recommended a series of treaties in order to reinstate chiefly authority and control the frontier. Glenelg was sympathetic and issued instructions to D’Urban supporting the treaty system between the colony and eastern Xhosa chiefs. However after a series of reprisal raids by the Xhosa people, D’urban reacted by annexing the land in Queen Adelaide Province, which meant that chiefs could retain their customary systems, but these systems would be gradually replaced by the British legal system. Buxton provided information that persuaded the Colonial Office that D’urban had acted improperly and that the Xhosa people had acted in self defence against settler violence, and the action was reversed. On December 1835, Glenelg renounced British sovereignty east of the Kaiskamma River, and urged D’urban to dis-annex Xhosa territory. Treaties were arranged that required the consent of those tribes to British protection and sovereignty which McHugh points out recognised the legal capacity of indigenous peoples to make treaties. Elbourne concludes that Buxton recognised simultaneously that there was a systemic problem in the relations between settlers and aboriginal peoples across the empire which he wanted to solve.

Being stretched for resources and starved for information at this time, the Colonial Office relied on Buxton’s information through his networks, after which political pragmatism resulted in a departure. Glenelg was less inclined to listen to Buxton after D’urban provided evidence to support his own position, and the resulting political

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27 Ibid., p.82; Laidlaw, ‘Networks, Patronage and Information in Colonial Governance’, p.122.
29 Ibid.
31 Ibid., p.166.
controversy later affected the composition and outcome of the final report of the Aborigines Committee in July 1837.  

**Saxe Bannister and the Aborigines Committee**

A parliamentary inquiry was established in mid-1835 chaired by Buxton and comprised of Members of parliament, many of whom were favourable to Buxton’s cause and others who were less so, including the Colonial Office undersecretary Sir George Grey who would vet the final report. Most of the witnesses that were called in 1835 were chosen to advance Buxton’s case for a change of British government policy for the Cape colony, and to reflect a central role for missionaries and the prevention of further settler encroachment on indigenous lands.

However, there were proposals made by witnesses that were not included in the final recommendations which advocated legal rights for indigenous peoples. One of the witnesses was Saxe Bannister who advocated a system comprising the rule of law, equal legal rights and protectors. Bannister is important because he proposed that Imperial legal rights for indigenous peoples should be implemented as an integral part of a centralised system. He advocated that specific provision be made for indigenous legal rights in colonies including Australia, and continued to do so within the Aborigines Protection Society. Bannister was Attorney General of New South Wales from 1824 to 1826. During his time in New South Wales he clashed with Governors Brisbane and Darling over the legality of actions against Aborigines on the ‘frontier,’ which was the

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34 J. Ferry, An examination of the various Aboriginal Evidence Bills of New South Wales, South Australia and Western Australia in the period 1839-1849, as well as an analysis of the racial attitudes which were espoused during the controversies’, BA Hons, University of New England, 1980, p.75; referring to letter from Bannister to U/S Horton 16 August 1824, *HRA*, Series IV, Vol. 1, pp.554-5.
35 Bannister was appointed on October 20, 1823 and arrived in New South Wales in early 1824. (He left NSW on 22 October 1827). Reece, *Aborigines and Colonists*, p.110.
major reason for his being removed from office by Darling in April 1826. In Brisbane’s term of office, Bannister recommended that martial law be declared in order to get around the legal difficulties of killing Aboriginal British subjects where magistrates were expected to use force with an even hand and manage uncontrolled violence. Bannister’s numerous appeals against the injustice of his dismissal caused the Colonial Office to consider him a nuisance. During 1827 he went to South Africa where he practised law, defended indigenous people in court and collected material for his first book, *Humane Policy*, which was published a year after his return to England in 1829. By that time, he was well known to philanthropist networks for his advocacy of political and legal rights in a trans-colonial setting

Like other philanthropists of his time, Bannister was influenced by the Enlightenment, and believed that indigenous people were rational human beings who could be reasoned with and persuaded about the benefits of equal participation in ‘civilized’ society. He believed in ideological justice and thought that equality under British law could remove barriers to the amalgamation of indigenous peoples and civilized nations which barriers were characterised by prejudice and color. He believed that racial prejudice gave rise to hostility and abuse of power, and that the prejudices of the colonist could be overcome through ‘long suspended rights’ granted to indigenous peoples through principles and laws arising from the British constitution that would be beneficial to both. While Bannister drew on his experiences in South Africa and New South Wales, he saw the problem as common to all colonial situations to be solved by universal legal

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38 Bannister, Evidence, 15 March 1837, BPP, Report, 1837, p.5.  
39 S Bannister *Classical Sources of the History of the British Isles showing the folly of conquests as means of civilization and the need of a good system of intercourse with barbarous tribes*, London, n.p, 1848  
40 This smaller group ran concurrently with the Select Committee and later formed the APS.  
41 Bannister, *Classical Sources*, pp. xv, xvii
and administrative measures supported by the British Parliament and an informed British public. He alluded to universal principles of justice which were necessary to govern conduct between aborigines and colonists, that he believed were ‘unlikely to originate in mere local circumstances,’ but in the way that the colonies were governed.

When Bannister gave evidence in August 1835 and again in March 1837, he called for principles that would redress the imbalance in power between indigenous peoples and colonists, including the removal of the inequalities in the application of British law, so that ‘perfect equality of rights should be declared by law and enforced in the courts.’

In many ways he was influenced by the anti-slavery movement similarly to Buxton and Stephen, but unlike the latter he proposed a detailed Imperial centred system, particularly laws and policy that would cover a range of circumstances. Bannister argued for improved instructions to governors from the British government that would curb their discretionary power to authorise military attacks against indigenous peoples.

In the 1820s in relation to New South Wales and Canada, he proposed legislation to enable indigenous people to give evidence that would be admissible without a Christian oath, thus removing a major impediment to their access to the civil and criminal courts, which he saw as a prerequisite to any good ‘system.’ Bannister envisaged ‘juries de mediate’ or mixed juries comprised of indigenes and Europeans in ‘proper cases.’ He also advocated education and training for indigenes so that they could participate in juries and even become judges, with a view to their gradual amalgamation into British

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45 Ibid.
46 Bannister’s evidence 31 August 1835, p. 176.
colonial society.\(^{48}\) This was an opinion that he shared with philanthropist Thomas Hodgkin whom he consulted in the mid 1830s and when writing his book, *Coloured Races*.\(^{49}\) Bannister proposed that courts should take account of indigenous laws either as a collection of written laws similar to which had been available the courts of the Middle Ages, or through the testimony of competent indigenous and European witnesses.\(^{50}\) According to Bannister, the Middle Ages, unlike the modern period in which he lived was a period where ‘colour did not constitute an odious objection to individuals, or deprive a race of the enjoyment of equality.’\(^{51}\)

He proposed three principles as prerequisites to his ‘system’.\(^{52}\) These were: the availability of sufficient funds to colonial governments which would come from colonial revenue; the ability to reach ‘tribes’ where any transaction with white men existed; and the principle ‘that no change of our law, national or international, must be shrunk from, so far as it concerns the aborigines.’ An example was eliminating the colonial practice of turning one tribe against another.\(^{53}\) In his opinion, current colonial policy was reactive to particular conflicts such as that involving the Xhosa people in South Africa, and a more complete ‘system’ was required which could bring about the ‘elevation’ of indigenous peoples to a state of legal, economic and political self reliance.\(^{54}\)

Bannister proposed a separate body as a branch of the Foreign Office, independent from the Colonial Office, so that the interests of indigenes could be represented for each

\(^{48}\) Ibid., p.17.
\(^{49}\) S. Bannister to T. Hodgkin, 21 June 1834, WL, Thomas Hodgkin papers, PP/HO/D, A1530.
\(^{50}\) *Minutes of Evidence 1836*, p176; *Report, 1837*, pp.18-19.
\(^{51}\) Bannister, *Classical Sources*, p.xv.
\(^{53}\) Ibid., p.15.
\(^{54}\) Ibid.
colony separately from those of the colonists and officials.\textsuperscript{55} This ‘superintending body’ (comprised of indigenous members) would include protectors in the colonies with a role similar to those proposed for South Australia where it was recommended that they ‘protect them in the undisturbed enjoyment of their proprietary rights to such lands as may be occupied by them in any especial manner.’ He also recommended that political agents be appointed to regulate conduct among neighboring tribes, and agents in London similar to lobbyists, to protect their own interests, monitor colonising companies and propose new regulations.\textsuperscript{56} They would all be accountable to Commissioners of Inquiry who would make surprise visits to colonies to inquire into their conduct.\textsuperscript{57} Bannister was influenced by the methods of the anti-slavery campaign, when he emphasised a system of communication between colonies and with the British public and Parliament, where the latter would receive regular updates on opinions and decisions by officials relating to indigenous people, including court trials, official despatches, and statements made by indigenes, which would be an essential preliminary step to policy or legal measures.\textsuperscript{58} He assumed that an informed public would press for improved policy and law for indigenous peoples and this public accountability would prevent the abuses of power and denial of rights that were becoming well known.\textsuperscript{59}

Bannister recommended that treaties be negotiated by the British Government with Aboriginal peoples of Western Australia and South Australia and other relatively new Australian colonies ‘\textit{before proceeding further}’.\textsuperscript{60} This proposal was made in 1835 at a time when Lieut. Governor Arthur was recommending treaties. Bannister believed that

\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid., p.15; \textit{The Perth Gazette}, 24 March 1838, p.48.
\textsuperscript{57} Ibid., p.16.
\textsuperscript{58} Bannister, \textit{British Colonization}, p.271.
\textsuperscript{59} Minutes of Evidence, 1836, p.175; Bannister, \textit{British Colonization}, p271; Bannister, \textit{Classical Sources}, p.xcv.
\textsuperscript{60} Minutes of Evidence 1836, 31 August 1835, pp.175-7.
squatters or unscrupulous colonists would exploit Aboriginal peoples and encroach on their lands unless this occurred. 61 One month earlier his younger brother Thomas, who had been an explorer, settler and magistrate in Western Australia and Tasmania, relied on arguments in Bannister’s book, *Humane Policy*, to morally object to the British government’s policy relating to Aboriginal peoples of Australia. At the time Thomas was a member of Batman’s Port Phillip Association and this argument reflected his own investment in wanting to enter into ‘treaties’ with Aboriginal tribes at Port Phillip in July 1835. 62 However, by the end of 1836 the mood had changed, with the establishment of a Parliamentary Committee on the Disposal of Waste Lands which concluded that private companies should not be allowed to enter directly into treaties with indigenous peoples. 63 This probably influenced Buxton and the Aborigines Committee which did not take up Bannister’s or Arthur’s recommendations for treaties in Australia. 64 Under-secretary for Colonies, George Grey was involved on both Committees, and it is likely that decisions on the Land committee affected that of the Aborigines Committee. However this would not prevent the British government itself from entering into treaties when the Treaty of Waitangi was signed in 1840 between the Maori people and the British government. By the time that Bannister gave evidence for the second time on 14 March 1837, he maintained his stance on treaties and added:

64 See Chapter 6.
that the right of the natives to their own land should be protected, not only by the ordinary legal remedies, but also by a fairer evaluation of what they cede in treaties, and by a vigorous armed pursuit of squatters and intruders, so as to ensure their expulsion and punishment.65

He distinguished newer colonies from the older ones, proposing that ‘old colonies’, such as the Cape and Jamaica where the Crown still possessed lands, be reserved for indigenous peoples as reward for good conduct and in order to facilitate amalgamation between the races.66 Bannister was not in favour of the removal of indigenous peoples to isolated islands as had occurred in Tasmania. Unlike Arthur he also thought that a truer valuation should be provided to indigenous people than a ‘trifling amount’ that Arthur assumed was sufficient for indigenous peoples to give up their lands67.

The main reason why Bannister proposed treaties for Australia was because of the perceived injustice in the British Government’s method of territorial acquisition that excluded any recognition of indigenous land rights. He believed that ‘the mere act of discovery of new lands was strangely held to give discoverers a lawful title to the soil and dominion over all its inhabitants’, and was unjust.68 The consent of Indigenous peoples to give up their land through treaty was essential, while guarding against the dangers of the abuse of power that could arise.69 New South Wales and Tasmania had been examples where the Crown had relied on the discovery principle to disregard Indigenous rights, and Bannister wanted to ensure that a fairer system was in place for the remaining unsettled parts of Australia. In reaching his conclusion, Bannister was mainly influenced by Spanish indigenous rights advocate Bartoleme de Las Casas, who in the sixteenth century had denounced ‘discovery’ as not being sufficient to give

67 Ibid.
68 Ibid.
69 Ibid.
‘discoverers’ lawful title to the soil and dominion over its inhabitants.\textsuperscript{70} Referring later to ‘prospective or newer colonies’ including Western Australia and South Australia, Bannister said that

Except in the last case, not a single guarantee was devised for doing justice to the natives. In most of the expeditions, so far from making treaties with them (before taking their lands), we did not even take means to understand their language. The consequences were frequent and sanguinary conflicts.\textsuperscript{71}

Bannister viewed this injustice as contributing to the antagonism that Australian Aborigines would feel towards Europeans and which accounted for their resistance to the benefits of ‘civilisation.’\textsuperscript{72} In his opinion, injustice in relation to their land could have been prevented by providing ‘suitable compensation to the Australians, in a proper system for their improvement and protection.’ Once this occurred he envisaged that title to land would be allocated to Aborigines with conditions against alienation in certain cases.\textsuperscript{73} While his views indicate an understanding of the importance of land to indigenous peoples, Bannister assumed that they would want to receive the benefits of free trade and education, as well as legal and political rights. He assumed that they would then want to amalgamate with the whites as one people.\textsuperscript{74} His thinking did not take into account the inherent practical difficulties on the ‘frontier’ that his experience in New South Wales had already demonstrated, nor the fact that indigenous peoples might prefer their own laws and society to that of what British civilisation offered.

\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid., p.203.
\textsuperscript{72} Bannister \textit{Classical Sources}, p. lxxii.
\textsuperscript{73} Bannister, \textit{British Colonization}, pp. 276-7; Bannister, \textit{Report}, 1837, p.17.
\textsuperscript{74} Bannister, \textit{British Colonization and Coloured Tribes}, p.278. The interim steps contemplated were in the nature of a federal union ,
Other Witnesses to the Committee

While the focus of the inquiry was on South Africa, there were witnesses who referred to Australia.75 The witnesses who gave evidence on Australia were the Presbyterian cleric Rev. John Dunmore Lang, Bishop W. G. Broughton, and Secretaries of missionary societies, Thomas Beecham, Dandeson Coates and William Ellis. In 1834-5, Buxton received correspondence from Lieut. Governor Arthur on Tasmania, Dunmore Lang and Quaker, James Backhouse on New South Wales, which was included in the first report of the Aborigines Committee of 1836.76 The appendix to the second report published on 26 June 1837 contained copies of despatches between the Secretary of State for the Colonies and the colonial governors of Western Australia and Tasmania.77 The Committee would interpret Governor Stirling’s actions at Pinjarra on 28 October 1834 as a punitive expedition which inflicted a ‘disproportionate’ and ‘indiscriminate punishment’ on Indigenous people.78 The Committee concluded that Europeans in New South Wales and Western Australia were acting upon the principle of ‘enforcing beligerent rights against a public enemy.’79

While Bannister was more trans-national in his focus, and recommended laws and policies based on his experiences in the Cape, New South Wales and North America, Bishop Broughton was only questioned about Aboriginal peoples of New South

75 Minutes of Evidence, 1836. There were no Australian indigenous witnesses. Other indigenous witnesses eg. John Tzatzoe, pp.563, 570, 579.
78 Ibid, pp.12-13, 83.
79 Ibid., p.83.
Wales.\textsuperscript{80} He was questioned particularly about the characteristics of Aboriginal peoples as a homologous group and their capacity for conversion to Christianity.

The Aborigines Committee relied heavily on Broughton and Lang’s evidence as the main source of information about Aboriginal peoples which mostly focused on the impact of Europeans which had placed them in the position of ‘moral and physical decay’ and threatened their ‘extinction.’ \textsuperscript{81} Broughton gave evidence that any attempt by missionaries to convert Aborigines to Christianity and to persuade them against a nomadic way of life had failed in New South Wales by the 1830s. He reported that the effect of depriving Aboriginal peoples of their land (while stating that portions of the country belonged to particular tribes) and the driving away their means of subsistence had resulted in a decrease in population in settlements, more than any brutal treatment by colonists.\textsuperscript{82} Lang and Broughton’s views formed the main part of the Committee’s conclusion that emphasised the helplessness of Indigenous people in New South Wales to resist the violent onslaught of convicts and colonists, and the important role of missionaries in checking this process. \textsuperscript{83}

Other witnesses referred to the importance of legal rights. Ellis advocated broad principles that should apply to all situations which included recognising the ‘inalienable right to the soil they inhabit, and the productions of the soil,’ and treaties.\textsuperscript{84} He proposed that the British government should enact Imperial legislation seeking the consent of indigenous peoples through treaties before any colony was founded, and until this was

\textsuperscript{80} Minutes of Evidence 1836, pp. 13-16.  
\textsuperscript{81} Report, 1837, pp. 10-11.  
\textsuperscript{82} Minutes of Evidence, 1836; Archdeacon Broughton, 3 August 1835, pp.13, 16.  
\textsuperscript{83} Report, 1837, p.11.  
\textsuperscript{84} Minutes of Evidence, 1836, 8 June 1836, p. 511.
done, there should be no ‘house built, no garden enclosed, and no portion of land occupied.’

In contrast to Bannister, Beecham believed that:

it was not enough to lay down a just and humane policy for regulating the intercourse between colonists and natives, but that it was indispensably necessary to adopt means for enlightening and improving the character of the natives, in order that they may be taught properly to exercise their own rights and duly to respect the rights of others.

In his opinion this object was best achieved by the Christianising process and was consistent with the central role for missionaries that the Committee wanted in official policy. However, Bannister saw this political role for missionaries as giving the British government an out-clause from any further involvement in policy and indigenous civil rights.

The 1837 report and recommendations

The Committee’s recommendations were based on the conclusion that it was better to segregate indigenous peoples from the contaminating influence of colonists who threatened their decimation, where they could be educated and given religious instruction by missionaries. The Committee was influenced by paternalistic guardianship principles that presumed that the ‘safety and welfare’ of ‘uncivilized’ indigenous peoples required special protection. In relation to the Indigenous peoples of Australia, it recommended that Protectors be appointed to protect civil rights, acquire lands to support their traditional hunting lifestyle (so long as agriculture was distasteful

85 Ibid.
87 Ibid., p.13.
88 Bannister, British Colonization, p.299.
89 Report, 1837, pp. 80-82.
to them) and encourage short term labour contracts and bans on the sale of liquor. The Protectors were to be magistrates, ensure the defence of accused Aborigines in court for offences against lives and property (either by themselves or by appointing a lawyer), and promote the prosecution of crimes committed against Indigenous people or property. It also recommended that coroners investigate the deaths of Aborigines.

The Committee recognised indigenous land rights had been disregarded by governments. It condemned the use of Imperial law to deny indigenous land rights, without reference to the ‘possessors and actual occupants’ and ‘without making any reserve of the proceeds of the property of the natives for their benefit.’ In particular it criticised the Imperial Act that established South Australia and which assumed that lands were ‘waste and unoccupied’ when the facts clearly showed otherwise. However, while the Committee discouraged the acquisition of new territory except by sanction of the British Parliament, it did not question the legality of the acquisition of sovereignty by the Crown in Australia and agreed generally with the official view at this time that Indigenous peoples of Australia were to be regarded as British subjects.

The Committee recommended that reparation comprise; education and religious instruction, the provision of missionaries and protectors, and reserves which would be funded from the sale of ‘unsettled’ lands. They referred to New South Wales as an example of where funds were readily available for this purpose. It was intended that the funds from the sale of ‘unsettled’ lands in Western Australia would also be provided

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90 Report, 1837, p.83; Reece, Aborigines and Colonists, p. 136.
91 Report, 1837, p.84.
92 Ibid., p.4.
93 Ibid.
94 Ibid., p.83.
95 Report, 1837, p.79, 83. No nominal equivalent from the sale of lands has been given to the Aborigines of South Australia. (New South Wales and Western Australia).
96 Ibid.
for similar purposes in that colony. Western Australia’s Land Fund was very small and did not increase until the 1850s. However, this requirement which was endorsed by the Colonial Office in the 1840s, would prove difficult to implement and make the implementation of such measures even less likely in Western Australia.

The Aborigines Committee did not advocate treaties, probably because of its assumptions about the character of Indigenous peoples as less civilized and in more need of protectionist policies, and its general finding of the abuse of power that might result. By contrast, Bannister specifically proposed treaties for Western Australia and South Australia where he believed that the consent of Aboriginal peoples was required before the ‘discovery of a savage country by British subjects’ took place. The Committee made a general recommendation that treaties not be negotiated between local governments and ‘tribes’ in their vicinity because of the risk of negotiating with a more powerful body, which would exploit the situation. This was in the context of seeking to prevent unequal relationships between Aboriginal people and Europeans. However, it did not preclude agreements sanctioned by the British Government.

The proposal for treaties also did not sit readily with the policy of guardianship where Aboriginal peoples were regarded as more like ‘children.’ Beecham referred to this shift in attitude and argued that this pattern of treaty making was not new. He added:

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\text{that when the English first took possession of Upper Canada, they entered into a treaty with the Indians as independent allies: but the policy was}
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98 McHugh, Aboriginal Societies and the common law, p.112.
99 Bannister, Humane Policy, p.82; Bannister, Coloured Tribes, pp.19-20.
100 Report, 1837, p. 80; Napier, Colonization: Particularly in Southern Australia, p.153; Irwin, The State and Position of Western Australia, p.27.
101 Beecham, Colonization of New Zealand, p.9.
gradually introduced of dealing with the Indians as minors or children, who were unable to take care of themselves and their lands. To the present time, they have enjoyed no political rights in the colony.

This was a trend which was to continue until treaties were no longer regarded as necessary.

The Aborigines Committee made a general recommendation that laws relating to indigenes not be initiated by local legislatures because they would favour settler interests, but by the executive government in Britain or its delegate the governor, who could in consultation with the protector-magistrates recommend simple regulations.102 The Committee pointed out the impracticability of a single set of regulations for all British colonies because of the different relationships in which nations stood with Britain and the variety of stages of ‘civilisation’ of aboriginal peoples.103 However, in relation to Australia, it proposed ‘special laws’ for the ‘regulation’ of Aboriginal peoples which focused on ‘offences against person or property’.104 The Committee concluded that they could not be expected to understand British law straight away, and emphasised their being on the lower scale of civilisation.105 Like the Committee, Bannister believed that the full force of British criminal law could not be applied immediately to indigenous peoples, and that the British government had a guardianship role to shield them from injustice. Bannister also acknowledged that indigenous peoples had laws that could be accommodated by the British legal system.106 He was influenced by the eighteenth century German philosopher Johann von Herder in proposing that a universal system could be applied that recognised cultural diversity in a federal union

102 Report, 1837, pp.77-78.
103 Ibid., p.76.
105 Report, 1837, p.84.
with colonial governments. Such a system required an ‘exact knowledge of facts’ which included a tolerance of cultural diversity and information about different peoples. While Bannister believed in the equal worth of humankind, there was still the understanding that human development was related to the progression from hunting through to agriculture and commerce, but with less pejorative assumptions about indigenous people than that made generally by the Committee.

In its interim report of 1836, the Committee hopefully concluded that: it would not be difficult: ‘to devise a system of intercourse with uncivilized nations more consonant to justice and humanity more in unison with the high character which Great Britain ought to maintain.’ Bannister later argued that the Committee had departed from this objective in its second report. It is likely that Buxton started out with the vision for a universally applied Imperial law, but that he changed his mind. In his letter to the anti-slavery campaigner Thomas Pringle, in January 1834, Buxton wrote that ‘certain regulations and laws’ were needed in countries where we ‘made settlements,’ which laws should be ‘based on the principles of justice.’ Despite its general influence, Buxton was forced through compromise with the Colonial Office to omit some recommendations on the late war in South Africa and to play down criticism of Imperial policy. Shortly after the final report was published, the Aborigines Protection Society publicised the additional information, and Bannister continued his push for Imperial legal rights within the Society.

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108 Ibid.
112 APS, *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements) with comments by the APS*, London, W Ball, A Chambers and Hatchard and Son, 1837.
113 Ibid.
The impact of the Aborigines Committee on the Colonial Office

The Colonial Office response to the Committee Inquiry had taken place as early as the mid 1830s during a period of intense lobbying by Buxton and his political allies. There was already a history of guardianship or ‘trusteeship’ towards indigenous people that had originated from Indian colonial affairs in the late eighteenth century and this guardianship role was expanded by the early nineteenth century, and affected the way that policy was framed.114 Some of the recommendations were implemented sporadically following the release of the Committee’s report in June 1837 which extended into the early 1840s. Many contests between the Colonial Office and colonising companies, on South Australia and New Zealand were taking place during the period of the Inquiry.115 The New Zealand and South Australian colonising companies anticipated the humanitarian arguments and employed them as part of their lobbying tactics for land grant approvals with Colonial Office officials.116

Many of the Committee’s recommendations were not implemented, and relied on the willingness of particular British government officials to take notice of them. The recommendations principally relied on a portion of the Land Fund in Australian colonies being allocated for the benefit of Aboriginal peoples. This was not endorsed by the Colonial Office until Secretary of State for Colonies Lord Russell proposed it in mid-1840.117

115 Laidlaw, ‘Networks, Patronage and Information,’ p.122.
117 See Chapter 6.
Secretary of State, Lord Glenelg anticipated that the Aborigines Committee would be useful as general rules for governors in regulating conduct with indigenous people.\textsuperscript{118} The first response from the Colonial Office in relation to Australia was when Glenelg appointed Protectors for Port Phillip and Western Australia in 1838-9.\textsuperscript{119} Even though Stephen and Glenelg had seriously considered the appointment of Protectors for Western Australia in 1837 to deal with the escalating collisions in York which included the killing of two Aborigines by soldiers from the 21\textsuperscript{st} Regiment, the proposal was delayed as measures were expected to be taken once the Aborigines Committee report was released.\textsuperscript{120}

The King’s address supporting Buxton’s motion for indigenous civil rights had been sent around to governors in August 1834. This was received by Stirling by mid-1835, who regarded it as an expression of British government policy on the treatment of Indigenous people. Stirling clearly expected some policy direction from Glenelg regarding the appointment of what he described as a ‘guardian or controller’ of Aborigines in ‘occupied’ districts, especially since the funding for such a person was unlikely to come from colonial revenue.\textsuperscript{121}

\textsuperscript{118} J. Stephen, Memorandum, 1 May 1837, PRO, CO 18/16, pp. 456-7, ‘…on the general subject of our intercourse with the Aborigines Lord Glenelg hopes shortly to be in possession of a report from the Members of the House of Commons which may be expected to suggest general rules for the Lt. Governor’s guidance.’
\textsuperscript{119} Reece, \textit{Aborigines and Colonists}, pp. 136-137.
\textsuperscript{120} Glenelg to Stirling, 16 March 1836, CO 397/2, Reel 1118, p.248; Memo from Sir George Grey to J. Stephen 12 May 1837, CO 18/16, pp.554-5.
\textsuperscript{121} Circular Despatch from T. Spring Rice to Stirling, 1 August 1834, acknowledged by Stirling in a Despatch to Glenelg, 10 July 1835, CO 18/15, Reel 300, p.258. This was notated with ‘no such despatch’ but Stirling was referring to a circular dispatch sent around to governors enclosing the King’s address, and which Stirling regarded as ‘instructions.’ Circular despatch from Spring Rice to Bourke, \textit{HRA}, Series 1, Vol. XVII, p.491
The Committee recommended that the Executive Council, not legislatures should initiate laws and policy relating to the ‘protection’ of indigenous peoples.\textsuperscript{122} This contest was played out in Western Australia after the local legislature refused funds for a mounted police force. Distrusting that the legislature would approve the funds for other programs such as Protectors, after learning of the situation regarding the absence of an adequate Land Fund, on 24 September 1838, Glenelg applied to the Treasury for funding for the salaries of two Protectors for Western Australia, rather than requiring that the costs be met from colonial revenue as for New South Wales.\textsuperscript{123} This was approved by the Treasury on condition that the colonial legislature provide funds for a civil police force to assist the Protectors.\textsuperscript{124}

The influence of the Colonial Office on colonial governors was affected by the tyranny of distance and the ability to employ particular methods of compliance. These methods were principally budgetary control through the British Parliamentary grant, instructions to governors as Crown representatives, and the veto power over colonial legislation. The latter is what Stephen used more effectively in order to push principles of legal equality for indigenous peoples and Evidence Acts.\textsuperscript{125} However, there was a general resistance by the Colonial Office of amending Imperial Acts to provide for indigenous rights.

**The Aborigines Protection Society and indigenous legal rights.**

In 1838, Bannister recommended that in order to secure justice in all parts of the world where new settlements were forming, that an Imperial law was required on behalf of

\textsuperscript{122} BPP, *Report*, 1837, p.77.
\textsuperscript{123} J. Stephen to A. Spearman, 24 October 1838, CO 397/4, Reel 773-774, pp.159-160; Glenelg to Hutt 16 January 1839, CO 18/21, Reel 441, pp.161-166.
\textsuperscript{124} Secretary, Commissioners of Treasury to J. Stephen, 18 December 1838, CO 18/21, pp.159-161.
\textsuperscript{125} Smandych, ‘Contemplating the Testimony of ‘Others’, p.30.
indigenous peoples. This presupposed that the British public would be sufficiently informed through his and other writings about the treatment of indigenes in British colonies to support such a law.

A group that formed as a result of the unfinished business arising from the Aborigines Committee provided the nucleus of the Aborigines Protection Society (APS) which was established in October 1836, its first paid secretaries being Saxe Bannister and William Higgins. Thomas Hodgkin, whom Saxe Bannister had known since 1834, was the main force behind the Society with Buxton as the public political face. While Thomas Hodgkin was ill in 1837 and 1838, Bannister took on a leading role. Bannister continued as secretary temporarily in 1839, after which he became more involved behind the scenes in specific inquiries on New Zealand, Australia and Africa, while continuing to lobby separately for his ‘system’ to be adopted by the Colonial Office.

The Society’s objective was to bring public attention to issues raised by the Aborigines Committee and to educate and inform public opinion, which they anticipated would influence law and policy. The Society also briefed outgoing emigrants and obtained information from incoming ones, and in 1838, briefed outgoing Governors Gawler of South Australia and John Hutt of Western Australia on its objectives. This influenced Hutt when he was developing colonial policies, although, he would subsequently come up against colonial interests upon his arrival in Western Australia in January 1839.

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128 APS, *First Annual Report*, 1838. William Higgins was chair of the Society for the Protection of Aborigines of South Australia in 1834-35 and was seen as largely ineffectual in this role, being utilised also by the SA commissioners; Ward, ‘The Politics of Jurisdiction’ p. 62.
130 Ibid.
131 S. Bannister to the Duke of Richmond, 10 January 1842, Goodwood Archives, MS1635, N80. This ‘system’ would include Bills in parliament, orders in council and instructions to governors and others.
In its first annual report 1838, the Society outlined its attitude towards colonisation. The Committee was not opposed to it, and in fact many of its members had various colonising interests and like Bannister wanted an improved system of colonisation that would be beneficial and not ‘ruinous’ to indigenous peoples. The Society worked on the basis that colonisation could not be prevented since it offered relief to the population pressures in England and provided trade and investment opportunities. However, many of the missionaries and their allies brought together by the Aborigines Committee would later object to the Society’s willingness to work with land companies whose interests they saw as a conflict of interest with the protection of indigenous rights.

The Society objected to the compromise made on the Cape Colony by the Aborigines Committee, and claimed that British government policy had been a more ‘immediate’ rather than ‘remote’ cause of the problems there. They had hoped that Buxton’s committee would have recommended ‘immediate legislative measures’, including treaties, and that it had come out stronger on colonial reform. They agreed with most of the Report’s recommendations except for two, the first one recommended that more attention be paid to the quality of the executive power to which indigenous rights were to be entrusted, and the second one related to treaties:

With respect to the 8th suggestion that “treaties with natives are inexpedient,” we do not think satisfactory... The relations between neighbouring nations must ever be extensive, however great the disparity of intellect or cultivation; and it is very questionable, whether it would be proper to restrain this relationship, when it might be conducted in an enlightened manner, and treaties we conceive calculated to secure this;

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135 APS, *Report of the Parliamentary Committee on Aboriginal Tribes, (British settlements) with comments by the APS*, p.11.
136 Ibid.
but, if the relation of contiguity alone existed, we should still consider a treaty necessary and highly advisable. Treaty or compact is natural to man in every state; it arises out of his social condition; and he does not feel himself at ease with his fellow-man except in the security which is afforded by conventional compact. And the Caffre or Indian are as capable of understanding the nature of a treaty, when it is plainly stated to them, as the civilized man. We cannot in any sense agree with the Committee in considering it as a cause of evil: it may be made an instrument by which wicked and violent men will pervert justice; but if no treaty existed, such dispositions would only lead them to similar conduct by more direct means.\(^\text{137}\)

By 1838-9, the Society was advocating treaties for North America and South Africa and was still referring to treaties being required for South Australia as promised by the South Australia Commissioners, and for new settlements.\(^\text{138}\)

**An Imperial bill of ‘rights’**

In 1838, the Society proposed that an Imperial bill be drafted that would solve legal problems identified by Bannister’s evidence to the Committee and protect the lives and rights of indigenous people in British colonies. It envisaged that the bill should remedy the problem of evidence, prohibit the practice of exciting one tribe against another, improve instructions to governors, and provide for the careful abstinence from all discretionary attacks on indigenous peoples. Above all, it should contain the ‘basis of a new system, to regulate, as far as law can do so, all the acts of Colonial Government and of the colonists which influence the progress of the coloured races.’\(^\text{139}\) However, the Society concluded that while it would be ‘indispensable,’ the ‘magnitude and difficulty’

\(^{137}\) Ibid., p.122.


\(^{139}\) Ibid., p.25.
involved meant that it would be better to bring it to the attention of the British Government and Parliament and not draft a bill themselves.  

In its first annual report, the APS stated that one of the difficulties of introducing any legislative proposals was that Buxton was no longer a member of the House of Commons, which they also saw as a possible reason why no legislative measures had arisen from the suggestions of the Aborigines Committee. However, in September 1838, the Editor of *The Eclectic Review* to which Bannister contributed, reviewed the Society’s publications including its first annual report, and noted that there were six available members of parliament other than Buxton who could have introduced a Bill.

The second difficulty which the APS anticipated with a universal Imperial law was ‘the immense variety in the grades of civilisation of indigenous peoples, and the inevitability that ‘measures for their protection must vary also.’ Bannister had suggested that next to equal laws, commissions of inquiry were required to find out about customs, geography and other ‘facts’ in each country. He envisaged that an imperial federal system of indigenous groups in New Zealand, Canada and Africa linked to a centralised system in London would be a suitable interim step towards amalgamation with colonial society, which would preserve the ‘personal respectability’ of indigenous leaders.

From 1838, reflecting Bannister’s ideas and influence, the Society conducted its own inquiries on places that had not been covered in as much detail by the Aborigines

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140 Ibid.
141 Ibid. Following the King’s death in 1837 an election was held and Buxton had lost his seat; P. Adams, *Fatal Necessity*, London, Oxford University Press, 1977, p.98.
142 APS, *Annual Report*, 16 May 1838. In the preface the following MPs are listed; four of whom were on the Inquiry: E. Baines, C. Hindley, Dr S. Lushington, C. Lushington, J. Pease, S. Gurney.
Committee, starting with Australia. A special inquiry was also held in October 1838 that examined a list of allegations of cruelty made by missionary Louis Giustiniani, by soldiers and settlers against Aborigines in Western Australia. On the way back to London, Giustiniani and the Quaker, James Backhouse met up in Mauritius. On 16 March 1838 Backhouse wrote to Buxton from Mauritius explaining how Lyon and Giustiniani had encountered ridicule in their advocacy for Aboriginal rights in Western Australia, and to expect to hear from Giustiniani. When Giustiniani arrived in London, in addition to informing the APS, Buxton forwarded Giustiniani’s letter to the Secretary of State for Colonies, Glenelg outlining nine allegations of ‘cruelty’ against Aboriginal people by colonists and soldiers in York, and calling for an inquiry into the matter. In July 1838, Giustiniani put his name forward to Glenelg as a Protector of the Aborigines. However, while Glenelg was supportive, the Church Missionary Society's opinion was unfavourable and Giustiniani’s request was denied. Instead Giustiniani returned to Europe. The Society sub-committee did not have access to the witnesses proposed by Giustiniani, but concluded that a major cause had been a lack of systematic policy to guide colonists in their conduct with indigenes. When Glenelg received the report he instructed the incoming Governor, John Hutt to investigate the allegations.

146 APS, Report of Sub-Committee, October 1838, CO 18/21, Reel 426, p.265.
147 J. Backhouse, ‘Extracts from a Letter to Thomas Fowell Buxton respecting the Aborigines of Australia’, 16 March 1838; J. Backhouse, Extracts from the Letters of James Backhouse; now engaged in a religious visit to Van Diemen’s Land and New South Wales, London, Harvey and Darton, 1838, p.55.
148 L. Giustiniani to Glenelg, 16 July and 21 July 1838; Glenelg to Giustiniani, 4 August 1838, CO 18/21, Reel 425-426, pp.311-323; APS to Glenelg, enclosing report of sub-committee into Giustiniani’s allegations, 12 October 1838, CO 18/21, Reel 425-436, pp.263-5.
149 Ibid.
150 APS, Report of Sub-Committee October 1838, CO 18/21, Reel 425-426, p. 265.
151 Glenelg to Hutt, 4 August 1838 enclosing two letters from Giustiniani, CO 18/21, Reel 425-426, pp. 307-313.
The results of the Giustiniani inquiry, evidence from Buxton’s committee and Bannister’s proposals, were fed into a larger APS inquiry on Australia, with the objective of forwarding a memorial to the British government and parliament, and an Address to the Queen, proposing legislative and policy measures.\textsuperscript{152} The conclusion was that (among other things) Australian colonies were being established without sufficient legislative and other guarantees in support of Aboriginal peoples and against their oppression.\textsuperscript{153} This inquiry reported in late 1838, and acknowledged that ‘Great Britain has long oppressed and is still oppressing these Aborigines- by taking their lands without treaties or consent founded on sufficient compensation’.\textsuperscript{154} However while the fact that treaties or agreements had not been made to purchase land from the Aborigines of Australia since 1788 was highlighted, the APS committee concluded that Great Britain had taken lands without treaties or consent founded on sufficient compensation. The prevailing conclusion was that reparation was required, along with lobbying for changes to existing Imperial legislation for South Australia, New South Wales and Western Australia, to provide reserves of land.\textsuperscript{155}

In 1838, APS committee member and M.P. Charles Hindley lobbied for an amendment to an Imperial bill which was intended to extend the Imperial statute establishing the government of Western Australia.\textsuperscript{156} He recommended that ‘aborigines ought to be protected, and that a clause should be introduced by which a certain portion of land

\textsuperscript{152} APS, Report of Sub-Committee on Australia with Notes.
\textsuperscript{153} Ibid., p.6. Point No 17 onwards, refers to the need for a new system of laws and administration.
\textsuperscript{154} Ibid.
\textsuperscript{155} Ibid., p.9, Mr Gouger: (p58): ‘No effective arrangements have yet been made, in the province for attempting the civilization of the natives: and not a single treaty or agreement for the purchase of land from the natives is believed to have been made from 1788 downwards.’
\textsuperscript{156} Russell, A History of the Law in Western Australia, pp. 329-30; The Imperial Statute, 10 Geo IV c22, 1829. This Act was amended by 1 and 2 Vic c46 (1838); Ward, ‘The Politics of Jurisdiction’ p.70. Hindley was Director of the South Australia Company in 1837 and belonged to the New Zealand Association.
should be appropriated to native inhabitants.' However, Hindley came up against a reluctant Colonial Office who preferred non-legislative measures for Western Australia. Under-secretary Grey replied ‘that measures had been taken for protecting the aborigines, which he hoped would prove satisfactory to the Hon Member’. This most likely referred to the appointment of Protectors.

The Society recommended a ‘system’ of legal and administrative changes that would include land to be held in trust for Indigenous peoples who wished to become settlers, for traditional hunting grounds, and where ‘the judges of all the Australia’s, …take notice of the native laws in particular cases before them, involving such laws.’ Subsequently, the Society informed the Secretary of State, Lord Glenelg and the British parliament of the ‘indiscriminate massacres of Aborigines’, and proposed the unlimited admission of evidence without oath.

**Universal rights**

In early 1839, Buxton recommended to Glenelg that a general law be drafted which would ‘improve on various points of British law affecting indigenous peoples. Glenelg replied that he was willing to receive a proposal on the subject. However, unlike Bannister, the Society was reluctant to draft a bill, stating that it could not, ‘with propriety, do more than submit this question to the care of the Government and legislature.’

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158 Ibid.
159 Ibid.
161 APS, *Second Annual Report*, 21 May 1839, p.16. These were matters raised in the last session of Parliament by members of the Committee who were also members of the House of Commons.
By February 1839, Glenelg had resigned from office and with him any sympathetic reception for a general law was lost. Stephen (even though he had drafted the bill that abolished slavery in the empire) was sceptical of Imperial laws that governed all situations, preferring to enshrine any principles of formal legal equality in colonial legislation through the Imperial veto power. In early 1839, the Society drafted its own Imperial bill which was confined to indigenous peoples to give evidence in the form of an affirmation, which they planned to submit to the British parliament. This bill would apply to all British colonies not only Australia.\(^{164}\) By July 1839, a deputation from the Society approached the new Secretary of State, the Marquess of Normanby, to gain his support, but this was not forthcoming.\(^{165}\) Instead the Society decided it was not ‘expedient’ to press for an Imperial bill ‘but to commit the business into the hands of the Colonial Office, where a promise has been made that measures shall forthwith be adopted to meet the case, through the medium of local governments.’ This, they did by sending a statement urging that measures be adopted by Australian colonial governments to pass local legislation.\(^{166}\) In August 1839, Normanby wrote to Governor Gipps in New South Wales attaching a statement by the Society endorsing such a bill.\(^{167}\) By this stage the Myall Creek massacres and lobbying in London were having a local impact.\(^{168}\) In the interim, an Evidence bill was passed by the New South Wales legislature in October 1839, and sent to London for approval. However, while Colonial office policy was for local governments to devise their own Acts, technical legal advice on the local bill was that it was invalid because it was deemed repugnant to the laws of

\(^{165}\) Ferry, ‘An examination of the various Aboriginal Evidence Bills, p.70.
\(^{166}\) Statement by APS, signed by J H Tredgold, 30 July 1839. HRA, Series 1, Vol. 20, pp. 250-251. This was sent to the Secretary of State, the Marquess of Normanby and then sent with a letter from Labouchere to Burton J in a Despatch to Gipps recommending that some measure be initiated.
\(^{167}\) APS sub-enclosure to Despatch from Normanby to Gipps, HRA, Series 1, Vol. 20, pp.303-4. A copy of statement by APS had been originally sent to Burton by Labouchere in August 1839.
\(^{168}\) Reece, Aborigines and Colonists, pp.179-181.
England.\textsuperscript{169} It was not until 1843 that an Imperial bill was drafted and passed to get around the problem, allowing colonial legislatures to pass their own laws if they wished.\textsuperscript{170} While Bannister had favoured an Imperial law he would later criticise this minimalist approach.\textsuperscript{171}

In 1840, the APS commissioned barrister Standish Motte to draft a proposal for Imperial legislation\textsuperscript{172} The proposal originated from many of Bannister’s ideas, but was also modified by Motte who included other sources.\textsuperscript{173} This system was intended to be adapted to colonial conditions, replacing the general directions to governors and directors of land companies, and to follow advice from commissions of inquiry undertaken in the colonies.\textsuperscript{174} The Society urged the British government to introduce similar laws, but met with resistance to the proposal.\textsuperscript{175} By 1841, disillusioned by the British government’s inaction, the APS in cooperation with the Society of Friends, made its own concerted effort to push the Motte Outline to all interested sectors, amidst increasing concern that colonising companies were avoiding any responsibility for indigenous rights.\textsuperscript{176} Copies were sent to the Colonial Office, politicians and directors of

\begin{footnotes}
\item[170] 6 Vic Ch 22 authorising colonial legislatures to pass laws for the admission, in certain cases, of unsworn testimony in civil and criminal proceedings. This was passed in July 1843.
\item[172] APS, \textit{Fourth Annual Report}, 7 May 1841, p. 29.
\item[173] \textit{The Eclectic Review}, August 1844, pp.242-4; APS, \textit{Third Annual Report}, 23 June 1840, pp. 42-3; S. Motte, \textit{Outline of a System of Legislation for securing protection to the Aboriginal inhabitants of all countries colonized by Great Britain; extending to them political and social rights, ameliorating their condition, and promoting their civilization}. London, John Murray, 1840, p.2. Motte used a variety of sources including suggestions from the members of the APS, extracts from Parliamentary Committees, and despatches.
\item[174] Ibid.
\item[175] APS, \textit{Third Annual Report}, 23 June 1840, pp.43-3.
\end{footnotes}
colonising companies (particularly in New Zealand and South Australia) in the hope that it might be taken up in whole or part, but without success.\textsuperscript{177}

A member of the APS, George Fife Angas, recommended the Motte proposal to the South Australian Parliamentary Committee, which had been appointed in 1841 to review the 1834 and 1838 South Australia Imperial Acts.\textsuperscript{178} The legal position of Indigenous peoples was raised by Angas who gave evidence to the Committee, however, while the APS expected the appeals would be successful, no one was interested, the focus being on the financial crises that South Australia was now in.\textsuperscript{179}

In January 1841, the Society of Friends (of whom Thomas Hodgkin was a key member) presented a memorial to the new Secretary of State Lord Russell, arguing for various measures including evidence laws.\textsuperscript{180} They advocated extending legal rights as a kind of 

\textit{Magna Charta} not only to indigenes connected with British colonies, but to those beyond British colonies where contact through trade had been made.\textsuperscript{181} This would include

the recognition and security of their title to some portion of the territories once wholly theirs; - to the \textit{bona fide} admission of their evidence in courts of law; to the recognition of their right as men and citizens to a full participation in all the privileges of English subjects, so that the distinctions of colour and race may no longer operate against them, and that effectual steps may be taken, both at home and in the colonies, to effect their elevation in a moral, intellectual and political point of view.\textsuperscript{182}

\textsuperscript{177} APS, \textit{Fourth Annual Report}, 17 May 1841, p.10.
\textsuperscript{178} APS, \textit{Annual Report}, 17 May 1841, p. 29; BPP, \textit{Evidence to the Select Committee on South Australia, 25 March 1841}, iv (394) p.210, A. Angas was also a former member of the South Australian Commission and an M.P. (appointed 1835); Burroughs, \textit{Britain and Australia}, pp. 172, 176
\textsuperscript{179} APS, \textit{Annual Report}, 17 May 1841, p.29. It was anticipated that reserves of land would be made available ‘for the inalienable possession of the natives.’
\textsuperscript{180} APS, ‘Memorial to Secretary of State, Lord John Russell’, \textit{Extracts from papers and proceedings}, January 1841, pp.19-20.
\textsuperscript{181} Ibid., p.20.
\textsuperscript{182} Ibid.
It also averted to the special claims to land of indigenous peoples including those of Australia who are ‘deprived of their lands and means of subsistence without treaty, payment or compensation.’\(^{183}\) By 1842, the Society despaired at the unwillingness of the British government to cooperate, lamenting the lost opportunity arising from the 1837 Aborigines Committee ‘of making some general legislative provision for the correction of the evils brought to light, and the introduction of a better system.’ It concluded sadly that the report and its evidence along with the Society itself, is ‘perhaps the only living monument of that inquiry.’\(^{184}\)

The Society continued to lobby for Aboriginal legal status at a time when settlers were seeking political and financial independence from Britain in the lead up to representative government which was granted in the 1850s for most Australian colonies except Western Australia. It shifted its lobbying focus more to obtaining political rights for indigenous peoples as citizens in a last ditch effort to influence the Australian Colonies Government bill of 1850, which like most other Imperial Acts was passed without any reference to Indigenous peoples.\(^{185}\) These attempts were compromised by political and economic contests over the colonisation of land at the expense of indigenous peoples. It is likely that the Society was itself torn in different policy directions by the agendas of colonising companies at particular times, thereby affecting its ability to include indigenous rights and status definitions in laws.\(^{186}\)

Ironically, Bannister’s proposal for treaties would be taken up in New South Wales by Supreme Court judge John Willis in September 1841, six years after Bannister’s brother, Thomas had supported the Batman ‘treaty’ in Port Phillip in July 1835.

\(^{183}\) Ibid.
\(^{184}\) APS, Fifth Annual Report of the APS, 1842.
\(^{185}\) Evans et al, Equal subjects, Unequal rights, pp.66-68
Bannister’s evidence to the Aborigines Committee was acknowledged by Willis in *R v Bonjon* in September 1841 which involved the prosecution of Bonjon for the murder of Yammowing.187 Willis referred to the findings of the Committee and other sources in reaching his decision that the Court did not have jurisdiction over Aborigines who ‘committed crimes against each other.’ He also referred to Bannister’s statement to the Committee that indigenous laws ought to be printed, and that courts should respect indigenous law in proper cases. Willis stated that it was ‘evident according to Mr Bannister’s testimony, that the Aborigines of the colony have laws and usages of their own,’ and noted Bannister’s proposal that treaties should be entered into with Aboriginal peoples in Australian colonies.188 Willis concluded that Aboriginal peoples were ‘distinct though dependent allies’, not British subjects, who had not consented to British occupation or sovereignty by treaty or conquest, and were entitled to exercise their own laws.189 While this case was not recognised as legal authority at the time, it is rare in that it supported Indigenous legal autonomy in Australia.190

While a move towards a ‘universal’ British law that accorded political and legal rights similar to British subjects had failed, the Colonial Office drafted an Imperial bill in 1843 that would enable local legislatures in all British colonies to enact their own valid Aboriginal evidence legislation. This was the Aborigines Protection Society’s only real success.191

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187 *R v Bonjon*, 16 September 1841, Supreme Court of New South Wales, *Decisions of the Superior Courts of New South Wales 1788-1899*, published by the Division of Law, Macquarie University, pp.1-14,[online], www.law.mq.edu.au/scnsw/.
This chapter demonstrates that there were indirect and direct effects from the influence of Buxton and his Aborigines Committee in the 1830s and early 1840s. The influence of Buxton’s networks was greatest on Colonial Office policy in the mid-1830s, where debates on the legal capacity of indigenous peoples to enter into agreements or treaties in the Cape Colony and in relation to South Australia were first raised, including any reference to negotiation with Aboriginal peoples. The violent conflict between Aborigines and colonists in Tasmania also had significant impact on Colonial Office policy in the early 1830s. Chapter 6 examines the effect of this trend in relation to proposals for agreements in Western Australia.

The Buxton motion emphasising civil rights was later endorsed by the British parliament and as a circular to colonial Governors in 1835. This created some colonial government expectation in Western Australia that the Colonial Office would issue Imperial directions and possibly Imperial laws to protect the civil rights of Indigenous peoples. However as outlined, there was a general resistance to any legal rights for Imperial laws in England and the colonies, even for South Australia, which continued with the push for self-government and the Australian Colonies Government Act 1850. This was regarded by humanitarians as the last opportunity for civil rights and equal law principles before settler dominated legislatures assumed power and political independence from Britain.

By the time the final report of the Committee came out in June 1837, the sophistication of coloniser companies had increased and contests on land rights had been completed for South Australia, but not New Zealand. In relation to existing colonies the extent of measures proposed was to recommend funding from the sales of Crown land for the appointment of protectors in a guardianship role that extended to land. While there were
recommendations for segregated reserves, it marked a significant departure from the consideration of Indigenous autonomy in the early 1830s.

Members of the APS such as Saxe Bannister continued to campaign for an Imperial standard of rights in law for Indigenous people including an Evidence Act based on equality principles. They had been influenced by earlier anti-slavery movement beliefs that equality principles could be pursued through legislation. However the assumption that a legal framework based on English cultural ideology could be developed to cut across racial and cultural prejudices clashed with a policy of guardianship, and the two were not necessarily compatible. There was also the overriding humanitarian belief that the rule of law was one of the benefits of civilisation, besides trade, employment and other opportunities that could be provided to Aboriginal peoples as a form of reparation for the taking of their lands.

The objective of enshrining Imperial legal rights was not achieved as perhaps Buxton originally intended, except in Africa where treaties were entered into. Robert argues that in relation to South Australia, although legislation was seen as causing problems by the failure to acknowledge Indigenous rights this failure was not rectified. Instead the focus was on British subject status and assuming that Indigenous people needed paternalistic protectionist policies. 192 This attitude also extended to other Australian colonies. The British Parliament was not as interested in protecting Indigenous rights as Bannister had hoped, but by the early 1840s neither was the British public.

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By the mid-1840s, the Society’s influence was caught up in the fate of the British philanthropists who were losing their influence on the British government and parliament. By this time, the tide had changed with the increasing lobbying strength of groups representing colonial interests and the push for representative and responsible government, which meant that the British government would have less control over policy. The British public had also lost what little interest they had. The tactic of appealing to public opinion was no longer effective. By contrast, by the late 1830s and early 1840s colonising groups were becoming more vocal and sophisticated, with political insiders such as M.P. William Hutt, brother of the Governor of Western Australia John Hutt pushing their agendas to the exclusion of Indigenous rights. Colonising companies referred to humanitarian rhetoric in their plans but excluded any policy or legislative commitment to such rights. Hutt had pushed his brother’s appointment as Governor of South Australia and when this was unsuccessful, he also recommended his brother’s appointment as governor of Western Australia based on his systematic colonization interests. The next chapter examines John Hutt’s policies which unlike his predecessor Stirling involved an ideological and systems based approach, and a vision for implementing humanitarian ideals within an economic context.
Chapter 4.

Hutt’s policy regarding the legal position and rights of Aboriginal people during the early 1840s.

John Hutt was Governor of Western Australia from 1 January 1839 to 19 February 1846.¹ Prior to his departure from England he was instructed by the Colonial Office that Aboriginal people were to be protected as equal subjects under British law, and he was provided with a copy of the Aborigines Committee report. However, within five months, Hutt would be writing to Glenelg informing him that it was impossible to comply with his instructions because of the practical problems associated with evidence and enforcement, pointing out the difficulties arising from the character of Aboriginal people and their laws.

Hutt inherited many of the issues that his predecessor had been faced with, which would impel him to develop principles to deal with the priority of settler demands to protect their livestock from Aboriginal people. These took the form of rules and colonial legislation within the pale of settlement which would eventually lead to a modification of Aboriginal legal status, marking a departure from Colonial Office instructions to uphold the principle of legal equality. The principles that Hutt developed were also affected by his vision for the amalgamation of Aboriginal people into colonial society, and his conclusions about whether Indigenous society and laws could be accommodated by existing colonial legal systems. The conclusions that he formed recognised a temporary legal pluralism which allowed Aboriginal people to practise their laws without interference from colonial legal authority. Chapter 7 examines this informal legal pluralism. This chapter outlines Hutt’s vision and policy, including the debates

¹ Battye, Western Australia, p.179.
surrounding the legal position and rights of Aboriginal people during the early 1840s.

The next chapter continues this examination, and the divergence between Colonial Office policy and Hutt’s modified colonial law through the development of an Aborigines Evidence Act. Chapter 8 examines how Hutt’s colonial legal framework was taken further and applied to the regions in the late 1840s.

**Hutt's vision**

On 24 July 1838, the Colonial Office hosted a farewell dinner for Hutt prior to his departure for Western Australia. Extracts from his speech were published in *The Perth Gazette*, two weeks after his arrival in the colony. During his speech, Hutt revealed that his goal was to promote the economic prosperity of the colony, and emphasised that priority should be given to the ‘prosperity’ of Indigenous peoples. Echoing the rationale of the Aborigines Committee he defined this goal as a problem to be solved, ‘whether civilized man could exist in the colonies without the extirpation of his savage brother’ but was confident that this goal could be achieved.

On 3 May 1839, Hutt outlined his vision in a despatch to Glenelg and questioned what choices were available to Aboriginal people in the future as the result of the colonisation of Western Australia. In his opinion there was only one option to the alternatives of ‘extermination’ or ‘slavery,’ which was that Aboriginal people should be gradually amalgamated with the ‘intruders’ into colonial society, ‘no matter how difficult that might be’. However, Hutt believed that success depended on the way in which legal

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2 *The Perth Gazette*, 12 January 1839, p.7 The dinner was held on 24 July 1838 in England, shortly before his departure.
3 Ibid.
4 Ibid.
6 Ibid., pp.363-4.
and political authorities were exercised and whether the ‘disposition’ of Aboriginal people would make it possible.⁷ To this end, he recommended the gradual exertion of legal authority and policies for the ‘improvement’ of Aboriginal people by missionaries and protectors.⁸

Unlike the Aborigines Committee who favoured segregation, Hutt’s protectors were not to go into the bush nor to claim reserves for hunting purposes, but to act as mediators by resolving disputes between Aboriginal people and settlers and ensure compliance with rules in the towns and farms.⁹ Their duties were primarily to persuade Aborigines to comply with rules governing their conduct with settlers. Hutt also wanted to encourage the training and education of Aboriginal people including teaching them to wear European clothes.¹⁰ After ascertaining that there was a shortage of cheap labour in the colony, Hutt encouraged the employment of Aborigines on public works and with settlers for the purpose of persuading them of the benefits of a ‘civilized’ way of life, and to support the agricultural economy.¹¹ He also proposed to Glenelg that missionaries were required to provide education and promote Christianity, but emphasised that due to financial problems in the colony it was not possible to implement these measures at this time.

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⁷ Ibid.
⁸ Ibid., p365.
¹⁰ Ibid.
Unknown to Hutt, in October 1838, Glenelg had already urgently sought and received Treasury approval for two protectors to be appointed for Western Australia. However, they would not take up their positions until February 1840.\(^\text{12}\) This conflict with the local legislature that Stirling encountered in the 1830s regarding the lack of available colonial revenue from the sales of land, would continue into Hutt’s governorship and affect the development and implementation of his policies.

Hutt inherited many of the problems that Stirling encountered, but unlike Stirling applied more idealistic principles and systems to deal with them. Hutt and his brother William Hutt MP, had been establishment members of the Wakefieldan system of colonisation, and John Hutt had been involved with the implementation of the colonisation of South Australia as Secretary to the South Australian Commissioners until 1837.\(^\text{13}\) Hutt intended to use his extensive experience as a colonial theorist to encourage emigration and labour schemes in Western Australia, and to review the land system in order to make the colony financially independent.\(^\text{14}\) He linked the former objectives of achieving economic health for the colony with preventing the ‘extermination’ of Aboriginal people.\(^\text{15}\) However, this would involve compromising some of the humanitarian ideals.

\(^\text{12}\) Peter Barrow was appointed on 20 July 1839 and Charles Symmons in the same year. Letter from H. Labouchere to Barrow, CO 397/4, Reel 773-4, p. 272; A. Spearman to J. Stephen, 18 December 1838, CO 397/4, Reel 773-774, pp 204-6; Hutt to Glenelg, 11 February 1840 reporting on the arrival of the two Protectors, BPP, \textit{Papers Relative to the Aborigines}, pp.371-3.

\(^\text{13}\) J. Hutt to Secretary of State, 4 December 1837, CO 18/21, Reel 426, p.340; P. L. Chauncey, \textit{Journals 1839-1841}, ML, A 1699, April 1841, p. 191.

\(^\text{14}\) Hutt to Glenelg, 12 February 1839, (No 23) CO 18/21, Reel 425-426, p. 106. By 22 January 1841, Stephen was commenting on Hutt’s good financial management abilities and improvement of the economy compared to the Imperial scheme of South Australia, J. Stephen, Memo to Vernon Smith on back of Despatch from Hutt to Russell, 14 July 1840, PRO, CO 18/25, p.172.

Colonial Office Instructions

On 1 January 1839, Hutt arrived in the Swan River Colony with instructions to impose a land tax, revise land regulations, institute a mounted police force, and protect Aboriginal people under British law.\(^{16}\) He had been briefed by the Aborigines Protection Society and the Colonial Office. Glenelg instructed him to investigate Giustiniani’s allegations regarding the killing of Aboriginal people by settlers and soldiers in 1837.\(^{17}\) This would prompt Hutt to be cautious and warn magistrates about the need for public accountability in reporting acts of violence against Aboriginal people in their districts.\(^{18}\)

Hutt had been given a copy of the Aborigines Committee Report which he (and his private Secretary Walkinshaw Cowan) had read on the long voyage and which he regarded along with his instructions as an expression of British government policy on the treatment of Aboriginal peoples.\(^{19}\) Similarly to Stirling, Hutt was instructed to promote religion and education among the native inhabitants, and especially take care to protect them in their persons, and in the free enjoyment of their possessions, and by all lawful means prevent and restrain all violence and injustice which may be practised or attempted against them, and take such measures as may appear to you to be necessary for their conversion to the Christian faith and for their advancement and civilisation.\(^{20}\)

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\(^{16}\) Glenelg to Hutt, 19 January 1839, CO 18/22, Reel 426, p.37; Colonial Office Instructions to Hutt, 23 July 1838, SRO, ACC 621/1, pp.34-35; Additional instructions 26 August 1842 related to land regulations, ACC 623/1.

\(^{17}\) APS, Second Annual Report, 21 May 1839; Glenelg to Hutt, 4 August 1838, CO 18/21, Reel 425-426, pp.313-4.

\(^{18}\) Colonial Secretary to Government Resident Leschenault, 5 March 1839, SRO, CSR, ACC 49/12, No. 145, p.135; Memo from Stephen to Vernon Smith, 28 December 1839 on back of despatch from Hutt to Glenelg 17 May 1839; ‘the investigation has terminated in nothing which could fix on any particular person a liability to any legal penalties.’ The conclusion is made that all that can be done is to ‘inculcate a moderation of forbearance’ by the settlers and vigilance by the local authorities, PRO, CO 18/22, p.284.

\(^{19}\) Cowan, A Colonial Experience, p.5.

\(^{20}\) Colonial Secretary to Government Residents 8 February 1839, CSR, ACC 49/12, No. 13, p. 117; Hutt to Glenelg, 3 May 1839, BPP, Papers relative to the Aborigines, p.373.
Hutt interpreted his instructions as requiring him to comply with the principles of the English constitution, including equality under British law, but five months later on 3 May 1839, he was reporting that this was impossible. The Colonial Office instructions did not contain details on how the objects of ‘civilisation’ were to be achieved. Consequently Hutt provided his views on the subject which were received with cynical enthusiasm. Secretary of State, Lord John Russell, who had replaced Glenelg in August 1839 approved of his vision of amalgamation of Aboriginal people with settlers. Stephen had been fairly pessimistic about the ultimate survival of Indigenous peoples in the face of contact with settlers. However, he envisaged that if any single person could achieve such a goal of amalgamation on equal terms with the settlers then Hutt could, but that this would require the assistance of missionaries to ‘exercise a spell over the minds of both races’ Hutt was allowed a great deal of discretion in implementing his plans for the civilisation and amalgamation of Aboriginal people, but when it came to legislation that was not based on racial equality it was a different matter. This is where the differences between the assumptions and intention of Colonial Office policy and Hutt’s proposals were more clearly demonstrated.

In England, Glenelg had instructed Hutt to withdraw soldiers from guarding settlers’ property in remote regions and reminded him personally that the military were only to provide external defence in case of hostile attack from Aborigines. Glenelg instructed Hutt that a civil police force should be appointed to assist the Protectors in controlling

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21 Ibid., p.363.
22 Ibid.
23 J. Stephen to R. Vernon Smith, 17 October 1839, CO 18/22, Reel 426, p.244.
24 Glenelg to Hutt, 5 January 1839, CO 18/22, Reel 426, p.349. This was flagged by Hutt at the second Executive Council meeting on 9 January 1839, and 17 January 1839, SRO, WAS 1620, CONS 1058/2; J. Stephen, to Spearman, 24 October 1838, CO 397/4, Reel 773-774, pp.159-160. The protectors’ role was to be ‘nearly analogous to those in New South Wales.’
and preventing conflict between Aboriginal people and settlers. Unknown to Hutt the provision of a civil police force was a condition of Treasury funding approval for the two Protectors. This took place at the same time that Hutt was instructed to bring land regulations into line with other colonies, to introduce a land tax, and to concentrate settlement in order to protect both settlers and Aborigines. However the demands of settlers for their property to be protected and the continuing crisis in the York district focused Hutt’s attention on applying rules and developing legislation to control Aboriginal people.

Hutt seeks advice

Hutt enthusiastically attempted to implement his instructions within the first month of his arrival. However his reception in the colony was affected substantially by his support for Wakefieldan economics and interest in Aboriginal people, and he was regarded with suspicion by settlers. He acknowledged that settler resistance to a revision of land regulations and imposing land tax had landed him in ‘hot water.’ Nevertheless, he saw it as his mission to improve the economic circumstances of the colony. Hutt had formed his vision of amalgamation relatively early, but the principles that he was to develop were substantially determined by the answers he received to questions about the nature of Indigenous law, society and rights. On 15 January 1839 after two weeks in the colony, he sent a circular of thirty three questions to colonial

25 J. Stephen to A Spearman, 24 October 1838, CO 397/4, Reel 773-774, pp.204-210; Glenelg to Hutt, 16 January 1839, PRO, CO 18/21, p.161; Minutes of Executive Council, 9 January 1839, WAS 1620, CONS 1058/2
26 Glenelg to Hutt, 16 January 1839, PRO, CO 18/21, p.161. Proposal by Lord Hill to Glenelg, 26 May 1838; Gairdner to Stephen, 1 June 1838; PRO, CO 18/21, pp 56; Glenelg received the APS sub-committee findings on 12 October 1838, CO 18/21, Reel 425-426, p.263.
27 Hutt to Glenelg, 11 March 1839, CO 18/21, Reel 425-426, p.139-40; Burroughs, Britain and Australia, p344-45.
officials asking about Aboriginal society, laws and culture\textsuperscript{30} These questions were sent to Moore (Advocate General), Rivett. H. Bland (the Government Resident of York), and Armstrong (Government interpreter). It is not known if Hutt consulted with Aboriginal people even though Miago, Munday and Weeip were in Perth at the time. Lieut. George Grey (who would soon become Government Resident of Albany) was also in Perth, and reported that Miago came to him shortly after Hutt’s inaugural speech and made his own ‘imaginary speech’ to him.\textsuperscript{31} Miago made the address not to the Europeans, but to Aboriginal elders about the authority that Miago would assert if he was the new British Governor.\textsuperscript{32} He emphasised how he would admonish elders such as Munday and Yellagonga for being quarrelsome and having a monopoly of power over the young men, when the latter behaved well. This assertion followed a recent dispute that had taken place between the older and young men over access to women in the streets of Perth. His speech can be contrasted with the punishment in the same week of Weeip, Miago and Munday by the magistrates for ‘fighting in the streets of Perth,’ which signified the increasing disparity of political power at the time of Hutt’s arrival.\textsuperscript{33}

Hutt grouped his thirty three questions under social, domestic and public life, and included questions on Indigenous governance, land rights, leadership, and laws.\textsuperscript{34} As a starting point, he assumed that Aboriginal people had claims to the ownership of land and requested information on their tribal boundaries and the nature of their proprietary interests. He also wanted to know the content of Indigenous laws and whether they were

\textsuperscript{30} Hutt circular, 15 January 1839, SRO, CSR, ACC 49/12, p.86 ; ACC 36, Vol 65, pp. 30-32; See Appendix for full list of questions; The Perth Gazette, 31 August 1839, p.139. Grey was also in Perth but left shortly after on an expedition not returning to Perth until 21 April 1839.
\textsuperscript{31} Lt. Grey became Captain Grey in June 1839 and later Governor of South Australia, New Zealand and the Cape Colony.
\textsuperscript{33} Magistrates Court, 4 January 1839, The Perth Gazette, 12 January 1839, p.7; Inquiry on suggestion of Francis Armstrong into the conduct of Weeip, Miago and Munday and others. Miago was to be sentenced to 7 days gaol but was given a reprieve if he would accompany Grey on his expedition. Warrants for Weeip and Munday were pending at the time.
\textsuperscript{34} Refer to the Appendix for the list of questions.
similar to British legal systems. Hutt would have been familiar with legislation associated with Wakefieldan schemes, and forms of legal pluralism from his background in systematic colonisation and as a Collector and Magistrate in North Ascot in Madras.\textsuperscript{35} Ward outlines two main kinds of legislation that were espoused depending on how indigenous laws were regarded along the scale of civilisation.\textsuperscript{36} There were those that sought to exempt indigenous peoples from the full penalties of British law which he described as ‘exceptionalist’ laws, and ‘declaratory’ legislation similar to what Saxe Bannister had proposed to the Aborigines Committee that sought to formally codify and recognize certain indigenous laws.\textsuperscript{37} The option that was adopted depended on how ‘civilized’, indigenous laws were regarded. Hutt’s questions indicate that his overriding concern was whether Aboriginal people and their legal, social and political institutions could be accommodated by colonial society rather than initial questions about the existing state of relations with the settlers. His last question provides the clue to his rationale, which compared Indigenous societies with adjudicative and other benchmarks, or what Ward calls a ‘measure’ of civilisation.\textsuperscript{38} This was, ‘what inducements have you found most powerful to attach them either to yourself or to the colonists.’\textsuperscript{39}

Unfortunately, there is very little in the archives that reveal what the responses by Moore, Armstrong and Bland were. What is known is that Armstrong forwarded a copy of earlier articles that he had written for \textit{The Perth Gazette} in October and November 1836, of information obtained from Aboriginal people that had been provided to

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\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid., p.1.
\textsuperscript{39} See Appendix.
Stirling. There is also a surviving extract from Moore’s response that was reproduced in *The Gazette*. These questions and answers substantially influenced Hutt’s opinion about the degree of compatibility between Aboriginal laws and customs (assumed to be largely homologous), and colonial society, which in turn would determine the principles that he subsequently developed. In this case he focused on the criminal law because it responded to pragmatic concerns of protecting settlers’ property, and which he concluded were similar to Indigenous laws on punishment. The fact that Hutt’s modified law would involve a departure from the principle of equal legal rights under British law was a secondary concern to achieving what he termed ‘equity’, within the overall goal of achieving ‘amalgamation’ and preventing the ‘extermination’ of Indigenous people.

Moore, Armstrong and Hutt met regularly during 1839 and early 1840 to compile an language dictionary in order to improve communication with Aboriginal people, to obtain information and facilitate policy objectives. Grey had also been working on a dictionary four months beforehand. Stirling (with whom Hutt discussed policy at length) Moore, and Bland also informed Hutt about the economic and political problems facing the colony. Moore spent a lot of time with Hutt during the first few months and

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41 *The Perth Gazette*, 31 August 1839, p.139.
43 Hutt to Glenelg, 3 May 1839, *Papers relative to the Aborigines*, p.365.
45 Extracts were published in *The Perth Gazette*, 24 August 1839, pp. 135-6; 31 August 1839, pp. 139-40, and later published in England. Grey differed from Hutt in publishing a vocabulary of dialects based on English phonetics.
46 Cameron (ed.), *Millendon Memoirs*, 1 January 1839, p. 400; Hutt to Glenelg 4 January 1839, CO 18/21, Reel 425-6, p.17. Stirling arrived in the Colony on 5 January 1839.
most likely explained to him about the ‘pale’ in relation to Aboriginal people within settlement, which Hutt decided to continue.\textsuperscript{47}

**Beyond the Pale**

Moore had already outlined the ‘pale’ policy on 21 July 1838, after he interpreted Glenelg’s instructions to apply British law equally to Aborigines. This was debated during a meeting of the Executive Council to determine if the death sentence against *Helia* should be commuted. Helia had been convicted for the ‘wilful murder’ of Yattoobong in the streets of Perth.\textsuperscript{48} Moore argued that to subject *Helia* and his ‘race’ to the full penalties, legal technicalities and forms of British law would result in the ‘grossest absurdity.’ This was because Helia would be practically unable to seek redress under British law and this would be unjust.\textsuperscript{49} This impracticability included the legal inability of Aboriginal people to give evidence as witnesses and complainants under the British legal system. Therefore, he considered that the Colonial Office instructions could only be interpreted as meaning that Aboriginal people were subject to British law only when it involved protecting settlers’ lives and property. Until the time arrived where these barriers could be removed, Moore concluded that in other cases, Indigenous people were better off seeking redress under their own laws by which they were bound.

It was the strong impetus to protect settlers’ lives and property that primarily motivated Hutt, Moore and Mackie during the 1840s to find legalistic ways to overcome the barriers to applying British criminal law. In 1839, there were increasing reports of Aboriginal tribes attacking sheep flocks and shepherds in the Upper Swan and York districts, at a time when sheep were considered the main economic mainstay of the

\textsuperscript{47} Cameron, ‘George Fletcher Moore’, p. 28.
\textsuperscript{48} Minutes of Executive Council, 13 July 1838 and 21 July 1838, CO 20/2, Reel 1118, pp. 269-272.
\textsuperscript{49} Ibid.
The growing conflict in York and demand for the protection of settlers’ farms in the rural regions, along with the difficulty of raising finances for any programs, affected Hutt’s priorities of asserting legal and political authority. However, Hutt wanted to apply British law gradually, which included tolerating Indigenous laws so that it would not lead to the lack of reverence for British laws and civilisation.

From the start, Hutt regarded the Government residents and magistracy as playing a key role in ensuring that principles that he described as ‘rules of law’, were applied to Aboriginal people in settled regions. The Government residents (who were also resident magistrates) were intended to be the ‘eyes of the government’ in the regions of Canning, York, Augusta (later the Vasse), Leschenault, and Albany, and were expected to reflect central government interests more than local interests. In this way it was probably similar to Governor Grey’s plan in New Zealand that Ward refers to where the Resident Magistrates were expected to be a ‘vehicle of central government’ in a way that regional magistrates were not. However, this would prove difficult to sustain as local interests took over. Hutt decided that his priority was to bring Aboriginal people who were in contact with Europeans under policy, laws and rules, developed and under the central control of the Executive Council.

In drawing up his general guidelines for the application of rules and British criminal law, Hutt initially drew a circle around towns and farmhouses, and ‘adopted’ Aboriginals, including those employed with settlers. The intention was that Aboriginal

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50 Bland to Colonial Secretary, SRO, CSR, ACC 36, Vol. 74, pp. 107,111,114. Bland reports that two thirds of the colony’s sheep flock were in the York district.
51 See Chapter 7. Colonial Secretary to Government Residents, 12 February 1839, CSR, ACC 49/12, p.121; Russell to Hutt with Notations on attachment of Greys principles, 8 October 1840, SRO, WAS 1178, CONS 41/4, p.67, 71.
52 Hutt to Glenelg, 3 May 1839, BPP, Papers Relative to the Aborigines, pp.363-4.
53 Colonial Secretary, Instructions to Residents, 12 February 1839, SRO, ACC 49/12, p.121.
people who came into contact with settlers would be gradually educated about British laws in towns and farmhouses which would be enforced only in cases where settlers lives or property were affected.\textsuperscript{55} He continued the appointment of Armstrong as a constable in Perth, adding to his list of duties that the tribes in the region be encouraged to labour on public works.\textsuperscript{56}

Unlike Mackie who had in 1837 imposed the full penalty for sheep stealing on Aborigines of up to seven years transportation, Hutt wanted to reduce the maximum penalties for Aborigines that would normally apply to British subjects. He was probably influenced by the Aborigines Committee which in June 1837, recommended that:

to require from the ignorant hordes of savages living in Eastern or Western Australia the observance of our laws would be absurd, and to punish their non-observance of them by severe penalties would be palpably unjust. On the other hand, if they are placed beyond the pale of the law as a rule of their conduct to others, they will infallibly lose the advantage of it, considered as a rule of conduct of others towards them. This task required obtaining local information which it was the protectors role to achieve and then recommend to the local government and legislation the best way to proceed. Once Aborigines had advanced knowledge and civilisation then there would be no need for such temporary and provisional special laws.\textsuperscript{57}

Hutt believed that attacks on settlers and sheep would be more likely to occur in remote regions such as the York district rather than in the Perth and Canning regions where settlers and soldiers were more numerous.\textsuperscript{58} He also wanted to concentrate settler expansion within existing agricultural regions rather than encourage pastoral expansion where military protection could not be offered to isolated settlements. This, he believed

\textsuperscript{55} Russell to Hutt, 8 October 1840, Hutt’s comments in margins on Grey’s principles, Attachment to WAS 1178, CONS 41/4; p. 69; Hutt to Russell, 11 February 1840, BPP, p.371.

\textsuperscript{56} Colonial Secretary to magistrates, 10 January 1839, SRO, CSR, ACC 49/12; No. 28.; Armstrong to Colonial Secretary 12 January 1839, ACC 36, Vol 75, p.131; Colonial Secretary to Armstrong, 3 September 1839, SRO, CSR, ACC 49/12, p.284.

\textsuperscript{57} BPP, Report, 1837, p.84.

\textsuperscript{58} Cameron, \textit{Millendon Memoirs}, 17 July 1839, p.467.
would assist in the protection of Aboriginal people and settlers. This policy was largely unsuccessful because the settlers distrusted Hutt’s land policies, and also because pastoral expansion did take place which would make it more difficult to apply policies in outlying regions. Glenelg’s efforts to reach a compromise in 1837 with settlers on the land regulations resulted in a scheme where settlers were able to exchange unsuitable land in return for new pasture further inland in the York and Toodyay districts, and in the Southwest in the newly settled Kojonup district. This was done between 1837 and 1842. The resulting pastoral expansion was inconsistent with the original intent of Colonial Office policy for concentrated settlement. This resulted in fresh encounters with Aboriginal tribes who had little or no previous contact with Europeans or their livestock.

**Government Residents in the regions.**

By the end of January 1839, Hutt commenced withdrawing troops from isolated farmhouses and stores which resulted in protests from settlers as far south as Albany and north-east to York, and a demand from government residents for a policy to punish Aboriginal people. In reply, on 12 February 1839, Hutt sent a circular of ‘rules’ to the Government residents. The rules were that no offence against European lives and property should remain unpunished, if declared to be deserving of punishment. Hutt

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59 Hutt reported on 25 January 1839 to Glenelg that the colonists were already beginning to look for additional land for their increasing flocks, PRO, CO 18/22, p.72.  
60 De Garis, ‘Political Tutelage’ p.301.  
62 Ibid.  
63 Ibid.  
64 Minutes of Executive Council, 9 January 1839, WAS 1620, CONS 1058/2. The soldiers also used to assist settlers with the harvest when protecting farms from Aborigines; Hutt to Glenelg, 25 January 1839 (received 22 July 1839) CO 18/21, Reel 425-6, p.70; Colonial Secretary to Resident Toodyay, 2 May 1839, SRO, CSR, ACC 49/12, No 265.; Petition from Peel to Government Resident King George Sound 7 March 1839, referring to 11 February 1839 letter regarding withdrawal of troops, CSR, ACC 49/12.  
65 Colonial Secretary to Government Residents, 8 and 12 February 1839, SRO, CSR ACC 49/12; *WAGG*, 20 February 1839, p.232.  
66 Colonial Secretary, Circular to Government Residents, 8 February 1839, CSR, ACC 49/12, p.117.
declared that this was a ‘rule of law’ which Aboriginal people understood, and if firmly and strictly enforced, would ‘awe them into habits of greater obedience to our orders and regulations.’\textsuperscript{67} In practice this strict enforcement meant that Aboriginal people were to be brought before magistrates and if the offence was considered too serious they were sent to Perth for trial.\textsuperscript{68} In Hutt’s opinion this policy would dispel the belief that he believed Aboriginal people possessed, that if they escaped into the bush after an ‘offence’ had been committed and remained there long enough, this ‘entitled [them] to a free pardon on … return to the dwellings of the settler.’\textsuperscript{69} The other rules were that no Aboriginal person be allowed to enter any town or European dwelling armed with spears, and that the Government residents were to ‘encourage employment.’\textsuperscript{70}

Initially Hutt carried out Colonial Office instructions as he saw them, and in 1839 there was a resumption of the apprehension and prosecution of Aboriginal people in the Upper Swan and York districts for theft in the Court of Quarter Sessions.\textsuperscript{71} There was a marked increase in Aboriginal people taking sheep in the settled regions and mostly in York. This resulted in a number of Aborigines being captured, charged with theft and detained in Fremantle jail, which brought to light other problems in applying British law.\textsuperscript{72} For example, Cunan had been prosecuted in Albany and was kept in the local lockup as it was considered too expensive to bring him to Perth for trial in the Quarter

\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid.
\textsuperscript{70} Colonial Secretary, Instructions to Government Residents, SRO, CSR, ACC 49/12, 8 February 1839, Instructions to Government Residents, 12 February 1839, CSR, ACC 49/12, p.117.
\textsuperscript{71} \textit{R v Dilly and Monaghan or Monagur}. The trial for spearing and killing a sheep was held on 1 July 1839. The Perth Gazette, 6 July 1839, p. 107; Dilly was sentenced to three years hard labour on Rottnest, There is no evidence that Monaghan (female) went to Rottnest. N Green and S. Moon, \textit{Far From Home, Aboriginal prisoners of Rottnest Island}, Nedlands, 1997, p.159.
\textsuperscript{72} Cameron, \textit{Millendon Memoirs}, 28 March 1839, p.461; 13 July 1839, p.466.
Sessions.\textsuperscript{73} There was also the problem of finding witnesses to give evidence. Hutt proposed that Aboriginal people be tried in Perth for more serious offences such as murder, and then transported to Rottnest Island for punishment which included being trained in agricultural pursuits.\textsuperscript{74} Hutt viewed Rottnest as a means of persuading Aboriginal ‘prisoners’ towards civilisation through education, public works and agricultural training. He intended that less serious offences such as non-violent theft should be summarily punished by flogging or detention for short periods by magistrates.\textsuperscript{75} Hutt’s view was that Aboriginal people who displayed the right ‘character’ could be released earlier into the colonial community as agricultural labourers. This direct relationship between labour, training and punishment would be accentuated during the late 1840s, replacing education and gradual approaches, with a modified form of colonial criminal law as a form of civilisation and control in the late 1840s.\textsuperscript{76}

In relation to property offences, Hutt sought to limit settlers’ claims to the right of self defence under British law if they shot or flogged an Aboriginal person who stole a sheep, especially in the remoter regions such as York.\textsuperscript{77} Hutt did this by warning that settlers would be prosecuted and brought to trial for administering their own form of ‘summary punishment,’ while extending the legal authority of magistrates to administer this function in the rural districts. He reasoned that because Aboriginal peoples’ lands had been usurped, and their established ‘manners and customs’ interfered with, Aborigines ‘ought to be treated like children’ where ‘kindness and forbearance was the

\textsuperscript{73} Cunan, (Cunanan) was apprehended on 22 October 1838 in Albany and gaol for theft but it was decided to leave him in gaol rather than bring him for trial. On 11 January 1839 Hutt ordered his release. SRO, CSR, ACC 49/12, No. 29.

\textsuperscript{74} Hutt to Russell, 19 August 1840, BPP, Papers relative to the Aborigines, p. 375.

\textsuperscript{75} See Chapter 5 and 8.

\textsuperscript{76} See Chapter. 8.

\textsuperscript{77} Gaden, Northam, p.53. In January 1839 an Aborigine was severely flogged by two servants of Robert Brockman who suspected him of theft while Brockman looked on. Magistrate Whitfield was reprimanded by Hutt for not taking any action against the servants.
rule and strictness the exception.’ Therefore he came out strongly on cases where Aboriginal people had been shot while being arrested for the theft of stock in the regions and sought to mitigate the punishment in relation to property offences. In a reply to a letter from Moore on 2 July 1839 in which Moore reported that an Aborigine had been shot while being apprehended for an attack on a flock of sheep in a remote settlement in the Upper Swan, Hutt replied:

Death is an extreme measure of justice to be dealt out against any man, or set of men, let his or their acts have been what they may, it is still more so against the untutored inhabitants of the woods, whose minds can hardly be brought to distinguish the difference between our having deprived them of their game and their hunting grounds, and their taking from us our flocks and herds, but it takes its severest form, though strictly, sanctioned by the provisions of our own law, when, in an attempt to execute a warrant against any of the Aboriginal people, they are suddenly surprised by night, quietly seated around their fires, and flee it is true from the hand of justice, but impelled also by fear, and scarcely conscious of what may be the cause or object of this apparently hostile attack upon them.

Hutt often demanded that magistrates and Government residents’ report to him any deaths of Aboriginal people and apprehend and prosecute settlers in the Court of Quarter Sessions, both out of fear that it might be reported to England, and from a belief that Aboriginal people should not be killed over property theft. Hutt’s ideals would be challenged by the inter-racial conflict in the York district when Aboriginal tribes retaliated against the capture of their relatives for trial in Perth for the theft of sheep. He would be forced to revise his ideals of protecting Aborigines from settlers whilst responding to the demands of settlers for the protection of their lives and property.

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78 Hutt to Glenelg, 3 May 1839, BPP, Papers Relative to the Aborigines, p.373.
79 Colonial Secretary to Advocate General, 2 July 1839, SRO, CSR, ACC 49/12, No 374, p.230.
80 R. H.Bland to Colonial Secretary, SRO, CSR, ACC 36, Vol. 74, p. 109. Cases where servants were being ordered by their employers to punish Aborigines for theft, eg; 5 February 1839, Resident of Toodyay was reprimanded for not adopting the law and taking depositions and prosecuting the servant. Colonial Secretary to Resident of Toodyay, SRO, CSR, ACC 49/12, No 94; Colonial Secretary to T. Peel, 2 July 1839, SRO, CSR, ACC 49/12, No 371.
The York clash

The first real test of Hutt’s policy to prosecute Aboriginal people using warrants, the courts and ‘rules’ of enforcement, encountered problems when violent conflict broke out between settlers and Aboriginal tribes in the Avon Valley District which included Northam, Toodyay and York. 81 On 18 March 1839, two Aborigines were apprehended and taken for trial in Perth for stealing a sheep. 82 Hutt recommended that soldiers be appointed as special constables to accompany them. 83 This was followed a couple of months later by the murder of a settler and her infant child. On 20 May 1839, Bland reported to Hutt that there had been a murder between Beverley and York, at Norrilong, a remote sheep farm 10 miles from York. A shepherd’s wife, Sarah Cook and her infant had been killed by a group of Aborigines, and their house burnt to the ground. 84 Bland had taken Wannine as a prisoner because he was the only person left at the scene. However, he reported that there was no evidence to prove that Wannine was involved in the murder. 85 Wannine later informed Armstrong that he had not been involved but that he had been ordered by Doodjeep and Barbary (Barrabong) from a different tribe to let the York tribe know that they had arrived for a corroboree to settle an inter-tribal dispute. 86 Bland believed that the killings had been committed to defy British law and wrote to Hutt pointing out how useless that law was in dealing with the matter, and asked Hutt for instructions:

81 Garden, Northam, pp.5, 11-12.
82 One instance is recorded when Dilly and Monaghan were apprehended on 18 March 1839 by Bland and taken to Perth to be tried. The trial was not held until 1 July 1839. Colonial Secretary to Resident York, 22 March 1839, CSR, ACC 49/12, No 176, pp.135-6; The Perth Gazette, 23 March 1839, p.47.
83 Colonial Secretary to Commandant, 19 April 1839, SRO, CSR, ACC 49/12, No 234, p.136.
84 Bland to Colonial Secretary 20 May 1839, SRO, CSR, ACC 36, Vol 74, p.114.
85 Ibid.
A native, living close to where the murder was committed, informs me that the spear belongs to a native named “Yijan” the father of a boy who was sent down by me to take his trial for sheep stealing and who he says told the other natives he would do so in revenge for taking away his boy, but if they are not to be punished upon native evidence, no other can be procured, upon which to apprehend them. I have a list of others concerned in it, who are all old offenders...As far as I can ascertain these last murders have been committed principally to set our laws at defiance, and as I am without the authority to apprehend offenders in these cases when there are no european witnesses I am at a loss how to act until I hear from you, and would rather not resort to any extreme measures until sanctioned by His Excellency.88

In subsequent reports Bland emphasised the threats to the economic security of the colony that this posed.89 Hutt responded with a more forceful policy to get around the problem of legal evidence, which would result in directions to apprehend groups of Aboriginal people on suspicion, even though Hutt would later admit it was illegal.90

With respect to that portion of your letter where you express yourself not possessed with authority to apprehend offenders in cases where no European evidence can be found, I am directed to inform you that whenever native evidence is borne out by circumstantial testimony, such as to have no reasonable doubt, in a magistrates mind of a party accused, being at least a participater in an outrage, he would be justified in directing his capture, and should resistance be offered of adopting such extreme measures as the law warrants.91

Hutt added in the same letter to Bland (on 23 May 1839) that if there was likely to be resistance to their capture then a soldier acting as a special constable would be justified in shooting the person, similarly to laws of treason or felony.92 This use of a legalistic device assumed that Aboriginal tribes understood and had consented to be British

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87 Heejan alias Doolbyne., Ejan, was from the Ejanok land group south east of York. Tilbrook and. Hallam, Aborigines of the southwest region, Vol VIII, p. 7,
88 Bland to Colonial Secretary, 20 May 1839, SRO, CSR, ACC 36, Vol. 74, p. 114; The Perth Gazette, 25 March 1839; Bland to Colonial Secretary, 6 July 1839, SRO, CSR, ACC 36, Vol 74, p.123.
89 Bland to Colonial Secretary, 1 February 1839, SRO, CSR, ACC 36, Vol. 74, p.107.
90 Minutes of Legislative Council, 6 August 1840, The Inquirer, 12 August 1840, p.7.
91 Colonial Secretary to Resident York, 23 May 1839, SRO, CSR, ACC 49/12, No 297.
92 This probably focused on indemnifying the soldiers as special constables or authorised persons from liability if they killed someone.
subjects and were liable for treason. At this time it was really stretching Hutt’s attempts to maintain an appearance of legality and also reflected his concern of avoiding public scrutiny in England by indemnifying the soldiers from prosecution if they shot Aboriginal British subjects.

On 13 June 1839, Hutt reported that information had been obtained from Yote-werpt at Fremantle jail (who was a suspect in the Cook killings), that seven others were present at the event. This presence was interpreted as ‘aiding and abetting’ in the crime. Bland was provided with a list of seven names and directed by Hutt to ‘follow up and trace out the murderers.’ 93 Two days later, a government proclamation was issued in English and translated into ‘mountain and lowland dialect’ by Armstrong, encouraging other Aboriginal tribes and settlers to assist in the apprehension of the seven suspects, which list was followed by an additional seven names in late June 1839.94 Unlike Stirling and Irwin in the 1830s, there was no reward offered to settlers in order to gain their assistance in the apprehension of outlaws, because Hutt considered that any reward offered to settlers might fuel the situation and lead to retaliation. Hutt also specifically warned against harming Aborigines who were not listed in the notice, in an attempt to contain the violence. Despite the reward of 50 lbs of flour to Aborigines, the seven suspects remained at large. 95

Even though Hutt offered Bland the support of the military to find 14 Aboriginal suspects, he attempted to keep control of extraneous violence beyond what he had

93 Colonial Secretary to Bland, 13 June 1839, SRO, CSR, ACC 49/12, No. 342. Alias Dargan or Sargent
94 The first warrant of seven names was issued in June 1839 for Heejan, Dilbun, Nhilbung, (brothers) Doodjeep, Yambuk/b, Barrabong and Boongar. Another warrant was issued later in June which included Mallum, Mallet, Wannine, Dirup, Tom, Nillink, Wingebong, Heejan, Dilbun, Nhilbung, Doodjeep/Doodypawirt. Proclamation, 14 June 1839, The Perth Gazette, 15 June 1839, p.96; Hallam and Tilbrook, Aborigines of the southwest region, p.7.
95 Colonial Secretary Note 14 June 1839, The Perth Gazette, 15 June 1839, p. 96; Colonial Secretary to Bland, 13 June 1839, SRO, CSR, ACC 49/12.
authorised. However, it proved increasingly difficult. During the process of searching for the suspects, and despite Hutt’s attempts to control the situation two Aboriginal people were killed and others shot by settlers. Several individuals from the same tribal group would be caught up as suspects in the attempt to capture ‘offenders’ who were viewed as the most troublesome, which would severely impact on the Indigenous people in the area and result in increased conflict.

The killing of Sarah Cook and her infant was generally regarded by settlers and the colonial government as the responsibility of one Indigenous ‘tribe,’ the ‘halfway house tribe’ or ‘Gwerrinjoke,’ who were perceived as ‘more savage and daring,’ because of their less frequent contact with Europeans. The fact that they were unlikely to understand British law and customs was not considered. The Editor of *The Perth Gazette*, Charles MacFaull reinforced Bland’s opinion that the murder of Sarah Cook and her child had been deliberately planned at a corroboree held in May 1839, and feared that this would lead to the collaboration of various tribes against the settlers.

Both urged Hutt to take stronger action. MacFaull argued that if the government had broken up the large gathering at the corroboree rather than waiting until it was too late, the Cook deaths might have been averted. Bland feared that the conflict would escalate, especially since there were no soldiers in the remoter parts of York and settlers

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97 Ibid.


100 *The Perth Gazette*, 13 July 1839, p.114.
did not have enough labourers to protect their sheep, which amounted to two thirds of the colony’s flock. 101

There is evidence that other encroachments were resented by Aboriginal people in a time of severe drought. On 1 February 1839, Bland reported that a bullock had been speared, its skull crushed and the carcass left to rot on Dempster’s farm in York. 102 This appeared to have been done as a protest rather than for the purpose of obtaining food. 103 While Bland was informed by Aboriginal people that it was Wongan alias Isaac who was responsible, there was insufficient evidence to bring a complaint. On 6 July 1839, Bland reported to Hutt that it was impossible to strictly follow British law and related a second event where Mallum made an attempt to kill a white shepherd in charge of stock, making a threat that he would spear the first unarmed white man he could find, because his relative had been sent to Perth for trial for aiding and abetting in the Cook murder. 104 Bland reinforced the threat to the economic security of the colony that the continued resistance by Aboriginal people in the York area posed. 105 In reply, Hutt stated that the acts and threats of Aboriginal people evinced ‘such a system of hostility as would amount among more civilized people to a declaration of war.’ 106 This statement was made shortly before he received news of the death of a shepherd, but this time much closer to Perth.

Despite efforts to apply British law to the frontier, Hutt found that it was not as easy as he had originally thought which resulted in the modification of his policy that would not

101 Bland to Colonial Secretary 4 November 1839, SRO, CSR ACC 36, Vol. 74, p.130.  
102 Bland to Colonial Secretary, 1 February 1839, SRO, CSR ACC 36, Vol. 74, p.107.  
103 Ibid.  
104 Mallum was prevented from spearing Mr Harvey’s shepherd by the intervention of an old Aboriginal woman. Tilbrook and Hallam, Aborigines of the southwest region, Vol. VIII, p.195.  
105 Bland to Colonial Secretary, 1 February 1839, SRO, CSR, ACC 36, Vol. 74, p.107.  
106 Colonial Secretary to Resident, York, 8 July 1839, SRO, CSR, ACC 49/12, p.238.
have been applied to other British subjects. Hutt was different from Stirling in that originally he had attempted to come as close as possible to applying British criminal law to Aborigines and settlers.

The Cox killing

It was the second event involving the killing of shepherd boy, John Burstenshaw Cox by Aborigines in the Canning region two months later, on 9 July 1839 that resulted in Hutt taking more direct action.\(^{107}\) The Government resident at the Canning, John Phillip reported that his servant had been killed while minding sheep and goats.\(^{108}\) Hutt regarded this event as a more direct threat to his authority, describing it as a ‘defiant’ and more ‘daring’ act, because it had taken place closer to Perth where there was a greater concentration of settlers and soldiers.\(^{109}\) He immediately gave orders for the apprehension of the suspects, believing that the same tribe was responsible for the deaths of Sarah Cook and her child, as well as Cox. Moore later remarked on Hutt’s reaction to this event in his private journal:

> The Governor seems to be not a little astonished. His theory was that such things could only occur at remote stations, and he seemed [sic] not very sorry when they did occur, because his theory was supported thereby; but seemed to have no idea that such a thing could possibly occur within reach of the capital (His Excellency’s residence), and where settlers are tolerably thick. He sees now the necessity for action, not theory. His blood seems to be up, and he has now endeavoured to raise and equip five distinct parties.\(^{110}\)

\(^{107}\) *The Perth Gazette*, 20 July 1839, p. 114.
\(^{108}\) Government Resident Canning, to Colonial Secretary, SRO, CSR, ACC 36, Vol. 74, p.84; Colonial Secretary to Government Resident Canning J. R. Phillip, 16 July and 17 July 1839; SRO, CSR, ACC 49/12, p.246; Hallam and Tilbrook, *Aborigines of the Southwest region*, p.206.
\(^{109}\) Minutes of Legislative Council, 15 October 1839, SRO, CO 20/3, Reel 1118-1119, pp, 372-376.
Hutt ordered the government residents to organise six teams of settlers and soldiers accompanied by magistrates in a broad sweep of the countryside. Hutt suspected that the ‘Giur-jang-op or ‘Half way house tribe’ were responsible and directed Armstrong in search of them, rather than specified individuals. In late July, two Aborigines were brought to Perth by Constable Hunt and charged with aiding and abetting in the murder of Sarah Cook and her child. One was sent to Fremantle gaol but the other offered to lead them to the tribe. On 21 July 1839, Armstrong and Hunt searched for the ‘Giur-jang-op tribe’ but came across another clan, the ‘Eelyanok tribe’, where four to five Aboriginal people including Wannine were shot and wounded. Tilbrook states that this number was probably an under-estimation. Several members of this tribe had been apprehended for the Cook murder but it was not until a nearly a year later that Barrabong and Doodjeep, and later Yambup were charged with the wilful murder of Sarah Cook. Mendic alias Nicola (not from the same tribe) was apprehended for the Cox murder two years later by police aide, Boorar who had in 1837 been charged with Mendic for stealing pigs.

The Court cases

The following court cases highlighted the problem of obtaining Aboriginal evidence and along with the need to protect settlers property precipitated more urgent calls by settlers for an Aboriginal Evidence Act. The separate trial of Doodjeep and Barrabong for the wilful murder of Sarah Cook and her child took place on 1 July 1840. This was the

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111 The Perth Gazette, 13 July 1839, p.114; Colonial Secretary to Government Resident Canning, 17 July 1839, SRO, CSR, ACC 49/12, No 406, p.246.  
112 F. Armstrong to Colonial Secretary, 31 July 1839, SRO, CSR, ACC 36, Vol. 75, pp.140-145; Tilbrook and Hallam, Aborigines of the Southwest region, p.206.  
113 Ibid.‘Giur-jang-op’ or the ‘Gwerringoke’ tribe.  
114 F. Armstrong to Colonial Secretary 31 July 1839, CSR, ACC 36, Vol. 75, p. 142.  
116 The Perth Gazette, 2 October 1841 ; Hallam and Tilbrook, Aborigines of the Southwest region, p.206.  
117 R v Doodjeep, R v Barrabong (Barbary), 1 July 1840, The Perth Gazette, 4 July 1840.
first prosecution in the Court of Quarter Sessions for the wilful murder of a European.118 The event had been witnessed by Aboriginal people, and before the trial, doubt was publicly expressed whether there was sufficient evidence to ensure a conviction.119 Although Aboriginal informants had identified Doodjeep and Barrabong as being involved in the murder, their evidence was not admissible. Reliance was therefore placed on Doodjeep and Barrabong’s confessions to bring the charge. Although Mackie regarded the apparent confessions as sufficient ‘to condemn them without trial,’ he recorded a plea of not guilty probably because the offence carried a death sentence which was intended to be carried out.120 Barrabong said that Yambup was the person who had thrown the first spear at the woman and that Doodjeep had thrown the second spear that killed the child.121 Barrabong then threw a spear that hit Sarah Cook in the leg. He added that Yambup told him and others to assist him in spearing Sarah Cook and her child because his mother had been killed by ‘white people.’122 Doodjeep stated that he threw a spear at Sarah Cook and hit her in the shoulder, and had witnessed Yambup and Barabong throw a spear at her.

There were no lawyers appointed for their defence or to dispute the charge of wilful murder.123 Although the Colonial Office had intended that protectors defend Aboriginal people in court or appoint lawyers, this did not take place until November 1841, when

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118 In January 1838, Giustiniani defended Boyon (Buoyeen) who had been charged with an assault on an European boy which at the time and a death sentence was passed. However, as a result of a meeting of the Executive Council it was decided to take account of an impending change in English law and therefore Boyon’s sentence was commuted to imprisonment on Rottnest Island. The Perth Gazette, 6 January 1838, Court of Quarter Sessions, 1 January 1838, p.2
119 The Evidence Act was drafted the day after the trial. The Perth Gazette, 16 May 1840; 6 June 1840; 11 July 1840.
120 Minutes of Executive Council, 2 July 1840, SRO, CSR, WAS 1620, CONS 1058/3, p.42.
121 R v Barrabong, (or Mulgan) Examination of Barrabong, Case 224, Criminal Indictment File, and R v Doodjeep, Case 225, WAS 122, CONS 3472/42.
122 Ibid.
123 Defence counsel was available for Europeans such as in Jane Green murder by October 1840 but not for accused Aborigines in July 1840. The Inquirer, 7 October 1840, pp.39-40.
lawyer, Edward Landor was appointed. Moore appealed to the grand jury by referring to the good character of the victim’s husband, Elijah Cook, who had testified finding the body of his wife. Reliance was placed by Moore for the prosecution’s case on the atrocity of the crime and the good character of Elijah Cook, who was portrayed as a friend of local Aboriginal people. This, and the full details of the crime convinced the grand jury to bring a verdict of guilty. Mackie then sentenced Doodjeep and Barrabong to be hung in chains at the scene of the crime as a severe example to Aboriginal people in the region.

The Executive Council debated whether the death sentence merited the exercise of the royal prerogative of mercy. The debate reflects the extent to which policy affected whether British law was applied or enforced in certain cases. The subsequent discussion demonstrates that unlike policy governing cases of inter-Aboriginal violence (inter se cases), the question of whether the accused had an understanding of British law and the court process was not considered, and in fact this ignorance was relied on in order to ensure a conviction. Mackie provided a report to the Executive Council that in his opinion there were no extenuating circumstances for commuting the death sentence. Even though he acknowledged that the accused had not been motivated by personal motive for revenge against the victims but had been asked to assist in the murder by Yambup, he did not believe that this was an extenuating circumstance. Moore reported to the Council that there had been no direct European evidence, but that Doodjeep and Barrabong had made a confession to the government interpreter of their guilt.

124 Glenelg to Hutt, 16 January 1839, CO 18/20, Reel 425, p.370; Hutt to Stanley, BPP, Papers relative to the Aborigines, 6 April 1843, p.422.
125 The Perth Gazette, 4 July 1840.
126 P. Barrow, Report, 31 March 1841, WAGG, 30 April 1841, No. 251; Viveash, Diary, 10 July 1840, p.89; The Perth Gazette, 4 July 1840; 11 July 1840, 18 July 1840; Minutes of Executive Council, 2 July 1840, WAS 1620, CONS 1058/3, p.42.
127 Minutes of Executive Council, 2 July 1840, SRO, WAS 1620, CONS 1058/3, p.41.
128 Ibid.
This anxiety about the inability to admit Aboriginal evidence in court resulted in an increased sense of urgency for an Aboriginal Evidence Act to be drafted, which matter was raised by Hutt at the next meeting of the Executive Council.\textsuperscript{129} In confirming a decision that the two Aborigines should be hanged emphasis was placed on their confessions, the jury verdict, and their history of offences against Europeans for which they had not been previously convicted, including the driving away of cattle. Hutt regarded the public executions as a ‘hazardous experiment’ because of possible retaliation, but wanted to make a severe example.

News of the first ‘legal executions’ in the colony received a disapproving reaction in England, not from the Colonial Office, but from the British newspaper, \textit{The Spectator}, after a former settler from Western Australia notified them of it.\textsuperscript{130} The report, republished in \textit{The Inquirer} on 6 October 1841, emphasised that the public execution had been more an act of revenge rather than punishment for a crime. The Editor of \textit{The Inquirer} replied that the action had been ‘proper’ and ‘legal,’ and argued that the crime was fully proved against Barrabong and Doodjeepl by their own confession, and other evidence which was not stated.\textsuperscript{131} The Editor rejected the defence put up by \textit{The Spectator} that Aboriginal people had no knowledge of British law and argued that since

\textsuperscript{129} The Act (with summary punishment provisions) shows the date that it was passed as 2 July 1840 which is incorrect. This was most probably the date it was drafted and after the qualms about the lack of evidence for the Cook convictions, Hutt raised the question of a Bill a week later afterwards, after he had received Colonial Office approval in principle. Minutes of Executive Council, 15 July 1840, SRO, WAS 1620, CONS 1058/3, p.44.

\textsuperscript{130} \textit{The Inquirer}, 6 October 1841. This could be Nairn Clark who went to India in 1840 but the name is not given.

\textsuperscript{131} The Colonial Office did not hear of it until the capture of Yambup two years later in 1842. The two Aborigines had already been executed. Hutt was following up his rules of enforcement. Hutt to Russell, 10 November 1841, BPP, \textit{Papers relative to the Aborigines}, pp.395-6.
it was assumed that they were British subjects, therefore they were also liable to be punished with the full penalty of British law.\textsuperscript{132}

It was not until one year later on 29 May 1841 that Yambup was committed for trial which was held on 1 October 1841.\textsuperscript{133} As before, the only evidence relied on was Yambup’s ‘confession’ taken earlier, that implicated him in the murder. A plea of not guilty was entered and a grand jury appointed. The jury convicted Yambup of wilful murder and Mackie passed the sentence of death on him. The majority of Executive Council members believed that the evidence suggested that Yambup was just as guilty if not more so than the other two, and therefore deserved to be executed.\textsuperscript{134} Acting prosecutor Richard Nash argued that Yambup should be made an example, on the grounds that Aboriginal people judged the circumstances by their own law of taking one life for another and in order to break this balance an additional execution was required.\textsuperscript{135} He referred to the example made of the ‘Murray river tribe’ on 28 October 1834, which had claimed a greater number of Indigenous lives which he stated had ensured the ‘perfect order of that tribe’ up to the present time. However, Hutt disagreed, stating that the executions of Doodjeep and Barrabong had achieved the object of deterrence by awing the tribe into submission, and that there had been no retaliation against the settlers. During the debate there was no account taken of the number of Aboriginal people illegally injured or killed.\textsuperscript{136} Although Hutt was outnumbered by the majority he exercised his right as Governor to commute Yambup’s sentence of transportation for life. Yambup was sent to Rottnest prison where he remained for a

\textsuperscript{132} Ibid.
\textsuperscript{133} \textit{R v Yambup}, 1 October 1841, \textit{The Inquirer}, 6 October 1841, SRO, Criminal Indictment File, Case No. 249, WAS 122, CONS 3472/49.
\textsuperscript{134} Minutes of Executive Council, 7 October 1841, SRO, WAS 1620, CONS 1058/3, p.165.
\textsuperscript{135} Ibid.
\textsuperscript{136} Colonial Secretary to Resident York, 2 July 1839, SRO, CSR, ACC 49/12, No. 373, p.229.
year before he was pardoned and released. Hutt did not report to the Colonial Office on the outcome of the Cook murder until after Yambup’s conviction, almost two years after the event. By then, it was too late for the Secretary of State, Lord Stanley to do anything about Yambup’s reprieve which he strongly disagreed with because it would send the wrong message to Aboriginal tribes about punishment under British law.

Mendic was charged with the wilful murder of shepherd, Burtenshaw Cox and his trial was held on the same day as Yambup’s. His statement was entered as a plea of not guilty by Mackie. There were no witnesses produced on behalf of Mendic in court. Mendic alias Nicholay said that:

I did not strike the boy. I speared him. The boy got sulky out of humour with me and thought that I had come to carry off some of the sheep, and he struck me. The boy took something out of his breast and gave me a blow over the nose which made it bleed. The boy threw me down first and then I threw the boy down into some puddle …..I then speared him with a glass spear. I saw a boy named George coming with a gun and then I ran away. I did not drive off any sheep but afterwards we found two sheep among the hills. I did before that, spear and cut one or two of Mr Phillips sheep. The only other native with me when I speared the boy was my brother Doolbung who had since been killed at the Murray by the Murray river natives.

Mendic’s statement with its implication of self defence was disregarded, and like Yambup he was sentenced to death by the grand jury. Solicitor William Nairn Clark argued that if a lawyer had been appointed to represent Mendic, they could have argued a case of self-defence. He criticised the conviction of wilful murder based on

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137 Green and. Moon, Far from Home, p.322; The Perth Gazette, 20 April 1841. Yambap or Yambup was released after one year on Rottnest.
138 Stanley to Hutt, 2 July 1842, BPP, Papers relative to the Aborigines, p.397.
139 Ibid.
140 R v Mendic alias Nicholay, 1 October 1841, Court of Quarter Sessions, Case 249, WAS 122, CONS 3472/49; The Perth Gazette, 13 July 1839, p.114; The Inquirer, 6 October 1841.
141 Nairn Clark to the Secretary of State, 15 December 1841, (received by CO on 6 June 1842), PRO, CO 18/30, p.142.
142 Ibid. Nairn Clark offered his services as Protector for Albany at a time when there was no Protector appointed. He also offered his services as a lawyer to defend Aborigines in court.
Mendic’s alleged confession when the deceased had apparently assaulted Mendic first. Nairn Clark had offered his services as a lawyer to defend Aboriginal people but he was refused, instead, Hutt chose lawyer Edward Landor who had recently arrived from England that same month to represent Aboriginal people when necessary. Landor would defend Aborigines in *inter se* murder and assault cases during 1842-3. During the 1840s, Nairn Clark consistently forced Hutt to expand on his responses to the Colonial Office after Clark complained about the lack of advocacy and legal rights in the colonial legal system for Aboriginal people.

The doubt arising from Mendic’s statement was taken into account by the members of the Executive Council who saw Yambup as more deserving of execution than Mendic. Unlike Yambup, Hutt showed no mercy, reflecting a policy decision that because the crime had taken place closer to Perth and because Mendic was not regarded as from the same tribe as the other three, he should be punished. On this occasion Hutt was in the minority, but he overruled the majority and directed that Mendic be executed at the scene where Cox had been killed.

Hutt developed and implemented an interim policy that had the appearance of ‘legal rules,’ and his priority was to apply a form of British criminal law to Aboriginal people in all cases involving Europeans. This was supplemented with his own rules of enforcement that had involved illegal measures that departed from those applied to the settlers as British subjects. The trials raised the question of whether Aboriginal people

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143 Hutt to Stanley, 6 April 1843, BPP, *Papers Relative to the Aborigines*, p.422.
144 See Chapter 7.
147 Ibid.
could be regarded as British subjects as the Colonial Office had instructed, and what this meant in practice.\footnote{148}

The legal position of Aboriginal people

On 3 May 1839, Hutt informed the Secretary of State, Lord Glenelg of his doubts about whether Aboriginal people could receive the full rights and obligations of British subjects under British law.\footnote{149} He and Moore collaborated in drafting legislation that would develop processes adapted to apply to Aboriginal subjects differently from settlers or ‘natural born subjects’.\footnote{150} ‘Natural born British subject’ was a Blackstonian term that distinguished British subjects from ‘aliens and denizens,’ and were British subjects born within the ‘dominions’ of England and with perpetual allegiance to the Crown of England, and full rights.\footnote{151} Aboriginal people were not designated aliens or enemies by Hutt but neither did they have the rights of natural born subjects. The term was first employed by Hutt (and possibly Moore) to distinguish Aboriginal subjects from settlers on the basis of legal form, procedure and the extent of punishment under the criminal law. This contrasts with Glenelg instructions that had intended that Aboriginal people be regarded similarly to natural born subjects as if they already had allegiance to the King.\footnote{152}

Hutt questioned whether Aboriginal people could be regarded as British subjects if it meant that they were to ‘participate with us in the benefit of the leading principles of the


\footnotetext[149]{149} Hutt to Glenelg, 3 May 1839, BPP, *Papers relative to the Aborigines*, pp.363-364.

\footnotetext[150]{150} Enclosure 1, Draft of a proposed Bill to enable the Magistrates to receive the Evidence of the Aborigines of Western Australia in certain cases, BPP, *Papers relative to the Aborigines*, pp.366-7.


\footnotetext[152]{152} Hutt to Bourke, 26 July 1837, *HRA*, Series 1, Vol. 19, p.48.
English constitution, perfect equality before the law, and full protection of their lives and liberties.’ In May 1839, their ‘properties’ under civil law were something that he did not regard as relevant.\textsuperscript{153} He proposed the modification of British criminal law and procedure based on assumptions about Indigenous character and amenability to certain kinds of punishment. However the decision to do this was governed by the private property rights of settlers which had to be protected, and that if this was not done, settlers would be more inclined to take punitive action. The economic future of the individual settler was not only at stake, but that of the colony itself with the increasing reliance on sheep and the commercialisation of what was regarded as ‘waste’ land. The problem of evidence and other processes had provided a barrier to Aboriginal people being prosecuted and convicted under the British criminal law. However it was a barrier that Hutt regarded as much based on his presumption that Aboriginal people did not have a religion, or a civil law, as it was by the impracticality of applying British law.\textsuperscript{154} This is a different opinion to that of James Stephen who did not equate ignorance of the law with a lack of religion or ‘culture,’ as grounds for denying Aborigines the ability to give evidence in court.\textsuperscript{155} These kinds of assumptions or prejudices led Hutt to develop and apply his own modified system of colonial law to create what he termed equitable principles.\textsuperscript{156}

Up until now, Hutt primarily focused on the control of Aboriginal people. However, on 13 July 1839 (before the arrival of the two Protectors in January 1840), he sent a circular to Grey, Moore, and Government surgeon William Scholl for their ‘consideration and guidance’ asking for suggestions regarding the ‘civilisation’ or

\textsuperscript{153} Hutt to Glenelg, 3 May 1839, BPP, \textit{Papers Relative to the Aborigines}, p. 363.
\textsuperscript{154} Ibid.
\textsuperscript{155} J. Stephen, Memorandum to Russell and R. Vernon Smith, 5 April 1841, PRO, CO 18/25, pp.260-265.
\textsuperscript{156} Ibid., p.364.
amelioration’ of Aboriginal people. He provided them with a copy of the Colonial Office instructions and an extract from the Aborigines Committee report which Hutt regarded as the expression of the British government’s ‘full wishes and sentiment’ on the topic, adding that he could not provide any definite instructions while things were in an ‘infant state.’ This request would lead Grey to draft principles which he later forwarded to Russell upon his return to England in April 1840, prior to his appointment as Governor of South Australia. On 10 July 1841, Hutt responded to a despatch from Russell which enclosed a copy of Grey’s principles. Hutt and Grey had already debated the legal position of Aboriginal people prior to Grey’s departure from Western Australia. While Grey argued that Aboriginal people should be subject to the full force of British law including in relation to their own laws, Hutt disagreed largely because they would be antagonistic to civilising policies, and problems of enforcement. Hutt replied that Aboriginal people could not be treated as British subjects ‘on all points.’ In his opinion British law could not be applied to all situations where an offence was committed by one Indigenous person against another outside the limits of a settlement or farmhouse (what he described as ‘bush and wild districts’). The law could also not be applied to controlling customs such as marriage, and Hutt argued that to impose it in full would necessitate the application of civil law which was impractical at the present time. Nevertheless, Hutt and Grey did agree on

157 William Sholl’s brother was already in WA, BL, Research Note, 79.
158 Circular from Hutt to G.F. Moore, G. Grey and W. Sholl, 3 July 1839, SRO, CSR, ACC 49/12, No. 403.
159 Grey, Expeditions in Western Australia, pp. 373-388. He drafted a letter to the Colonial Office from Mauritius on 4 June 1840, and sent it to the Colonial Office.
160 Russell to Hutt, 8 October 1840, WAS 1178, CONS 41/4, pp67-75; Hutt to Russell, 10 July 1841, BPP, Papers relative to the Aborigines, pp.392-394.
161 Grey was Resident Magistrate from September 1839 and married Eliza Spencer in November 1839. He went to England in April 1840 before becoming Governor of South Australia in January 1841.
162 Russell to Hutt and notations on Grey’s principles, 8 October 1840, WAS 1178, CONS 41/4, pp.66-78; Minutes of Executive Council, 15 June 1841, WAS 1620, CONS 1058/3, pp.136-7.
163 Hutt to Russell, 10 July 1841, BPP, Papers relative to the Aborigines, pp.392-394; Minutes of Executive Council, 15 June 1841, WAS 1620, CONS 1058/3, p.136.
164 Ibid.
165 See Chapter 5 and 6.
the punishment of Aborigines under criminal law where it impacted directly on Europeans, and of the need for Aboriginal people to be eligible to give evidence in a court of law. Both agreed that the best means for their civilisation and amalgamation in Western Australia was through employment.166

Hutt’s policy was generally supported by Stephen and the new Secretary of State, Lord Stanley.167 On 26 November 1841, in an inter-office memo Stephen stated that he did not expect Hutt to comply with Grey’s principles:

Mr Hutt's former report about the Aborigines was, I think, disposed of by Lord Stanley’s general approbation and by His Lordship’s decision that the best thing which can be done for these people was to leave Mr Hutt to work out his own views in their favor in his own way. There would seem little or no motive therefore for engaging in a correspondence on the subject. But I think that it might perhaps be of use to observe that when mention is made by Captain Grey or others of bringing them within the reach of British law, all that is meant must be understood to be that they should enjoy the protection of our law and that in their relations to us they should be subject to the responsibilities of it so far as they can be taught to understand what these responsibilities in general are.168

Stephen’s view reflected a gradual approach to the application of British law, requiring prior education about its responsibilities. This is also reflected in his opinion about the role of Protectors which were to go into the bush and educate Aboriginal people about law rather than assume that they already knew about it when approached by Protectors in towns.169

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166 Minutes of Executive Council, 15 June 1841, SRO, WAS 1620, CONS 1058/3, p.136.
167 Stephen to Vernon Smith, 11 December 1839, PRO, CO 18/22, p. 117-118. Stephen acknowledged that the Land Fund was not sufficient to make WA independent of the British parliamentary grant.
168 Stephen to Hope, 26 November 1841, PRO, CO 18/28, p.110.
169 J.Stephen to Gardiner, Memo on back of Despatch from Hutt to Marquis of Normanby, 11 February 1840, PRO, CO 18/25, p.28. In commenting on Hutt’s rules that no Aborigine be allowed to appear in the Protectors’ presence in towns unclothed. Stephen remarked: ‘How are the natives to know this rule or to be always prepared. The protector was to be always on the move amongst them.’
Prior to Moore’s return to England in March 1841, Hutt supported Mackie’s appointment as an ex-officio member of the Legislative Council, knowing that Mackie supported him on his legislative proposals regarding Aborigines.\textsuperscript{170} The appointment was reluctantly approved by the Colonial Office aware of the problem of judicial independence. In his practical memo on the subject, Stephen reasoned that the risks were worth the additional legal expertise which would improve the quality of drafting legislation, in what was regarded as a colony with the population of a large ‘English village.’\textsuperscript{171} Inadvertently, Mackie’s support for the decentralisation of legal power in the hands of local magistrates would also entrench localised interests even more against equality principles.

Public debate

Although Hutt informed the Colonial Office as early as May 1839 that Aboriginal people could not be regarded as having the full rights of British subjects, his legislative proposal did not become publicly known even to the Legislative Council until 23 October 1839. On 2 November 1839, the Editor of \textit{The Perth Gazette} reported that Hutt had stated that it was impossible to regard Aboriginal people as British subjects, which provoked some debate particularly as it coincided with the arrival of two Protectors in January 1840 from England.\textsuperscript{172}

\textsuperscript{170} Minutes of Legislative Council, 10 July 1841, SRO, WAS 1250, CONS 311/1; Colonial Secretary, Circular to Mackie, Moore and James Lewis, 12 August 1839, SRO, CSR, ACC 49/12; W. Mackie to Colonial Secretary 18 November 1839, SRO, CSR, ACC 36, Vol. 75, p.149.
\textsuperscript{171} Hutt to the Marquis of Normanby, 7 May 1840, PRO, CO 18/28, p.108; Memo from Stephen to R. Vernon Smith, 13 October 1840, CO 18/25, Reel 428, p.118; Memo from Stephen to Vernon Smith, 22 January 1841 on back of Despatch from Hutt to Russell 14 July 1840, PRO, CO 18/28, p.172.
\textsuperscript{172} Minutes of Legislative Council, 23 October 1839, \textit{The Perth Gazette}, 2 November 1839, p.174; Hutt to Normanby, 11 February 1840, BPP, \textit{Papers Relative to the Aborigines}, p.371,
In October 1839, Hutt initiated the debate in the Legislative Council regarding the funding of a mounted police force to pursue Aboriginal ‘offenders.’ In this context, William Tanner (who was one of the wealthiest land holding settlers) alluded to Hutt’s policy of applying British criminal law to Aboriginal people, and argued that ‘with regard to the measures adopted towards the natives, he considered the policy bad. Pretending to govern them by British law was a mockery of justice; they neither knew the law, nor could their oaths be taken.’ He added that:

He was aware that a strong feeling existed in England that aborigines of this and other Colonies were ill treated, but those who entertained such opinions knew nothing of the matter, and could not place themselves in our position. He thought if representations were annually made to the Home Government, Her Majesty’s Ministers might be induced to adopt some mode more consistent with our situation.

Hutt responded to Tanner by giving his reasons for the departure from Colonial Office policy:

With respect to the natives, no one feels more the task imposed upon me than I do; on the one hand, to do justice to the settlers, and at the same time to bring into operation the governing principle of the British Legislature. I freely confess, that I am desirous my public acts should be scrutinized, and my sentiments known, and I must acknowledge the Hon Gentleman who has just spoken has stated what is perfectly true. I, for one until I came here, was of opinion that strict justice was not administered to the savage, but I now find it is not easy to treat with him, and there is great difficulty in carrying out the law. I did not see a remedy, and consequently have addressed the Government, pointing out the impossibility of fulfilling their instructions. I have taken it upon myself to propose a measure, which I hope will obtain the sanction of the Home Government. I may now state this as it has reached the public ear.

The solution that Hutt was referring to was the draft evidence and summary punishment bill to punish Aboriginal people for property offences, which he had sent to the Colonial Office on 3 May 1839. This would eventually modify the legal position of Aboriginal

173 Ibid.
people in theory as well as practice. Hutt contacted the Editor of *The Perth Gazette* to dispute what had been reported which resulted in a response in the subsequent edition. Hutt stated that he was bound to carry out the instructions of the British government, ‘and he would continue to act in obedience to those instructions, not contravening those laws which had been in force.’ The Editor upheld the accuracy of its report and responded to Hutt’s objection stating ‘that his Excellency had honorably acknowledged that the aborigines *cannot* be treated as British subjects. Our remark refers to the expression in the report, and does not leave the inference that his Excellency will not act up to his instructions.’

There was some public support for Hutt’s position. A correspondent to *The Perth Gazette*, ‘Delta,’ wrote on 28 March 1840 that if the government could not protect ‘civilized’ Aboriginal people in towns from their ‘brethren,’ then they too should not be subject to the whole of British law, regarding relations between themselves. Like Hutt he believed that British criminal law should apply to disturbances in the streets or the murder of an Aborigine who placed himself under the protection of a settler. However, lawyer William Nairn Clark criticised the absence of rights available to Indigenous accused in the court room where they did not have access to impartial interpreters, lawyers or Protectors. Other settlers, particularly in the remoter regions believed that Hutt was being too soft regarding punishment and enforcement.

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175 See Chapter 8.
177 Ibid.
179 *The Inquirer*, 16 February 1842; Despatch from Hutt to Stanley, 6 April 1843, BPP, p422-423; 19 June 1843, BPP, *Papers relative to the Aborigines*, pp.423-426.
It was not until the crisis in York when suspects were still at large that on 15 October 1839 that Hutt pushed his case for a civil police force. He applied an economic argument that the funds lost through property theft in the Canning alone, by resident magistrate and agriculturalist, J. Phillip had amounted to £4000 since settlement.181 There was no resistance to the proposal except on how the funds were to be raised. Moore recommended that the funds should be raised from a duty on goods sold by auction, in preference to Hutt’s proposal for a land tax.182 Hutt obtained approval for a small force at an annual expense of £330, who would pursue Aborigines immediately after an aggression had been committed. This was expanded in 1840 to include an Aboriginal police force.183

In conclusion, Hutt was influenced by the humanitarian movement which regarded the role of the government as that of a guardian over Aboriginal people with a central role for missionaries and protectors. Initially he envisaged that his primary role would be to protect Aboriginal people from the settlers. However, this increasingly gave way to finding ways to modify British law in order to protect settlers’ property, not just in the towns but in the remote agricultural regions. This policy was affected by settler input and demands for the protection of their property, especially when the military were withdrawn, which would involve the push to extend the ‘pale’ of British criminal law to magistrates in the agricultural regions, and result in a departure from equality principles.

Hutt initially tried to marry Indigenous legal, political and social institutions with those of British legal and political systems so that he could work towards his goal of inducing the two races to mingle in colonial society. This is what he meant when he said that he

181 Minutes of Executive Council, 15 October 1839, SRO, WAS 1620, CONS 1058/2.
182 Minutes of Legislative Council, 15 October 1839, CO 20/3, Reel 1119, p.372.
wanted Aborigines to share in the economic prosperity of the colony. Hutt envisaged that Aboriginal people could become a part of colonial society by facilitating economic wealth using their labour. This was a way to ensure that settlers had a vested interest in supporting funds for ‘civilising’ Aborigines. However, this compromise would affect some of the methods that were employed, but which were also consistent with the humanitarian vision of preventing the ‘extermination’ of indigenous peoples. Hutt envisaged that Aboriginal people would want to learn a trade or become mechanics and gain houses and blocks of land in an agricultural economy.

Hutt’s assessment of Indigenous society and laws and the prejudicial attitude of the settlers who sought to protect their own property interests, resulted in the adoption of a modification of the British criminal law rather than pursue a policy of rights associated with Indigenous autonomy or equality. The pattern of the use of the criminal law was already established in the Stirling period in 1837, but Hutt took it one step further in practice, by developing rules of enforcement and legislation which he believed would assist his overall goal of ‘amalgamation.’ The primary reason for continuing this modified legal status approach was to avoid again the difficult question of negotiating with Aboriginal people over their land.

The question remains why Hutt did not understand that a differential legal status would make ‘amalgamation’ more difficult. This may be because he thought that such legislation would be no longer necessary, once the vision was achieved. His views were that Indigenous peoples in an uncivilized state had a propensity for criminal activity, and there is some evidence to suggest that he expected the summary punishment legislation to be temporary.184 Hutt inherited many of the cultural prejudices common at this time about the superiority of British legal authority and society, and its benefits. He

184 Hutt to Russell, 20 January 1842, BPP, Papers relative to the Aborigines, p.413.
also relied excessively on executive control through Government residents and assumed that their impartiality would to a large extent over-ride local interests, and consequently did not realise that the prejudice entrenched by his legislation would foster the prejudice that already existed against Aboriginal people. Neither did he question the assumption that the benefits of civilisation were something that Aboriginal people as a group were ready to adopt. Hutt rationalised the departure from formal legal equality on the basis that the nature of punishment was less severe than for other natural born subjects and more in tune with Indigenous laws and customs. However, towards the end of his Governorship, Hutt was becoming disenchanted with progress, and blamed Aboriginal people for holding on to their own customs, even the children (whom he had targeted for the new labour based society) who were rejecting European ways. The application of the policy which denied that Aboriginal people were aliens, enemies or independent nations also accelerated the criminalisation of Aboriginal people as a kind of economic subject on their own lands and their removal to Perth for trial, which had increased their resistance to the settlers.

Hutt believed that the future of Aboriginal people and the prevention of their ‘extermination,’ lay with keeping the economic future of the colony secure which was his overriding concern, and this meant keeping the settlers happy and the land utilised for diversified commercialisation. By the time he departed the colony there was diversification of activities on land that included licences for timber cutting, sandalwood export, kangaroo skins, pastoralism and mining. The priority given to settler interests mitigated against a policy where land rights could be negotiated with Aboriginal people. Chapter 6 examines the relationship between the dispossession of Indigenous people

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185 Hutt to Stanley, 11 March 1845, CO 18/39, Reel 436-7, pp.84-85.
from their lands and the continual avoidance by colonial and British authorities of the question of land rights, and the relationship to the application of the criminal law.
Chapter 5

The development and implementation of an Aboriginal Evidence Act

The colonial governments of the late 1830s and 40s soon realised that there was a major legal barrier to bringing Aboriginal people under British legal authority. This was because under British law Indigenous peoples were ineligible to act as witnesses and complainants in court unless they could swear a Christian oath as a divine sanction to tell the truth. At that time, colonial authorities did not believe that they possessed a religion by which an oath could be sworn. The lack of an Aborigines Evidence Act proved a barrier both to the Colonial Office instructions of subjecting them to equal rights and obligations under British law, and to the colonial government’s attempts to legally admit the evidence of Aboriginal informants and witnesses in order to punish Aboriginal people for attacks on European lives and property. The latter was regarded as an alternative to reliance on other punitive measures. These different motivations would reflect the kind of legal rights that arose from the debate. The previous chapter outlined how Hutt was influenced by demands from settler-magistrates for increased power to control Aboriginal people in the agricultural regions. This chapter examines the origins, development and implementation of an Aborigines Evidence Act in Western Australia. The resulting Act would provide theoretical legal rights for Aborigines which ironically was the only victory for the Colonial office and the humanitarian movement during the early 1840s. However the motivation of the settler-magistracy behind the efforts for such a bill would make the practice much less likely, especially for civil cases. Chapter 8 examines the summary punishment provisions to which an Evidence Act was intimately linked and which was passed as a separate Act in 1849 and given
Royal Assent, after James Stephen had left the Colonial Office and was replaced by Herman Merivale as permanent under-secretary.

**Motivation for an Aboriginal Evidence Act**

The problem of evidence first came to light in May 1835, when carpenter, John McKail was prosecuted for shooting Gogalee, the son of Yellagonga of the Mooro people, who died a few days later. ¹ This was after Narral and others were encouraged to lodge a complaint with the magistrates². Armstrong reassured Gogalee’s relatives that McKail would be punished severely under British law. A preliminary hearing was held where Narral who had witnessed the event provided evidence of what happened³. Mackie considered that there was sufficient evidence for a charge of assault causing death to be laid and the matter was referred for trial at the Court of Quarter Sessions. The fact that McKail had also confessed may have assisted the decision. Armstrong persuaded Gogalee’s relatives to refrain from tribal punishment by emphasising that British justice would prevail.⁴ The prosecution witnesses listed for the trial were all European and although Narral had witnessed the event his evidence was unlikely to be admitted, much to the dismay of the Mooro people. It was decided to settle the matter out of court, and instead of punishment under British law for murder or manslaughter, McKail was given a conditional pardon and banished to Albany where he became a prosperous merchant.⁵ In Albany, there were also cases where sealers had attacked or killed Aboriginal people and which were not acted upon.⁶ However, it was not the problem of protecting

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² Stirling to Glenelg, 10 July 1835, CO 18/15, Reel 300-301, p.256.
⁴ *The Perth Gazette*, 6 June 1835, p.507.
Aboriginal people from Europeans that fuelled the impetus for Evidence legislation in Western Australia.

In July 1837, Moore outlined the need for evidence to be heard from Aboriginals, particularly after British government instructions that formalities such as warrants, were to be observed in order to bring Aboriginal people under British law and when it was illegal to apprehend individuals who only left footprints. Moore recommended to Stirling that if British criminal law was to be applied, then an Evidence Bill was necessary that would allow Aboriginal people to give evidence as witnesses especially when they were the only witnesses to a theft or murder:

I want the Governor to apply to the Home Governor for permission to make a law to render legal the evidence of the natives against one another. In ninety cases out of a hundred we know the offenders only through themselves.

This was not taken up, probably because Stirling had resorted to executive or military action by this time rather than legislative action to deal with offences by Aboriginals, and was about to resign as Governor.

Mackie was confronted with the problem of evidence in the Court of Quarter Sessions in 1837, which resulted in the establishment of a lower standard than might have been relied on for settlers. On 3 April 1837, Boo-goon-gwert was charged with aiding and abetting in the robbery of a large quantity of grapes and other produce. He had been a member of a large group of 50 Aboriginals who had been involved in raids on Drummond’s garden over several days. It was also part of his tribal territory where he

8 Ibid.
exercised digging rights. Boo-gan-gwert denied stealing the grapes and there was little
evidence pointing to him. Drummond stated that he had not seen him take any grapes,
and no Aboriginal witnesses were allowed, but the fact that he was spotted at the scene
was sufficient to convict him of aiding and abetting. When addressing the jury, Mackie
observed, that the same degree of evidence could not be expected in a
case of a savage, which might be obtained to establish a charge against a
person moving in civilized life. We cannot receive evidence from
accomplices.

The main evidence relied on in order to convict Aborigines in the Court of Quarter
Sessions was that of European witnesses or the accused’s confession. On 4 April 1840,
an anonymous correspondent to The Perth Gazette, ‘Delta,’ criticised the method being
employed. He pointed out the injustice of subjecting Aborigines to British criminal law
if there were barriers of evidence and they had no means to enforce their legal rights in
practice:

Here frequently are they condemned on their own confession; yet say the
Legislators, “the evidence of a people who understand not the value of an
oath shall be of no avail.” Therefore they will not admit the evidence of a
native for or against another; yet will they take the confession of a person
against himself and condemn him on the facts given therein. Neither has a
native the advantages that an European has in Court: if there be any flaw
in the indictment, or any other technical error; an European, through his
counsel would reap the benefit thereof; but the native, having no counsel,
and being quite ignorant of form, is not in the least benefited thereby- and
this they call mercy to them.

As the previous chapter has outlined, Hutt dealt with the problem of asserting British
legal authority by formulating legalistic rules of capture and enforcement. In May 1839
he also highlighted the fact that Aboriginal people could not bring complaints or

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10 Hallam and Tilbrook, Aborigines of the Southwest, p.29.
11 R v Boo-goon-gwert. Court of Quarter Sessions, 3 April 1837, The Perth Gazette, 8 April 1837, p.880.
12 The Perth Gazette, 4 April 1840, ‘The Aboriginal British subjects of Western Australia, by Delta’.
evidence against Europeans who assaulted them; however this seems to have been secondary to the primary motivation for an Evidence Act.13

The lack of the ability to obtain legal evidence from Aboriginal people was highlighted by the problems of apprehending suspects in the Cook and Cox killings, which was the reason given by *The Perth Gazette* on 25 May 1839 for endorsing a policy of apprehending more Aborigines on suspicion than would normally be the case under British law. The Editor of *The Gazette* justified this approach on the basis of the difficulty of applying British law to Aboriginal people:

> It is monstrously absurd to place the savage, through the mockery of trial by jury, or to leave him unpunished, unless his offence has been witnessed by a white man, and it would be no bad hit at the impracticability of carrying the British laws into effect, if a fair proportion of the blacks who may be reasonably suspected of having committed offences, were to be taken up and bound over to keep the peace. British law would keep them bound long enough.14

The illegal practice of arresting Aborigines on grounds of suspicion had taken place at the height of hostilities in York as previously outlined. However, by 1840, at the instigation of settler-magistrates, legislation was drafted to ensure that evidence could be obtained for a complaint where Aborigines alone had witnessed a ‘crime’.15 The problems arising from the Cook trial on 1 July 1840 provided renewed impetus for a draft Bill to be put to the Legislative Council. The Editor of *The Perth Gazette* used Wannine’s re-arrest on suspicion of murder to argue for Evidence legislation similar to the New South Wales Act which had been passed on 8 October 1839.16

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16 *The Perth Gazette*, 16 May 1840. An Act to allow the Aboriginal natives of New South Wales to be received as competent witnesses in criminal cases, passed 8 October 1839.
Proposal for an Evidence Act

On 3 May 1839, Hutt sent a draft proposal to Glenelg for an Evidence Act which also provided for an extension of the magisterial powers of summary punishment to apply to Aborigines for property offences. This was based less on any benevolent policy to confer legal rights on Aboriginal people arising out of their theoretical status as British subjects, and more about bringing them under the power and influence of the colonial magistracy in the regions and in the Court of Quarter Sessions. The Bill was based on the assumption that Aborigines should be subject to British criminal law even where they had little or no understanding of that law. This led to discussion about the legal status of Aborigines and what rights if any this involved.

The Bill was specifically aimed at allowing Aborigines to give information and evidence on affirmation in criminal cases and was primarily aimed at situations where they were the only parties at the scene of a ‘crime’. Hutt argued that the proposals to bring about formal legal equality such as a mixed jury, and other legal processes would not be useful to Aborigines because they were not sufficiently civilized to understand the implications. 17 He had also outlined the costs of bringing Aborigines to Perth from outlying districts and the inconvenience to settlers, who as witnesses and jurors would be forced to leave their farms and travel to Perth. Hutt believed that juries would be prejudiced against Aboriginal people more so than magistrates who he assumed could be trained to be more impartial.18 Surprisingly he had not consulted Mackie on this proposal until 18 November 1839 after it had been publicly disclosed to the Legislative Council.19 Hutt intended to rely on trained magistrates in the regions whom he regarded

17 Hutt to Glenelg, 3 May 1839, p365; Hutt to Russell, 10 August 1840, BPP, Papers Relative to the Aborigines, pp.373-4.
18 Hutt to Russell, 19 August 1840, Papers Relative to the Aborigines, pp.374-6.
19 Mackie to Colonial Secretary, 18 November 1839, SRO, CSR, ACC 36, Vol. 75, p.149.
as a kind of protector, rather than as settlers with vested interests in protecting their property.\textsuperscript{20} In this respect the motivation for an Evidence Act differed from that of the New South Wales Evidence Act which was not tied to summary punishment provisions, and which impetus arose from the Attorney General J. H. Plunkett responding to problems of prosecuting Europeans in court after the Myall Creek massacre of 9 June 1838.\textsuperscript{21}

The proposed Act provided that Aboriginal evidence could lawfully be taken on affirmation on an inquiry or complaint or in court, whether the offence was committed by an Aboriginal person or ‘any other person.’\textsuperscript{22} Where the inquiry was preliminary to the trial, Aboriginal evidence could be taken in writing and verified by a Justice of the Peace, and subsequently used for warrants and legal proceedings normally applied to natural born subjects.\textsuperscript{23} An Aborigine did not have to appear in court.\textsuperscript{24} Hutt said that this was required because an Indigenous informant may disappear before the trial, which he attributed to their erratic habits.\textsuperscript{25} However, this process where the statement could be relied on in court would be regarded by some members of the Legislative Council as conferring an advantage in favour of Aboriginal defendants and complainants that was not available to Europeans.\textsuperscript{26}

\textsuperscript{20} \textit{The Inquirer}, 12 August 1840, p. 7. Report on Legislative Council, 6 August 1840; \textit{The Perth Gazette}, 8 August 1840.


\textsuperscript{22} An Act to allow the Aboriginal Natives of Western Australia to give information and evidence in criminal cases, and to enable Magistrates to award summary punishment for certain offences. The WA Act was intended to be passed on 2 July 1840 but was in fact passed on 13 August 1840, \textit{The Perth Gazette}, 22 August 1840.

\textsuperscript{23} Ibid.

\textsuperscript{24} Ibid.

\textsuperscript{25} Hutt to Glenelg 3 May 1839, BPP, \textit{Papers relating to Aborigines}, p.374.

\textsuperscript{26} Minutes of Legislative Council, 26 November 1841, SRO, WAS 1250, CONS 311/1, pp. 45-49; \textit{The Inquirer}, 1 December 1841, pp.4-5.
The Act that was presented subsequently to the Legislative Council on 16 July 1840 was very similar to Hutt’s draft proposal. Similarly to the New South Wales Evidence Act which was available as a model, an Indigenous person’s evidence did not carry the same weight as other British subjects, with the ‘degree of credibility’ of their evidence left to be decided by magistrates or the judge and jury. \(^{27}\) It borrowed from the New South Wales Act in that Aboriginal evidence was only conclusive if it was supported by ‘strong corroborative circumstances.’ \(^{28}\) Any affirmation perceived to be falsely made was punishable by a jail sentence. The Evidence Act was attached to another provision that allowed two or more magistrates to try Aborigines for certain offences summarily and without juries. Hutt envisaged that this would apply to offences in both towns and agricultural regions such as robbing hen-roosts, plundering gardens or stealing a stray sheep. \(^{29}\) The Evidence Act was intended to apply to agricultural regions where statements could be taken by magistrates from Aboriginal people who had little contact with settlers and British law.

Hutt reasoned that if an Aboriginal informant were ineligible to give evidence, that it would mean that colonial authorities would be unable to legally apprehend an offender, or if they were apprehended, then a conviction could not be made which would result in settlers administering illegal methods and the ‘extermination of [Aborigines as] the weaker party.’ \(^{30}\) It would also mean that ‘acting only on notorious facts, offenders in very gross cases’ would be ‘apprehended and summarily convicted by a magistrate, on legally inadmissible evidence.’ \(^{31}\) While pointing out to the Colonial Office the advantages of his proposed legislation in May 1839, Hutt added that this was not the

\(^{27}\) *The Perth Gazette*, 16 May 1840.
\(^{28}\) *The Perth Gazette*, 8 August 1840; 22 August 1840. ‘The evidence so given shall be of so much weight only as corroborating circumstances may entitle it to.’
\(^{30}\) Hutt to Glenelg 3 May 1839, BPP, p.365.
\(^{31}\) Ibid., p365.
practice in Western Australia yet. However, after the events in York a couple of months later, Hutt found himself implementing just such a practice. In his despatch to the Colonial Office on 3 May 1839, Hutt stated that while the proposed bill may appear ‘coercive’ in effect, he regarded it as a form of protection conferred by magistrates. The proposal also ‘offered the ‘additional ‘possible advantage’ to the Aboriginal person, that they might obtain redress from Europeans, for injuries inflicted which was currently out of reach.

Hutt had originally sent his draft proposal to the Secretary of State, Lord Glenelg at the same time as his vision statement for the amalgamation of Aboriginal people into colonial society, and it was received in this policy context in October 1839. On 29 October 1839, new Secretary of State, Lord John Russell (who had replaced Glenelg in August 1839) gave qualified support for a local bill to be drafted which Hutt interpreted as approval to proceed, but this qualification was not adopted by Hutt. In an internal memo to colleague, R. Vernon Smith, Stephen interpreted Hutt as posing the problem of ‘how the Aborigines could be gradually absorbed into the race of intruding Europeans so that they might live together on equal terms as one people.’ Stephen regarded that this was more likely to be achievable by missionaries acting on settler and indigene, rather than governors. He saw the British government’s role more as providing protectors to ensure justice was observed. Therefore, it is likely that Stephen viewed

32 See Chapter 4.
34 Hutt to Glenelg, 3 May 1839, BPP, *Papers relating to Aborigines*, p.365.
35 See Chapter 6.
36 Minutes of Legislative Council, 16 July 1840, WAS 1250, CONS 311/1; *WAGG*, 5 January 1839; p.218. Proclamation, 3 January 1839; These were W. Tanner, T. Peel, W. L. Brockman and G. Leake; Russell to Hutt, 29 October 1839, *Papers relative to the Aborigines*, p.367.
an Evidence Act as a form of protection that could be afforded to Aboriginal peoples to promote equal rights.\textsuperscript{39}

At first instance, the draft proposal was not commented on in detail, except that Russell gave in principle support to evidence being taken without oath, with the judge and jury to decide what the evidence might be worth.\textsuperscript{40} Russell proposed that a clause be added to the Bill that no sentencing be carried out until the chief judge had before him the evidence of the case and confirmed the sentence. Hutt did not include this suggestion in the Bill which he introduced on 23 July 1840, because of the impracticability of its implementation over a large geographical region.\textsuperscript{41} Russell also added a comment (which was not relayed to Hutt) which was probably the reason for the recommended clause that ‘the larger question of Aboriginal tribes cannot be dealt with in this cursory way.’\textsuperscript{42} It probably reflected a deeper concern that Hutt was using the criminal law by attaching an Evidence bill to summary punishment in order to control newly encountered Aboriginal tribes in the regions who had little contact with Europeans and did not understand British laws.

\textsuperscript{39} Smandych, ‘Contemplating the Testimony of ‘Others’, pp. 238-240.
\textsuperscript{40} Russell to Hutt, 19 October 1839, BPP, Papers relating to Aborigines, p.367.
\textsuperscript{41} His rationale is explained in the despatch from Hutt to Russell, 11 February 1840,BPP, p374; Minutes of Legislative Council 23 July 1840, SRO, WAS 1250, CONS 311/1. A Bill to allow the Aborigines to give information and evidence and to enable Magistrates to award summary punishment in certain cases.’ It was passed on 13 August 1840, Minutes of Legislative Council 13 August 1840, SRO, WAS 1250, CONS 311/1.
\textsuperscript{42} J. Russell, Memorandum to J. Stephen and R. Vernon Smith 19 October 1839, on back of dispatch from Hutt to Glenelg, 3 May 1839, PRO, CO 18/22, pp.232-3
Debate on the First Evidence Act

Hutt introduced the bill on 6 August 1840 to the Legislative Council, a month after the Cook trials, as an experiment which was intended to operate for two years from the date it was passed.\[^{43}\] He pointed out the advantages:

> Under the present system, if the Native felt aggrieved, he had no means of redress; the act, therefore, might be said to constitute the magistrates so many protectors of Natives, to whom reference could be made, and by whom differences could be adjusted.\[^{44}\]

Hutt also saw the legislation as a way to indemnify magistrates from illegal practices:

> It was necessary to shew the natives that a regular and uniform course would be adopted with regard to them; up to that time our proceedings towards the natives had been illegal in many instances, not perhaps unjust, but yet not according to the strict letter of the law; the bill was intended to afford protection to the Magistrates, and to give force to their proceedings.\[^{45}\]

One of the members of the Legislative Council, William Tanner (who was one of the wealthiest settlers in the colony), was happy to vote for the bill because it was only intended to operate for a short time, but he feared that the magistrates might act hastily and without due caution under it.\[^{46}\]

While there was little debate in the Legislative Council on the bill which had probably already been discussed informally a year earlier, there was discussion in the local newspaper. The Editor of The Inquirer (a settler newspaper which had started business on 5 August 1840) strongly opposed the principles of the Evidence bill, and urged that it be given careful inquiry by the Legislative Council, particularly in terms of its practical

\[^{43}\] An Act to allow the Aboriginal natives of WA to give information and evidence in criminal cases, and to enable magistrates to award summary punishment for certain offences. The Perth Gazette, 2 July 1840; Hutt to Glenelg, 3 May 1839, BPP, Papers relative to the Aborigines, p.376.
\[^{44}\] Ibid.
\[^{45}\] Minutes of Legislative Council, 6 August 1840, The Inquirer, 12 August 1840, p.7.
\[^{46}\] This was William Tanner.
workability. On 19 August 1840, the Editor expressed his surprise at the lack of opposition to the bill and criticised the remarks by a member of the Legislative Council that the Evidence Act would not be used to convict a ‘white man,’ and questioned why this ulterior motive had not been stated more openly. He predicted correctly that the difference between intention and practice would be objected to by the Colonial Office:

If it be the intention, that the act should only apply to the Aborigines, it should have been so stated, boldly and fairly, and not conveyed in the shape of secret instructions to those whose duty it may be to put the law in force; such a measure might have subjected us to the outcries of soi-disant philanthropists, but the present act will scarcely escape their vituperations, when it shall be found that it bears unequally upon the two races.

The Editor also considered that it would be impractical to expect sworn interpreters to be readily available to take depositions from Aborigines in isolated regions. This was not raised by the Council but was more likely to be a problem in the regions where Aboriginal tribes would be encountered for the first time.

Unlike South Australia and New South Wales where local Evidence Acts had first been sent to England for Royal Assent (in 1839 and 1844 respectively), the Act came into immediate operation on 13 August 1840, coupled with Hutt’s rules of enforcement and the appointment of Aboriginal police.

**Operation of the first Act.**

The Aborigines Evidence Act 1840 was in operation for just over a year before news of its disallowance reached the Colonial Office. During that time it was regarded by

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47 *The Inquirer*, 12 August 1840, p.7.
48 *The Inquirer*, 19 August 1840, p.10.
49 Ibid.
50 Ibid.
magistrates as a success because of the summary punishment provisions. Although Hutt encouraged Indigenous complaints through the Protectors against Europeans, there were few successful prosecutions under the first Act. This was because Aboriginal evidence had to be backed up with strong corroboration by settlers. By 1841, the number of petty sessions’ hearings (without a jury) increased in Albany. An Aboriginal man, Marriott, brought a complaint against a European before the Resident magistrate, J. R. Phillips, but this was dropped because the only witness, (a European) told a different version of events from him. Earlier, the Resident of Albany, George Grey, received a complaint from an Aboriginal man, Taal-wurt Tdondarup, and a preliminary local court hearing was held on 15 February, 1840. This took place before the Act had been passed, and reflected Grey’s opinion that Aboriginal people had to receive the benefits of British law as much as its obligations. Grey had encouraged Taal-wurt Tdondarup to bring a complaint for assault against a sealer who was Timorese. After an initial hearing an agreement was reached and an offer of compensation was provided by a ship’s mate of the Timorese man and Taal-wurt Tdondarup received a crown.

The Evidence Act was disallowed for a number of reasons including the fact that Hutt had not taken up Russell’s former suggestion which appeared to be more critical to approval being given than had first appeared.

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52 Marriott v Weston, SRO, WAS 1686, CONS 348/6. Information and Complaint of Marriott, 26 October 1840.
54 Ibid., p.362.
55 Ibid., p.364.
The Second Aboriginal Evidence Act

Russell specifically objected to the first Act in three main ways, firstly the combining of evidence provisions with a system of summary punishment, secondly the lack of provision in the Evidence Act for the application to civil cases. Thirdly, while Russell and Stephen were in favour of an Evidence Act, they objected to the inclusion of a statutory prescription of the extent of the deduction to be made by the judge and jury on the value of the evidence.

Russell instructed Stephen to write a ‘draft despatch’ on the legal policy issues relating to the Act. Although Stephen believed that evidence should be taken without the necessity for legislation he did not believe that the prejudice of Europeans would allow it, and he strongly supported an Aborigines Evidence Act. He believed that the general principle was that ‘every man’s statement should be received for what ‘a judge deems it may be worth,’ which in Stephen’s view was already provided by British law. This was a minority view because the Crown legal officers would later reject the New South Wales Act on the ground that it was contrary to British jurisprudence and repugnant to the Laws of England. Stephen recommended that the requirement for strong corroborative evidence be removed, as all that was required was for the unsworn testimony to lead to a ‘real and perfect’ conviction from a competent tribunal which then ought to be followed by a judicial sentence. However, he believed that this was unlikely to happen in practice as the uncorroborated declaration of an Aboriginal person

57 Russell to Hutt, 30 April 1841 which was received towards the end of 1841. pp. 377-378; Reply by Hutt to Russell, 20 January 1842 sending a new Act. BPP, Papers relative to the Aborigines, pp. 377, 398.
58 Ibid., p.378.
59 Russell to Vernon Smith, PRO, CO 18/25, p.257; Stephen to Vernon Smith 5 April 1841, on handwritten copy of Despatch from Hutt to Russell, 19 August 1840, PRO, CO 18/25, pp. 260-265.
60 Ibid.
carried ‘little weight’ with such a tribunal when ‘white men are the judges.’ In his view it would have been better ‘to have declared simply that the want of an oath should not prevent the admission for what it is worth of the evidence of a native, when the court should be convinced that the witness was unconscious of the nature and obligations of an oath.’ Stephen also recommended that the hearing of Aboriginal evidence should not be confined to criminal cases but also include civil cases.

Russell agreed that courts should receive the unsworn testimony of indigenous peoples and make any deduction about its weight and the credibility of the witness ‘which the avowed absence in his mind of the religious sanctions for truth may require.’ However, he ruled against a statutory rule to measure the extent of that deduction. Russell was referring to the requirement for strong corroborative circumstances before Aboriginal evidence could be regarded as conclusive. He stated that an English court would normally take that into account without a prescription of the kind and therefore to include it in a statute may have an unintended practical effect. He added:

> By laying down a general rule for appreciating the evidence of aborigines, which is not extended to the evidence of other persons, it affords an apology, and perhaps a valid apology, for such a practical administration of the law as may virtually exclude them from the protection of it.

Russell accepted Stephen’s recommendation of allowing Aboriginal evidence to be taken in civil cases on the basis that if it was not included, indigenous testimony could never be admitted. He added that ‘the evidence which is admitted where liberty and life are at stake, should not be excluded when proprietary interests only are in question.’

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62 Stephen to Russell and Vernon Smith, 5 April 1841, PRO, CO 18/25, pp.260-265.
63 Ibid.
64 Russell to Hutt, 30 April 1841, BPP, Papers Relative to the Aborigines, pp..377-378.
65 Ibid., p.378.
Russell did not give specific examples, but it is clear that this was consistent with his own and Stephen’s strong views on ensuring equal legal status for indigenous peoples.

Russell strongly rejected the concept of applying criminal law to Aboriginal peoples in the regions without the usual formalities of British law as for other British subjects:

> It is wise to sacrifice some immediate convenience with a view to maintain the general principle of strict legal equality, because, in the continued assertion of this principle will be found the best attainable security for maintaining just opinions, and a correct moral sentiment throughout society at large, on the subject of the rights of the native population.\(^{67}\)

The summary punishment provisions were severed from the Act, and Hutt did not reintroduce them during this term of office. The Bill was redrafted, and the requirement for Aboriginal unsworn testimony to be corroborated was removed. What remained was that the degree of credibility to be attached to the evidence was to be decided by the court and jury, or Justices of the Peace.\(^{68}\) On 10 July 1841, four months before Hutt reintroduced the Act, Mackie was appointed as an unofficial member of the Legislative Council. Hutt was in favour of legislative based summary tribunals (without juries) being applied to Aboriginal people on the grounds that it would be more efficient and less expensive from the settlers’ perspective.\(^{69}\)

On 19 November 1841, the Legislative Council entered into vigorous debate on the revisions instructed by the Colonial Office. There was strong protest at the omission of summary punishment provisions and the insistence that Aborigines should become

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\(^{69}\) Stephen, Memorandum to Vernon Smith 13 October 1840 on back of handwritten Despatch from Hutt to Marquis of Normanby, 7 May 1840, PRO, CO 18/25, p.111; Mackie to Colonial Secretary, 18 November 1839, SRO, CSR, ACC 36, Vol. 75, p.149; Minutes of Legislative Council, 10 July 1841, SRO, WAS 1250, CONS 311/1.
complainants and witnesses in civil actions. Most members believed that ‘the bill … would confer a right on the aborigines to give evidence in civil cases in which neither their interests or liberties are involved.’ Three members of the six member Legislative Council strongly opposed the bill along similar lines. There were lawyer George Leake who was one of the richest propertied colonists in the colony, Surveyor General Septimus Roe, and Richard W. Nash who was Acting Advocate General. They believed that Aboriginal people were not civilized enough to have property nor to understand civil law which was reserved to protect settlers’ property rights. This served official interests for excluding and preventing them from being able to sue for property rights. Mackie pointed out that even if civil cases were included in the Act it was unlikely to be exercised in practice. It does not appear to have occurred to them at this stage that Aboriginal complainants might want to sue for wages at a time when their employment by settlers was being encouraged in the colony. The Council members lamented the excision of the summary punishment provisions and Mackie in particular, concluded that this would mean more trials, additional costs and settler inconvenience which could have been avoided.

Nash opposed the bill on the basis that it was contrary to the principles of British law and evidence and would confer an advantage to Aboriginal people over settlers. In particular, he opposed the provision for written statements to be admitted in court without the witness being present at the trial, which he saw as giving greater weight to

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70 Minutes of the Legislative Council, 19 November 1841 and 26 November 1841, SRO, WAS 1250, CONS 311/1; The Inquirer, 1 December 1841, pp.4-5; Report on Legislative Council, 18 November 1841, The Inquirer, 24 November 1841, p.4; The Inquirer, 24 November 1841, p.2.; The Inquirer, 8 December 1841; Nash Protest.
71 Ibid.
72 Moore was on leave in England from March 1841.
74 Ibid.
the ‘uncivilized’ than even that of ‘sworn evidence of a minister of the Gospel.’ The only legal rights that Nash believed that Aboriginal people should possess were the necessity for British law to protect their physical security, or ‘affording them the protection which was due to human beings.’ He argued that the Act had suspended the ‘salutary defences’ thrown by British laws around settler rights, and that the temporary Act was intended for Aborigines ‘in compassion to their condition.’

There was a general fear that the legal rights of the settlers (and particularly property rights) would be eroded. Nash had added that the law would be dangerous to the lives, properties and reputation of settlers and to include civil actions would expose them to ‘every random injury and insult.’ Roe (with whom Leake agreed) termed it an ‘Aborigines Bill’ only, remarking that it should be confined to transactions where Aborigines were the principal actors and should only be used where crimes and offences had been committed with the knowledge of Aboriginal people themselves.

While the Editor of The Inquirer was opposed to an Evidence bill from the start, he was more vehemently opposed to Stephen and Russell’s recommendation to include civil cases, (regarded as the unwarranted interference of ‘Exeter Hall’ in London) which placed no limits on the reception of Aboriginal evidence. The Editor stated that it was an experiment rendered necessary in consequence of the frequent occurrence of outrages in which natives were concerned, and of which natives were the only witnesses; In fact, it was an act passed for the protection of native against native, and for the relief of aborigines generally by affording to the law the means of getting at the real criminal, in case of any outrage, through

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75 Minutes of Legislative Council, 26 November 1841, SRO, WAS 1250, CONS 311/1, pp.45-49; The Inquirer, 1 December 1841, pp.4-5.
76 Ibid.
77 Ibid.
78 Ibid.
79 Papers tabled on likely costs of having trial by jury. The Inquirer, 24 November, 1841, p.2.
their evidence and thus averting from the remainder the vengeance of the white.\textsuperscript{80}

He strongly opposed the Colonial Office policy of equal legal rights for Aborigines under British law, claiming that ‘the doctrine of equal civil rights can only hold good where the responsibility is equal, and among those actually forming a part of the civil polity, and it is letting sensibility run away with reason to assert the contrary.’\textsuperscript{81}

The majority of the Legislative council members (including Hutt) thought that it was more important to have an Evidence Act than not, even with the objectionable amendments of the formal legal equality proponents in the Colonial Office, which in theory gave more legal rights to Aborigines than the Legislative Council had intended.

In the end Hutt’s casting vote won the day and the Act was passed on 26 November 1841.\textsuperscript{82}

Hutt sent off the revised Act to the Colonial Office on 20 January 1842 and must have been puzzled when it was disallowed.\textsuperscript{83} In the meantime, the New South Wales Act had been received by the Colonial Office who had forwarded it to the Crown’s legal officers for an opinion.\textsuperscript{84} While Stephen wanted legislation on the grounds of policy, the law officers ruled that it was repugnant to English law and contrary to British jurisprudence. Assent was refused and consequently the Western Australian Bill was refused assent on

\textsuperscript{80} The Inquirer, 8 December 1841.
\textsuperscript{81} Ibid.
\textsuperscript{82} Hutt to Russell, 20 January 1842, BPP, Papers relative to the Aborigines, pp.398-9. Hutt urged Russell to allow him to bring in a bill giving summary jurisdiction to Magistrate in the case of Aborigines, similar to the 5, 6 and 7 clauses of the disallowed Act 4 Vic 8.
\textsuperscript{83} Stanley to Hutt, 15 February 1843, BPP, pp.401-2. An Imperial Act was contemplated. The W.A. Act had also been sent to the Law officers and disallowed; Stanley to Hutt, 4 July 1843, BPP, Papers relative to the Aborigines, pp. 426-7. This despatch enclosed a copy of the Imperial Act but by this time Hutt had already passed an Act to extend the 1841 Act for five years on 3 August 1843. This does not appear to have been sent to the Colonial Office, and in any event by 28 March 1844, the Imperial Act 6 Vic Ch 22 had been accepted by the Local Legislature.
\textsuperscript{84} Russell to Hutt, 30 April 1841 acknowledging Hutt’s despatch of 19 August 1840. BPP, Papers relative to the Aborigines, p.377.
The Western Australian Act continued in operation from 26 November 1841 for two years. When the Act was due to expire and before news was received of its disallowance, Hutt passed another Act on 3 August 1843 that extended the original Act by five years. Despite the disallowance it does not appear that the Act ceased operation. By 1844 a copy of the Imperial Act had been received authorising colonial legislatures to enact their own legislation.

The Imperial rationale was much the same for New South Wales, South Australia and Western Australia but the motivation for local implementation varied. The New South Wales evidence bill had been weighted more towards ensuring that Aboriginal people would have an avenue in court to give evidence against Europeans. This also seems to have been the motivation for the South Australian Act 1844 as well, although it did not become operational until 1846. Pope outlines how in 1842 and 1844, magistrate Edward Eyre persisted in his call for Evidence legislation in that colony on the basis that Aboriginal people should be able to access legal processes as their own systems

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85 Smandych, ‘Contemplating the Testimony of Others’, p.270. The Law officer’s letter to Stanley is dated 26 October 1842.
87 The 1841 Act was passed on 26 November 1841, and was intended to operate for two years. It did operate locally, but Assent was refused. Stanley to Hutt, 15 February 1843, BPP, Papers relative to the Aborigines, p.401. In August 1843 before Hutt learned of the disallowal of the former Act Hutt renewed the Act for a further five years until August 1848.
88 Stanley to Hutt, 15 February 1843, BPP, pp.401-2; Stanley to Hutt, 4 July 1843, BPP, p.426-7, providing a copy of the Imperial Act.
89 Smandych, ‘Contemplating the Testimony of Others’, pp.280-281; The Perth Gazette, 30 March 1844; Meeting of Legislative Council, 28 March 1844.
90 Ibid., pp.272-283.
91 Pope, ‘Aborigines and the Criminal law in South Australia’, pp.92, 95. Act No 8 of 1844, An Ordinance to allow the Aboriginal inhabitants of South Australia and the parts adjacent to give Information and Evidence without the sanction of an Oath, passed 12 August 1844. It was not in operation until 1846.
were breaking down, in order to bring complaints against other Aborigines and settlers.\textsuperscript{92} The inability to give evidence in Eyre’s opinion reinforced Aboriginal peoples’ opinions that the British law was unjust.\textsuperscript{93} This tallies more with the Colonial Office’s protectionist policy and equality under British law. However, it was not until the Imperial Act was passed that South Australian Governor George Grey (formerly Government Resident of Albany in 1839) took action.\textsuperscript{94} There were no other instances of an Evidence Act being linked to summary punishment provisions as in Western Australia at this time.\textsuperscript{95}

\textbf{Implementation of the second Evidence Act}

The second Evidence Act highlighted the tension between settlers, Colonial Office officials and APS members, the latter who were advocating for equal rights under British law as for ‘natural born subjects.’ The fact that the summary punishment provisions had been severed and were no longer operational in Western Australia meant that Aborigines prosecuted for theft continued to be sent to Perth for trial. This may have meant a reduction in the number of successful prosecutions as there were fewer cases in 1842-3.\textsuperscript{96} Additionally, the establishment of a mounted police force and Aboriginal police aides played a key role in improving the effectiveness of apprehending ‘offenders’ in places such as York, so that by 1842, reports of property theft in York had declined.\textsuperscript{97} However, by the mid 1840s, the number of convictions of Aborigines for theft in the Court of Quarter Sessions increased, with an average of ten

\textsuperscript{92} Ibid., p.90.
\textsuperscript{93} Ibid., pp. 90-91.
\textsuperscript{94} Ibid.
\textsuperscript{95} See Chapter 8.
\textsuperscript{96} A.Gill, \textit{Crime and Society Project}, BL, MN 1469, ACC 4382A/15.
\textsuperscript{97} Symmons, Protector’s Report for 31 December 1840, \textit{The Perth Gazette}, 9 January 1841, pp.1-2. At the special request of the settlers, two similar appointments have been recently made in the District of the Upper Swan and at Leschenault; Minutes of Legislative Council, 15 October 1839, WAS 1250, CONS 311/1; Hutt to Russell, 15 May 1841, BPP, \textit{Papers relative to the Aborigines}, p.383.
to twelve cases each in 1844 and 1845, which doubled by the end of 1846. This increase coincided with the pastoral expansion that was taking place by 1846-7. 

Figure 2. The pattern of pastoral expansion in the 1840s.

(Cameron, *Ambition’s Fire*, p.173.)

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98 A. Gill, ‘Crime and Society project,’ BL, MN 1469, ACC 4382A/15-16. This does not include *inter se* cases; See Chapter 7; C Symmons, Report for December 1843, *The Perth Gazette*, 13 January 1844, p.2. Symmons reported that during the last 15 months, ‘not a native subject to my jurisdiction has been arraigned at the criminal bar.’ The number of Aborigines on Rottnest Island had also gradually declined by 31 December 1843 but increased from 1844. *The Perth Gazette*, 3 January 1844, p.3. There was a general increase in Aborigines being convicted in the Court of Quarter Sessions for property theft from the mid 1840s (i.e.; in Perth from 10-15 in 1845 to nearly 30 in 1846); T. Yule, Report of Protector of Aborigines in York, 20 January 1844; *The Perth Gazette*, 10 Feb 1844, p.3; Cameron, *Ambition’s Fire*, pp.188-9.
Hutt preferred to encourage agricultural rather than pastoral activities at this time, making ‘squatting’ illegal, and discouraging the official exploration for new pastoral lands which did not resume until his departure from the colony in February 1846. By 1845 there was an increasing shift towards the decentralisation of the criminal legal system in the town of Albany where Justices of the Peace sat with juries for lesser offences.

During the Hutt period, the Evidence Act resulted in some settlers being prosecuted for crimes against Aboriginal people. From the six prosecutions that made it to trial in the Court of Quarter Sessions between 1839 and 1846, three resulted in a conviction. One involved the prosecution of settler, Charles Bussell, in the remote district of the Vasse for the manslaughter of a young Aboriginal girl, Cummangoot on 10 March 1842. Bussell had aimed a loaded gun at Cummangoot with the intention of intimidating her into confessing to a robbery of his flour store. He was found guilty of manslaughter but his lawyer managed to plead a case of accidental death and he was only given a fine of one shilling with a caution from Mackie. Nairn Clark protested at the disproportionate sentence and wrote to the Aborigines Protection Society who forwarded his letter of protest to the Colonial Office.

99 De Garis, ‘Political Tutelage,’ p.319; The issue of depasturing licenses in 1844 was a compromise.
100 The other two were: R v Wm Cooper, September 1844, Albany sessions, (An indictment was issued against William Cooper for assault with intent to rape Fereland but there was no trial or conviction) Unnumbered case, Gill, ‘Crime and Society’, MN 1469, ACC 4382A/15; R v McDonald, February 1846, Albany Quarter Sessions. James Stuart McDonald (labourer) was indicted for shooting Bobby with intent to do grievous bodily harm. He was committed for trial at the Quarter Sessions but there is no evidence of a conviction. Gill, ‘Crime and Society’, MN 1469, ACC 4382A/16.
101 R v Bussell, Court of Quarter Sessions, 1 July 1842, SRO, Criminal Indictment File, Case 271, CONS 3472/52; The Inquirer, 13 July 1842. ‘White-Fellow’, Letter to the Editor.
102 Ibid.
103 Stanley to Hutt, 26 July 1843, BPP, Papers relative to the Aborigines, pp.429-9, enclosing a copy of a letter from Nairn Clark to the APS dated 20 January 1843 which reports on the Bussell case in which Nairn Clark states that he was at the trial and that Bussell pleaded guilty to manslaughter (used a defence
but nothing came of it. While Hutt encouraged investigations of settlers who committed
offences under British law against Aboriginal people, once the matter reached the courts
or a magistrate, he was unlikely to interfere.\textsuperscript{104}

Another case was that of labourer and bailiff, James Stoodley, who beat an Aboriginal
elder Wabbamarra to death with a whip on a remote pastoral station.\textsuperscript{105} On 19 March
1842, Stoodley was charged with manslaughter but released on a legal technicality. The
second conviction was that of victualler William Rolfe Steel, who was charged with the
‘assault and battery’ of an Aboriginal woman Elup, whose complaint was taken under
the Evidence Act before committing magistrates and read out in the Court of Quarter
Sessions on 3 January 1844.\textsuperscript{106} Steel was found guilty and fined five pounds. The third
conviction was that of labourer Robert Connacher who was charged with the
manslaughter of an Aboriginal woman, and tried on 1 April 1846.\textsuperscript{107} He received a
recommendation for mercy from the grand jury and was sentenced to twelve calendar
months gaol.\textsuperscript{108} Most of the cases involving settlers were pressed after Hutt or the
Protectors urged their investigation. Grand juries had the power to assess if there was
sufficient proof for the stated charge, and were generally prejudiced in favour of settler
interests. This, along with the availability of lawyers to defend the accused, meant that

\textsuperscript{104} Colonial Secretary to Government Resident York, 22 February 1839, No 127, CSR 49/12, Colonial
Secretary to Resident Albany, R Spencer 7 March 1839, No 150, SRO, CSR, ACC 49/12, p.135.
\textsuperscript{105} R v James Stoodley, 3 April 1844, The Perth Gazette, 6 January 1844, p.2; The Perth Gazette, 27 April
\textsuperscript{106} R v W. R. Steele, 3 January 1844, The Evidence Act 4 and 5 Vic No 22 (the 1841 Act) was referred to
in the Perth Gazette, 6 January 1844, p.2, reporting the case in the Court of Quarter Sessions of 3 January
1844.
\textsuperscript{107} R v Connacher, 1 April 1846. (Committed for trial on 14 January 1846), Case 359; Gill, Index, BL,
MN 1469, ACC 4382A/16.
\textsuperscript{108} Ibid.
charges were downgraded or they received lighter sentences. However, once Hutt left the colony, fewer cases against Europeans were prosecuted.

The Colonial Office policy of equal legal status as incorporated in a colonial Aboriginal Evidence Act in the early 1840’s theoretically resulted in expanded legal rights for Aborigines in Western Australia. However, the implementation of such legal rights relied on the discretion of colonial officials being prepared to inform Aborigines of these rights and magistrates prepared to adjudicate them. There were few civil cases in the towns which reflected Mackie’s intention evidenced by his earlier statement in the Legislative Council. In general, any dispute involving Aboriginal employees relied more on informal dispute resolution involving the Protectors than the courts. In 1843, the first recorded court case was when Moyen (who had been educated at the Wesleyan mission) sued his employer in the Court of Requests in Perth. The Court of Requests was a civil court that was established statutorily in 1842 and allowed (among other things) youths under 21 years to sue for wages for amounts less than £10; where oral arguments were admitted. Edward Landor, whom had been appointed in November 1841 by Hutt to defend Aborigines from time to time, was now Commissioner of Requests. In April, Moyen sued a market gardener, William Lewington, for recompense of wages of half a crown. Although Lewington denied making an oral agreement with him, Moyen’s evidence was corroborated by Doton, (who also had been educated at the Wesleyan mission.). Moyen won his case and Lewington was ordered to pay his wages and costs. Landor censured Lewington for attempting to

109 Hutt to Glenelg, 3 May 1839, BPP, Papers relative to the Aborigines, p.364.
110 There were more absconding cases. As a complete survey of civil cases has not been undertaken, more formal processes may be revealed.
111 Moyan or Mooyan.
112 Russell, A History of Law in Western Australia, p.174, The Court of Requests was a civil court set up in 1842 under statute, 6 Vic No 13.
113 Hutt to Stanley, 6 April 1843, 19 June 1843, BPP, Papers relative to the Aborigines, pp.422, 425.
114 The Court of Requests, 31 March 1843, The Inquirer, 5 April 1843.
115 Ibid.
defraud Moyen out of the agreed sum for his services, which he stated was an ‘attempt founded upon the apparent helplessness of the native to obtain his rights.’\textsuperscript{116} Ironically, this was held up by the Editor of \textit{The Inquirer} who had originally opposed the Evidence Act, as the ‘first instance in this colony in which an aboriginal native has figured as plaintiff; thus asserting his right to equal laws and equal justice with his fellow subjects the white population.’\textsuperscript{117}

In many respects, Hutt’s policies reflected a more humanitarian view than the majority of magistrates and many of the settlers in relation to the Aboriginal people. There was a large effort by Hutt to ensure that magistrates adhered to legal forms and did not take matters into their own hands, however he also gave them unprecedented power which would later enshrine inequalities in law and procedure.\textsuperscript{118} By 1841, Hutt’s civilisation policy was being implemented with limited success and funds, primarily in Perth, Fremantle and Albany, which coincided with general and specific legislation being applied to Aboriginal people in towns\textsuperscript{119} Aborigines who were employed by settlers or the government were more likely to be caught by general legislation that applied to settlers as well as to them specifically, such as the Master and Servants Act 1842.\textsuperscript{120} This was a double dose of subjection, where legislation was applied to prevent interference with the objects of ‘civilisation’ which focused on labour and education.\textsuperscript{121}

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\textsuperscript{116} Ibid.
\textsuperscript{117} Ibid.
\textsuperscript{118} Colonial Secretary Circular to magistrates, 19 May 1843, \textit{The Inquirer}, 31 May, 1843.
\textsuperscript{119} Green, ‘Aborigines and white settlers’, pp. 90-92; An Act to prevent the enticing away the Girls of the Aboriginal race from School, or from any service in which they are employed, 1\textsuperscript{st} August 1844.
\textsuperscript{120} 6 Vic No 5, Provision made for a summary remedy in certain cases of breach of contract between masters and servants. 2 or more JP being authorised to fine and imprison recalcitrant servants or to order masters to pay wages due; Russell, \textit{A History of the Law in WA}, p. 174. You-yat and War-bung-ga from the ‘native institution’ were summarily convicted under the Master and Servants Act. You-yat received three months and War-bung-ga six weeks gaol; \textit{The Perth Gazette}, 12 August 1843.
\textsuperscript{121} An Act to prevent the enticing of Aboriginal girls from school or employment 8 Vic No 4 of 1844.
\end{flushright}
The Aborigines Evidence Act appears to have lapsed in August 1848, because the Act came up for ‘revival’ in April 1849. This occurred at the same time as the Summary Trial and Punishment of Aborigines Act was passed in April 1849, which coincided with the arrival of a new Governor Gerald Fitzgerald. The debate on the revival of an Evidence Bill was regarded as if the former Evidence Act had never existed. Mackie noted that a bill had been drafted in accordance with the law in New South Wales. He may have been referring to the New South Wales Act 1839 which had not been assented to by the Colonial Office, or the 1844 bill which had been rejected by a squatter dominated New South Wales legislature. Mackie referred to South Australian and New South Wales legislation rather than to the former Western Australia Act. He advised that the South Australian Evidence Act included civil cases so as to provide for the recovery of debts which information he was providing to the Council, but not with the intention of proposing an amendment. It was not Mackie but George Leake who recommended the extension of Aboriginal evidence to civil cases. Leake asked Fitzgerald whether the bill was intended to apply to civil and criminal matters because Aboriginal people were now being extensively employed by settlers, and in cases of disputes their wages were not recoverable because their evidence was inadmissible. This shift in attitude from the early 1840s coincided with a marked increase in the employment of Aborigines by settlers in the colony including the York district, which

122 Minutes of Legislative Council, 18 April 1849, CO 20/6, Reel 1121, p. 265; Fitzgerald to Earl Grey, 18 May 1849, CO 18/50, Reel 442-443, pp.399-400. 'The revival and making perpetual of this ordinance was found to be absolutely necessary to the ends of justice, no complaint of its working being made on the contrary, the Aborigines have generally proved themselves of the trust and confidence reposed in them by its clauses.'
123 Minutes of Legislative Council, 18 April 1849, 25 April 1849, 3 May 1849, 9 May 1849, CO 20/6, Reel 1121, pp.273, 277, 284, 289. The two Acts were approved by the Colonial Office and gazetted on 18 June 1850; The Perth Gazette, 21 June 1850. 12 Vic No 14, An Ordinance to revive and continue and ordinance instituted 'An Act to allow the Aboriginal natives of WA to give information and evidence without sanction of an oath'.
124 This was either a copy of the 1839 or 1844 Bill as there was no Aborigines Evidence Act in NSW until much later.
126 Minutes of Legislative Council, 18 April 1849 and, 25 April 1849, CO 20/6, Reel 1121, pp.265-277.
127 Minutes of Legislative Council 25 April 1849, CO 20/6, Reel 1121, p.277; Western Australian Almanack, 1849, Census, BL., p.34.
when the first census was taken in October 1848 amounted to 541 Aborigines casually and regularly employed by settlers, out of a total of 1960 estimated to be in ‘located districts.’ 128 This is quite a significant number when you consider that the European population at this time was 4430. 129 Fitzgerald replied that it would be unjust to confine Aboriginal evidence solely to criminal cases. 130 By 1848, Aborigines were being prosecuted for \textit{inter se} offences under the full penalty of British law and a Summary Punishment Act was about to be debated and passed in the same session, which was probably the main reason why the Evidence Act was revamped.

During the late 1840s, there was an increasing departure from adhering to legal procedure in the Court of Quarter Sessions in Perth as Nairn Clark pointed out. 131 The decision to develop a separate jurisdiction through the Summary Punishment Act for Aborigines in the regions had been made that departed from legal processes and even lowered the standard of Aboriginal evidence required. Nairn Clark protested at the lack of ‘standing’ defence counsel for Aborigines accused of offences where they had no knowledge of the law under which they were being tried. He also criticised the lack of impartial interpreters in the Court, where the only interpreter acted for the Crown. 132 Nairn Clark argued for mixed juries of six Aborigines and settlers, suggesting that six of his countrymen empanelled to do him justice were required ‘as he may be regarded in the light of an alien until the British government give the aborigines…recompense for

\begin{itemize}
\item 128 Ibid.
\item 129 Ibid., p.45.
\item 130 Minutes of Legislative Council 25 April 1849, CO 20/6, Reel 1121, p.277; No 14, An ordinance to revive and continue an ordinance entitled an Act to allow the Aboriginal Natives of Western Australia to give information and evidence without the sanction of an oath. A copy of this later Act has not been found. It appears that the decision was made to use the original 1841 Act (and the 1843 extension) and make it perpetual. See notation on last page of copy of 1841 Act which says ‘made perpetual by 12 Vic No 14. 1849,’ LL, Acts of Council B, 1832-1853.
\item 131 Nairn Clark to Russell, 8 January 1842, PRO CO 18/33, p.295; The \textit{Inquirer}, 12 July 1848.
\item 132 Ibid.
\end{itemize}
their lands.\textsuperscript{133} He had perceptively related the criminalisation of Aboriginal people through the courts as a form of governance that had avoided negotiating with them over their lands. However his efforts were disregarded by Mackie who responded by stating that ‘the aborigines were British subjects, and that a jury of British subjects were there to try them.’\textsuperscript{134} By 1855 the grand jury system had been quietly abolished in the colony, leaving only ordinary juries.

It was not until 1859 that there was a conviction of a European for the wilful murder of an Aboriginal man that resulted in the death sentence being carried out for the first time. In October 1859 the Evidence Act was used to prosecute a convict, Richard Bibby for the wilful murder of Billamarra at the Upper Irwin.\textsuperscript{135} Bibby had used a defence that Billamarra had stolen a sheep when in fact Bibby was attempting to kidnap an Aboriginal woman. Gin-bar-oo was a witness against Bibby, stating that he had seen him with a pistol in his hand standing over Billamarra who he had just shot dead.\textsuperscript{136} It might not have been a successful conviction if a European had not witnessed the event casting doubt on Bibby’s defence. The Editor of The Inquirer pointed out that the fact that there had not been a robbery made the case more worthy of a conviction and severe punishment.\textsuperscript{137} They also added that if the victim had been ‘white,’ no more thought would have been given to the question of execution. By this time the first Irish born English judge, Alfred McFarland had arrived in the colony in 1857 to replace Mackie who had retired, bringing with him formal English procedure into the Criminal court in Perth. Some settlers believed that Bibby’s status as a ticket of leave man with former

\textsuperscript{133} Ibid., p.295.
\textsuperscript{134} The Inquirer, 12 July 1848.
\textsuperscript{135} R v Bibby, Court of Quarter Sessions, 5 October 1859, The Inquirer, 12 October 1859, p.2.
\textsuperscript{136} R v Bibby, Case 802, Gill, ‘Crime and Society Project’, MN 1469, ACC, 4382A/20, Case 802, Richard Bibby was a labourer and ticket of leave man in Champion Bay. Another labourer Edward Cornellie also heard Bibby state his intentions of killing Bibby before hand.
\textsuperscript{137} The Inquirer, 26 October 1859.
convictions, had been the main reason why he was chosen as an example rather than well known ‘respectable’ settlers who were known to be engaged in similar practices. Bibby was the first European executed for the murder of an Aborigine in the colony.

This chapter has shown that there was a different impetus for an Aboriginal Evidence Act in Western Australia from that which Stephen and Russell at the Colonial Office had intended. The Act was developed in response to local circumstances and the sense of urgency fuelled by the desire for magisterial control to punish Aboriginal people for property offences in the regions, and the Cook trial. However this sense of urgency resulted in the Act being accepted with its unpalatable conditions, in the only real success for Stephen and Russell of racial equality under British law. The outcome alone reflected the sense of urgency arising from settler-magistrates (members of the elite land holding group) who demanded a legalistic solution for the problems of theft of settlers’ unprotected sheep. Hutt also saw it as limiting the excuse of settlers to exercise the right of self defence. This resulted in a contest on what kind of legal rights should be extended to Indigenous people, between proponents of the equality principles underlying the rule of law, namely Stephen and Russell and the colonial government who did not believe that Aborigines could have the same kind of legal rights as other British citizens. Aborigines clearly were not seen by most settlers as having the rights of natural born British subjects which attitude is reflected in other social and racial attitudes towards Aboriginal lifestyle and laws. The intention of Colonial Office policy (and APS lobbying) was to enact an Evidence Act in order to bring legal practice closer to the policy that Aborigines should be on equal terms with other British subjects, but this was not the intention of the colonial government for such legislation.

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139 *The Perth Gazette*, 21 October 1859.
The optimum standard achieved by the Aborigines Evidence Act relied on the colonial government enforcing the higher standard. Hutt was one of the few who attempted to give practical effect to the equality of Aborigines’ physical protection by prosecuting Europeans under British law, although even he could not control the decisions of grand juries that often resulted in reduced sentences or acquittals.

Nash believed that the only rights arising from the Act should be the protection of Aborigines’ physical security from unprovoked attacks by settlers. This was a narrower version of protection than the Colonial Office envisaged for Aboriginal British subjects in the late 1830s and early 1840s. Giustiniani and Nairn Clark recognised that the imposition of British law meant that rights had been taken away and nothing was replacing the ongoing Aboriginal dispossession from their land. Nairn Clark had argued for mixed juries to provide an Indigenous perspective of justice because Aboriginal land had not been compensated for and Aborigines had not consented to be British subjects.

Unlike New South Wales and South Australia (who did not have an Evidence Act tied to summary punishment provisions) the main impetus for the Western Australian Evidence legislation was focused more on protecting the lives and property of settlers and indirectly, the prevention of escalating conflict by ensuring an expedient process for the punishment of Aborigines. It may therefore have initially had a more economic function than a physical one. This is especially the case when taken with the purpose of the Summary Punishment Act which is examined in Chapter 8.

Stephen supported Hutt’s amalgamation vision which he regarded as ensuring that Aborigines were brought on equal terms with settlers. He regarded the Protectors as ensuring that Aborigines were protected under British law against unscrupulous settlers,
which included defending Aborigines in court (to go with the evidence legislation). However, the protectionist policy that assumed that Aborigines should be regarded more as children, and legal equality did not sit well together. While Hutt did encourage Protectors and magistrates to investigate the settlers’ actions against Aboriginal people more than other governors, it was inevitable that the roles of Protectors would shift towards settler interests especially after the recruitment of settlers-pastoralists, such as Bland as protector in October 1842.

Hutt was not aiming to make the status of Aborigines equal under British law, as the Colonial Office anticipated. This was because he thought that settlers would object to any other option other than Aborigines as a useful labour force. This meant that the legal position of Aboriginal people was modified to a different ‘class’ of subject, even within the pale of British law, in towns and settlements. Chapter 8 covers the period from the mid 1840s, when a separate criminal system based on Hutt’s legal framework would be pursued to apply to Aboriginal people with renewed pressure for the implementation of Summary Punishment legislation.
Chapter 6
The debates regarding Aboriginal status and land rights

There were debates on Aboriginal land rights in Western Australia during the 1830s and early 1840s which arose from local causes and the effects of the humanitarian influence in England. This chapter argues that during the 1830s there was official recognition that Aboriginal people had land rights that survived annexation by the British government, as a result of their continual protests that their lands were being taken from them. However, these rights were largely ignored in practice in favour of settlers who wanted to enforce what they regarded as a civil law contract with the British government for their own rights to cheap land.

It was not until after the extent of the conflict in Tasmania was reported in Britain in 1831, that there was criticism by some Europeans of the method of colonisation. In August 1832, Goderich supported Arthur’s recommendation for settlers to purchase land from Aboriginal peoples. This was an acknowledgement by the British government that Aborigines had land rights that survived sovereignty and that this encroachment was the cause of the conflict between settlers and Aborigines in the Swan River Colony. However, despite this recommendation there was no government response to a proposal from Aboriginal people for an agreement to purchase their rights in land and for co-existence until 1836. It took place at a time when the problem of encroachment was most intense in the Swan district (including Perth), where Aboriginal people protested at not being able to access their land and rivers and settlers complained of the taking of their personal property. By 1836 most of the land around the Swan district was privately
owned by settlers, except for portions along the Swan river foreshore and even this, the settlers wanted to purchase from the colonial government.¹

The chapter examines the nature and significance of the proposals that were made and argues that the British and colonial governments increasingly recognised the prior rights of Indigenous people to their land. However, this was tempered by assumptions about the superior rights of British proprietary interests and judgments about Indigenous societies on a scale of ‘civilisation.’ However, by February 1837, the potential to resolve the land question had disappeared with an official shift towards regarding Aboriginal people as trespassers and criminals to be dealt with by magistrates and the Criminal courts, and sentenced to transportation on Rottnest Island. This coincided with the lack of willingness to acknowledge land rights until the impact of the recommendations of the 1837 Aborigines Committee in the early 1840s. By this stage, any Colonial Office policy on the subject was closely allied to Wakefieldian ideas of raising revenue from the sale of Crown land to save the Imperial expenditure for the economic development of colonies.

**Territorial status and the contest over land**

The colonists acquired land which the British government initially granted to them free, subject to generous conditions which required that the land be cultivated or improved to be of economic value. Settlers associated wealth and social standing with the ownership of ‘cultivated’ land, values that differed from those of Aboriginal people.² These values found their way into Imperial legislation and the application of legal principles. The political goals of colonisation also influenced what kind of legislation was drafted.

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¹ Bourke, *On the Swan*, p.123; Minutes of Executive Council, 8 September 1836, CO 20/2, Reel 1118, p.151.
Stirling had pressured the British government for a settler-funded colony, and in 1829 an Imperial Act was hastily passed by the British Parliament that stated that settlement was to occur on the ‘wild and unoccupied lands on the west coast of New Holland,’ which settlement would be known as Western Australia. This, and the reliance on annexation based on the legal right of occupancy was the authority by which the British government appropriated land from Indigenous people and allocated it as free grants to settlers. However, by August 1832 there was a significant shift by the British government from assuming that the land was ‘unoccupied’ to acknowledgement that Aboriginal people existed and were of sufficient numbers (especially after settlers were dispersed) to become an economic and physical threat. This arose after it was realised that Aboriginal people were resisting the settlers’ encroachment on their land, a fact that Goderich concluded was the reason for the conflict when he forwarded Arthur’s proposal to Stirling, recommending that settlers enter into agreements with each tribe.

It was not until after there was a series of violent conflicts with Aboriginal tribes from May 1830, that some perceptive settlers criticised the method of colonisation that had failed to negotiate with Indigenous people on land rights. By the mid-1830s, Moore described the method of colonisation as a ‘conquest’ and Stirling as an ‘invasion’. This realisation arose in the political and economic context of a protest by settlers at what they believed was a breach of contract with the British government regarding the ‘quiet

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4 *The Perth Gazette*, 2 November 1840, Colonial Office land conditions, 5 December 1828. The conditions were that settlers had to improve, cultivate or reclaim the land from its ‘wild’ state to the satisfaction of the Government within 21 years from the date of the grant. These regulations were subsequently changed to 10 years.

enjoyment’ of their land grants. While many settlers in the Upper Swan attributed the violent conflict to Aboriginal people’s loss of subsistence and access to their hunting grounds, some settlers and magistrates went further and proposed an agreement with local Indigenous owners in an effort to prevent any more attacks on them and their livestock. However, while settlers would have known through correspondence and newspapers about the ‘Black War’ in Tasmania, they were unaware that Arthur had reached a similar conclusion and that the Colonial Office had endorsed this view on 16 August 1832 by sending Arthur’s proposal to Stirling. This recommendation was acknowledgment that Aboriginal peoples existed, that they had land rights and that they should be compensated to enable settlers’ peaceful occupation of the land.

Arthur’s recommendation for agreements with Aboriginal ‘tribes’.

The first sign of a shift in policy regarding Aboriginal peoples of Western Australia by the Colonial Office was when Goderich sent a dispatch to Stirling on 16 August 1832. This had been made in response to Stirling’s report which was sent on 30 November 1831, of increasing violent conflict from hostile Aboriginal tribes ‘inhabiting the district around Swan River’ where settlers had resisted persistent efforts to take their personal property. At the same time, Stirling reported that he had ‘occupied’ good pasture land at York and that there were now a few settler families living there. Goderich warned him against an escalation of conflict and proposed that he adopt Arthur’s suggestions. He referred to the violent conflict in Tasmania and how Arthur believed that more

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7 See Chapter 2.
8 Goderich to Stirling, 16 August 1832, CO 397/2, Reel 304, pp.113-118; Arthur to Goderich, 7 January 1832, BPP, Correspondence and others Papers relating to Aboriginal Tribes in British Possessions, (1834), Vol. 3, IUP, 1968, pp.162-163.
9 ibid.
10 Stirling to Goderich 30 November 1831, SRO, WAS 1180, CONS 42/1, p.150.
11 Ibid.
12 Goderich to Stirling, 16 August 1832, CO 397/2, Reel 304, pp.113-134.
‘kindness and attention shewn towards these people in the first instance, would have prevented much of the annoyance which settlers had subsequently experienced.’

Goderich recommended that Stirling cultivate ‘a friendly intercourse with the natives of Western Australia by adopting the course which Colonel Arthur’s experience has pointed out as the most likely to avert the evils to which a different system has exposed the settlers in Van Diemen’s Land.’ At the same time, Goderich acquiesced to Stirling’s request to send additional troops by replying that the Governor of New South Wales, Sir Richard Bourke, had been asked to send two companies of soldiers if he could spare them.

Arthur recommended that as the colony of Western Australia had been exposed to the same ‘evils’ which had taken place in Tasmania as a result of the ‘opposition of the Aborigines,’ that one of the first steps taken by the colonial government should be the establishment of a ‘friendly understanding’ with the Aborigines. He recommended:

Some two or other discreet persons will be beneficially employed from the origin of the colony, to learn the native language, and keep a direct intercourse with the Aborigines; and the utmost care should be taken to make them presents (the most trifling will satisfy them) for whatever land is taken possession of by the British settlers; for as each tribe claims some portion of territory, which they consider peculiarly their own, they should be in some formal manner satisfied for bartering it away; a negotiation which they perfectly comprehend.

Arthur had learnt this lesson as a result of the violent conflict with the Aboriginal peoples of Tasmania, which he attributed to bad colonisation policies and which he argued could have been avoided or minimised if treaties had been entered into with Aboriginal peoples from the outset. The Colonial Office had been concerned at the

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13 Ibid., pp.113.
14 Ibid.
15 Ibid., p. 114.
16 H. Reynolds, Fate of a Free People, Ringwood, Penguin, p. 122.
17 Arthur to Goderich, 7 January 1832, BPP, Correspondence and others Papers (1834), pp.162-163.
possible public embarrassment in Britain from the Tasmanian violence which had been reported in Parliament in 1831 as the worse example of colonisation that had seen the near destruction of Aboriginal peoples.\textsuperscript{18} The implications of the wide dispersal of settlers in Western Australia occupying a region far larger than Tasmania was also a factor. The recommendation had been forwarded to Stirling a year after Goderich had introduced new Land regulations on 28 April 1831 abolishing free grants for new emigrants, and which authorised the sole method of sale of Crown lands by public auction at an upset price of five shillings an acre, similarly to New South Wales and Tasmania. This was made with the intention of providing revenue to fund the emigration of British labourers and other infrastructure, and concentrate colonial settlement.\textsuperscript{19} However, depressed economic conditions in the colony meant that this revenue was not yet available and this measure was strongly resisted by the settlers who preferred the more attractive original grants system.\textsuperscript{20} Goderich realised that his regulations would have little effect in containing the dispersal of settlers as Stirling had already issued large grants of land, and Goderich proposed raising revenue from leasing Crown land for sheep grazing as in New South Wales.\textsuperscript{21} There was no financial support from the British government for Arthur’s proposal and Goderich probably anticipated that the relatively low cost would be borne by the settlers.\textsuperscript{22}

Eight months later, on 24 September 1832, Arthur emphasised his point more strongly to the British government, when he wrote to Under-secretary Robert Hay (who received the despatch on 15 February 1833) about the proposed colonisation of Spencer’s Gulf in

\textsuperscript{18} House of Commons, ‘Copies of all Correspondence between Lt.Governor Arthur and His Majesty’s Secretary of State for the Colonies, on the Subject of the Military Operations lately carried on against the Aboriginal inhabitants of Van Diemen’s Land’ 23 September 1831, reproduced in BPP, \textit{Correspondence and Papers relating to the Government and Affairs of the Australian Colonies}, (1830-1836), Vol. 4, Shannon, IUP, 1970, pp. 173-237.

\textsuperscript{19} Goderich to Stirling, 28 April 1831, (No. 1) CO 397/2, Reel 304, p.64 ; Burroughs, \textit{Britain and Australia}, pp.3, 35-47.

\textsuperscript{20} Ibid.

\textsuperscript{21} Goderich to Stirling, 28 April 1831, (No 2) (acknowledging Stirling’s 18 October 1830 despatch), CO 397/2, Reel 304, pp.78-85.This despatch enclosed the Imperial Act, 10 Geo 4 c.22.

\textsuperscript{22} Cameron, \textit{Ambition’s Fire}, p. 128.
South Australia by a chartered company of Wakefieldan supporters who expected to create a Land Fund for emigration. Arthur proposed:

It was a fatal error from the first settlement of Van Diemen’s Land, that a treaty was not entered into with the Natives, of which Savages will comprehend the nature- had they received some compensation on the territory they surrendered, no matter how trifling, and had adequate laws from the very first been introduced and enforced for their protection, His Majesty’s Government would have acquired a valuable possession without the injurious consequences which have followed our occupation, and which must forever remain a stain upon the colonization of Van Diemen’s Land.

Arthur framed his proposals in terms of what he regarded as the general problems of colonisation and the disappointment encountered by emigrants to Western Australia (many who were now in Tasmania). He added that the retarded growth of the Swan River Settlement was due to failed expectations on a number of matters, including the lack of fertile agricultural soil near Fremantle and Perth, lack of knowledge of the interior, as well as the ‘unfriendly disposition and depredations of the aborigines.’

This was the basis on which Arthur proposed agreements, by recommending that any land that settlers ‘may wish to occupy’ could be ‘formally purchased’ with ‘such baubles as they will consider a remuneration,’ with the objective of removing barriers to colonisation experienced in colonies such as the Swan River settlement. The colonising project in Spencer’s Gulf had already been disallowed by the Colonial Office and the question of colonising South Australia was not referred to again until 1834.

Arthur believed that ‘trifling presents’ (in relation to West and South Australia) would be sufficient to persuade Aboriginal tribes to give up their land, move onto reserves, and

23 Burroughs, Britain and Australia, p.172. The Ripon regulations were named after the Earl of Ripon, Viscount, Frederick, John Robinson Goderich.
receive the benefits of British civilisation and protection.\(^{26}\) This reflected the assumption that Indigenous societies in Australia did not place a high economic and cultural value on land. Glenelg wanted the colonising company to finance such an agreement with the Crown, with Protectors to negotiate on behalf of Aboriginal people over their lands.\(^{27}\)

Arthur also proposed in September 1832 that agreements could be funded from the sales of Crown land in Tasmania, and recouped from later sales to emigrants in South Australia. In relation to Western Australia, separate agreements were to be negotiated by agents on behalf of the settlers (and by implication the local government) with each tribe, prior to settler occupation of each tribe’s territory. It was expected that Indigenous peoples would surrender their land for a ‘trifling amount’ thereby providing a cost-effective solution for settlers and the colonial government, rather than the greater physical and economic cost of violent conflict. Unlike Western Australia, which had been colonised for three years when Arthur made his proposal in 1832, in the case of South Australia, Arthur proposed that the British government and the South Australian Commissioners enter into a treaty prior to the arrival of the colonists.\(^{28}\) In both cases, the low economic cost would be borne from the revenue obtained from the sale of lands to settlers. Both Goderich and Arthur agreed that the economic costs of a war were outweighed by the benefits of negotiating with Aboriginal tribes, as Lyon had also emphasised when he made his local proposal for peaceful co-existence.

After the announcement of the establishment of a colony in South Australia, on 27 January 1835, Arthur sent another despatch along similar lines to the temporary


\(^{28}\) Ibid.
Secretary of State Thomas Spring Rice, which was read by the new Secretary of State, Lord Glenelg in April 1835. Glenelg sent a copy to the South Australian Colonisation Commissioners at a time when South Australia was still in the process of being colonised, which proposed that they enter into an agreement with Aboriginal peoples to purchase their lands. However, this did not happen because of the resistance of the South Australian Commissioners who claimed legal authority under the South Australia Act which had already been passed by the British parliament on 15 August 1834, before Glenelg became Secretary of State. The Act provided for the establishment of the colony and declared the lands that the British government were claiming as British territory to be ‘waste and unoccupied, which are supposed to be fit for the purposes of colonisation.’ The Act was later severely criticised by the Aborigines Committee because of obvious contradictions with the colonising company’s report that stated that large numbers of Aboriginal people had been seen along the coast, pointing out that in fact they occupied the land and that their land rights should be recognised. The Colonial Office held up the colonising project in South Australia during this period until 1836, because of concerns about the proprietary title of Aboriginal peoples. However, Robert concludes that there was a general resistance by the colonising companies towards Aboriginal land rights in South Australia, let alone enshrining them in law. The fact that there was an Imperial Act that made no reference to the legal rights of Aboriginal peoples to their land was relied on as a precedent by the colonising company in future transactions with Glenelg.

30 Reynolds, *Fate of a Free People*, p.122.
35 Robert, ‘Colonizing concepts,’ p.117.
There has been very little analysis of the significance of Arthur’s proposal in relation to Western Australia.\textsuperscript{37} The Goderich despatch is important because it marked a departure from the assumptions underlying the act of territorial acquisition and the Imperial Act of 14 May 1829, which authorised possession of what was assumed to be ‘wild and unoccupied’ lands.\textsuperscript{38} By forwarding the recommendation, Goderich acknowledged (as Glenelg did in relation to South Australia) that there had been no negotiation with Aboriginal peoples over their title to land.\textsuperscript{39} It meant that the British government implicitly if not explicitly recognised that Aboriginal peoples had prior land rights, which they had not given up to the British government when possession was claimed on the basis of occupancy in 1829, or earlier in Albany.\textsuperscript{40} It also recognised Indigenous rights to sell their interests in land to the government, no matter how low on the scale of civilisation these interests may have been regarded. While Arthur’s proposal for agreements involved negotiating Aboriginal land rights, it assumed to a large extent their removal from their lands onto reserves, which would leave the settlers to enjoy their grants.\textsuperscript{41}

\textbf{The local impact}

Despite protests by Aboriginal people that their lands were being taken and Goderich’s endorsement of Arthur’s proposal, there was no decision made by the colonial government to negotiate an agreement to purchase Indigenous lands in the early 1830s. Stirling had been absent from the colony at the time that Goderich’s despatch had been

\textsuperscript{37} G.R. Mellor, \textit{British Imperial Trusteeship 1783-1850}, London, Faber and Faber Ltd, 1951. p.299.
\textsuperscript{38} Russell, \textit{A History of the Law in Western Australia}, pp.61, 329. Appendix 1, 10 Geo IV, c.22, 1829.
\textsuperscript{39} Goderich to Stirling, 16 August 1832, CO 397/2, Reel 304, pp 113-118.
\textsuperscript{40} Russell, \textit{A History of the Law in Western Australia}, pp.247-8.
\textsuperscript{41} Ryan, ‘Aboriginal Policy in Australia- 1838,’ p.15.
received in April 1833, and Irwin was Acting Governor. At this time, Yagan had been declared an outlaw rather than regarded as an Indigenous leader with whom agreements could be negotiated. Ironically, the despatch was received by Irwin several months after the rejection of Lyon’s proposal to negotiate an amicable agreement of peace with Aboriginal people.\(^{42}\) Instead, Irwin urged the Colonial Office to support Stirling’s proposal for a ‘Superintendent of Native Tribes’ and mounted police force, to control Aborigines. He also reported how he had ordered the distribution of flour to local Indigenous tribes in Albany and encouraged others near Perth to barter fish for flour.\(^{43}\) It was not until after Yagan was killed in July 1833 that thought was given by settlers to a ‘conciliatory’ policy, shortly before Irwin returned to England in September 1833. This was a time when the settlers’ desire for reaching a more permanent understanding with Aboriginal people was at its height. \(^{44}\)

On 23 September 1833, the Goderich despatch enclosing Arthur’s proposal for agreements was discussed by the Executive Council.\(^{45}\) Earlier, Munday and Miago, referred to as representatives of Yellagonga’s and Yagan’s tribes sought a meeting with the colonial government, with Armstrong acting as interpreter.\(^{46}\) Among other things, Munday protested at the way that settlers had taken over Aboriginal lands, forced them to come into conflict with other tribes and allowed their dogs to drive the kangaroo away.\(^{47}\) Irwin suggested a general meeting with all the tribal groups around Perth, but was told that this was not possible at this time until the time for large gatherings.\(^{48}\)

\(^{42}\) Goderich to Stirling, 16 August 1832, CO 392/2, Reel 304, pp.113-118.

\(^{43}\) Irwin to Goderich, 10 April 1833, SRO, WAS 1180, CONS 42/1, p.241.

\(^{44}\) M. Durack, *To Be Heirs Forever*, Nedlands, UWA Press, 1976, p.109. According to Durack, after Yagan escaped from Carnac Island he went to see Irwin and made some form of agreement with him, which allowed him to continue to go in town and obtain food from the settlers.

\(^{45}\) Minutes of Executive Council, 23 September 1833, CO 20/1, Reel 1117, pp. 256-259.


\(^{47}\) *The Perth Gazette*, 7 September 1833, p.142.

\(^{48}\) Ibid.
The Executive Council led by Acting Governor, Captain Richard Daniell (who had just arrived from Tasmania with an advance party of soldiers from the 21st Regiment in Tasmania to replace the 63rd regiment) discussed the agreement made between Irwin, Miago and Munday. The Council members referred to Arthur’s proposal and the paragraph in the Governor’s instructions regarding the civilisation of Aboriginal people. It was decided that rations of wheat would be provided to Aboriginal people in ‘settled districts.’ The distribution of wheat to Indigenous men, women and children was intended as compensation for the loss of kangaroos and other game. One of these ration points was to be at Mt Eliza and another at a place away from farmhouses at the Upper Swan. Two days after this meeting, a government notice was published telling settlers not to use that part of the ‘reserves, situate immediately under Mt Eliza’ as a public thoroughfare for the ‘service of the Native tribes’ as several families were living there. This was only to be provided for as long as it was ‘necessary to occupy such ground.’

Despite the Colonial Office endorsement of Arthur’s proposal for agreements there was no reference at the Executive Council meeting to negotiate with Indigenous people for their land. This was no doubt due to the unpopularity of the recommendation which was exacerbated by the adverse reaction to Gode rich’s Land Regulations. When Moore had anonymously expressed his opinion in July 1833 in The Perth Gazette, he reported in

49 Minutes of Executive Council, 23 September 1833, CO20/1, Reel 1117, p.256. ‘Conciliating the natives of the country by supplying them with provisions and other articles of what we have deprived them by taking possession of their country.’
50 Ibid, p.256; Minutes of Executive Council, 1 October 1833, CO 20/1, Reel 1117, p.265; The Perth Gazette, 22 February 1834, p.239. The rations were ‘to be distributed daily in Perth (under the charge of Ellis) and the military at Upper Swan, York Kelmscott, Murray and by Government Residents in Augusta and King George Sound.
his private journal in the same month, ‘Some persons are swearing greatly at the idea [of] paying the natives indeed for their land’. 53

Moore later became a member of the Legislative and Executive Councils in August 1834, and his views reflected settler opinion of wanting greater control over the expenditure of colonial revenue. In July 1833, Moore had already pointed out that it was the British government rather than settlers who should pay for any agreement to purchase land from Aboriginal people, because he believed that settlers should not have to pay for the injustices that the British government had created and of which the settlers were not aware at the time. 54 Moore still thought this was the case subsequently in July 1834 when the deaths of soldiers and settlers were reported at Pinjarra. He criticised the levying by the British government of a charge on the sale of ‘Crown’ land of 5 shillings an acre under Goderich regulations when ‘purchasers have then to fight for inch by inch and maintain it at the perils of their lives and property.’ 55

In September 1833, prior to his departure from the colony, Irwin also met with Weeip at the Upper Swan to let him know that the government was now on friendly terms with him and his tribe, and that wheat would be distributed. 56 Any additional plans that Irwin may have had were interrupted by his sudden departure for England on 29 September 1833. 57 While in England, Irwin published a book which included a recommendation that the British government enter into treaties with the Australian Aborigines.

53 Cameron, Millendon Memoirs, 23 July 1833, p.260; Minutes of Executive Council, 23 September 1833, CO 20/1, Reel 1118, pp.256-262
55 Ibid., p.330.
56 Minutes of Executive Council, 14 September 1833, CO 20/1, Reel 1117, p. 252. Due to illness Irwin’s departure was delayed until 29 September 1833, CO18/12, Reel 298-99, p.274.
57 Cameron, Millendon Memoirs, pp.276-7.
Aboriginal legal rights.

In September 1833, inspired by the earlier public debate, Lyon recommended to the members of the Agricultural Society that pressure be put on the local government to legally recognise Indigenous land rights through a local enactment.\(^{58}\) He introduced a draft resolution to the Society that proposed a local enactment be passed by the British and colonial governments as a ‘national measure.’\(^ {59}\) Lyon emphasised the importance of formally recognising Indigenous legal rights:

> The sooner the national rights of the Aboriginal inhabitants are recognised by some regular deed or charter, the better it will be for them, and the British colonies in this hemisphere. It is an act of justice, as well as humanity, and therefore ought not to be delayed. Delays in such cases are dangerous, and may lead to a great sacrifice of human life.\(^ {60}\)

Lyon proposed that the Bill protect the legal rights of Aboriginal people as British subjects and those rights which naturally belonged to them as ‘Aboriginal inhabitants’, which meant land rights associated with the ‘unrestricted liberty in fishing upon the rivers, even after the adjacent lands have been located, and also of hunting upon all lands not reclaimed.’\(^ {61}\) Lyon wanted legal rights to protect Aboriginal people such as Yellagonga who had been attacked on their lands while fishing, as well as encourage them to remain in a fixed location and become farmers.\(^ {62}\) He hoped to influence the mood of conciliation among members of the Agricultural Society after Yagan and Midgegooroo’s deaths, by proposing that the local government ‘be further solicited to leave certain lands in every district un-appropriated for the use of the aboriginal

\(^ {58}\) The Perth Gazette, 9 September 1833, pp.154-155.


\(^ {60}\) The Perth Gazette, 11 January 1834, p.215.

\(^ {61}\) Ibid., p.216.

\(^ {62}\) Ibid., p.215.
inhabitants; that such lands be reserved in situations convenient for the formation of native villages.’ 63

However, it was decided by all the members of the Agricultural Society that discussion on the proposal be deferred until Stirling’s return. There is no evidence that Lyon’s legislative proposal was brought to Stirling’s attention and it is likely that it was forgotten.64 Both Lyon and Moore’s proposals arose from the belief that Aboriginal people had to be reconciled to the settlers’ presence, and that the best way to do this was to formally recognise Indigenous legal rights (as these were understood, by Europeans at the time). Only then with the consent of Indigenous people as parties to the ‘contract’, could settlers with a clear conscience retain ‘undisputed title to their lands.’ 65 Lyon believed that both the colonial government as a representative of the British government and the British Parliament had a responsibility to pass laws, and sought to take advantage of the growing humanitarian movement building in England, predicting the heightened interest that would lead to the Buxton inquiry with its emphasis on the protection of civil rights of indigenous peoples.

Lyon’s proposal was the first attempt to formulate a legal instrument that would recognise the legal position of Aboriginal people and also take into account their rights as the original owners of the land. However, this proposal and Lyon’s stand as an advocate for Aboriginal rights was unpopular with many of the agricultural settlers, particularly the Burgess brothers (one of whom chaired the Agricultural Society meetings) who held extensive agricultural and pastoral interests.66 By October 1834

63 Ibid., pp.215-216.
64 The Perth Gazette, 15 February 1834, p.235.
65 Ibid., The Perth Gazette, 11 January 1834, p. 216
66 Ibid.
other events would harden attitudes, with actions taken against Calyute who was regarded as the leader of the ‘Murray River tribe’. 67

**The debate on Aboriginal land rights - 1836**

On 14 July 1835, Irwin published a book in England which raised the subject of treaties with the Aboriginal peoples of Australia (including Western Australia), in the same month as Members of Parliament were being appointed to the Aborigines Committee of 1835-37. 68 Irwin had met with Colonial Office officials to defend his administration from criticism of its conduct in relation to Midgegooroo and Yagan, but he does not appear to have raised the subject of treaties there. This is possibly because by this time, Stirling had already met with the Colonial Office in his official capacity as Governor. 69 Instead Irwin published his policy recommendations in his book dedicated to former Secretary of State, Sir George Murray, which was written primarily in response to the claims from the theorist on systematic colonisation, Edward Gibbon Wakefield, and Colonel Charles Napier that the Swan River Colony was largely a failure due to its original land grants system and consequent economic problems. 70 Irwin argued that it was ‘impossible to maintain and vindicate the abstract right of civilised nations’ such as the British nation ‘to establish themselves in the territories of savage tribes without, at least acknowledging that such intrusions involve the settlers, and the nation to which they belong, in deep and lasting responsibilities.’ 71 They had moral obligations to assist Aboriginal peoples with the changes brought on by colonisation, having gradually

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67 See Chapter 2.
69 F. C. Irwin to Rev. James Irwin, 19 November 1836; Stirling to Irwin, 1 April 1836, Papers of Irwin family of Drogheda, ML, T 2093, M 1661-1666. Stirling acknowledged receipt of Irwin’s book.
70 Irwin, *The State and Position of Western Australia*, pp.27-29. The book was dedicated to Sir George Murray on 14 July 1835.
71 Ibid, p.27.
deprived them of their ‘hunting and fishing grounds.’ Inspired by Moore’s meeting with Yagan, Irwin recommended that Moore would be an ideal negotiator for such a treaty on behalf of the Government of Western Australia:

The writer would suggest that a formal treaty with them be speedily entered into. As a measure of healing and pacification he is persuaded it would do much to prevent irritation and heart-burnings, and to promote a permanent good understanding with them. The advantages of such an arrangement could not fail to be shared by both parties.  

Irwin assumed that Aboriginal tribes had leaders or chiefs who had the authority to enter into agreements that would be binding on the rest, and while he proposed that the British government negotiate a treaty in Western Australia, his central focus was on taking moral responsibility to encourage Aboriginal people into another way of life.

By March 1836, Irwin’s book was available in Western Australia (published in The Perth Gazette in extract form) and while the Editor of The Perth Gazette appears to have deliberately avoided any reference to treaties in Western Australia, Stirling now had access to the book and to Goderich’s despatch. The question of Indigenous land rights was not debated officially until September 1836, in response to solving the problem of conflicting land use and co-existence near the Swan River foreshore.

On 13 September 1836, Stirling reported on a proposal by ‘certain’ Aboriginal leaders to enter into an agreement to purchase their land. Stirling had been approached by Government Interpreter Francis Armstrong on behalf of Aboriginal tribes. It is most

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72 Ibid., pp.27-28.
73 Ibid.
74 Ibid., p.28.
75 Ibid., p.22. ‘The form of their government is patriarchal, and they live under independent chiefs, to whom, however, they are little in subjection, except when they are at war among themselves’.
76 The Perth Gazette, 20 February 1836, p. 654; The Perth Gazette, 5 March 1836, p.663.
77 Minutes of Executive Council, 13 September 1836, CO 20/2, Reel 1118, p.152; Bourke, On the Swan, p.2. The Swan District comprised the land grants along both sides of the Swan River as far as its point of exit from the Darling Range (head of the river) and included the Middle and Upper Swan.
probable that this was Munday and Miago and other leaders of districts around the Swan and Canning regions. By this time Armstrong was entrusted with mediating disputes between Aboriginal people and settlers and making representations to Stirling and Mackie at certain times. At the Executive Council meeting on 13 September, Stirling outlined the proposal,

> that some time back the native interpreter had been applied to by certain of the leading natives of their district, on the subject of their lands which had to a considerable extent been taken from them in consequence of the settlements effected by the whites, and expressive of a wish to dispose of the same to the government for a small consideration provided they were allowed free access to such parts as were not enclosed.\(^7^8\)

On 12 September 1836, Moore reported that Aboriginal people around Perth were ‘beginning seriously to complain of our encroachments and to enquire what compensation we mean to give them for taking away from them the use of their own land.’\(^7^9\) One of the leaders disparagingly referred to by the Editor of *The Gazette* was Munday, who ‘claims the land between Perth and the Peninsular Farm, which he distinctly gives us to understand, belongs to him, but that the houses are the property of the white man, and he will make it over to us for a modicum of flour.’\(^8^0\)

While in general the relationship between the settlers and the tribes around Perth had been relatively peaceful at this time, tensions were building, with the settlers complaining of the theft of livestock and vegetables, as well as trespass. Aboriginal people resented the barriers to practising their traditional lifestyle and laws along river foreshores and near to the Mt Eliza Institution. The Institution had been established formally in December 1834 by Stirling on one of the few pieces of land not granted by

\(^7^8\) Minutes of Executive Council, 13 September 1836, CO 20/2, Reel 1118, p.152.
\(^7^9\) Cameron, *Millendon Memoirs*, 12 September 1836, p.408.
\(^8^0\) *The Perth Gazette*, 10 September 1836, p.760.
the government to settlers, at Mount Eliza, (a hill overlooking the town of Perth); with a
view to encouraging Indigenous people to take up fixed residence.\textsuperscript{81} Local Indigenous
families were encouraged to grow vegetables, use a boat for fishing on the Swan River,
and were casually employed in return for flour or whea, with the intention of keeping
them away from settlers’ grants and stores.\textsuperscript{82} However, they resisted the pressure being
applied on them to stay in one spot, asserting their right to access their traditional lands
beyond the Mt Eliza Institution and boundaries established by white people.\textsuperscript{83} In his
report for January 1836, Armstrong highlighted several disputes where Aboriginal
people resented the threats of gaol or punishment made against them by settlers on their
own land while searching for roots and frogs or other fare.\textsuperscript{84} Munday threatened to spear
Europeans if he was sent to gaol. Armstrong reproached him emphasising the greater
power of colonial legal authority. In reply, Munday stated that he had not forgotten the
‘Pinjarra affair,’ referring to Stirling’s punitive expedition, two years earlier.\textsuperscript{85} This
occurred at a time when fences were being put up around gardens by settlers which
several Aborigines objected to by tearing them up for firewood.\textsuperscript{86}

In September 1836, Perth settlers lobbied Stirling to purchase reserve land adjacent to
Mt Eliza in fee simple, between their allotments and the Swan River.\textsuperscript{87} Most of the land
in the Swan District was occupied by settlers in fee simple and inaccurate surveying on
‘Crown’ land, also meant that they were already encroaching onto these

\textsuperscript{81} Minutes of the Executive Council, 10 December 1834, CO 20/1, Reel 1118, p.418; Stirling to Earl of
Aberdeen, 10 July 1835, CO 18/15, Reel 300-301, p. 253.
\textsuperscript{82} The Perth Gazette, 25 April 1835, p.48; The Perth Gazette, 13 February 1836, p.651.
\textsuperscript{83} The Perth Gazette, 18 June 1836, p.712 ; The Perth Gazette, 29 October 1836, pp. 789-90 ;The Perth
Gazette, 5 November 1836, pp.793-4; The Perth Gazette, 12 November 1836, pp. 797; ‘Manners and
Habits of the Aborigines of Western Australia, from information collected by Mr F. Armstrong,
Interpreter’, These reports were published as refutation to settler complaints about the Mt Eliza Institution
; The Perth Gazette, 22 October 1836, p.784 ; Green, Nyungar-The People, pp.186-206.
\textsuperscript{84} Armstrong, Report to Colonial Secretary, January 1836, SRO, CSR, ACC 36, Vol. 44, p.142.
\textsuperscript{85} Ibid.
\textsuperscript{86} Minutes of Executive Council, 8 September 1836, CO 20/2, Reel 1118, p.151; R. M. B. Brown to
Colonial Secretary, 12 August 1835, SRO, CSR, ACC 36, Vol. 41, p.220.
\textsuperscript{87} Ibid.
reserves. Stirling warned them against assuming that their encroachment into unsurveyed portions entitled them to rights of possession. He reproached the settlers who had taken up land along the river foreshore for progressively encroaching on unsurveyed portions beyond their allocated grants. On 8 September 1836, the Governor in Council discussed the request from settlers to purchase this land in fee simple. The Council concluded that the reserve should be retained for public purposes and leased instead, subject to improvements. At this time, settlers were awaiting news of the outcome of the memorial sent to the Colonial Office which urged Glenelg to revise taxes and conditions on existing land regulations. Up until this time, the sale of town allotments provided the only source of colonial revenue which the Legislative Council wanted to use for road construction in agricultural regions, particularly York, where sheep were now becoming the mainstay of the colonial economy.

By 1836, there was a greater understanding by officials of Indigenous languages and claims to land than before. In October, Armstrong published articles in *The Perth Gazette* about Aboriginal society, laws, and proprietary rights in land, which most likely comprised information that he had already communicated to Stirling. He reported that:

> The right of property is well recognised among them, both as to land and as to their moveable effects…..Land appears to be apportioned to different families, and is not held in common by their tribe, For instance, Nandaree, Elal and Yalgonga claim between them all the land between Mount Eliza and Fremantle and from the river towards Mr Trigg’s limekiln. Bogaberry, Meelup, Bonberry, own a tract eastward from Yalgonga’s for a considerable distance round the lakes. From near Monger’s Lake to as far as Bassindean, and for a breadth of four or five miles inland from the Swan, is Munday’s territory. To the north of

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89 Minutes of Executive Council, 8 September 1836, CO 20/2, Reel 1118, p.151.
90 *The Perth Gazette*, 10 September 1836, p. 760. Colonial Secretary Office Notice, 9 September 1836.
91 Minutes of Executive Council, 8 September 1836, CO 20/2, Reel 1118, p.151.
92 Cameron, *Ambitions Fire*, p.180; *The Perth Gazette*, 21 January 1837, p.837. Petitions had been sent in July 1832, April 1835, and subsequently.
Munday’s are Warang’s Miago’s and Moorongo’s lands. These co-
proprietors appear equally interested in their respective districts, and are
equally ready to revenge any trespass, which may be committed, not only
by unauthorised hunting but by taking swans nests etc. Land is beyond
doubt an inheritable property among them, and they boast of having
received it from their fathers’ fathers, etc, to an unknown period back.94

The fact that Aboriginal people had their own ‘districts’ in which they hunted and fished
was well known to Stirling and officials of the Executive Council. In his report to the
Colonial Office on the statistics of the colony for the year ending June 1837, Stirling
reported: ‘Certain usages established by custom are frequently appealed to as rules of
conduct. Of these, the principal relate to the right of individuals to certain portions of
hunting ground, derived by inheritance from their immediate ancestors.’95

Stirling stated that he was in favour of some arrangement being made with Aboriginal
people in the Swan region to ensure their ‘good conduct’ and believed that an agreement
could be reached cheaply by providing some flour and clothing.96 The proposal may
have appealed to Stirling because it offered a resolution to settler complaints of trespass
on their crops and gardens and because he thought that he might be able to comply with
any obligations arising from expected British government policy at low cost. By this
time the mounted police force employed to control the escalation of conflict over
property was all but disbanded, which meant that other methods had to be found.97
Stirling was also influenced by events taking place in England which demonstrated a
possible shift in Colonial Office policy.98 He had received a copy of Spring Rice’s
circular enclosing Buxton’s recommendation for the civil rights of Aborigines to be

95 Statistical Report ending 30 June 1837, BPP, *Correspondence and Papers relating to the Government
96 Minutes of Executive Council, 13 September 1836, CO 20/2, Reel 1118, p.152.
Stirling was waiting for guidance from Colonial Office regarding Protectors and other policy regarding a
mounted police force. The Colonial Office delayed giving an answer until after the Aborigines Committee
had reported.
protected, and anticipated some direction from the Colonial Office on this subject. By August 1835 even the Editor of The Gazette, Charles MacFaull anticipated an Imperial Act on Indigenous rights, although he thought it would not have any effect in Western Australia.

The Editor reported on 10 September 1836 that the British government was ‘in favour of a purchase being made from the natives of the land we occupy in this territory.’ This most probably referred to a recent report received a month earlier, that Glenelg was attempting to effect: ‘arrangements under which British settlers may occupy South Australia without invading the rights of the Aborigines’, (reported on the same day as the announcement of members of the Aborigines Committee), as well as the Batman ‘treaty.’ Stirling was also aware of the Goderich despatch and Arthur’s proposal, which anticipated that the ‘views of His Majesty’s Government’ would be met on reasonable economic terms.

The question of purchasing Indigenous land was being discussed among the settlers in late 1835 and early 1836 in light of the ‘treaties’ that had been entered into by John Batman with Aboriginal people in Port Phillip, a region that Batman considered not to have been previously ‘discovered’ by the British government. In June 1835, Batman signed on behalf of the Port Phillip Association two agreements to purchase land from Indigenous ‘chiefs’ at Port Phillip (an area formerly uninhabited by Europeans). The payment for the land which covered approximately 600,000 acres, partially consisted

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99 T. Spring Rice to R. Bourke, 1 August 1834, HRA, Series 1, Vol. XVII, pp.491-492. It was also sent to Governor Stirling.
100 The Perth Gazette, 1 August 1835, p.539; Stirling to Earl of Aberdeen, 10 July 1835, CO 18/15, Reel 300-301, p.258 ; reproduced in Appendix to Report, 1837, pp. 139-141.
101 The Perth Gazette, 10 September 1836, p.760.
103 Minutes of Executive Council, 13 September 1836, CO 20/2, Reel 1118, p.152.
of 100 blankets, tomahawks, knives, flour and other objects, and it was mutually agreed that a certain quantity of food, clothing and arms, would be paid annually to the local Aboriginal tribes. 105 It was clearly not made on equitable terms and involved ‘trifling amounts’ just as Arthur had similarly proposed earlier, but it precipitated a vigorous debate about the legal rights of the Crown as the owner and allocator of land, Indigenous land rights, and whether settlers could purchase land directly from Aboriginal peoples.106

By 1 January 1836, Stirling received a copy of the proclamation sent to him by the Governor of New South Wales, Richard Bourke, responding to the Batman proposal, which Stirling ordered to be published in The Gazette on 2 January 1836 for the ‘general information’ of settlers.107 This proclamation disclaimed any legal right of colonists to enter into a treaty, bargain and contract with the Aborigines for the ‘possession, title, or claim to any lands within New South Wales.’ 108 It proclaimed that any ‘act or possession’ without legal authority would be considered a trespass by the colonial government on those lands and warned colonists that any agreement made with Aboriginal people on ‘Crown’ land was invalid.109 It is likely that Stirling published the notice because he was aware that settlers were engaging in their own private arrangements which may have included unsurveyed Crown land. The Editor of The Perth Gazette reported on 10 September 1836 that: ‘Mr Shenton bought the other day, seven acres for as many shillings, and the bargain was sealed by a solemn assurance, on

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105 The Perth Gazette, 26 September 1835, p.571; Castles, An Australian Legal History, p.28.
107 The Perth Gazette, 2 January 1836, Government Notice 1 January 1836, enclosing Bourke’s proclamation dated 26 August 1835 for general information.
108 Ibid.
109 The Perth Gazette, 10 September 1836, p.760.
the part of the vendors, to protect him from any intrusion on the part of their sable friends.\textsuperscript{110}

By the end of 1836, Glenelg’s policy response on the Batman treaty was not yet known in Western Australia. However, the fact that Stirling had raised the question of an agreement to the Executive Council on 13 September 1836 meant that Bourke’s proclamation had not been interpreted by Stirling as precluding the idea that the British or colonial government itself could enter into agreements with Aboriginal people. \textsuperscript{111}

During 1835-36, the British government made agreements with indigenous peoples in the Cape Colony, and had also formally recognised Aboriginal land rights in the Letters Patent of South Australia which on Glenelg’s insistence stated:

\begin{quote}
provided always, that nothing in these our Letters Patent contained shall affect or be constrained to affect the rights of any Aboriginal natives of the said Province to the actual occupation or enjoyment in their persons or in the persons of their descendants of any lands now actually occupied or enjoyed by such Natives.\textsuperscript{112}
\end{quote}

The Letters Patent were framed in a different way to the proposal put by the Aboriginal tribes in Perth, in that it defined what land Aboriginal people ‘actually occupied,’ rather than what land the settlers were occupying. The focus on the interpretation of the word ‘occupied’ was a tactic employed by the South Australian commissioners within what Robert calls the ‘Lockean economic discourse of property’, so that very little land would meet the requirement.\textsuperscript{113} In Western Australia the question was the provision of compensation for land already physically occupied by the settlers which was not enclosed by fences, and the retention of Aboriginal people’s access to land and water.

\textsuperscript{110} Ibid.

\textsuperscript{111} Bourke sent a copy of his proclamation (issued in August 1835) to England in a despatch, Glenelg to Bourke, 10 October 1835, \textit{HRA}, Series 1, Vol. 18, pp.379-391.


\textsuperscript{113} Robert, ‘Colonizing Concepts of Aboriginal Rights,’ p.52.
However the minutes of the Executive Council meeting on 13 September precluded any negotiation:

After some conversation it appeared more advisable to inform the natives that it was not the wish of the government to deprive them of any part of their land beyond that which is or maybe required by the white inhabitants of the territory, and upon which they are not to trespass or commit any theft on pain of forfeiting the good will shown, and the protection afforded by the local government and inhabitants generally, and also of disturbing that friendly intercourse which is no less beneficial to them than to the other party. That occasional issues of flour had been made to them, in consideration of their good conduct which will be from time to time repeated, provided they conduct themselves properly, and that the Governor as well as all the whites, would do them all the good in their power. Lastly that as they have for some time back behaved themselves, entirely to the satisfaction of the Governor, he would direct an issue of flour to be made to such of them as may be in Perth on Friday first at noon.114

The original optimism for an opportunity for negotiation had radically changed to that of warning Aboriginal people against trespass on all land deemed to be required by settlers now and in the future. The statement was deliberately vague as to the extent of land being referred to, and the warning of trespass was similar to that employed by Bourke in his proclamation addressed to colonists. Trespass was normally settled among settlers through the application of the civil law, a form of redress which Aboriginal people did not have access to, neither as nominal British subjects or as Indigenous owners of land. The threat of trespass (using the criminal law) would be something that Aboriginal peoples could not defend.

114 Minutes of the Executive Council, 13 September 1836, CO 20/1, Reel 1118, p. 152.
Moore’s advice

There is no record of the substance of the debate in the Executive Council, but there is a record of Moore’s opinion from his journal entry on 17 September 1836 that was made after the meeting:

There are great discussions here as to the propriety of purchasing from them their interest in the land. I consider it a matter of justice that some recompense should be made to the natives or some consideration given, but.. I consider it is the part and duty of the British Government to do this as a national measure on account of the large territory which has been acquired and added to England, whether it be by conquest or by mere occupancy. But I feel strongly that it would be a measure of great injustice to compel the poor struggling settlers to pay for it, this country, out of their pockets when it formed no part of the conditions of original purchase. A purchase of land from an individual implies a power and a right for the vendor to sell and the purchaser has a right to complain if the usual covenant for quiet enjoyment is broken by his being disturbed in his possession. Surely it would appear very strange between individuals if the vendor sold an estate as if it was his own and then after some years coolly told the men who bought it that he must now pay the rightful owner of the land for his interest in it. A government, in my opinion, is bound to act with justice as well as an individual.115

Moore echoed the opinion that he had given earlier in July 1833. However, since then he had been appointed Advocate General and a member of the Legislative and Executive Council, and was more disposed to absolve the settlers from any financial and legal responsibility. He employed the civil law to argue that there had been a breach of contract between the settlers and the British government, as if the settlers had no responsibility for the colonising enterprise. This meant that in Moore’s opinion the British government was solely responsible for making a treaty with Aboriginal peoples

115 Cameron, Millendon Memoirs, 17 September 1836, p. 408.
as a national measure, which they had failed to do. Moore saw a clear distinction between settlers and the British government, where settlers regarded their rights (which included the British civil law) as superior to those of Aboriginal people. This pattern of marginalisation would be further entrenched in the late 1840s by the application of a separate criminal legal system to Aborigines in the regions, during a period of rapid pastoral expansion.

By September 1835 Irwin had established the Western Australian Missionary Society and funded a missionary, Louis Giustiniani, to preach to Aboriginal people and settlers. Upon Giustiniani’s arrival in June 1836, Moore and Mackie were appointed as agents for the Society in Western Australia. By the time that the Executive Council met, an application had already been made to the Colonial Office through Stirling on 26 August 1836 to purchase a portion of land for a mission in Middle Swan for the civilisation and Christianisation of Aboriginal people.

The question of an agreement to purchase lands from Aboriginal people, even for a small amount would have raised questions of the likelihood of having to expend funds over a much larger region as settlement expanded. The implication was that the proposal for the Swan district would have had to be extended to other regions occupied by settlers, based on the formal recognition that Aboriginal peoples had pre-existing land rights. The local proposal had not been intended to mean removal as Arthur had in

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116 See Chapter 2.  
117 See Chapter 8.  
118 Bourke, *On the Swan*, p.120. The objects included the instruction of the Aborigines in the arts of civilised life on the plan of the Moravian mission.  
120 *The Perth Gazette*, 1 October 1836, p. 773; Such as the campaign by the Editor of *The Perth Gazette*, Charles MacFaul who publicly called for the removal of convicted Aborigines under the criminal law to Rottnest Island; N. Green, ‘The Perth Gazette’s Influence on Aboriginal Policies in Western Australia-1838, Bi-centennial History Conference’ Melbourne, 7 and 8 February 1980, Unpublished manuscript, p.3.
mind, but an agreement for co-existence on the same land where Aborigines would still have access to river foreshores. The ‘trifling amount’ which Arthur regarded as a ‘fair equivalent’ most likely reflected assumptions made about Aboriginal society, as possessing hunting and fishing rights which some officials and settlers believed was the only proprietary interests that they had at this time.\textsuperscript{121} However, it would also have meant a loss of economic power which the settlers would not have wanted to relinquish. There were many settlers who wanted Aboriginal people to move away from the Swan District as a solution to the problem of using the same resources and land, which may not have taken place if the government had formally recognised Indigenous interests in land and dual occupation of the land and the river foreshore.\textsuperscript{122} Guistiniani reportedly proposed at the end of September 1836 after the reports of conflict in York (90 kilometres from Perth), that Aboriginal people should be sent to isolated reserves similar to those in North America where they could be civilised and protected.\textsuperscript{123} This was similar to what the Aborigines Committee report recommended. At the height of the York conflict in early 1837, Giustiniani reportedly made another proposal for the removal of Aborigines to Rottnest Island along the lines of what had been instigated by Arthur in Tasmania.\textsuperscript{124} However, this was rejected by Stirling and the Executive Council on what the Editor of \textit{The Swan River Guardian} described as the ‘pretext that the Natives are British subjects, and it would be an infringement on their liberty, to force them to leave their Native Land.’\textsuperscript{125}

\textsuperscript{121} \textit{The Perth Gazette}, 24 September 1836, p.769; Arthur to Goderich, 7 January 1832, BPP, \textit{Correspondence and others Papers relating to Aboriginal Tribes}, (1834), pp.162-163; Arthur to T. Spring Rice, 27 January 1835, BPP, \textit{Report}, 1837, p.121.

\textsuperscript{122} Ibid.

\textsuperscript{123} This was reported in \textit{The Swan River Guardian} on 4 May 1837, p. 118, but there is no record in the Executive Council minutes. \textit{The Perth Gazette}, 24 September 1836, p.769, refers to Giustiniani’s proposal for reserves as in North America.

\textsuperscript{124} Green, ‘Aborigines and white settlers’, p.87.

\textsuperscript{125} \textit{The Swan River Guardian}, 4 May 1837, p.118.
The result of the Executive council meeting was verbally reported to Armstrong on 13 September 1836, and confirmed in a letter. There was no report on how Aboriginal representatives responded, but any warning of trespass would not have been well received. The Editor of *The Perth Gazette* (which was perceived by many as the government newspaper) interpreted the decision reached by the Executive Council in the following way:

An experiment, to which we alluded last week, of making a purchase of the occupied lands of this territory from the natives, was tried yesterday, by order of His Excellency the Governor. This was thought a favourable period, from the general good conduct of the natives of this and the adjoining neighbourhood (probably the Upper Swan). Mr Armstrong, Interpreter to the Natives, received instructions to convey to the minds of the aborigines of this district, that it was not the intention of the Governor to deprive them of any portion of land beyond that which may be required by the white inhabitants of this territory.

The vague reference indicates that there was no agreement and that the question of access of either party to regions not bound by houses or fences was not resolved. Brock refers to the proposal briefly to point out that the response made no concessions to Aboriginal ownership of land. Any opportunity for formal recognition of such ownership was lost even though Goderich had demonstrated Colonial Office support for such a move four years earlier. It is apparent that the Executive Council thought that there were other ways to resolve the problem of encroachment of two peoples who occupied the same land, without having to formally recognise Aboriginal land rights.

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126 Colonial Secretary to Armstrong, 14 September 1836, SRO, CSR, ACC 49/8, No 335.
127 *The Perth Gazette*, 17 September 1836, p765; *The Perth Gazette*, 14 January 1837, p. 833; Green, ‘The Perth Gazette’s influence’ p.2. Flour was given to each family by the Government.
Stirling was aware of Glenelg’s interest in new colonies such as South Australia and South Africa and perhaps thought a similar push would happen in Western Australia.\textsuperscript{129} The minutes of the Executive Council had been sent to the Colonial Office with no comment.\textsuperscript{130} However, the tide was changing with the increased lobbying pressure from the colonising companies, and Wakefieldan lobbying for the Disposal of Waste Lands parliamentary committee that promoted the use of land sales revenue for emigration.\textsuperscript{131} By March 1837, just as settlers were about to forward another petition requesting a return to the old grant system for Crown land, Glenelg’s new rules had been received in response to their earlier petitions.\textsuperscript{132} While Glenelg’s compromise attempted to concentrate settlement and raise revenue in the longer term by allowing settlers to exchange parts of their old grants for new pasture, it in fact had an opposite effect resulting in increased pastoral expansion and the dispersal of settlers, thereby encroaching further on Indigenous land.\textsuperscript{133}

What was Glenelg’s position on land treaties for Australia? Green reports that if Glenelg had supported Batman’s treaty and recognised Aboriginal peoples’ right to trade their land it would have been necessary for the Crown to make repayment for all future land sales as well as reparation for lands already acquired.\textsuperscript{134} There is no doubt a lot of truth in this as a practical consideration. Other events in South Australia presumed that the colonising company would pay for any purchases, but in Western Australia the establishment of a free land grant system meant little colonial revenue was available for negotiating agreements without British government assistance. Goderich expected that

\textsuperscript{129} The Perth Gazette, 7 May 1836, p.689. This referred to the Cape Colony.
\textsuperscript{130} Stirling to Glenelg, 4 October 1836, CO 18/16, Reel 302, p.532.
\textsuperscript{131} Burroughs, Britain and Australia, p.192.
\textsuperscript{132} Ibid, p. 192 ; The Perth Gazette, 21 January 1837, p.837; Glenelg to Stirling, 7 March 1837,CO 397/5, Reel 774, pp. 37-45.
\textsuperscript{133} Cameron, Ambitions Fire, p.185; WAGG, 2 September 1837, pp. 113-114.
\textsuperscript{134} Green, Broken Spears, p.180.
the low economic cost would be covered by settlers, and Glenelg (in relation to South Australia) expected the South Australian Commissioners to provide any funding from the sale of Crown land. Economics was a greater practical reason for an existing colony such as Western Australia, where the land grant system had been described by the Colonial Office as ‘squandering’ an opportunity for colonial revenue and economic wealth. This became apparent to Goderich in the early 1830s, but he still submitted Arthur’s low-cost proposal as an alternative to costly violence, knowing that settlers did not have a lot of funds. However, by 1836 Glenelg would have been aware of the general reluctance of the local legislature in Western Australia to fund any proposals regarding Aboriginal people, let alone agreements.

The primary factor that prevented any proposal for agreements between settlers and Aboriginal people was provided in Glenelg’s despatch to Bourke on 13 April 1836 which emphasised that the British government’s main concern was retaining its ability to control the process of the alienation of land, rather than the question of whether the British government should enter into treaties with the Aborigines. Glenelg wrote to Bourke supporting his proclamation in favour of maintaining the right of the Crown ‘to the Soil on which these new Settlements have been effected.’ However, the despatch did not reach Sydney until September 1836, and Stirling would not have heard about it until after his Executive Council meeting of 13 September 1836.

Stirling had expected some policy direction on a Department or Protectors as early as 1836. However, Glenelg waited until the release of the Aborigines Committee report

135 Glenelg to Bourke, 13 April 1836, HRA, Series 1, Vol. 18, p.379.
136 Ibid, pp.379-391; The Swan River Guardian, 12 October 1837, p. 232. Nairn Clark reported that the outcome of the Colonial Office response to the Batman ‘Treaty’ was still not publicly known by October 1837.
137 Glenelg to Stirling, 16 March 1836, CO 18/15, p. 264. Interestingly, the draft refers to the need for reparation for ‘those advantages of which they are deprived by the occupation of their territory’ but this
in June 1837 which referred to a guardianship system for Aboriginal people under the supervision of missionaries, and emphasised that they were to be protected as British subjects with the appointment of Protectors. The Aborigines Committee had also recommended that a portion of the proceeds from the sale of Crown land would provide reparation in the form of reserves and the civilisation of Aboriginal peoples in New South Wales and Western Australia. This would not become policy until the new Secretary of State Lord John Russell raised the matter in relation to New South Wales, Western Australia and Port Philip in September 1840.\footnote{Glenelg to Bourke, 26 July 1837, \textit{HRA}, Series 1, Vol. 19, pp.47-48; Russell to Hutt, 8 September 1840, BPP, \textit{Papers Relative to the Aborigines}, p.379.}

Instead of confronting the questions of legal rights in land and negotiating agreements, Stirling chose the course of the colonial criminal law to control Aboriginal ‘trespass’ and ‘theft.’\footnote{G. F. Moore, ‘Brief Chronicle of the principal events which have occurred, connected with the Colony of WA, since the first settlement, September 1843.’ \textit{Journal of Agricultural and Horticultural Society for the year 1842-43}, p. xliiv. In September 1836, Moore reported the outcome as the ‘Gratuitous distribution of flour to natives as a reward for continued good conduct in this neighborhood.’} On 19 November 1836, he wrote to Mackie enclosing a copy of Armstrong’s report on the ‘petty aggressions’ by Aborigines at the Swan district and seeking a meeting to discuss a plan of action.\footnote{Colonial Secretary to W. H. Mackie, 19 November 1836, SRO, CSR, ACC 49/8, p.87.} Prior to January 1837, Aborigines who committed offences under colonial criminal law were detained without trial by magistrates or their punishment was determined by the Governor in Council. After January 1837 the first criminal prosecutions of Aboriginal people who repeatedly stole from settlers in the Swan and Canning River regions took place in the Court of Quarter Sessions. Aboriginal people now found themselves being regarded as trespassers and criminals on their own land where they could receive sentences of up to seven years...
transportation on Garden Island or Rottnest Island.\(^{141}\) By 1838, even the land allocated for the use of Aborigines near Mt Eliza itself was taken over by settlers, and Aboriginal people were considered more of a nuisance when they practised their traditional laws. This change was recognised at the time by lawyer and Editor of *The Swan River Guardian*, William Nairn Clark who objected to the moral and legal injustice of the British government who had seized

on the possessions of the Aborigines by bloodshed, rapine, and every species of iniquity enacted under the sun; and with the rapacity of a miser demands instant payment. – where Aborigines while conquered are not treated as prisoners of war to which they are entitled by the Law of Nations but are hanged as British subjects.\(^{142}\)

### The Land regulations

The debate over the settlers rights culminated in Glenelg’s compromised Land regulations which were received in the colony by September 1837 and which disregarded Indigenous land rights.\(^{143}\) Permanent undersecretary, James Stephen had already been instructed to regard New South Wales and Western Australia similarly in terms of the use of the Land Fund in order to encourage emigration in accordance with the recommendations of the Disposal of Lands committee.\(^{144}\) The regulations allowed settlers to surrender an agreed area of unimproved land in return for full title to the remainder of their land. They could also exchange poor land for better pasture land in a new region.\(^{145}\) On 28 September 1837, the Editor of *The Swan River Guardian*, Nairn Clark blamed the Colonial Office Land regulations for hindering the economy of the

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\(^{141}\) See Chapter 2. Rottnest Island was used as a prison from 1838 onwards.

\(^{142}\) *The Swan River Guardian*, 28 September 1837, pp.224-225.

\(^{143}\) Glenelg to Stirling, 7 March 1837, *WAGG*, 2 September 1837, pp.112-114. Moore interpreted these instructions for Stirling regarding the land regulations. Cameron, ‘George Fletcher Moore,’ pp.24-25.

\(^{144}\) George Grey to James Irving, 17 July 1838, CO 397/4, Reel 773-774, p.180.

\(^{145}\) Cameron, *Ambitions Fire*, p.181.
colony, while emphasising the glaring omission of Indigenous land rights from the debate. Clark argued that Indigenes’ fishing and hunting grounds ‘handed down to him as property from his forefathers’, should be taken into account in the land regulations. He referred to the example of land that had been purchased from indigenous peoples by the American government ‘on just terms of equity’ and from which the land was then sold to emigrants where the indigenous peoples retire so that the settler is left to enjoy the purchase. Nairn Clark pointed out the inequity in not purchasing Indigenous lands and imagined what an Aboriginal person might say in response:

Give us five shillings per acre for our lands which you exact from the Settlers and we shall then enter into a solemn league and covenant, as the Americans did with William Penn, never to disturb you in the possession of this Country or to hurt a white man? ... ‘The principles of the illustrious William Penn are as wise as they are just; for the purchase of the land of the possessors is a safer as well as a better title, than a seizure made by force and maintained by oppression and bloodshed.

By 1840, the Colonial Office was applying uniform Land regulations to all colonies without allowance for differences. The protest of settlers against land taxes and raising the minimum price on Crown land would continue into the 1840s and became more intense.

In its annual report for 1839 the Aborigines Protection Society lamented the fact that the Mt Eliza Institution was no longer available to Aboriginal people, on the grounds that the expense was more than the Colony could sustain, reminding readers that the £400 pounds received in one year from the Crown of the sale of lands (which was probably from town allotments) ‘could have been apportioned for this purpose, and to ‘qualify

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146 The Swan River Guardian, 28 September 1837, p.224.
147 Ibid
148 Ibid. Five shillings per acre was the price for the sale of Crown land in the land regulations.
149 Morrell, British Colonial Policy in the Age of Peel and Russell, p.83.
them to become owners as well as tenders of sheep and cattle.\textsuperscript{150} The local impetus for an agreement with the Aborigines was exhausted by 1837. However, the impact of the Aborigines Committee would continue to be felt during the early 1840s, following the appointment of two Protectors to Western Australia.\textsuperscript{151}

**Governor Hutt**

Hutt inherited the problems encountered by Stirling, but he was more influenced by the humanitarian movement in England and Colonial Office instructions, and sought to understand whether Aboriginal society and rights in property were similar to those of ‘civilised’ society. In particular, he asked specific questions of Moore, Armstrong and Bland relating to land which he compared with British property law and European concepts.\textsuperscript{152} He grouped his questions on land under the heading of ‘public and social life.’\textsuperscript{153} Under the heading of ‘social life’ Hutt asked whether Aboriginal people had tribal names or whether the ‘tribes’ were mostly distinguished by the part of the country in which they lived.\textsuperscript{154} He also asked whether Aborigines had ‘chiefs’, and if so what authority they exercised, the obligations of family members, and whether ‘different tribes ever enter into anything like offensive or defensive compacts with each other?’ In particular Hutt asked whether

\begin{quote}
the natives claim possession of every rood of ground in the country. Are you acquainted with the nature of these claims. Is it as mere hunting grounds or do they pretend to a proprietary right in the soil and if so in whom is this right vested, in the tribe- the family or the individuals?\textsuperscript{155}
\end{quote}

\textsuperscript{150} APS, Second Annual Report, 21 May 1839, p.14.  
\textsuperscript{151} See Chapter 2.  
\textsuperscript{152} Colonial Secretary, Circular of questions, 15 January 1839, SRO, CSR, ACC 49/12, p.86; ACC 36, Vol. 65, pp.30-32; See Appendix.  
\textsuperscript{153} Ibid.  
\textsuperscript{154} Ibid.  
\textsuperscript{155} Ibid.
In particular, Hutt was interested in the nature of Indigenous proprietary interests in land. Assuming that they were owners of land, his questions were influenced by British understandings of the value of land:

As they claim to be owners of land in what way is the boundary of property whether as regards tribes, families or individuals distinguished and are the boundaries strictly attended to; ....Do they at all understand the transfer of the right in landed property from a party to another; .. and what are their laws of inheritance.\textsuperscript{156}

There is no record of the answers that Hutt received, but Armstrong sent a copy of the articles that he had written and published in \textit{The Perth Gazette} in October and November 1836.\textsuperscript{157} Therefore, Hutt had access to the same information that Stirling had relied on when debating the question of an agreement with the Aborigines in September 1836.\textsuperscript{158} Armstrong had also stated that Aboriginal peoples had no trace of civil government. From this information Hutt concluded that Aborigines were a very different ‘race’ of people from other ‘tribes’ or ‘nations’ that he had ‘seen described elsewhere’, and concluded that they ‘had no acknowledged heads of tribes or families’ by which they could be influenced.\textsuperscript{159}

Hutt was influenced by local officials, particularly Moore who continued to urge reparation, but this time more along the lines of civilisation, education and employment (a view reinforced by Captain George Grey who later became the Governor of South Australia, New Zealand and the Cape Colony, and who was in the colony at the time.)\textsuperscript{160} Moore responded to Hutt’s questionnaire, but only the conclusion to his answers has

\begin{itemize}
\item \textsuperscript{156} Ibid.
\item \textsuperscript{157} Green, \textit{Nyungar- The people}, pp.186-206.
\item \textsuperscript{158} Armstrong to Colonial Secretary, 18 January 1839, SRO, CSR, ACC 36, Vol. 75, p.133.
\item \textsuperscript{159} Hutt to Glenelg, 3 May 1839, BPP, \textit{Papers Relative to the Aborigines}, p.363. This had changed by 1841 to, ‘there is neither nation nor tribe collected together under one common head, through whom the whole may be influenced.’ Hutt to Russell, 16 May 1841, BPP, \textit{Papers Relative to the Aborigines}, p.380.
\item \textsuperscript{160} Cameron, ‘George Fletcher Moore’, p.25.
\end{itemize}
been found. He maintained his earlier argument that Aboriginal rights to land had been disregarded at settlement:

This people has been taken under the protection of the British nation, and claimed as its subjects- their country has been taken possession of- their existence has been overlooked- their rights have been unregarded- their claims have been unattended to- their lands have been sold by the British government without reference to their existence. Should not some reparation be made?- should not some trouble be bestowed upon their improvement in the simple arts?-should not some expense be incurred for their advancement in civilization, and for the gradual amelioration of their condition?-and should not some care be taken to secure the purchaser in the peaceable and quiet possession of his purchase? And by whom should the burden of this be borne? By the few struggling settlers by whose means the land is secured as an extension of the dominions of their country, or by the British nation, which has acquired so vast a territory by such a bloodless conquest, and upon such easy terms?161

Hutt’s assessment of Aboriginal society and land rights would be affected by the local legislature and protests by settlers over how colonial revenue should be spent. By the time of Hutt’s arrival in the colony the monopoly of political power of the large gentry landholders was stronger, with the appointment of four Legislative Council members who would reinforce settlers land interests.162 On 3 May 1839, Hutt informed Glenelg that he believed Aboriginal people ‘possessed in the soil over each separate portion of which some individual claims an inherited right,’ but that this had been ‘divested’ a long time ago by the British government, who had not been aware of their claims.163 This is the same paragraph that former Attorney General of New South Wales, Saxe Bannister would comment on in 1844, in his book which he used as an illustration to demonstrate where Indigenous rights should have been taken notice of by the British government at the time.164 Even the civil law which was normally accessible to British subjects was deemed by Hutt to be inapplicable to Aboriginal people; one of the reasons

161 The Perth Gazette, 31 August 1839, p.139.
162 Hutt to Goderich, 3 May 1839, BPP, Papers relative to the Aborigines, p.363.
163 Ibid.
164 Bannister, Classical Sources, p.xliii.
being that they could in theory sue for their civil rights in land.165 This was a departure from the ‘strict legal equality’ principle that the Colonial office was pressing in the early 1840s, this time for the civil law to be available to Aborigines under an Aborigines Evidence Act.166 In February 1840 Hutt instructed the Protectors to record ‘each portion of country occupied by them, and to collect names in the native language of all portions of land, in justice to the ‘first inhabitants or discoverers of any spot.’167 Hutt acknowledged that Aborigines retained ‘usufructuary’ rights in the land, based on what he regarded as the value of the land to their society.168

It was not until September 1840 that the Colonial Office raised the subject of Aboriginal policy in relation to land reserves and revenue. On 4 September 1840 Russell sent Hutt a copy of two despatches (both of which had earlier been sent to Governor Gipps in New South Wales) recommending that he adopt various measures for the civilisation of Aboriginal peoples.169 In 25 August 1840, Russell outlined his policy which included the requirement for colonial governments’ to allocate reserves and 15 per cent of the yearly revenue from the sale of Crown land for the ‘protection’ of Aboriginal peoples, the details of the appropriation to be decided by the governor.170 The British Treasury had already authorised the appropriation for New South Wales of 15 per cent of land revenue for the benefit, civilisation, and protection of Aboriginal people.171

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165 Hutt to Glenelg, 3 May 1839, Papers relative to the Aborigines, pp.363-5; Hutt to Russell, 20 January 1842, BPP, Papers Relative to the Aborigines, p.399.
166 See Chapter 5. Russell to Hutt, 30 April 1841, BPP, Papers Relative to the Aborigines, p.379.
167 Hutt to Marquis of Normanby, 11 February 1840, BPP, Papers Relative to the Aborigines, p.371.
168 Hutt to Glenelg, 3 May 1839, BPP, Papers Relative to the Aborigines, pp.363-4; Hutt to Russell, 15 May 1841, BPP, Papers relative to the Aborigines, pp.380, 382.
169 Russell to Hutt, 4 September 1840, BPP, Papers Relative to the Aborigines, p.379.
171 Ibid, p.294; The Imperial Waste Land Act 1842 (5 and 6 Vic, c. 36) provided that the gross proceeds of sales were to be applied to the public service, with one half appropriated for emigration.
This expression of policy had been prompted by an earlier despatch that Russell sent to Governor Gipps on 5 August 1840 (a copy of which was also sent to Hutt) enclosing an opinion from the Colonial Land and Emigration Commissioners in response to a proposal from the Church Missionary Society (CMS) in New South Wales.\textsuperscript{172} The CMS had requested additional funds in order to expand its mission in the Wellington Valley. The Commissioners recommended that several isolated moderate reserves (remote from the contaminating influence of colonists), be held in trust by the New South Wales government for the benefit of Aboriginal people, to encourage them towards a settled agricultural and pastoral life, instead of large reserves that allowed them to continue their traditional life.\textsuperscript{173} This, they anticipated would be funded either from colonial revenue or the Land Fund. This was a departure from the Aborigines Committee which had acknowledged these traditional rights when it instructed that protectors be appointed to protect hunting grounds, albeit temporarily.\textsuperscript{174} The Committee had pointed out that New South Wales had yielded the Treasury annual returns of more than £100,000 from land sales, some of which it recommended should go towards missionaries who would instruct the ‘tribes,’ and protectors who would defend them.\textsuperscript{175} The protectors’ duties included claiming ‘for the maintenance of the Aborigines such lands as may be necessary for their support.’\textsuperscript{176} This meant that reserves could be allocated for hunting purposes under the guardianship of protectors and missionaries. However, Hutt saw any reservation of large areas of hunting ground as incompatible with settlers’ demands for pasture land and in conflict with the amalgamation of Aboriginal people in colonial society as a class of labourer.

\textsuperscript{172} Russell to Gipps, 5 August 1840, BPP, \textit{Papers relative to the Aborigines}, p.58.
\textsuperscript{173} Ibid.
\textsuperscript{174} BPP, \textit{Report, 1837}, p.83.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid., p.83.
On 15 May 1841, Hutt responded to Russell by providing details about his ‘experiment’ of amalgamation and added that the sales of Crown land in Western Australia were not sufficient to amount to the 15% required for Aboriginal welfare, and that a greater sum was presently obtainable from general revenue.\textsuperscript{177} By 1841, there was a total of £1115 which had decreased from the maximum amount in 1840 (the highest achieved in the 1830s and 40s), of £2172, probably as a result of Glenelg’s surrender regulations, and would not increase again until the 1850s.\textsuperscript{178} This difficulty in relation to Western Australia had earlier been acknowledged by Permanent Undersecretary James Stephen who generally supported Hutt’s policy of amalgamation. Stephen believed that the Land Fund was a buffer against having to raise local taxation which had been ‘squandered’ in Western Australia.\textsuperscript{179} The Legislative Council had also been reluctant to expend funds on Aboriginal people when it could be used for roads and emigration schemes.\textsuperscript{180} Consequently, unlike other Australian colonies, the British parliament continued to fund the salary of two Protectors who arrived in Western Australia in January 1840 and other ‘sub-protectors’ in the 1840s and early 1850s.

Hutt was under considerable pressure from the Legislative Council over the stringent conditions on land regulations. In 1839, a memorial from the Agricultural Society was forwarded to the Colonial Office seeking unconditional full title to land grants.\textsuperscript{181} This had been sent to the Land and Emigration Commissioners who rejected it and pushed unpopular proposals to raise land revenue. Subsequently, Hutt was pressured by the Legislative Council to hold a Committee inquiry into Colonial Office instructions that required that the minimum price for the sale of Crown land be the same as that of New

\textsuperscript{177} Hutt to Russell, 15 May 1841, BPP, \textit{Papers relative to the Aborigines}, p. 386.
\textsuperscript{178} Burroughs, \textit{Britain and Australia}, p.386.
\textsuperscript{179} J. Stephen to G. W. Hope, 15 October 1841, CO 18/ 27, Reel 429-430, p.370.
\textsuperscript{180} Minutes of Legislative Council, 23 April 1835, CO 20/2, Reel 1118, p. 45.
\textsuperscript{181} Cameron, \textit{Ambition’s Fire}, p.187.
South Wales. Despite Hutt’s protest, the Committee was established in October 1842. Among a range of questions concerning the economic value of land, a select group of land-holding settlers were asked whether revenue from the sale of Crown land (or what settlers regarded as public land or a source of local revenue), should be appropriated for Aboriginal people. There was a generally held aspiration that any funds made available should be used for ‘some plan…to employ them on the land.’

It was clearly contemplated by the Colonial Office that a time would arrive when the Land Fund would be available for the Aborigines in Western Australia. The local regulations arising from the Waste Land Act 1842 acknowledged Indigenous rights in a clause allowing the government to withhold lands from sale, in order to reserve or dispose of lands ‘for the use or benefit of the aboriginal inhabitants of the country.’

In May 1841, Hutt argued against isolated reserves run by missionaries on the basis that New South Wales was different to Western Australia, firstly because New South Wales had convicts, who were of the ‘vicious and contaminated class,’ and secondly because unlike New South Wales ‘the colonists were not opposed to the civilisation of the Aborigines.’ This policy changed after Hutt left the colony, when the colonial government granted 20 acres of land in 1846 to the Benedictine monks to establish a

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182 ‘Evidence taken before the Legislative Council on the disposal of Crown lands in Western Australia.’ The Inquirer, 19 October 1842; 26 October 1842. Settlers wanted to retain the disposal of Crown lands in 160 acre lots with the right of commonage but this legislation had been disallowed by the Colonial Office. The Governor had also had the opportunity to ask questions.

183 The Inquirer, 26 October 1842.


mission, (the New Norcia mission), and a 1000 acre depasturing license in the remote Victoria Plains, to encourage local Aboriginal people to work as shepherds.187

The question of reparation for the loss of Indigenous lands was to be provided by Hutt’s goals of training and employment. Hutt rejected the Commissioners’ assumptions that it was only in converting the Aborigines from hunters to agriculturalists that reserves were of use.188 In his opinion, Indigenous peoples valued the land for subsistence purposes, but once the land was ‘usuarked’ by Europeans for ‘agriculture or gardening’ it lost its value to them. 189 Hutt was opposed to the provision of large reserves of this kind because he envisaged that it would result in increased conflict with the settlers which would set back his experiment of mingling Aboriginal people and settlers in towns and on farms. In his reply to Russell, Hutt emphasised:

Yet it is only as hunting-grounds that they can for a very long time be of any service to the aborigines. It is impossible to attach these people to the soil, because they know nothing of tillage, not even in the rudest form. It is not the earth, but the roots which it produces, and the animals also which inhabit it that they prize, because serving them for food. These reserves will, of course, be composed of some of the best lands in a colony where good first-rate land is rare…. This pressure from the colonists would force the government to relocate the Aborigines somewhere else.190

Hutt was not saying that Aboriginal people did not have claims to the reserves for hunting purposes in the interim (as it would take a long time to apply the British law and civilisation). However, he believed that such an arrangement would lead to conflict with the settlers who wanted the pasture land that the kangaroos grazed on and the

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187 Minutes of Executive Council, 27 December 1847, CO 20/5, Reel 1120, p. 177; The Perth Gazette, 31 July 1847.
188 De Garis, ‘Political Tutelage 1829-1890’ p.317. Hutt was opposed to measures ‘calculated to render this permanently a pastoral country’. However while remission certificates for settlers for employing Aborigines did not apply to sheep herding Hutt later recognised pastoral work as the best means for Aboriginal employment.
190 Ibid., p.382.
Indigenous people inhabited. Despite this reluctance to formally recognise Indigenous land rights, Hutt gave considerable thought to what a possible Indigenous land claim might entail and outlined the obstacles for determining land claims in his despatch to the Colonial Office. He pointed out the problems, such as determining who had a rightful claim to the land, especially when the time came for allocating it to individuals who had taken to settled life. He assumed that Aboriginal people lacked a civil government or collective authority which would affect whether negotiations for land rights could be made. The fact that Hutt gave any thought to the processing of land claims is interesting and demonstrates that he believed that Aboriginal people continued to have rights to land, although giving effect to such rights would prove too politically and practicably difficult. Moore had informed Hutt of his views on the responsibilities of the British government to enter into agreements. However, Hutt did not contemplate agreements to purchase Indigenous interests in land as had been debated in September 1836 by the Executive Council. This attitude explains why there was no legislation or charter that acknowledged Aboriginal legal rights to land. To a large extent Hutt wanted to avoid conflict with settlers who continued to further their own pastoral interests, but he also believed that the best chance for the survival of the Aboriginal peoples was in ‘mingling’ with Europeans in towns and on farms as labourers or skilled workers.

The new Secretary of State, Lord Stanley, does not appear to have enforced immediate compliance with Russell’s policy, being sufficiently impressed with Hutt’s plan to allow him discretion to continue it. Stanley, however, queried whether a reserve already

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191 Ibid., pp.382-3.
193 Cameron, Ambition’s Fire, p.161. Hutt was aware that pastoral expansion was taking over from agriculture in the 1840s.
194 Stanley to Hutt, 30 October 1841, BPP, Papers relative to the Aborigines, p. 391. Stanley probably meant the Wesleyan mission reserve in Perth. In 1844 a mission farm was established at Gullillilup towards Wanneroo, 14 kilometres from Perth. McNair and Rumley, Pioneer Aboriginal Mission, pp.40-41, 85.
existed which Hutt had not mentioned in his earlier despatch to Russell in May 1841. While Hutt acknowledged that Aboriginal people could practise their own laws and customs outside towns and farms as an interim phase towards their gradual amalgamation into colonial society, the ultimate object of his policy was (similarly to Grey’s principles) to reward permanent Aboriginal labour with a small plot of land. A few grants were issued to Aboriginal people in the 1840s and some grants of ten acres of land were sporadically allocated. This continued sporadically into the 1850s, but nothing on the scale that had been envisaged.

The Wewar trial held on 3 January 1842 focused on inter se offences, but also made some reference to the question of the reservation of land for traditional purposes. Advocate General, Richard W. Nash had worked with Hutt in the development of emigration schemes and land regulations and responded to Landor’s argument against the jurisdiction of the Court to hear inter se cases, by denying that Aboriginal people had laws or rights in land that could be recognised. He added that

a considerable amount of cant and nonsense had been talked in the mother-country upon allowing the natives distinct districts and hunting grounds. Our duty was to civilise the savage, and this could only be done by inducing him to frequent our residences, and by protecting him when in our society.

In Western Australia, the legal status and rights of Aborigines in criminal cases for theft and attacks on settlers was contested only when they were defended by counsel, a practice that was not consistently applied at this time. There were few court cases

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195 G. Grey, Report upon the best means of promoting the civilization of the Aboriginal inhabitants of Australia, Russell to Gipps, 8 October 1840, HRA, Series 1, Vol. 21, p.40.
196 Minutes of Executive Council 28 April 1846, WAS 1620, CONS 1058/3, p.362.
197 *R v Wewar*, Court of Quarter Sessions, 3 January 1842, *The Perth Gazette*, 8 January 1842, p.3; *The Inquirer*, 12 January 1842, pp.4-5.
198 *The Inquirer*, 12 January 1842, p.5.
199 Symmons to Colonial Secretary, SRO, CSR, ACC 36, Vol. 392, pp.131-134.
involving Indigenous defendants where legal counsel were employed in the period up to the late 1850s, let alone cases involving land rights, but a detailed survey of both criminal and civil cases has yet to be carried out in Western Australia. Kercher has pointed to a similar pattern in New South Wales in the early nineteenth century where there were no court cases involving Aborigines land rights, however, a closer study of the unreported court cases is needed before this can be confirmed. Mackie was also not in favour of civil law cases involving Aboriginal plaintiffs.

In 1840, there was a proposal for an emigration scheme in England that reflected traces of the influence of the humanitarian movement and referred to Indigenous land rights. A proposal for a settlement in the Southwest of Western Australia intended that Aboriginal people be compensated with reserves and equality under British law in return for extinguishing their title to land, and freedom from conflict. In 1839 after earlier attempts to convince Glenelg of the validity of various land speculations had failed, a new company was formed known as the Western Australian Company, with the purpose of establishing a series of settlements where Crown land would be purchased and resold to capitalists and intending emigrants. It was comprised of former settlers and its Directors included the systematic coloniser, Edward. G. Wakefield and the governor’s brother, William Hutt, M.P. The company had applied for a substantial land grant in the Southwest for the first Wakefieldan settlement in Western Australia, to be called Australind. In order to gain favour with the Colonial Office, the Company approached the Aborigines Protection Society in 1840 for support. On January 1841,

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200 See chapter 4.
203 Battye, Western Australia, p.155.
204 Statham-Drew, Stirling, pp.387, 394-8, 400.
205 APS, Fourth Annual Report, 7 May 1841, p.27.
the Society (under the leadership of Thomas Hodgkin) made an agreement with the Company to finance the passage of surgeon and explorer Richard King as a commissioner to make inquiries and collect information. This took place at a time when the Company had been seeking the support of the Colonial Office for a new locality after an unexpected change in plans threatened the economic viability of the project. 206

The Society sent a memorial to the Colonial Office on 3 March 1841 which requested that a commissioner be sent to conduct an Inquiry which would include:

First, an arrangement with the natives for the extinction of their title to the Crown lands of the colony, and the security of these natives of a portion of land adequate to supply the means of their peaceful existence.

Secondly, measures which may afford both to the natives, and to European settlers, that security of life and property, the absence of which is the fruitful source of evils in other colonies similarly instituted, and which unless averted by reasonable precautions, must, by their recurrence in WA seriously interfere with the happiness and prosperity, which it must be the united wish of her Majesty’s subjects and the company, that it should enjoy.

Thirdly, the adoption of measures which may promote the advancement of the aborigines (who have virtually become our adopted fellow-subjects) and secure the enjoyment of equal civil rights to the aboriginal inhabitants of the country. 207

The APS pointed out that its memorial was based on the ‘understanding that Her Majesty’s Government so far recognises the principle of aboriginal claims as to insure the adoption of any really practical measures which may be devised.’ 208 The APS interpreted this as adopting principles already laid down by the Commissioners in the establishment of South Australia which had failed because the principles were not implemented. However, there was no reference to agreements as mentioned for South

206 Burroughs, Britain and Australia, p.353. A much smaller contingent had sailed in December 1840.
207 Memorial of the APS concurred on by the W.A. Company to Lord John Russell. F. Maitland Innes to Russell, Enclosure No 2, Appendix, APS, Fourth Annual Report for 1841, pp.44-45. This is also repeated in CO 18/29, Reel 430-431, p.225; APS, Extracts from Papers and Proceedings, September 1841, pp.155-157.
208 F. Maitland Innes to Russell, Enclosure 2, APS, Appendix to Fourth Annual Report for 1841, p.45.
Australia by the APS as late as 1838-9, unless this was implicit in the word ‘arrangement’ in the memorial.209

Stephen supported the proposal as long as the governor had a ‘veto’ on the choice of Commissioner, but stated that ‘no pledge can be given as to what will be done in the result of the enquiry beyond the most general engagement to do whatever may then appear to be wise and practicable.’210 Vernon Smith commented that the conditions were ‘very vague.’ The Secretary of State, Lord John Russell gave approval for the appointment of a commissioner to ‘enquire into the condition of the Aborigines in Western Australia, ’as long as the British government did not have to pay for their passage.211 He made no comment on the other aspects of the memorial.

However, at the last minute, the Company reneged on the deal with the Society, claiming that there had been a misapprehension regarding finances, and the venture took place on a much smaller scale without any proposal recognising Indigenous rights. The Company had been in financial trouble before the memorial was even proposed and the first ship had already sailed with the first immigrants arriving in Western Australia on 17 March 1841. Its abandonment coincided with the reduction of the scale of the project and the withdrawal of investors and capital.212

There was a general resistance to recognising Indigenous land rights in Australia let alone incorporating such rights in law in contests between different parties.213 This resistance was already apparent in England in the late 1830s and 40s, but was even more so in the colonies. Any opportunity that arose took place in the early to mid 1830s rather

211 Vernon Smith to Russell, 4 March 1841, PRO, CO 18/29, p.226.
212 Statham Drew, Stirling, p.399. Only 500 emigrants arrived in the Colony.
than the latter half of that century in relation to Western Australia, as a result of both local and humanitarian influences on the Colonial Office. Attempts in 1838 by the Aborigines Protection Society to persuade the British parliament to legislate for reserves for Western Australia, New South Wales and South Australia had also failed.\(^{214}\) Nevertheless, by 1840, the Treaty of Waitangi had been signed between the British government and the Maori people of New Zealand which asserted British sovereignty and legal authority and recognised Maori people’s rights in land and customary laws.\(^{215}\) This occurred when it was advantageous at the time for the Imperial power to politically acknowledge indigenous rights to land in order to facilitate the annexation of land titles.\(^{216}\)

**Pastoral leases**

The last major indirect effect of the Aborigines Committee was through the lobbying of one of the Protectors of New South Wales, George. A. Robinson who raised the question of the rights of Aboriginal peoples to practise their traditional lifestyle on pastoral leases, to the attention of the Colonial Office in 1847.\(^{217}\) Uncertainty surrounded this issue, as Robinson pointed out. Earlier in 1841, a settler in the Port Phillip District who held a licence to occupy a run, was prosecuted for the attempted murder of an Aborigine while forcing him off his pastoral station. This was the case of *R v Bolden* (1841), where Justice Willis concluded that a person who had a licence to occupy a run could lawfully protect his stock and remove a European or Aborigine from

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\(^{214}\) Russell, *A History of the Law in Western Australia*, Appendix 1, p.329. These Acts established the power of the Governor to institute courts and laws -For WA it was the Imperial Statute 10 Geo IV c22, 1829 which was renewable annually from 1835.


that land.\textsuperscript{218} This decision was made at a time when pastoralism was expanding all over New South Wales with calls from squatters and settlers for the enforcement of British law to protect their property.\textsuperscript{219} On 11 February 1848, Secretary of State, Earl Grey instructed Governor Fitzroy to provide for the mutual rights of Aboriginal peoples and pastoralists on Crown leases which should be officially recognised or legally enforced so as not to ‘deprive the Aborigines of their former right to hunt over these Districts or wander over them in search of subsistence.’\textsuperscript{220} Subsequently, an Order in Council was passed in New South Wales in July 1849 that required the insertion of a condition to a pastoral lease to the effect that ‘such free access to the said Run or parcel of land, hereby demised or any part thereof as will enable them to procure the animals, birds, fish, and the foods in which they subsist.’\textsuperscript{221}

The question of Aboriginal access to pastoral leases reflected Colonial Office perceptions of pastoral development generally in the Australian colonies, including New South Wales, and the need for the plurality of interests in land to be formally recognised. The clauses were drafted differently by the administrators of the various colonies, with South Australia providing the most detail on Aboriginal rights.\textsuperscript{222} In Western Australia, Governor Fitzgerald sent off proposals for land regulations to the Colonial Office without any reference to Aboriginal rights provoking a response from Earl Grey who questioned why they had not been provided for as in New South Wales. This prompted Fitzgerald to make an order on 17 December 1850 that declared: ‘that nothing contained in any pastoral lease shall prevent the Aboriginal natives of this

\textsuperscript{218}R v Bolden, Supreme Court of New South Wales, 2 December 1841, Decisions of the Superior Courts of New South Wales, 1788-1899, Macquarie University, p.4. In the late 1840s more restrictive legislation used to curb certain customs that interfered with agriculture- eg; lighting fires at certain times of the year, and the licensing of ‘native dogs.’
\textsuperscript{219}Ibid.; Reece, Aborigines and Colonists, pp.50, 196.
\textsuperscript{220} Grey to Fitzroy, 11 February 1848, HRA, Vol. 26, Series 1, pp. 225-6.
\textsuperscript{221} Reynolds, The Law of the Land, p.185.
\textsuperscript{222} Ibid., p186. South Australia’s provisions contained a more detailed list of Aboriginal rights.
colony from entering upon the lands comprised therein, and seeking the subsistence there from in their accustomed manner.223 Clement argues that although important, this recognition of Aboriginal access was not a major statement, as it reflected change in Imperial perceptions of the colony’s development.224 It was also part of a larger clause where settlers could seek compensation for other forms of trespass, with no mention of enforcement on behalf of the Aborigines. Nevertheless, it did reflect the last concerted attempt by the Colonial Office before Australian Colonies Government Act (1850) came into effect, to ensure that Aborigines were not pushed off the land. Robinson’s concern was reflected in the duties inherent in his role as outlined by the 1837 Aborigines Committee recommendation which included the protection of Indigenous hunting grounds. He took it more seriously than Protectors in Western Australia who had not been similarly briefed by Governor Hutt.

In the 1850s, Aboriginal people were still unlikely to have practical access to the civil courts except perhaps in relation to labour disputes in Perth. However, enforcement required knowledge of the law and the means to enforce any rights. The example below demonstrates (at a time when there were sub-protectors appointed in the regions of Vasse, York and Albany), that some acknowledgement was made by the Executive Council of the difficulties of Aboriginal people being able to enforce their legal rights. On 17 November 1853, the Sub-Guardian of Aborigines, Arthur Trimmer (one of the last appointments for Albany), sought government approval for an agreement with Aboriginal people in the Jerramungup and Salt River districts ‘for the prevention of sheep stealing and burning the bush’ in exchange for a quantity of flour or rice at stated

223 WAGG, 17 December 1850, pp.1-4.
periods, about twice a year, and requested a contribution from the Government for this purpose.225 The Executive Council replied to Trimmer that

the government can recognise the claim only with regard to the trespass of the white man on the hunting grounds of the Aborigines, and for the prevention of native fires. The Council on these grounds and as an experiment having great doubts of any good results arising from this policy are willing to grant an amount not exceeding 10 pounds in the whole on the settlers subscribing an equal amount, and the application of this grant is to be extended only to the extreme remote parts of the Albany districts.226

While there was formal recognition that a claim could be made for trespass on the hunting grounds of Aboriginal people, the Executive Council considered that it was unlikely in practice and that the pursuit of an alternative form of ‘compensation,’ which was more to the satisfaction of the settlers, was more likely to succeed.227

There were fewer voices among the settlers and officials arguing for Indigenous land rights by the late 1840s and 1850s. Colonial Secretary, Richard Robert Madden had returned to England in January 1849 disgusted at the disregard for Aboriginal lives and rights. On May 1849, while still Colonial Secretary (on leave of absence), he made a last ditch effort to influence the British Government, making a statement before a meeting of the Aborigines Protection Society, that the land rights of the Aboriginal peoples of Western Australia had been denied by private individuals who had come to appropriate the land and invite immigration. Unlike Moore who had asked the same questions in the 1830s, Madden placed the responsibility squarely on the settlers as much as the British government:

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225 Minutes of the Executive Council, 17 November 1853, SRO, WAS 1620 CONS 1058/2, p.369.
226 Ibid.
227 Ibid.
Step by step they obtained a grant; and without at all considering the right over the soil of the Aborigines, these speculators commenced locating. They made no reservations, at all on behalf of the Natives, but, on the contrary, pursued a system of aggression and annoyance towards them, which naturally resulted in quarrels and the perpetration of murder and massacre. The grant of this large tract of country was made on the representation that it was uninhabited; but was in reality populated by a numerous tribe.\textsuperscript{228}

In summary, there were significant debates about Aboriginal rights in land in Western Australia in the 1830s and 1840s. During the Stirling period, there was an official understanding that Aboriginal people had proprietary interests in land, and recommendations were made to purchase the land from them as a form of reparation, however a decision was made not to put this into practice. This reluctance was affected by wider contests which were governed by the legal, economic and political implications that could affect settlers’ rights in land, as set out in colonial petitions to the British government.

There was a window of opportunity for negotiation between Aboriginal people and settlers that arose during the early 1830s while Stirling was in England. However the momentum was lost when Stirling returned from England, without the change in land regulations and economic relief that the settlers expected. Another opportunity came in September 1836 when the possibility of negotiating an agreement of dual occupation was briefly debated by the colonial government. However, the subject was avoided after the land regulations (and obtaining exclusive possession) became the primary concern of government and settlers in 1837, and when expected changes in British government policy failed to materialise, which policy was increasingly replaced with ‘protection’ rhetoric. Bannister was one of the few that continued to advocate within the APS for treaties after the Aborigines committee failed to recommend treaties for Australia. In

\textsuperscript{228} APS, Twelfth Annual Report of the APS, May 1849, p.9.
1838-9, the APS had continued to lobby the British government for what were regarded as standards promised by the example of South Australia, but the Society was losing its influence by this time. This is especially the case after the Wakefieldian colonising companies became more sophisticated in their lobbying power of the parliament (and the Disposal of Waste Land committee), and the Colonial Office. This occurred, ironically during a time when the political circumstances regarding New Zealand would lead to a treaty in the British government’s quest for Crown certainty on land titles. This is something that Robert rightfully concludes was Glenelg’s primary concern arising from the Batman treaty, which was that it conflicted with the claims of the Crown to the land and the control of sales revenue. In Western Australia, by the early 1840s only Nairn Clark pointed out that Indigenous land rights had been totally disregarded.

The main debate in the early 1830s took place not in the courts but in the Executive Council. There had already been some public debate on the subject of Indigenous rights in 1833 when Moore first raised the example of William Penn’s agreement with indigenous people in Pennsylvania as an ideal model for colonisation. He, similarly to Nairn Clark and Saxe Bannister was not opposed to colonisation, but to the injustice of the method that dispossessed Indigenous peoples without compensation. This had also been raised by witnesses to the Aborigines Committee in 1835-1837. Goderich also thought that the colonial government on behalf of the settlers could have negotiated an agreement with Aboriginal peoples at low cost. However the fact that Moore had distinguished settlers responsibility for such an agreement from that of the British government as if they were two separate entities, meant that such an agreement would not be made and that Aborigines would instead be regarded as outlaws, subjects and an economic commodity like the land. Moore played a leading role in vetting colonial

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229 Robert, ‘Colonizing concepts of Aboriginal rights,’ p.44.
expenditure after Stirling surprisingly conceded a major part of this power to the Legislative Council. From 1835 onwards, any provision of funding from colonial revenue to implement policy regarding Aborigines, would involve a greater contest between governor and the Legislative Council, and between settlers and the British government. The British government was also unwilling to pay for an agreement if there was little revenue from the sale of Crown land. The land in the Swan district was nearly all owned in fee simple title by the settlers which gave the Government less political clout in any case, at a time when Aborigines’ access to the river foreshore was being increasingly curtailed. Therefore the proposal from Armstrong on behalf of Indigenous leaders was unlikely to have been successful even if Stirling had exerted his influence.

Stirling had resisted settler attempts to purchase foreshore land in order to extend their ribbon allotments down to the Swan River foreshore. This may have been why he advertised Bourke’s proclamation that warned that only the Crown had the right to make decisions regarding the alienation of what was regarded as Crown land. The proposal by Aborigines for an agreement of dual occupation was not taken to the Legislative Council which would have opposed it on economic and political grounds. Moore was on both Councils and his views were well known in relation to the provision of colonial funds for a Mounted police. The Colonial Office was also not about to provide funding for ongoing agreements with Aboriginal people and Goderich endorsement of Arthur’s proposal that urged settlers to pay for an agreement was unpopular. Despite some official opinion that the British government should pay for any agreement with Indigenous people, the proposal of 1836 does not appear to have been put to the British government, probably because the settlers petitions of gaining certainty of title to land in areas outside of Perth were still being debated in 1837 and well into the 1840s.\footnote{BPP, \textit{Report, 1837}, p.4; Acts of Parliament have been passed disposing of lands without any ‘reference}
The question of the lack of colonial revenue arising from the sale of Crown land had to be dealt with. Settlers complained of the government charge on Crown land and the changing requirements on their existing grants, and in March 1837, Glenelg offered a compromise arrangement that gave them access to new land. However, there was still a push by the British government to increase the minimum upset price on the sale of Crown land. This took place as the settlers focus shifted from Perth allotments to the acquisition of large areas of land for pastoralism. By the time that a land treaty was being negotiated in New Zealand, the Aborigines Committee report had already released its recommendations in June 1837, proposing reparation in the form of Land Funds and reserves for New South Wales and Western Australia under the guardianship of missionaries and protectors. By this time, only Saxe Bannister had continued to suggest treaties for Western Australia. The influence of economic and political factors, and the fact that New Zealand was not viewed as a Crown colony until 1840, meant that the opportunity for Australia had passed in favour of a more paternalistic protectionist policy.

Governors Stirling and Hutt acknowledged that Aborigines had rights in land, based on their limited understanding of Indigenous societies in general and Aborigines in particular. However, they both chose to avoid the question. Additionally, as Tilbrook outlines, the exact relationship between the Aborigines and the land in the Southwest was never fully grasped by the Europeans.\(^{231}\) Hutt’s opinion was that Aborigines had rights to their hunting and fishing grounds (as their ties to land were understood at that time) but that due to various difficulties influenced by economic and political factors to the possessors and actual occupants, and without making any reserve of the proceeds of the property of the natives for their benefit.’

\(^{231}\) Tilbrook, ‘Shadows in the Archives’, p.88.
these claims were not given effect to, and large reserves for Aborigines to hunt and fish were viewed as likely to interfere with settlers pastoral interests. In Hutt’s view, reparation was best made in the form of employment, education and eventual amalgamation into colonial society. It was not until the late 1840s at the instigation of the Colonial Office that the preservation of access rights on pastoral leases was included in legislation. However, in general there was an avoidance of enshrining Indigenous rights in agreements or statutes that might be recognised by law and might imply that Aboriginal people could enforce their rights in the civil law courts (as Hutt feared). Indigenous people were therefore relegated to a status where (while civil law and the law of nations was viewed as only for the ‘civilised’) they could not have equal rights as British subjects (as Glenelg intended) nor could they make claims to their hunting or fishing grounds.
Chapter 7

The status of Indigenous law: legal pluralism?

The question of whether Aboriginal people were subject to British law for disputes amongst themselves (inter se) arose in Western Australia during the 1830s and 1840s. There were similar issues confronting other Australian colonial authorities as a result of contact with Aboriginal peoples, but each colony developed its own response to the problem in relative isolation. 1 The Executive Council and courts in Western Australia were more willing to entertain debates on the legal status and rights of Indigenous people in relation to inter se offences in the 1830s and 40s because of a reluctance to interfere with what were regarded as ‘private feuds’ between Aborigines. This non-interference policy was also recognised by the Colonial Office in the early 1840s, despite the official position that Aboriginal people were to be regarded as British subjects. However by November 1848, there was a policy shift towards exerting the full penalty of British law for tribal murder and assaults and on April 1850, the first legal execution for inter se murder in Western Australia was carried out as a severe example to Aboriginal people. This coincided with a general push by magistrates to control Aboriginal people and their law, (regarded more as a superstition by this stage) during a period of expansion of the pastoral economy and at a time of acute labour shortages, particularly in the York district, but also in the Southwest. 2

The chapter examines the debates on the legal position and rights of Aboriginal people in relation to inter se offences in Western Australia and whether there was a form of

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1 The Swan River Colony was isolated from the East to a large extent. By 1834, trade-links had still not been established and shipping was infrequent and irregular adding to the Swan River Colony’s isolation. Green, Broken Spears, p.95; Hutt to Russell, 15 May 1841, BPP, Papers relative to the Aborigines, p.380.
2 Hasluck, Black Australians, p.45.
legal pluralism. Benton describes ‘weak legal pluralism’ (exemplified in New South Wales before the *Murrell case*), as the recognition of ‘legal authority of indigenous groups without proscribing a formal plan for the interaction of colonial and indigenous law’, that was later replaced by the colonial ‘legal hierarchy.’ \(^3\) ‘Strong legal pluralism’ on the other hand was where ‘politically prominent attempts have been made to fix rules about the relation of various legal authorities and forums.’ \(^4\)

### The Stirling period

In mid-1836, Stirling received a despatch from Glenelg reminding him that Aboriginal people were to be protected under British law and subject to the same legal forms as the settlers. \(^5\) Mackie interpreted this as applying the full penalties of criminal law to Aborigines as for other British subjects for offences against Europeans lives and property. \(^6\) However, in relation to conduct among Aboriginal people, the local policy was not to interfere with their laws unless they involved ‘crimes’ against settlers. In November 1837 Armstrong sought advice from Mackie about whether British law applied to matters involving tribal conflict in Perth. \(^7\) Mackie replied that Stirling thought it best not to interfere in what were regarded as ‘private quarrels.’ \(^8\) There was an official understanding that the ‘quarrels’ among Aboriginal people should not be interfered with. \(^9\)

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\(^1\) *R v Murrell and Bummaree* (1836), 5 February 1836, Supreme Court of New South Wales, *Decisions of the Superior Courts of NSW 1788-1899*.


\(^3\) Glenelg to Stirling, 23 July 1835, CO 397/2, Reel 304, p.167.

\(^4\) *The Perth Gazette*, 7 October 1837, pp. 984-5.

\(^5\) Armstrong to Colonial Secretary, 6 November 1837, SRO, CSR, ACC 36, Vol. 57, p. 28.

\(^6\) Armstrong to Colonial Secretary, 27 November 1836 to 27 October 1837, SRO, CSR, ACC 36, Vol 58, p.145.

\(^7\) Ibid.,p. 145; Reply from Colonial Secretary to Armstrong, 15 November 1837, SRO, CSR, ACC 49/8.
The political question of how the colonial government and the courts were to deal with *inter se* offences arose out of complaints by settlers of increased street violence in Perth amongst groups of Aborigines, and the recommendation for a legalistic solution was made.10 Many settlers in Perth complained that Aboriginal people should be punished for violence in the streets of Perth and by early 1838 the colonial government was pressured into action.11 They argued that it would be inconsistent with the current Colonial Office policy of equality under British law.12 Additionally, there was increasing concern that Aboriginal people near Perth, who had been useful to settlers, were being killed by members of the ‘Murray river tribe.’13 On 24 April 1838, the first prosecution for an *inter se* murder occurred, along with the first official debate on the legal position of Aborigines and the status of their laws.

Lieutenant Henry Bunbury who arrived in the Swan River Colony on March 1836 from Tasmania reported that the non-interference policy had been in place in New South Wales when he was there in 1835.14 Bunbury believed that it was unjust and politically unwise to interfere with laws that had existed before Europeans arrived.15 However, there was also awareness that a similar issue was being encountered in New South Wales courts with a very brief reference in *The Perth Gazette* on 8 July 1836, to the *Murrell* case where lawyer, Sydney Stephen argued that Aborigines should not be subject to the jurisdiction of the court for *inter se* offences, but at a time when the judicial decision was not yet known.16

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14 Bunbury and Morrell, *Early Days in Western Australia*, pp.24, 190.
15 Ibid.
16 *The Perth Gazette*, 9 July 1836, p.725. There was a brief extract published in *The Gazette* that referred to a trial in the New South Wales Supreme Court of an Aborigine who had ‘murdered another’, and
While there was little understanding of Indigenous law other than what was described as retaliation of a life for another, there was official understanding that Aboriginal people had rules of conduct by which they were governed, which information was sent by Stirling in the statistical report to the British Government for June 1837. Increasingly, Governors and magistrates found it more difficult to treat Aborigines as British subjects in accordance with Colonial office instructions.

**Inter-tribal violence in the streets of Perth: The Helia Case**

Helia was the first Aboriginal person to be charged for the wilful murder of another Aborigine. At the magistrates hearing on 24 April 1838, he was charged with the wilful murder of Yatoobong under British law. An elder of the ‘first North tribe’, Helia was exercising his traditional rights to gather tubers on the shore of the Swan river and became involved in an inter-tribal dispute in which Yatoobong was killed. On 2 July 1838, he was brought before a bench of magistrates and a grand jury in the Court of Quarter Sessions. Although a grand jury had the power to amend a charge from wilful murder, it did not do so, being comprised of townspeople who objected to his conduct.

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adding that Sydney Stephen had argued that the ‘black could not be tried by that court, as he was not a subject of the king.’ This is no doubt *R v Murrell*. At that time the outcome was not known and the judges’ decision does not appear to have been published in subsequent editions.

17 *The Perth Gazette*, 9 June 1838, pp.91-92, Statistical Report upon the Colony of WA sent by Stirling to the British Government for the year ending June 1837.

18 *The Perth Gazette*, 1 January 1837, p.928.

19 *The Perth Gazette*, 28 April 1838, pp. 66-7; Magistrates’ hearing before Mackie, T.Yule and R. M. Brown on 24 April 1838 one day after the event; Yatoo-bung or Yatorbong.

Mackie directed that the meaning of the charge against him be explained to Helia. Armstrong was the interpreter and through his translation. Helia admitted that he had speared Yatoobong, but not with the intention of causing her death:

I was gathering yandyeet (flag root) when I heard a noise as if natives fighting. I ran to the place and saw the deceased’s husband spear my son Eanung. I threw a spear at the deceased’s husband (Bilyang) and afterwards speared the deceased, but not mortally- I only speared her in the foot. I speared her because I had heard that my daughter Wilgup had been killed to the Northward by some relatives of the deceased, whose name was Yatoo-bung. The interpreter has told me that the white people would not suffer the natives to kill one another in the streets, and I have spoken to the other natives about it, but in vain.  

Helia was not represented by a lawyer and his statement through Armstrong was interpreted by the court as a plea of not guilty. No less than five European witnesses testified against him, but there were no Aboriginal witnesses as they were legally ineligible to give evidence in court. The jury found Helia guilty of wilful murder and he was sentenced to death. While several other members of his tribal group had also been involved in the spearing of Yatooboong, it is likely that Helia was identified as a principal because Armstrong had previously given him the task of making sure other Aborigines were not involved in armed disputes in the streets of Perth.

The question of whether Helia’s sentence should be commuted was referred to the Governor in Council. Stirling stated that it would be an ‘act of injustice and cruelty’ to recommend the execution of someone acting in accordance with moral duties under his own laws and that if the full force of British law was applied to Helia, this precedent

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21 Helia’s statement, SRO, Criminal indictment file, Case Nos, 180, 182, CONS 3472/35; The Perth Gazette, 28 April 1838, p. 67.
22 The Perth Gazette, 7 July 1838, p. 107.
23 Minutes of Executive Council, 13 July 1838 CO 20/2, Reel, 1118, pp.269-271.
would also mean that a death sentence would extend to the rest of his people in similar cases. He added:

Undoubtedly the laws of England must eventually prevail within the territory and offences against it of such a nature as that are now under consideration must be visited by punishment sufficient to deter and prevent the crime of murder, that the time did not appear to have arrived for its application, to the natives in question between themselves. Instruction must be conferred upon them. Civilisation reclaim them and protection be secured by the law before they could justly be tried [my emphasis] or liable to its punishment.24

Stirling proposed that as his instructions did not give him the power to pardon Helia, who had already been convicted in a court of law, he should be detained as a prisoner until representation was made to the Secretary of State for Colonies.25

Advocate General Moore agreed. In his opinion, Aboriginal people had their own laws that guided their conduct amongst themselves, that it was not possible for them to seek redress under British laws (as they did not have access to same forms and technicalities) and therefore they should not be prevented from seeking redress under their own laws. Moore referred to Glenelg’s direction that Aboriginal people should be treated by the same legal process as other British subjects but argued that this should be subject to ‘many qualifications.’26 In Moore’s opinion this meant that they could only be considered British subjects and amenable to British laws ‘so far as is necessary to secure their lives, persons and property of the British settlers from molestation.’27 Moore considered that it would be cruel to take Helia’s life when he had been acting according to the need for retaliation, authorised and recognised as an ‘imperative duty’ by his own

24 Ibid., pp.269-70.
25 Ibid.
26 Minutes of Executive Council, 21 July 1838, CO 20/2, Reel 1118, pp.271-2.
27 Ibid., p.271.
people, and although his conduct contradicted British law he had not known of the existence nor the force of that law as applied to his own people.\textsuperscript{28}

The debate focused on the mitigation of punishment in Helia’s case rather than the jurisdiction of the court; however, the decision was subsequently made not to prosecute any further cases until the British government’s views were known. There is no evidence, however, that Stirling actually sought advice from the Colonial Office and he was saved from the need to do so, when Helia drowned in an escape attempt from Rottnest Island.\textsuperscript{29} After the Helia case there were no further prosecutions even though in October 1838 the townspeople in Perth petitioned the colonial government to change the non-interference policy. Settlers also complained of nudity, inter-tribal violence and sought to prohibit Aborigines from carrying spears within the town limits.\textsuperscript{30}

Shortly afterwards, the Editor of \textit{The Perth Gazette} speculated what Colonial Office policy might have been on the question by referring to a statement by the Secretary of State, Lord Goderich involving a similar situation:

\begin{quote}
Lord Goderich, in a letter to the Governor of British Guinea, on a reference as to sentence of death passed upon a native Indian for the murder of another, observes- “It is a serious consideration that we have subjected these tribes to the penalties of a code of which they unavoidably live in profound ignorance; they have not even that conjectural knowledge of its provisions which would be suggested by the precepts of religion, if they had ever received the most elementary instruction in the Christian faith; they are brought into acquaintance with civilized life, not to partake its blessings, but only to feel the severity of its penal sanction.”\textsuperscript{31}
\end{quote}

\textsuperscript{28} Ibid, pp. 273-4.  
\textsuperscript{29} Green and Moon, \textit{Far from Home}, p.85.  
\textsuperscript{30} Minutes of Executive Council, 25 September 1838, CO20/2, Reel 1118, pp. 299-300; \textit{The Perth Gazette}, 13 October 1838, p.162. The memorial also stated that the ‘inhabitants of the town should be empowered to destroy all spears found in the hands of the natives within the limits of the town.’  
\textsuperscript{31} \textit{The Perth Gazette}, 28 July 1838, p.119.
Despite being in favour of the execution of Helia, the Editor of *The Perth Gazette* assumed that the Colonial Office would not have endorsed the death sentence for Helia should the matter have gone further.\(^{32}\)

The news of Helia’s death brought an angry response from his relatives. Moore noted in his private journal that there was growing resentment by Aboriginal people against the increasing interference by settlers in their laws. It is therefore likely that the non-interference policy was also a pragmatic political response to prevent retaliation against the settlers. Moore attempted to intervene when Helia’s son Eannun sort to revenge his father’s death. Eannun is reported to have said, ‘Why does the white man interfere? I saw before me the murderer of my father, and you would not let me kill him.’ Moore reminded him that it was only the brother of the man, and that the white people did not punish a man because his brother was guilty. Eannun added:

> Well it was his brother; it is the same; the Yoongar says it is good; the Yoongar thinks it is the same. Why did his brother throw my father into the sea? Mauli Megat is a bad man; he has killed sheep upon the Canning; he has burned a house upon the Canning…… he will kill more white people, and the governor will be angry, and the governor will say to me: Eanun go with the white men, and look for the footsteps of Mauli Megat; and I will say, “I will not go; I went before, I saw him, and the white men would not let me kill him” You shall see it at some future time; the governor will ask me: I will say, ”Ask me not, I will not go.”\(^{33}\)

Shortly afterwards, Stirling changed Armstrong’s role from mediator to that of town policeman under the control and direction of the magistrates residing in Perth, and introduced measures to banish Aboriginal people from the town if they fought in the

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streets. While there were no more convictions for inter se violence, the policing and resultant banishment resulted in the Aborigines’ continual loss of rights to practise their own laws within the precincts of towns. Local Aboriginal people resisted the various measures that included having their spears broken if they entered the town or camped near it armed with spears, where as those regarded as ‘strangers’ were to have their spears taken off them and returned upon their departure. Stirling left the Swan River Colony in December 1838, and the next Governor would continue this policy.

The Hutt period

Stirling’s successor, Governor Hutt developed principles to govern the conduct between Aboriginal people and settlers within the towns. He attempted to work out whether Indigenous laws could be accommodated as part of colonial legal and social institutions. He did not believe that Aboriginal people could be regarded as British subjects and under British law in their dealings with each other, unless they were under the protection of a settler. In April 1839, Hutt reviewed the policy after Weban was prosecuted for the wilful murder of a child on a settler’s farm outside Perth.

Weban (also known as Beewullo) was an elder, and the brother of Helia. (Tilbrook states that both were senior members of ‘First North tribe’ north of Perth, toward Gingin.) On 31 March 1839, Weban was apprehended and charged with the wilful murder.

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34 WAGG, 23 February 1839, No 139, p.232; An instruction issued on 20 February 1839 to Resident magistrates stated that no Aborigine should be allowed to enter any town or dwelling of Europeans armed with a spear.
35 Colonial Secretary to Armstrong, 14 August 1839, SRO, CSR, ACC 49/12.
36 Hutt had sent out a questionnaire two weeks after his arrival. See Chapter 4.
39 R v Weban, Court of Quarter Sessions, 1 July 1839, The Perth Gazette, 6 July 1839, pp.106-7. Weban was known as a ‘boylya” or “native doctor” with extraordinary powers. Helia was his brother. He was
murder of Yellelan, who was dressed as a European child by the Shaw family at their farmhouse in Upper Swan.\textsuperscript{40} In answer to the charge of wilful murder, Weban was reported to have said that Weenat’s party had killed his brother and that Tomigin had told him to kill the child in revenge for that act. This was interpreted by the court as a plea of guilty. There was no lawyer representing Weban, but prior to the verdict, Moore explained to the grand jury that Weban’s actions had been according to his own laws.\textsuperscript{41} He pointed out the relationship between the death of Yellelan and other inter-tribal disputes which had led to Weban killing Yellelan as part of the natural resolution of a retributive cycle. This made no difference to the jury who found Weban guilty of wilful murder, and a sentence of death was recorded against him which was later commuted to life imprisonment on Rottnest Island.\textsuperscript{42} Weban escaped from Perth gaol shortly afterwards and disappeared.\textsuperscript{43}

A week later, Hutt instructed Armstrong to draft a notice which was published in the Government Gazette in English and the ‘Aboriginal language’, stating that ‘If a native residing with, and under the care of a European is killed by a native, the Governor will immediately have the murderer apprehended and punished in precisely the same manner as if the murder had been committed on a white person.’ \textsuperscript{44} In addition to a policy of banishment, there was now one of punishment if an Aboriginal person was living with and under the care of a European. Similar instructions were issued to the two Protectors, Peter Barrow and Charles Symmons appointed by the British government, who arrived

\textsuperscript{40} Other names for Weban were Weeban, Webam and Beewullo. Hallam and Tilbrook, Aborigines of the South West Region, Vol VIII, pp.13-15.
\textsuperscript{41} The Perth Gazette, 6 July 1839, pp.106-7.
\textsuperscript{42} Ibid.
\textsuperscript{43} Grey, Expeditions, Vol. 2, p.326.
\textsuperscript{44} WAGG, 13 July 1839, p. Colonial Secretary Office notice, 9 July 1839. Armstrong draft notices, 9 July 1839, SRO, CSR, ACC 36, Vol. 75, p.138.
in January 1840.\textsuperscript{45} By 1842 this notice included Aboriginal people who at the time had been casually or regularly employed by Europeans.\textsuperscript{46}

### Grey’s opinion.

In July 1841 Hutt received a despatch from Secretary of State, Lord John Russell recommending the general adoption of Capt. George Grey’s suggestions (now Governor of South Australia) for the strict application of British law to Aborigines, subject to modifications arising from local experience and knowledge.\textsuperscript{47} Hutt replied that he had received the benefit of his ideas several months prior to Grey’s departure from the colony in April 1840. However, Hutt disagreed that British law should apply to all \textit{inter se} cases, except ‘murder’ in townsites and farming localities.\textsuperscript{48} He thought that British law should only apply to those \textit{inter se} offences ‘which come under our cognizance’ and that these could only be regarded ‘as breaches of the peace, and that even murder can only be visited with the penalty of banishment.’\textsuperscript{49} In Hutt’s opinion, one of the difficulties was the lack of enforcement which required a larger police force than presently existed, and that until this could be done it would be unjust and impractical to interfere with Indigenous laws and customs as this would prevent Indigenous people from being able to protect themselves. He added that Aboriginal people had no redress under British law and that it was difficult to obtain evidence in cases in which they alone were involved.\textsuperscript{50}

\textsuperscript{45} Hutt to Marquis of Normanby, 11 February 1840, Encl No 6, Instructions to the Protectors of the Aborigines in Western Australia, BPP, \textit{Papers Relative to the Aborigines}, pp.371 -373.


\textsuperscript{47} Russell to Hutt, 8 October 1840, BPP, \textit{Papers Relative to Aborigines}, p.391; Hutt to Russell, 10 July 1841, BPP, p.392; A. C. Castles and M. C. Harris, \textit{Lawmakers and Wayward Whigs}, Adelaide, Wakefield Press, 1987, p.33. Grey was Governor of South Australia from May 1841 to October 1845.

\textsuperscript{48} Hutt to Russell, 10 July 1841, BPP, \textit{Papers Relative to the Aborigines}, p.392; Minutes of Executive Council, 15 June 1841, WAS 1620, CONS 1058/2, p.140.

\textsuperscript{49} Hutt to Glenelg, 3 May 1839, BPP, \textit{Papers Relative to the Aborigines}, p.365.

\textsuperscript{50} Ibid.
However, while differing in their approach, Grey and Hutt agreed that they were working towards the amalgamation of Aboriginal people into colonial society which they believed could be achieved by encouraging settlers to train and employ them.\(^{51}\) This was particularly the case in Western Australia more than other colonies because cheap labour was generally in short supply.\(^{52}\) Nevertheless, unlike Grey, Hutt did not believe that Indigenous people would readily adopt civilisation if they were punished severely and if their laws were controlled. Although Grey had made a study of Indigenous law he regarded it as ‘superstition’, rather than law like written colonial codes.\(^{53}\) Grey believed that the moment that the British government decided that Aboriginal peoples were British subjects, British law should have replaced Indigenous laws so that they would be encouraged to appeal to British legal authority. While Hutt and Grey had similar longer term objectives, they disagreed on the method of achieving them.

Grey criticised the erroneous principle that he had witnessed from 1837 to 1839 when he was in Western Australia, that ‘although the Natives should, as far as European property and European subjects were concerned, be made amenable to British laws, yet, so long as they only exercised their own customs upon themselves and not too immediately in the presence of Europeans, they should be allowed to do so with impunity.’\(^{54}\) In October 1838, he reported examples of inter-tribal violence witnessed by Europeans where no official action had been taken in Perth and in rural districts.\(^{55}\) Grey believed that the non-interference principle had been defended based on the

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\(^{51}\) Hutt said wages, which meant money or food. Hutt to Russell, 10 July 1841, BPP, *Papers Relative to the Aborigines*, p.392.

\(^{52}\) Minutes of Executive Council, 15 June 1841, SRO, WAS 1620, CONS 1058/2, p.140. There was a similar proposal to employ females. Hutt to Russell, 21 July 1841, BPP, *Papers Relative to the Aborigines*, pp.393-394.


principle that; ‘the natives of this country are a conquered people, and that it is an act of generosity to allow them the full power of exercising their own laws upon themselves.’ He disagreed with this principle because he concluded that ‘savage and traditional customs’ were not a ‘regular code of laws’ and secondly, because conferring this right would mean that all persons (not only Aboriginal people) would be subject to them, and that normally there was some authority involving ‘proper persons’ administering laws, which he concluded can not exist in relation to Indigenous customs. This second reference is likely to have been to the assumption made in the case of *Campbell v Hall* (1774) on the continuity of law in a conquered colony.

It is not clear how Grey obtained the information about the rationale for the non-interference policy, but it appears to have been when he was in Western Australia between 1837 and 1839, when he spoke with officials and settlers like Moore. However, he does not appear to have been aware that in New South Wales the non-interference policy had been rejected by the Supreme Court in April 1836 in *R v Murrell*. In addition to pragmatic reasons, the question of consent to be bound by British laws was highlighted most in the *inter se* offences and was a major feature of the local debate on the legal position of Aboriginal people in the early 1840s in Western Australia. This also took place during the early 1830s when some settlers acknowledged the injustice arising from the territorial acquisition of Western Australia as a ‘settled’ colony. However, it is unlikely that Hutt himself relied on the principle of conquest as the reason for tolerating customary law because when he received the despatch from the Colonial Office in the middle of 1841 with Grey’s principles attached to it, he or a high

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57 Ibid.
58 McHugh, *Aboriginal Societies and the Common Law*, p.162; *Campbell v Hall* (1774) 98 ER 1045.
ranking official had underlined Grey’s sentence ‘conquered people’ and placed a question mark next to it.\textsuperscript{61}

**Colonial Office policy**

By the time that Hutt’s amalgamation policy was communicated to the Colonial Office, Russell had been replaced as Secretary of State by Lord Stanley who was more enthusiastic about Hutt’s plans for civilising Aboriginal people. At this point, Stephen recommended to Stanley that Hutt should be given the ‘fullest powers’ and ‘unfettered discretion to carry on his own plans in his own way.’\textsuperscript{62} Stanley agreed, and recommended that Hutt’s reports on civilising Aboriginal people be sent to other governors for their information.\textsuperscript{63} Like Hutt, Stephen accepted on practical grounds that British criminal law could only be gradually applied to Aboriginal people. \textsuperscript{64} Stephen was prepared to allow Hutt broad discretion in applying his amalgamation experiment, even though in reality he believed only missionaries could successfully accomplish this goal.\textsuperscript{65} In an internal memo from Stephen to Stanley (the contents of which were not communicated to Hutt), Stephen revealed his thoughts on Grey’s principles.\textsuperscript{66} In his opinion, Aboriginal people should come under the obligation and protection of British law in relation to Europeans, as far as they could be educated about what those responsibilities were. However,

\begin{quote}
\textit{in their relations to each other there [sic] wd seem no reason why they should not be governed by their own customs, except so far as those customs may be manifestly inhuman or so pernicious to themselves as to require and to admit the interposition of authority to prevent the observance of them. There is no insuperable or very grave difficulty in the}
\end{quote}

\textsuperscript{61} Hutt’s notations, Russell to Hutt, 8 October 1840, SRO, CONS 41 WAS 1178/4, p.69.
\textsuperscript{62} J. Stephen to G. W. Hope, 15 October 1841, Stanley to Hope on despatch from Hutt to Russell, 15 May 1841, CO 18/27, Reel 429-430, pp.342, 370.
\textsuperscript{63} Stanley to Hutt, 30 October 1841, CO 18/27, Reel 429-430, p.372.
\textsuperscript{64} It was sent to the Governors of New South Wales, South Australia and the Superintendent of Port Philip.
\textsuperscript{65} Stephen to Hope, 26 November 1841, CO 18/28, Reel 430, p. 60.
\textsuperscript{66} Ibid.
\textsuperscript{66} Ibid., p.60.
toleration amongst one class of society of usages and customs having the force of law in all their mutual dealings and relations, which those very usages and customs are prohibited in their dealings and relations with other classes. The advantages of uniformity of law wd appear in such a case as the present to be unattainable, and if they could be attained the price to be paid for them would probably be greater than the compensatory advantage. I am not sure that it would answer any good purpose to make such remarks as these to Mr Hutt, but I believe them to be substantially true, and it might perhaps be satisfactory to him to know that the measures which he condemns as impracticable are not really expect [sic] of him by Lord Stanley. JS

Stanley agreed, and added that he thought it would be advantageous to forward Stephen’s suggestions to Hutt, but this did not take place. It is clear that Stephen did not agree with Grey that Indigenous laws should be immediately replaced by British law, and endorsed the continuation of the application of Indigenous law to inter se situations. The British government was prepared to recognise that two sets of laws could operate, where Aboriginal law had the force of law in relation to all mutual dealings and relations of Aborigines which were not ‘pernicous’ or ‘inhuman.’ This left British law to apply to what were regarded as ‘inhuman’ offences, and to offences against settlers. The definition of what was ‘inhuman’ is vague but probably included murder. Stephen still perceived Aboriginal law as coming under overall British authority because the choice about whether to interfere or not, remained with the British and colonial authorities. In this sense it was informal legal pluralism and not legal dualism. Stanley and Stephen also knew that Hutt intended that the gradual amalgamation of Aboriginal people into colonial society was the eventual goal over the longer term, and therefore it was a form of temporary legal pluralism. Hutt assumed that only those who were able to understand British law in terms of its full rights and obligations could be regarded as British subjects, whereas the Colonial Office seem to

67 Stanley to Hope, 26 November 1841, CO 18/28, Reel 430, pp.59-60.
68 Ibid.
70 Ibid.
have assumed that Aboriginal people were a class of colonial society who could practise different ‘usages and customs’ with the ‘force of law,’ where they did not interfere with the dealings of Europeans within settlements. In fact, Hutt differed from Colonial Office policy in not punishing under British law what might be considered ‘pernicious’ actions in all cases, and instead banishing Aboriginal people to the outskirts of towns. This is something that an anonymous correspondent *Delta* (who appears to have had an official role in the colony), argued the Aborigines had learnt to do in the early 1840s, that is, to avoid the force of British law by moving to remoter districts at certain times in order to resolve disputes under tribal law.\(^\text{71}\)

The Colonial Office policy on *inter se* offences arose in response to pragmatic concerns about the extent of the pale of British law. While it did not refer to legal precedent in New South Wales, its policy was not inconsistent with the New South Wales courts having the jurisdiction to prosecute and punish *inter se* murder cases.\(^\text{72}\) The policy decision was also made after Russell and Stephen had rejected Hutt’s proposal for Aboriginal Summary Punishment legislation on racially discriminatory grounds in April 1841.\(^\text{73}\) It is therefore likely that the acknowledgement of customary law by Stephen was affected by practical considerations of achieving equality under the law. The Colonial Office allowed Hutt a great deal of discretion to pursue his own policy on this subject as long as it did not construct Aboriginal peoples in law as an inferior class of subject.

It was not until 1842 that the first court case that contested the question of the jurisdiction of the courts for *inter se* offences, was held in Western Australia. Hutt asked

\(^{\text{71}}\) *Delta*, ‘On the cause of Crime amongst the Aborigines’, *The Inquirer*, 19 December 1849.

\(^{\text{72}}\) *R v Murrell and Bummarree* (1836), Supreme Court of NSW, Decisions of the Superior Courts of New South Wales, 1788-1899, p.4. The decision was made upholding the jurisdiction of the NSW Supreme Court on 11 April 1836.

\(^{\text{73}}\) Russell to Hutt, 30 April 1841, BPP, *Papers Relative to the Aborigines*, pp.377-379.
the recently arrived lawyer Edward. W. Landor to defend Wewar, who was the first lawyer to defend an Aboriginal person in court.74

**The We-war case (R v Wewar) - January 1842**

The first debate about the jurisdiction of the Court of Quarter Sessions in relation to Aborigines for *inter se* offences was the *Wewar* case.75 We-war from the ‘Murray River tribe’ was arrested and charged with the wilful murder of Dy-ung (Dyang) from the ‘Canning tribe’, which had occurred on Thomas Peel’s farm in the Southwest of Western Australia.76 Dyung had been employed by Government Resident, John Phillips to guide soldiers through Murray tribal territory towards Peel’s farm.77 According to European witnesses, Wewar joined the party with the consent of Dyung and the two were reported as getting on well together, however, later that night, while Dyung and Wewar were sleeping in a separate hut adjacent to Peel’s house, Wewar reportedly speared Dyung. The trial was held on 3 January 1842, before Mackie and other magistrates and Landor advised Wewar to plead not guilty.78 In his statement made earlier in October 1841, Wewar was interpreted as stating, ‘I speared Dy-ung to avenge the death of Nindar, a Murray Native killed at Perth by Ningena… Dy-ung was Ningena’s nephew, but after I had left him, another native Ki-bar made the wound

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74 Solicitor, William Nairn Clark offered his services as defence counsel in 1841 but was refused by Hutt. Landor arrived in October 1841 from England with his two brothers, hoping to take up squatting on ‘government land’. However, finding it was illegal his brothers rented a property in York and Landor was forced to work as a lawyer, something he had not planned on. E. W. Landor, *The Bushman*, (1847) London, Senate, 1998, p.255.Hutt to Stanley, 6 April 1843, BPP, *Papers relative to the Aborigines*, p.422.
77 Symmons to Colonial Secretary, 21 October 1841, SRO, CSR, ACC 36, Vol. 95, p. 81.
78 The magistrates who heard cases on 3 January 1842 (in addition to the Chairman) were George Leake, Rev. G.B. Wittenoom, Chas Symmons (Protector of Aborigines), W.H. Drake, J.W. Hardey and M.B. Brown, SRO, CONS 3577/4.
larger.’  

The newspaper report of the case stated that Nindar was Wewar’s adopted son.  

Landor made several arguments against the jurisdiction of the court. The first was, that since it had been declared and acknowledged by the British government that the possession of the colony was occupancy and not conquest, British laws could not apply to Aboriginal people for offences committed among themselves, unless they had assented to and accepted such laws. Secondly, even if the colony were acquired by conquest it would be necessary to show that British laws had been expressly imposed on Aboriginal people and were to be received by them instead of their own laws. Thirdly, Landor argued that if Indigenous people were subject to British law, they must be subject to the whole machinery of that law which should include punishment for minor offences committed among themselves, such as slander, perjury, theft, indecent exposure of the person, which they were not.Fourthly, he argued that Aboriginal people had laws and specific punishments for particular crimes, and therefore the prisoner had probably already been punished or acquitted for the same offence by the only laws he was acquainted with or bound to obey, and that it was contrary to all justice that he should be tried and punished again. Fifthly, Landor stated that there is no act of Parliament which provides that the aborigines shall, as among themselves, be answerable to our laws, and that, as we choose to found our title on occupancy, no local proclamation is sufficient authority to make them so amenable; for if the Governor have not arbitrary power to impose penal laws by proclamation upon us, who are really British subjects, a fortiori [all the more so], he cannot possess that power over strangers. If they were already British subjects, there was no need of a  

79 R v We-war, Court of Quarter Sessions, 3 January 1842, Criminal Indictment File, Case No. 253, SRO, CONS 3472/50; The Perth Gazette, 8 January 1842, p. 3; The Inquirer, 12 January 1842, pp.4-5.  
80 Hallam and Tilbrook, Aborigines of the South West Region, p.280. Nundjar is listed as one of Wewa’s sons. F. Armstrong, List of names of Aborigines from the south side of the Murray or Kan=neeng, Boo=yang, Bee=la of which Wi-wa and his family are listed as members, CSR ACC 36, Vol. 58, p.159.  
81 R v Wewar, The Perth Gazette, 8 January 1842, p. 3; The Inquirer, 12 January 1842, p.5.
proclamation; if they were not British subjects, no proclamation could impose penal laws upon them.\(^{82}\)

Lastly, Landor emphasised that there were contradictions in the policy where ‘the circumstance of killing a man who happens to be casually employed by the British, does not make that to be murder, within the meaning and cognisance of our laws, which would not be murder, had the party not been so employed by the British’.\(^{83}\) Announcing that Landor’s arguments had been overruled by the majority of magistrates, Mackie addressed the grand jury outlining three modes of the acquisition of sovereignty; treaty, conquest and occupancy. He ruled out conquest even though he said that the measures of the British Government might be more ‘easily justifiable,’ but that ‘the theory of that government, as expounded by successive Secretaries of State, is, that its possession of the territory is based on a right of occupancy.’\(^{84}\) Despite Landor’s aspirations to the contrary, Mackie upheld Colonial Office instructions by pronouncing that sovereignty and jurisdiction were co-extensive and therefore Aborigines were amenable to British laws.\(^{85}\) He responded to references on the Law of Nations, principally Vattel:

\[\text{there are two cases of which such a right may be exercised according to principles of natural law, of which the situation of the colony being uninhabited country was not the present case. Instead it had been a large extent of country roamed over by wandering savages, who make no use, or a very trifling use, of the soil, and subsist by the chase and spontaneous products of the earth...the authors did not proceed to prescribe by what common principles or rules the intercourse of the Aborigines, within the limits so occupied, and the newcomers is to be regulated... But as jurisdiction is clearly an inseparable incident of sovereignty, it follows that the British nation having, under the principle of the law of nations just stated, taken possession and assumed the sovereignty of a territory bounded by certain parallels and meridians, the law of that nation must be paramount coextensively with that territorial sovereignty.}\(^{86}\)

\(^{82}\) Ibid.

\(^{83}\) Ibid, pp.4-5.

\(^{84}\) Ibid.

\(^{85}\) Ibid.

\(^{86}\) Ibid., p.5.
Mackie responded to Landor’s last argument that pointed to contradictions in the non-interference policy, by stating that there were practical limits to the application of British criminal law to ‘offences’ committed between Aboriginal people:

It is not however to be supposed that a prudent and judicious government would enforce the application of British Law indiscriminately to all transactions of the natives inter se, so as to incur the risk of burlesquing the persons of justice, or turning them into engines of wanton oppression. There are certain obvious limits to that application, as to a right to be protected and offences to be punished. There are on the one hand those sacred rights of persons, which regard the safety of life and member; on the other, those offences against the laws of god and the law of nature (or, as the latter has been defined, the dictates of natural conscience) which infringe those rights, and among which offences, the vindictive spilling of blood is unquestionably one, even within these limits…

Mackie upheld Hutt’s non-interference policy and believed that except where an Aboriginal person was under the protection of, or employed by settlers, Indigenous law was recognised as applying in most cases. He added that the purpose of setting these limits on the court’s jurisdiction was for reasons of ‘justice and humanity,’ and a matter of policy in advancing the objects of civilisation by encouraging Aborigines into employment by settlers, and by allowing the British law to protect them from their relatives. Mackie expressed concern that settlers might take matters into their own hands if the British law was not applied in these instances, and acknowledged that up to this point there had been no interference with the ‘laws and usages of the natives’, between each other, outside of towns and dwellings. While matters of public policy were a large factor in his decision, Mackie stated that there were ‘atrocities’ among themselves in the bush that could not be the object of judicial inquiry. He was clearly not keen for the court to interfere unless it directly affected the settlers and added that:

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87 Ibid.
88 This limited application was considered necessary to enforce the law, but Mackie really saw the role of suppressing ‘barbarous propensities’ as that of the role of missionaries.
89 The Inquirer, 12 January 1842, p.5.
‘the court cannot entertain the objection that by holding the British criminal law to be applicable to the Aborigines, they render the latter liable to unjust and arbitrary interference with their natural laws and usages.’

After a plea of not guilty had been entered and a petty jury appointed, the acting Advocate General, Richard Nash put the case for the prosecution. Responding to Landor’s arguments, Nash argued that he did not think that reference to the Law of Nations was relevant here, except as between civilized nations:

He regretted that the silly affectation of disclaiming a title by conquest should have led any one to originate the discussion of this day. The title of England, or of any nation to a savage territory, was that of occupancy, where the individual savages or families (for tribes were nothing more) did not resist, and of conquest where they did... in fact, there never was a more unlucky case for such an argument than that of the prisoner at the bar, whose tribe had actually so resisted, and been accordingly attacked and conquered in the fullest sense of the word.

Nash referred to the punitive expedition led by Stirling on 28 October 1834 that had resulted in the massacre at Pinjarra, where many more Aborigines than Europeans had been killed, which example had been advocated as a way to deal with other conflicts.

Wewar was one of two elders from the Murray River tribes who had survived. Nash argued that British criminal law should punish rather than deter crime, as an example to other Aboriginal tribes. This did not impress Landor who objected to the argument of ‘expediency’ in a court of law, and added that the British criminal law could not be applied to Aboriginal people who already had laws which they were bound to obey, that

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90 Ibid.
91 Nash replaced Moore as Advocate General in an acting capacity on 5 Jan 1841 while Moore was on a leave of absence. WAGG, 15 January 1841.
92 The Inquirer, 12 January 1842, p.5.
94 Hallam and Tilbrook, Aborigines of the Southwest Region, pp.317-8.
they could not be expected to be subject to British laws that they did not understand until they were taught the meaning of those laws.\textsuperscript{95}

Wewar was found guilty and the death sentence was commuted to transportation for life.\textsuperscript{96} On the way to prison at Rottnest Island, he was interpreted by Henry Trigg (who was present at the trial) as having protested:

\begin{quote}
I can not understand why the Governor is sulky or severe with me, if a white man kills a white man we never interfere. Sometime back the white man killed many of the natives and the Governor took no notice, now why should the Governor take any notice of me if I kill a fellow native that steals my wife, or kills my brother, when it is according to our law.\textsuperscript{97}
\end{quote}

The case resulted in some public debate in the newspapers. The Editor of \textit{The Inquirer} and lawyer, Francis Lochee, echoed the views of the majority of settlers in approving of the result, but saw the question as one of the distinction between ‘personal’ and ‘territorial’ law.\textsuperscript{98} In his opinion there were customs practised under personal law, such as by indigenous people in India that were not punished under British criminal law, even though they would normally be considered an offence.\textsuperscript{99} While Lochee equated the actions of Wewar under customary law as a form of personal law, he added that ‘so far then [as] his punishment by us would seem to be unauthorised and against precedent we do not see why we are compelled to follow this Indian practice... wherever a civilised people go, they carry their rights along with them and the first is their power to protect themselves.’\textsuperscript{100}

\textsuperscript{95} \textit{The Inquirer}, 12 January 1842, p.5.
\textsuperscript{96} Green and Moon, \textit{Far From Home}, p.305. Wewar was given a free pardon in 1846 by Governor Clarke after falling ill on Rottnest and being unable to work. He was subsequently sentenced to six months for stealing flour and sent back to Rottnest.
\textsuperscript{97} \textit{WAGG}, 11 February 1842 No 291, H Trigg, Report.
\textsuperscript{98} \textit{The Inquirer}, 19 January 1842, Editorial, p.4.
\textsuperscript{99} Francis Lochee was the Editor of \textit{the Inquirer} from 1842-6, a solicitor, and close friend of Governor John Hutt \textit{Australian Dictionary of Biography}, Melbourne, Melbourne University Press, 1966, Vol. 2, p.122.
\textsuperscript{100} \textit{The Inquirer}, 19 January 1842, Editorial, p.4.
In response to criticism that he was interfering with the developing judicial system for the control of Aboriginal people, Landor wrote a letter to The Inquirer, arguing that Aborigines were entitled to the best legal representation possible as was the practice in England.\textsuperscript{101} He argued that Mackie could have chosen another course other than affirming the ‘embarassing’ declaration of successive Secretaries of State by concluding that territorial sovereignty based on occupancy was coextensive with jurisdiction, and therefore British law was paramount. Landor emphasised that it meant that when territory was annexed to the British Crown,

\begin{quote}
\textit{at that same moment by the simple act of taking possession of the country in the name of our gracious sovereign, the native inhabitants came within the jurisdiction of our laws, and were liable to be hung, stuck in the pillory, or transported beyond the seas for the term of their natural lives for future offences committed among themselves.} \textsuperscript{102}
\end{quote}

Landor queried that if this was the case why had there been a need for subsequent proclamations from Secretaries of State that Aboriginal people were British subjects and subject to British laws, ‘since the law of occupancy, our acquisition of the territory, \textit{ipso facto}, made them amenable to our laws for offences committed among themselves.’\textsuperscript{103} In his opinion, ‘jurisdiction, however, is not the necessary incident of territorial sovereignty, unless that sovereignty were acquired by conquest or treaty.’\textsuperscript{104} Had it been conquest, which Landor believed reflected the situation, then the government would have to show that they expressly imposed British laws upon the ‘subjugated nation.’ He

\textsuperscript{101} Landor returned to England in 1846 and arrived back in WA after a 13 year absence on 28 December 1859 with his family.
\textsuperscript{102} Landor, Letter to the Editor, The Inquirer, 19 January 1842, p.4.
\textsuperscript{103} Ibid.
\textsuperscript{104} Landor, The Bushman, p.193
then referred to the non-intereference principle in North America, as Forbes had done in the New South Wales case of *R v Ballard*.105

Perhaps the relation that exists between the red Indians of North America, and the Government of the United States, may afford a parallel case to ours, but there (I understand) though the territorial sovereignty of the Americans extends over a great part of the land of the Red Savage, the latter is answerable only to the laws of his own tribe for offences committed against any of his own people.106

Landor left the colony in 1846, but continued to argue the moral and legal injustice of the application of British law to Aborigines for *inter se* matters in his book published in 1847, and in letters to the Aborigines Protection Society and the colony’s newspapers.

**Other court cases in Western Australia**

From the 1840’s, there was increased expansion of settlement and encounters with Aboriginal tribes who had little or no contact with Europeans. By December 1841, the Aboriginal Evidence Act was now construed by Hutt as applying to situations where Aboriginal people were prosecuted for killing other Aborigines who had been employed by settlers.107 The lack of a corroboration requirement for Aboriginal witnesses in the Act made it easier to bring *inter se* convictions. Coupled with the strengthening of law enforcement, several Aboriginal people were prosecuted for *inter se* murders taking place near farms, but still within the categories defined by Mackie in *Wewar*.108 Despite this, there were few *inter se* prosecutions during Hutt’s term as Governor, with nine convictions in the Court of Quarter Sessions over a seven year period between 1839 and February 1846. These were all instances where the victims had been employed by a

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105 *R v Ballard* (1829) reported in *the Sydney Gazette* 23 April and 13 June 1829, *Decisions of the Superior Courts of NSW*, p.3

106 *The Inquirer*, 19 January 1842, p.4.


settler at the time of the offence.\textsuperscript{109} Landor defended most of these cases, and while there were no more arguments regarding the jurisdiction of the court he argued that the charges in most cases should be downgraded, which resulted in convictions ranging from assault to manslaughter.\textsuperscript{110}

Five of these cases relied on both Aboriginal and European witnesses giving evidence under the new Evidence Act 1841.\textsuperscript{111} Gilba, who was employed by a settler, Shipton, made a complaint against four Aboriginal youths who had ambushed and assaulted him, which resulted in prosecutions under the Criminal law. Wilbeer was charged in 10 March 1842 on the first count of attempted murder and secondly with common assault, and Landor persuaded him to plead guilty to the second count. He was convicted and sentenced to two years in Fremantle prison with hard labour. (an offence which for settlers normally attracted a fine of five pounds).\textsuperscript{112} This arrest was followed two months later by the arrest of his colleagues on 11 June 1842. Nerrup alias Tom and Bukkup were tried together in July and a fourth, Wanjan, was tried in October 1842 for the same offence and received similar sentences of two years.\textsuperscript{113} At this time, magistrates responded to what they regarded as a problem of subtle threats against employed and protected Aborigines by their relatives which would not have met the legal prerequisites for prosecution in the courts under British law. Armstrong received information from an employed youth of a plan to murder him by two other boys. Two ‘ringleaders,’ Eanna and Bokoberry were identified and apprehended in default of

\textsuperscript{109} Two involved complaints by employed Aborigines. One brought by Gilba and the other by Yangebung in \textit{R v Meggat}, 7 January 1846.Gill, ‘Crime and Society’, MN 1469, ACC 4382A/15-16. From 1839 to 1846 there were nine convictions for \textit{inter se} murder, assault, or manslaughter, where the Indigenous victims were employed by settlers.
\textsuperscript{110} Ibid.
\textsuperscript{111} \textit{The Perth Gazette}, 19 March 1842.
\textsuperscript{112} \textit{R v Wilbeer}, Court of Quarter Sessions, 1 April 1842, \textit{The Perth Gazette}, 26 March 1842.; 9 April 1842, Case No. 263; Gill, ‘Crime and Society’ MN 1469, ACC 4382A/15.\textsuperscript{113} \textit{R v Wanjan}, Court of Quarter Sessions, 3 October 1842, Case No 274, \textit{R v Nerrup}, Court of Quarter Sessions, 1 July 1842, Case No 265, Gill, ‘Crime and Society,’ MN 1469, ACC 4382A/15.
sureties to keep the peace, and were sent to Rottnest in order to ‘teach them outwardly at least to conform to our social regulations.’

On December 1844, Symmons reported that it was an extremely rare occurrence for feuds to take place among Aboriginal people in the districts where Europeans were concentrated around Perth, and that they found ways to avoid being noticed.

**Irwin and Fitzgerald**

There was a revision of *inter se* policy with each new Governor until the 1860s. From 1848, there was a shift to a stricter position which coincided with the arrival of Colonial Secretary Richard R. Madden from England, the expansion of pastoral settlement towards Champion Bay, and the increasing employment of Aboriginal people as servants and stock-keepers by settlers prior to the arrival of convicts in 1850. This coincided with a marked increase in the number of *inter se* court cases. Any defence of Aboriginal people in court was now less about recognising that they had their own laws (which were increasingly regarded as superstitions), and more about controlling traditional laws and customs that interfered with the colonial government’s objective of pastoral expansion in new regions, and Aborigines as a cheap source of labour. Many settlers in the expanded York district wanted to retain Indigenous servants and labourers whom they had known since childhood and who were now reaching adulthood, by breaking the hold of Indigenous society and laws.

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116 The total number of convictions of individual Aborigines for *inter se* murder or assaults (not number of trials) in trials held from April 1846 to December 1848 in the Court of Quarter Sessions was 14.
117 W. Cowan to Colonial Secretary, 12 May 1855, SRO, CSR, ACC 36, Vol. 317, pp.34-37.
In 1847, there was initially official reluctance to extend the application of British law to *inter se* murder and assaults outside the existing categories.\(^{118}\) However, by the middle of 1848, Madden urged the new Governor, Charles Fitzgerald to extend the policy to include the application of British law to all Aborigines in settled districts, not just those where the victim had been employed by settlers.\(^{119}\) This reflected Madden’s belief that all human life should be protected and that there should be equality under British law.\(^{120}\) Madden also urged that inquests be conducted on all Aboriginal people who had been killed by others in settled districts.

On 27 September 1848, Fitzgerald consulted with Irwin, Madden and Moore, prior to sending a circular to Resident Magistrates and Protectors announcing ‘a new course calculated to teach the natives that murder was a crime against our laws and religion.’\(^{121}\) The nature of punishment depended on whether the offence had been committed by an Aboriginal person employed by settlers or one who had no contact with Europeans.\(^{122}\) This was not advocating the death penalty at this stage but the prosecution of all cases in settled districts. In cases where magistrates received information that an Aborigine had killed another or had committed serious bodily harm, they were to be apprehended and committed for trial. Every prosecution would be vetted by government lawyers (who in practice relied on recommendations by magistrates in the regions) who would report whether the character of each case was one of ‘unusual atrocity.’ Where it was, then in

\(^{118}\) ‘Report of a committee of the Legislative Council of W.A. appointed to inquire into and report upon the expenses connected with the Aborigines’, 22 July 1847, CO 18/45, Reel 439-440, p.320. The Committee comprised of Mackie, Moore and Leake (all lawyers and members of the Legislative Council).

\(^{119}\) R. R. Madden, BL, Madden Papers, July 46-September 48, AJCP, M946.

\(^{120}\) Ibid.

\(^{121}\) Ibid.

\(^{122}\) Circular from Colonial Secretary to Resident Magistrates and Protectors, 27 September 1848, BL, July 1846- September 1848, M 946; P Cowan, *A Colonial Experience*, p.31. Fitzgerald arrived in the Colony in August 1848.
such cases an individual was to be sent to trial, but dealt with less rigorously than in the
case of a white person who was considered to have an understanding of British criminal
law and the Christian religion. However, in circumstances where ‘aggravation’ was
absent, an Aboriginal person who had been committed for trial was allowed to enter into
the same arrangement as other prisoners and work on public works during his
imprisonment before trial, and afterwards as part of their sentence. Symmons wanted
to include women who egged on others to commit *inter se* violence, but this was not
followed up as a rule.

From 1849, the question of whether to push for the full penalty of criminal law became
the focus of official and public debate. On October 1848, Walkinshaw Cowan was
appointed Guardian of Aborigines and Justice of the Peace at York, exchanging places
with Bland who became Secretary to the Governor and Councils. Cowan had been
Hutt’s Secretary and was influenced by Hutt’s vision for the gradual amalgamation of
Aboriginal people into colonial society, but unlike Hutt he was more zealous in wanting
to prosecute *inter se* murders and assaults. This was because settlers in the York region
(which had now expanded into the Victoria Plains) were complaining that their long-
term Aboriginal servants were being killed. This was attributed to the hold on the
Indigenous youth by the elders under traditional law which was regarded by Cowan as a
major barrier to Christianising and civilising and to their continued employment by
settlers. Cowan believed that in the end, it was conversion to Christianity that would

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123 Colonial Secretary to Resident Magistrates and Protectors, 27 September 1848, July 1846-September 1848, BL, M946.
124 Ibid.
126 Symmons was pushing for the full penalties of the British law to be applied to particularly notorious
offenders involved in ‘bloodshed’ as a form of prevention for a crime now considered to be increasing.
separate Aboriginal people from their ‘superstitions’ and what he regarded as their propensity to murder other Aborigines.\textsuperscript{128}

By February 1850 Cowan and Symmons advocated that a severe example should be made where an Aborigine engaged in tribal killings, by holding a trial for wilful murder followed by a public execution.\textsuperscript{129} Symmons reported that \textit{inter se} murders were on the increase and that a severe example should be made when the killing was committed on a ‘native employed by and now directly under the protection of the whites.’\textsuperscript{130} He stated that he did not want the death sentence carried out in every case, and believed that Aboriginal people in the expanding settled districts had a full understanding of British law and its penalties. However, there was significant opposition among many settlers to the death penalty in such a case.

The subject received more attention from Fitzgerald before the arrival of convicts in 1850 because of the acute labour shortage, where seasonal demand was being partially met by the casual employment of a large number of Aboriginal people in harvesting, reaping, sheep herding, and as general servants.\textsuperscript{131} Aboriginal people would also leave their employment to attend to their obligations under their own laws.\textsuperscript{132} In other regions, the colonial government focused more on the enforcement of ‘offences’ by Aborigines against European lives and property.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{128} Ibid.
\item \textsuperscript{129} W. Cowan, Report of Guardian of Aborigines in the York District for 31 December 1849. \textit{The Perth Gazette}, 1 February 1850.
\item \textsuperscript{132} \textit{The Perth Gazette}, 11 January 1850. There was a series of mass escapes and disappearances around the same time on 31 December 1849, believed to coincide with a corroboree.
\item \textsuperscript{133} See Chapter 8.
\end{itemize}
The Kanyin case (*R v Kanyin*) – April 1850

The first legal execution for an *inter se* murder occurred on 12 April 1850 (after a trial by jury) when Kanyin was hanged as a public example.\(^{134}\) In December 1849, Cowan reported the death of a young Aboriginal named Yadupwert who had been employed by a European shepherd to look after sheep.\(^{135}\) Cowan asked Yadupwert to accompany an Indigenous policeman, Cowit, to capture Morriel who had escaped from Perth gaol. At the trial the shepherd reported that Yadupwert had told him that he had seen Morriel, and was on his way to report this to Cowit. However, before he could do so, Yadupwert was killed by an Indigenous group, in revenge for the death of a relative.\(^{136}\) In his annual report for 1849, Cowan identified Bamma as the main perpetrator of whom an example should be made, but Kanyin and two other Aboriginal men were captured, Bamma proving more elusive. Cowan reported to Fitzgerald that this was a particularly ‘aggravated case’ and in March 1850, Kanyin, Mongeen and Ngalungoot were sent to Perth for trial at the Court of Quarter Sessions.\(^{137}\) Cowan reported that the relatives of the deceased (one of whom had been for some years employed in York) had abstained from revenge and assisted policeman Charles Ridley in the capture of the three, on condition that an example be made by hanging one of the accused men.\(^{138}\) There were others that Cowan thought were involved, Bamma, Yonan and Djungar, two of the former whom had been brought up on Stephen Parker’s farm, which alarmed Cowan

\(^{134}\) *R v Kanyin* (*or Kungin*), Mongean and Ngolangwert – charged with wilful murder of Yadupwert or Tadupwert alias Monkey. *The Perth Gazette*, 12 April 1850. Kanyin was hanged in 12 April 1850 near York. The trial was on 6 April 1850 Petition of H.H. Hall, *The Inquirer*, 17 April 1850; *The Perth Gazette*, 10 May 1850.


\(^{136}\) Ibid.


\(^{138}\) Ibid.
who had expected them to be partly ‘civilised.’\textsuperscript{139} According to Cowan, the relatives of the deceased (some who also worked on farms) had said that they would be satisfied with a life for life and identified Kanyin as an old offender.

The trial was held on 6 April 1850 in Perth and a plea of not guilty was entered by the court, because the charge carried the death sentence.\textsuperscript{140} There was no lawyer appointed on behalf of the three accused, which was now a common practice by this time despite lawyer William Nairn Clark’s protest in July 1848 that Aborigines accused of crimes should be represented by lawyers.\textsuperscript{141} Cowan relied on a statement by Morriel which alleged that the three Aborigines had confessed to the murder and emphasised that he had told the Aboriginal people of the York district about ‘the Governor’s determination to make an example of the first native who murdered another.’\textsuperscript{142} Kanyin reported through an interpreter that Bamma had reproached him for not taking revenge or getting satisfaction for the death of Belang, and had threatened to spear any of them who refused to go with him after Yadupwert.\textsuperscript{143} He then admitted spearing Yadupwert on the left side adding that others had speared him first. Mongeen and Ngalungoot admitted spearing Yadupwert. The Advocate General indicated the Governor’s view on the desirability of the death penalty and the sentence of death was passed on all three.\textsuperscript{144} Registrar and Crown Solicitor, Alfred Hawes Stone reported that there were many different opinions on the death penalty because ‘we have not before interfered when they killed each other.’\textsuperscript{145}

\textsuperscript{139} Cowan to Colonial Secretary, 28 March 1850, SRO, CSR, ACC 36, Vol. 199, p.73.
\textsuperscript{140} \textit{R v Kungin, Mongeen and Ngolangwert}, The Court of Quarter Sessions, 6 April 1850, \textit{The Perth Gazette}, 12 April 1850; \textit{The Inquirer}, 10 April 1850.
\textsuperscript{141} Symmons to Colonial Secretary, 10 July 1858, SRO, CSR, ACC 36, Vol 392, p.131; \textit{The Inquirer}, 12 July 1848. Court of Quarter Sessions, 6 July 1848.
\textsuperscript{142} \textit{The Perth Gazette}, 12 April 1850; \textit{The Inquirer}, 10 April 1850.
\textsuperscript{143} Ibid.
\textsuperscript{144} C.H. Stone, ‘The Diary of Alfred Hawes Stone,’ \textit{Early Days}, Vol 1, Pt VI, 1929, p.25.
\textsuperscript{145} Ibid.
On 8 April 1850 after the trial, Fitzgerald convened a meeting of the Executive Council. He reported that he wanted to impose the death penalty as an example, but requested the opinions of other members.\textsuperscript{146} Moore acknowledged that Yadupwert had been speared under tribal law but believed that Aboriginal people were fully aware that it was a crime for which they were liable to be punished under British law.\textsuperscript{147} A vote was taken whether only one should be executed. Irwin voted against the execution of any of them, adding that no matter how expedient the measure was, he considered that Aboriginal people ‘were compelled to such acts by the force of superstition and custom which has the influence of law with them, and also by the dread of personal violence from the rest of the tribe.’\textsuperscript{148} However, the majority decided that all three would be executed on 12 April 1850, and that other Aboriginal prisoners should witness the event.

The first planned public execution of an Aborigine for \textit{inter se} murder attracted vigorous public debate among the settlers, many of whom in Perth (not so much those in York who had more to lose when their employed workers were killed) were alarmed at the planned execution. Henry Hall hastily put together a petition to Fitzgerald requesting that the sentences be commuted.\textsuperscript{149} The petition reflected the greater amount of settler discord on the application of British law to \textit{inter se} violence and countered the assumptions made by the majority of the Executive Council that Aboriginal people had sufficient understanding of British law, and therefore should be punished under it. The petition stated that Aboriginal constables had spoken to the three condemned men, that they had no idea of the existence of British law by which they were to be executed, and that they did not understand that it was applicable to them. The petitioners also argued that the three would be going to their deaths with their minds full of ‘darkest delusion

\textsuperscript{146} Minutes of Executive Council, 8 April 1850, WAS 1620, CONS 1058/4, p. 182.
\textsuperscript{147} Ibid.
\textsuperscript{148} Minutes of Executive Council, 11 April 1850, WAS 1620 CONS 1058/4, p. 184.
\textsuperscript{149} The Inquirer, 17 April 1850.
and debased by grossest superstition."^{150} They stated that ‘our impression is, that to take away the life of a subject by a law unknown to and not acknowledged as right by that subject, is little short of being despotic.’^{151} In their opinion, only one person should be executed.^{152}

The arguments were similar to those raised earlier in the 1840s by Landor in *Wewar* that Aboriginal people had not consented to be bound by British law. By 1850, there was some reluctance on the part of settlers and officials for Aboriginal people to be subject to the full penalties of British law for *inter se* violence, especially when they had little contact with Europeans, and when they had not consented to British law being applied to them. This opposed Cowan’s and some of the Executive Council member’s claims that the three Aborigines knew and understood British law.

Aware of these doubts, on the same day as the petition was lodged and the day before the execution was due to take place, Fitzgerald hastily convened another Executive Council meeting, announcing that Mackie had additional information.^{153} Fitzgerald stated that he was more inclined to approve the execution of one rather than all three and again asked for the opinion of the Council. Mackie thought that one execution would be sufficient as he considered that the prevention of liberty and detention with hard labour was a very severe punishment, however he recommended that the other two should be reprieved at the last minute in order to terrorise them into learning a lesson. Fitzgerald agreed and concluded that this was the only way to eliminate the ‘superstition’ that motivated Aboriginal people to retaliate against one another. It was

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^{151} Ibid.
^{152} Ibid.
^{153} Minutes of Executive Council, 11 April 1850, WAS 1620, CONS 1058/4, p.184.
decided that Kanyin would be executed because he had been imprisoned on Rottnest previously, which was the criteria used to determine that he had a sufficient understanding of British law.\textsuperscript{154} Mongean’s and Ngolangwert’s sentences were commuted to transportation for life on Rottnest Island.\textsuperscript{155}

Mackie’s deliberate strategy was acted on, and Mongean and Ngolangwert were reprieved at the eleventh hour, a tactic that was condemned by the Editor of The Gazette.\textsuperscript{156} The public execution of Kanyin took place on 12 April, and his body was taken to York near the site of the grave of Yadupwert and hung in chains as an example.\textsuperscript{157} Two months later Cowan reported that the example had been a success, and requested that no death sentences be carried out for those being tried for murders prior to the execution of Kanyin, except those who may have ‘murdered’ Aboriginal people employed by settlers. This also reflected the increased use of British law as a form of coercion or ‘moral training’ that was taking place during the 1850s.\textsuperscript{158}

On learning of the execution, Secretary of State, Earl Grey replied that he approved of the ‘extreme penalty of the law’ on this occasion, similarly for British subjects under the same circumstances where murder was committed.\textsuperscript{159} There was no reference to cultural differences. It was different to the stance taken by Stephen and Stanley who were prepared to adopt the gradual ‘weak pluralism’ approach (which would probably not have involved the death penalty being carried out) because Aboriginal people could not receive actual redress or protection under British law or understand that it applied to

\textsuperscript{154} Green, Broken Spears, p.231. There is no evidence that Kanyin had been on Rottnest, but Mongean had been there during 1839.
\textsuperscript{155} The Inquirer, 17 April 1850.
\textsuperscript{156} The Perth Gazette, 19 April 1850.
\textsuperscript{157} Ibid.
\textsuperscript{159} Ibid.
them, and which acknowledged they had their own traditional laws. However, the mood
had now changed to endorse Grey’s principle of strict application which sought to more
immediately replace customary law in settled districts, and included the implementation
of the death penalty.

Walkinshaw Cowan and legal policy.

In July 1855, Cowan urged a review of policy with a new Governor, Arthur Kennedy
and queried whether the colonial government should interfere at all in *inter se* murder
cases if the inconsistent policy regarding penalties commenced by Fitzgerald was
maintained. Both Symmons and Cowan recommended that the death penalty be
carried out for ‘notorious’ offenders, defined as those accused of the murder of an
employed Aborigine or who had repeatedly flouted British legal authority. In a letter
to Kennedy in May 1855, Cowan pointed out that efforts to prevent tribal murder were
not working and sought to eliminate what he regarded as legal dualism, whereby
employed Aboriginal people were regarded by settlers with whom they worked as being
subject to two different set of laws. He outlined that the present position was that
there were two laws by which an Aboriginal person who was prosecuted and convicted
for tribal murder would be set to work on the roads as a penalty, whereas a settler who
was convicted for killing an Aborigine or another European would face the death
penalty. Cowan reported an increasing number of cases involving Aboriginal people in
the York region who were personally known to him. Curare (Yurare) who had been
employed on a remote pastoral station on the Salt River had been killed by other

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161 as in the case of Bamma or Kanyin.
employed Aborigines which appalled Cowan, as many of the perpetrators had been living with settlers since childhood.\footnote{Ibid} It was the fact that the accused came from the York district and were expected to be more civilized and Christianised that disturbed Cowan the most. However he also realised that employed Aborigines were caught between two different worlds, where they worked for settlers during the day and returned to their relatives each night and to their tribal life.\footnote{Ibid.} Cowan argued that one of two courses should be pursued, one where the Governor and magistrates did not interfere, or the other, where tribal killing must be regarded as a ‘crime’ to be fully punished under colonial law. He did not believe that imprisonment would stop the murders, and believed that the second path had to be taken because settlers who employed Aboriginal people on their farms would not want two different laws to operate. He reasoned, ‘how revolting would it be to the feelings of the settlers to see their native servants who have been brought up amongst them from their childhood speared in the service and on their premises without the offender being brought to justice.’\footnote{Ibid.} Cowan argued that unless servants were protected under British law, settlers would not be able to retain them and might take the law into their own hands to protect or avenge their deaths.

Cowan drew a large distinction between the status of an employed Aborigine who was regarded as an economic commodity to the settler (similarly to the land), and Aboriginal people who were relatives of those employed and had little contact with settlers in the ‘bush’. Other motivations for breaking down traditional laws and Indigenous societies were outlined by Symmons in 1854, which include controlling inter-tribal disputes and
encouraging the amalgamation of tribes.\textsuperscript{166} By this time (unlike the late 1830s and early 1840s) any formal acknowledgement of Indigenous customs, laws and inter-relationships had disappeared. The government was also losing interest in the civilising agenda. By the end of 1855, Cowan was becoming dismayed at the lack of government support for his proposals for civilising Aboriginal people and encouraging them to become farmers through labour, including the lack of support for Aboriginal police and interpreters to identify particular Aboriginal people involved in \textit{inter-se} offences.\textsuperscript{167}

In 1855, Kennedy abolished Fitzgerald’s dual punishment policy by taking Aboriginal people off road gangs convicted of \textit{inter se} murder and sending them to Rottnest Island which had been resurrected as an Aboriginal prison.\textsuperscript{168} Despite convicts being available for public works, a petition was submitted by Cowan on behalf of settlers who did not want Aborigines from York working off their sentences at Rottnest, but to no avail.\textsuperscript{169}

From July 1855 during a time of economic restraint, grand juries were abolished as a general cost cutting measure and their function placed in the hands of the Crown prosecutor.\textsuperscript{170} Aboriginal people who were being prosecuted for tribal killings and sent to Perth now went before a normal jury at the Court of Quarter Sessions, and in the 1860s, the Supreme Court. Ironically this was when juries in the 1860s were becoming more opposed to the implementation of the death penalty for Aboriginal people who had been convicted for tribal killings in remote regions. However, they now had less influence on the nature of a charge than grand juries had previously exercised.\textsuperscript{171}

\textsuperscript{166} C. Symmons, Report for 1854, SRO, CSR, ACC 36, Vol. 392, pp.60-75.
\textsuperscript{167} Minutes of Executive Council, 5 June 1855, CO 20/2, Reel 1118, p.496; Cowan to Colonial Secretary 22 May 1855, SRO, CSR, ACC 36, Vol. 317, pp. 34-5.
\textsuperscript{168} Cowan, \textit{A Colonial Experience}, p.64.
\textsuperscript{169} Ibid.
\textsuperscript{170} Russell, \textit{A History of the Law in Western Australia}, p.138.
\textsuperscript{171} This would require further research into the court cases.
Ironically there was a return to English legal procedure and the appointment of lawyers in Perth which contrasted with the suspension of the equality principle in the regions. During the 1850s, another system was being applied to tribal spearings regarded as an offence of common assault under British law. Aboriginal people were liable to punishment by magistrates under the Summary Trial and Punishment Act in the regions (which is the focus of the next chapter), particularly in York and Albany.\(^{172}\)

Although it was not general practise for lawyers to be appointed, on July 1855, despite a tight budget, Kennedy directed that lawyers be appointed for Aboriginal people being tried for murder in the Perth Courts as was the case in England for a felony.\(^{173}\) Two lawyers, Nathaniel Howell and George Leake were paid by the colonial government to defend Aborigines for murder cases, and Symmons role had changed more dramatically from that of Protector in the 1840s to the Guardian of settlers, with the additional role of Sheriff presiding over the executions of Aborigines convicted for *inter se* murder.\(^{174}\) The lawyers focused their attention on arguing against the implementation of the death penalty, rather than jurisdiction. Defences ranged from arguing for the limitation to the extension of the pale of British law, to the defence of insanity.\(^{175}\) Yandoon was charged in June 1855 with the murder of an Aboriginal girl, Yundegan, in York.\(^{176}\) Howell argued that ‘the place where the spearing took place was as far from any white man’s house as from here to Guildford’, but was unsuccessful in preventing the death sentence being carried out. A new Colonial Secretary, W.A. Sanford, had continually spoken against *inter se* execution on the grounds that the accused was acting in accordance with

\(^{172}\) An Ordinance to provide for the Summary Trial and Punishment of Aboriginal Native Offenders in certain cases 1849. See Chapter 8.

\(^{173}\) J. Bennett, *Sir Archibald Burt*, Sydney, Law Book Company, p.123. Minutes of the Executive Council, 15 August 1855, SRO, WAS 1620, CONS 1058/5, p.491. The budget was cut by £6925

\(^{174}\) *R v Mangean, The Perth Gazette*, 6 July 1855. Mangean was charged with wilful murder of Bobtschabin in York.

\(^{175}\) *The Perth Gazette*, 9 April 1852; 23 April 1852. *R v Bickengoot*.

\(^{176}\) *R v Yandoon*, Court of Quarter Sessions, 4 July 1855, Criminal Indictment File, Case No. 662, Gill, *Crime and Society*, BL, MN 1469, ACC 4382/18; *The Perth Gazette*, 6 July 1855, 20 July 1855.
the ‘religion of his race.’ However, on 20 July 1855 he was replaced by a new Colonial Secretary, F. P. Barlee who would have no such objections.

In 1858 Mackie was replaced by Irish-born Alfred McFarland, a judge from England trained in the formal procedures of British law but who was also interested in legislative reform, and like Mackie sought a seat on the Legislative Council. McFarland was considered pushy by officials and became even more unpopular when he dismissed the first twelve cases of *inter se* murder that came before him on legal technicalities, the absence of which in former times would not have been a barrier to conviction. In a strongly worded letter to the Colonial Secretary in July 1858, Symmons objected to the ‘not guilty’ verdicts which he attributed to the use of defence counsel in court cases, and which he believed was the result of philanthropic sentiment rather than a legal right. He added that lawyers had not been appointed in the past as a general practice, in order to ensure a conviction. Symmons argued that formal legal equality did not work, and that in any case the Colonial Office had operated against its own policy by approving colonial legislation that worked against Aboriginal people, which would not be allowed for other British subjects (as it would be an infringement on their rights), such as the prohibition on publicans selling liquor to Aborigines introduced in 1844. This latter measure was not inconsistent with the protectionist rationale behind the Aborigines Committee recommendation to prohibit the sale of liquor to indigenous peoples.

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177 Minutes of Executive Council 7 April 1855 and 11 July 1855, SRO, WAS 1620, CONS 1058/5, pp. 462, 488.
178 Minutes of the Executive Council, 20 July 1855, SRO, WAS 1620, CONS 1058/5, p.490.
179 Russell, *A History of the Law in Western Australia*, p.82.
180 Symmons to Colonial Secretary, 20 July 1858, SRO, CSR, ACC 36, Vol. 392, p. 131. A corrobory was held afterwards which was officially described as celebrating the return of the 12 people to their tribes.
181 Ibid.
182 Ibid.
McFarland objected to the limits on his role, and on equitable jurisdiction. He proved so unpopular that he was nearly removed from office, but stayed in the colony until the new Chief Justice of the Supreme Court, Archibald Burt arrived in 1861.\footnote{Bennett, \textit{Sir Archibald Burt}, p.20.}

Despite Cowan’s determination most officials had given up on the employment and training of Aborigines by this time.\footnote{C.Symmons, Report of Protector of Aborigines for 1848, \textit{The Perth Gazette}, 9 January 1849; \textit{A Colonial Experience}, p. 36.} There still remained a general reluctance to carrying out the death penalty in every \textit{inter se} murder conviction during the 1850s. In 1849, Mackie and Fitzgerald suggested that Aboriginal people convicted of \textit{inter se} murder be transported to Van Diemen’s Land which met with a negative response from the Governor of that colony and from the Colonial Office.\footnote{Fitzgerald to Earl Grey, 15 May 1850, CO 18/46, Reel 440, pp. 456-460.} In October 1858, McFarland even went to the lengths of proposing that legislation be passed, that would direct Aboriginal people to give up their glass tipped spears and use wooden ones for hunting instead, thereby avoiding more serious injury and a likely death sentence.\footnote{Court of Quarter Sessions, 6 October 1858, \textit{The Perth Gazette}, 8 October 1858, p.2; \textit{The Perth Gazette}, 16 July 1858.} This would more likely bring any prospective offenders within the jurisdiction of the Summary Punishment Act 1849. The legislation did not eventuate and the practicality of this was obviously not thought out. However, it still reflects some official reluctance to enforce the full penalty of British law on Aboriginal people convicted of \textit{inter se} murder. An alternative system of incorporating Indigenous law or values appears never to have been considered, except briefly in the Hutt’s period.\footnote{See Chapter 4.}In January 1848, lawyer, Nairn Clark had suggested mixed juries, of which half would consisting of Aborigines, but this idea had been dismissed by Mackie.\footnote{\textit{The Perth Gazette}, 12 July 1848. Court of Quarter Sessions, 6 July 1848.}
By the time Archibald Burt arrived from England to become Chief Justice of the new Supreme Court on 31 January 1861 the full force of British criminal law was being applied to Aborigines accused of killing other Aborigines, particularly in the newly expanded pastoral districts.190

Court cases in other colonies

While there were similar pressures regarding the status of Indigenous law in each of the Australian colonies, there was some variation on the response, that was highlighted by the ambiguity of Colonial Office instructions. The relative isolation of Western Australia during the 1830s and 40s, and the nature of the largely legally untrained magistracy meant that reference to legal precedent in other colonies was unlikely. There is no evidence that Chief Magistrate Mackie in Wewar referred to New South Wales cases. However, after the case, in January 1843 the Editor of the Inquirer did briefly refer to Bonjon.191

It also appears that other colonies developed their own solutions to a perceived problem during the 1830s and 1840s. At that time, the Chief Justice of the Supreme Court of South Australia, Charles Cooper had not considered it necessary to try inter se matters in the 1840s because he believed Aboriginal people had not consented to be bound by British law, preferring to develop a practical test for jurisdiction which was whether the accused had been in contact with Europeans for a reasonable period.192 The first inter se prosecution took place in South Australia in 1846 and involved the murder of an Aboriginal shepherd. Despite ensuing prosecutions however, there was not the same zealosity for implementing the death penalty as in Western Australia where there was

191 *The Inquirer*, 25 January 1843. ‘Chronology.’
192 Pope, ‘Aborigines and the Criminal Law in South Australia’, p.130.
a greater demand for Aboriginal labour. In South Australia there was the more separate
influence of an independent judiciary from the colonial government and settler interests,
than in Western Australia.\footnote{Statham, ‘Swan River Colony 1829-1850,’ p.181. The population of W.A. in 1850 was 5254.}

In New South Wales the jurisdiction question came earlier in 1829, and it is therefore
worth comparing the New South Wales cases which have been examined in relation to
the legal status of Indigenous people generally, with those of Western Australia.
Landor’s arguments in \textit{Wewar} reflected more what Dowling concluded in the \textit{Ballard}
case, but was repudiated in the \textit{Murrell} case, seven years later.

\textbf{The Ballard Case (\textit{R v Ballard}) –1829}

In the same year as the formation of the Swan River colony, the first case was heard in
New South Wales which tested whether the Supreme Court had jurisdiction when one
the practice of non-interference and Ballard was discharged for want of jurisdiction.
Chief Justice Forbes noted that it had been the policy of the courts and colonial
government not to interfere in quarrels between Aboriginal people, and referred to a
similar principle in the North American British colonies that relied on principles of
natural justice:

\begin{quote}
They did not give up their natural rights. This is not merely matter of
theory but practice….They make laws for themselves, which are
preserved inviolate and are rigidly acted upon.\footnote{Proceedings of the Supreme Court, Vol. 22 in Archives Office of New South Wales 2/3205, \textit{Decisions of the Superior Courts of NSW}, Macquarie University, p.3.}
\end{quote}
Forbes emphasised the injustice and impracticality of applying British law to Aborigines in relation to *inter se* matters.\textsuperscript{196} Judge Dowling stated that the actual or implied consent of the Aborigines was required before British law could be applied to conduct among themselves.\textsuperscript{197} Ballard would be reversed seven years later by the *Murrell* case.\textsuperscript{198}

**The Murrell case (*R v Murrell and Bummaree*) –1836**

In February 1836, Jack Congo Murrell was indicted in the New South Wales Supreme Court for the wilful murder of Jabinguy (Jabbingee) and George Bummery was charged with the murder of Pat Cleary on the road between Windsor and Richmond.\textsuperscript{199} In his argument against the court’s jurisdiction, Murrell’s lawyer, Sydney Stephen argued that New South Wales was neither ceded, settled nor conquered and that Murrell should be punished under his own laws by which he and his people had continued to be governed since time immemorial.\textsuperscript{200} Murrell belonged to a tribe who were not British subjects nor subject to British laws, the British had come to reside amongst them and therefore should obey Aboriginal laws rather than be amenable to British laws. Neither Murrell nor Jabinguy were practically able to be protected by British laws and therefore were not bound by them.\textsuperscript{201} The Supreme Court rejected the argument that it had no

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\textsuperscript{196} Ibid., pp.3 -4. .  
\textsuperscript{197} Ibid., p. 4.  
\textsuperscript{198} *R v Ballard or Barrett*, Supreme Court of New South Wales, 13 June 1829, *Decisions of the Superior Courts of NSW*, p.2; Robert Ballard or Barrett was indicted for the murder of Borondire or Dirty Dick. C.J. Forbes gave his opinion before and after the trial on 21 April 1829 and 16 June 1829, *Decisions of the Superior Courts of NSW*, pp.1, 5.  
\textsuperscript{199} *R v Murrell and Bummaree* (1836) Supreme Court of NSW, February 1836, *Decisions of the Superior Courts of NSW*, p.1. Murrell was indicted for the murder of Jabinguy (Jabbingee) and Bummaree (George Bummery) for the murder of Pat Cleary.  
\textsuperscript{200} The oral argument was slightly different to the plea. *Decisions of the Superior Courts of NSW*, p.3.  
\textsuperscript{201} Forbes CJ, Dowling and Burton JJ, 19 Feb 1836, *R v Murrell and Bummaree*, *Decisions of the Superior Courts of NSW*, p.3.
jurisdiction to hear the case.\textsuperscript{202} The leading judgment by Burton (with whom the other judges were in agreement) stated that Aborigines were amenable to British laws for \textit{inter se} offences and against the peace of the King.\textsuperscript{203} The act had occurred on New South Wales territory, and ‘England had exercised for many years the rights of Domain and Empire over country thus possessed.’\textsuperscript{204} Burton made no distinction in law between British subjects and aliens as both came under the protection of British law. Aboriginal people did not have laws that could be recognised:\textsuperscript{205}

Although it be granted that the Aboriginal natives of New Holland are entitled to be regarded by civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of government and law, as to be entitled to be recognized as so many sovereign states governed by laws of their own.\textsuperscript{206}

In Burton’s view, if the Supreme Court had no jurisdiction there would continue to be violence on the streets and no protection for Aborigines under British law.\textsuperscript{207} Despite there being no provision for Aboriginal peoples to give evidence in New South Wales, Burton dismissed Stephen’s arguments of the likely injustice, stating that this could be overcome by the local legislature and by the exercise of the royal prerogative of mercy.\textsuperscript{208} As the court found it had jurisdiction, Murrell and Bummery were tried on 13 May 1836. Murrell, however, was found not guilty and the Crown did not proceed with the prosecution of Bummery.

\textsuperscript{202} The judgment regarding jurisdiction was delivered on 11 April 1836. Forbes C.J., Dowling and Burton JJ in banco, 11 April 1836, Supreme Court of NSW, Miscellaneous Correspondence relating to Aborigines, State Records of NSW, 5/1161, pp210-216[4], \textit{Decisions of the Superior Courts of NSW}, p.4.


\textsuperscript{204} Forbes CJ, Dowling and Barton JJ in banco, 11 April 1836, \textit{Decisions of the Superior Courts of NSW}, p.5.

\textsuperscript{205} Ibid.

\textsuperscript{206} Ibid., p.4.

\textsuperscript{207} Ibid., p.5.

\textsuperscript{208} Ibid.
The Bonjon case (*R v Bonjon*) – September 1841

Six months before the *Wewar* case, an *inter se* case was heard that debated the legal status of Aboriginal peoples before Supreme Court judge Willis at Port Phillip (at that time under the jurisdiction of New South Wales). While the *Murrell* case was authority for the court’s jurisdiction on *inter se* matters, Willis reached a very different conclusion in the *Bonjon* case (*R v Bonjon*). In September 1841, Bonjon (Bon Jon), was tried for the murder of Yammowing in Geelong. Bonjon’s lawyer, Redmond Barry, argued that the court did not have jurisdiction because the territory of New South Wales had been occupied by the British, which gave the Crown a right to the soil, but not authority over Aboriginal people as subjects, unless some treaty, compact or other expression of assent had been made. Aboriginal peoples had their own laws and modes of regulation and punishment and were self governing communities.

In his judgment Willis said he was not bound by *Murrell* because in his opinion the Supreme court did not have jurisdiction over crimes committed by Aboriginal people against one another. Aboriginal peoples were distinct though dependent allies, not British subjects who were entitled to exercise their own usages and laws. Bonjon was acquitted and therefore Willis did not need to come to a final decision on the question of whether Bonjon should come under the jurisdiction of British law and the courts. This case was not viewed as precedent at the time, although it caused sufficient doubt.

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209 Bonjon was from the Wadora people and Yammowing from the Colijon tribe.
211 Other Supreme Court judges in Sydney and Colonial Office officials disagreed with Willis J that *R v Murrell* was not accepted law.
213 Kercher, *An Unruly Child*, p.11
for Governor Gipps to query whether legislation was required to settle the question.  

However, it was the highest point at which a Supreme Court in colonial Australia reached on Indigenous legal autonomy.  

Barry’s argument that Aborigines had their own laws and had to assent to be bound by British law was similar to Landor’s argument, which was acknowledged by the Editor of the *The Inquirer* in January 1843. Landor had not referred to Aborigines as self-governing communities and had considered that conquest was more the mode of acquisition which was applicable to the circumstances. The Editor added that the Judge had ‘entertained the objections’ and approvingly stated that the decision had been contrary to the settlers wishes. 

The Colonial Office response was to support Burton and the other Supreme Court Judges who pointed out that a declaratory act was unnecessary and who concluded that the ruling in *Murrell* was determinative. However, while the legal principles developed independently in the Australian colonies in the early 1840s, there were similarities in the kinds of legal arguments put forward to challenge the courts’ jurisdiction. Like Sydney Stephen in *Murrell*, Landor had argued in *Wewar* that Aboriginal people were regulated and bound by their own customs and laws, and not by British law, and that as Aboriginal peoples could not practically be protected by all aspects of British law, they could not be subject to it. However, unlike Landor, Stephen focused on the continuance of Indigenous laws after annexation and not the category of territorial status used to justify the court having jurisdiction.

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214 Gipps to Stanley 24 January 1842, *HRA*, Series 1, Vol. 22, pp.653-7. This despatch was acknowledged by Lord Stanley, 2 July 1842.


216 *The Inquirer*, 25 January 1843.

Political expediency played a large part in judgments. Most of the initial cases in Western Australia and New South Wales were prosecuted after Europeans had witnessed *inter se* conflict in town streets. While Mackie recognised the injustice of applying British law to these cases, expediency outweighed abandoning the jurisdiction of the court in relation to the category that he defined. The main difference between the *Murrell* and *Wewar* cases is that unlike Chief Magistrate Mackie, Justice Burton in *Murrell* concluded that all transactions *inter se* should be amenable to British law and that any difficulties in bringing Aborigines under British law should be legislated for. Mackie attempted to limit the application of British law rather than relying like Burton in the *Murrell* case on the local legislature to remedy the injustice. By contrast, Mackie regarded it more as the role of missionaries to educate Aborigines in the regions. However, like *Murrell*, there is reference to, and reliance on the prerogative power of mercy, under which Wewar’s death sentence was commuted to transportation for life. *Wewar* was similar to the *Ballard* case in its discussion of the boundaries of the application of British law and natural law, in which Chief Justice Forbes defined (before and after the case) the boundaries of what *inter se* matters might fall within the court’s jurisdiction and what did not. Like Mackie, Forbes referred to rights arising from natural law which, although regarded as less important than civilized law was something that Aborigines did not give up to magistrates.

During the 1830s there was an informal legal pluralism in Western Australia which continued until 1848. This policy with some exceptions was endorsed by the Colonial Office in 1841 on pragmatic grounds even though all Aborigines were in theory, British subjects coming under the protection of British law. The *Wewar* case resulted in the legal recognition of Hutt’s 1840s non-interference policy and confirmed a legal status
for Aborigines employed by or residing with settlers, in that they were entitled to protection under British law as if they were white people despite the inequitable application of this law to them. However, it also recognised the status of Indigenous laws which did not come within the categories of exceptions. While *Wewar* did not reflect a formal recognition of customary law or Indigenous autonomy, such as in *Bonjon*, there was a conscious policy decision not to apply British law to Aborigines who did not fall within the category outlined by Mackie’s and Hutt’s policy which had also been affirmed by the Colonial Office in 1841. By 1841 the protection of employed Aborigines from attack from other Aborigines (and also from Europeans) became increasingly important to the colonial government and the courts. This distinction became blurred when those employed by settlers were also participating in tribal killings and were being charged with murder themselves. In 1848 there was more of a push to regard even Aboriginal people who had little contact with settlers as fully liable to the penalties of British criminal law for tribal murder. This coincided with the reduction in expenditure on education and training, the move to physically protect Aboriginal youth employed by settlers from being killed or influenced by tribal law and their relatives.

While a system of formal or strong legal pluralism may have been considered briefly by Hutt and Moore in the early 1840s that incorporated Indigenous laws and institutions as part of the British legal system or which implemented mixed juries, this was not implemented. This was probably because of the prejudicial assessments made about Indigenous laws and society by officials and settlers, and the increasing disparities in economic and political power between Indigenous people and settlers. It was the criminal law that Hutt found most similar to Indigenous culture and laws, not the civil laws.

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218 eg; civil law, giving evidence in court
law. Where Indigenous laws were seen as interfering with civilising and economic objectives such as industrial education for Aboriginal children in Perth or firing the bush, then legislation was passed in an attempt to control them.\textsuperscript{219} Of the few court cases where the legal status of Aborigines was debated, the \textit{Wewar} case demonstrated some willingness on the part of officials to acknowledge that Aboriginal people had not consented to be bound by British laws where their ‘private feuds’ were involved. This view was more prevalent in the general colonial community during the 1830s and 40s than later on. This comes out consistently in the court cases and Executive Council meetings of the late 1830s and early 1840s, and was later restricted to debate against the implementation of the death sentence for Aborigines convicted of \textit{inter se} murder. This arose in \textit{Wewar}, when Landor argued that Aborigines had to consent to their laws being replaced by British laws in relation to conduct among themselves, whether the territory was settled or conquered. He may have had inside knowledge that Mackie felt the same way, but had chosen another route. While Mackie adhered to the principle of occupancy espoused by successive Secretaries of State, there is some evidence to show that he and others at that time did not really believe this complied with the facts. Landor later criticised Mackie for not following his moral conscience by following the direction of the Colonial Office: ‘Judges are compelled to yield to their authority and do violence to their own consciences whilst they help to lay the healing unction to those of their lawgivers.’\textsuperscript{220} This theme of consent also came up with the petition against Kanyin’s execution in 1850, and was repeated by Landor who argued against the legal execution of Aborigines for \textit{inter se} murder cases in the 1860s.\textsuperscript{221} It also arose in South Australia

\textsuperscript{219} Protection of Aboriginal Girls 1844, 8 Vic No 6. A fine of 2 pounds could be imposed on persons found guilty of enticing Aboriginal girls from school or employment. This remained in force until it was repealed by the Aborigines Act No 14 of 1905. Russell, \textit{A History of the Law in Western Australia}, p.320. Others were general Acts that that required licenses for ‘native dogs’ or they would be shot. Eg; 1841 4 and 5 Vic No 14 Licenses for Dogs, 1847 10 Vic No 15 Bush Fires – The penalties were summary punishment for Aborigines and European boys, and fines for Europeans.

\textsuperscript{220} Landor, \textit{The Bushman}, p.193.

\textsuperscript{221} See Appendix.
when Supreme Court justice Cooper developed a separate opinion from the colonial government that it was not possible to prosecute Aboriginal peoples for ‘offences’ under British law where an Aborigine was acting under tribal law. Cooper applied a broader practical test which was whether an Aborigine had contact with a European, but by 1860 he had caved into pressure from the Colonial Office and the governors. The issue of consent was a theme with Cooper, especially with *inter se* offences because Aborigines had not acquiesced to British law. In New South Wales, it is illustrated by Justice Forbes in *Ballard* and Willis in *Bonjon*, and in the arguments put by lawyer Sydney Stephen in the *Murrell* case. This theme of consent to be bound was also used in contradictory ways to advance arguments by magistrates for a modified status for Aboriginal people in relation to settlers property. Chapter 8 examines this aspect.

As more Aborigines were employed by farmers particularly in the York region in the lead up to convictism in 1850, the exceptions became more the rule, with a sharp increase in *inter se* murder cases. By 1850, the first public execution of an Aboriginal person under British law for *inter se* violence had taken place as an example to others. This trend coincided with the maximum employment of Indigenous youth as pastoral labour in the colony and civilisation by coercion through the enforcement of legislation, which had replaced Hutt’s temporary legal pluralism approach. From then onwards, executions for *inter se* offences continued to be implemented sporadically until the 1860s, when it became more common, and nearly all Aboriginal accused sent to trial in Perth were prosecuted for *inter se* murder. By the 1860s there was still some reluctance by both officials and jurors to apply the full penalty of British criminal law. This extra push for the death penalty had commenced in the late 1840s with the realisation that Aborigines who had been expected to be employed as servants in the long term (and educated in Christianity and partially civilized) were still engaged in tribal killings. This
took place more in Western Australia because of the extreme shortage of cheap labour in the pre-convict era. This shocked officials such as Cowan and Symmons who sought more extreme measures against what they saw as an increase in this activity. In South Australia the pressure for an economic Aboriginal labour market appeared to be of less concern to colonists and the death penalty was not carried out as a severe example, despite some death sentences being handed down for *inter se* prosecutions in the Supreme Court of South Australia, and in fact sentences were more lenient generally. Pope concludes that the lighter sentences indicated that in practice crimes for *inter se* murder were seen as of a lesser order.

The exceptions especially regarding employed Aborigines would erode the non-interference policy and become the norm by 1850’s. What was left was Hutt’s legislative framework which was borrowed subsequently to develop a system of differential legal status for Aboriginal people which the next chapter examines and which would institutionalise settler prejudice and discriminatory practice.

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223 Ibid., p.148.
Chapter 8

The expansion of colonial law and its separate treatment of Aborigines

There were two major pushes for a separate criminal legal system to apply to Aboriginal peoples in the agricultural and pastoral regions of Western Australia. Firstly, during the early 1840s, where provision had been made for settlers to lease ‘commonage’ on Crown land for sheep grazing in York when shepherds were in short supply. Secondly, in the late 1840s which was a period of rapidly expanding pastoral settlement.¹ By 1846, the settled districts had extended north of Toodyay and York as far as Victoria Plains, and further exploration by the Gregory brothers stimulated settlement northwards towards Champion Bay, which was settled in 1850.²

By the mid-1840s there was increasing reliance on sheep for wool by a new generation of pastoral licensees and squatters with a more hardened attitude towards Indigenous people than settlers closer to Perth.³ It was Bland and Symmons as the Guardians of Aborigines and the Protectors of settlers, who argued that a separate summary punishment system under magisterial control in the rural regions was necessary in order to protect Aboriginal people from the retaliation of pastoralists for the theft of their sheep. By the 1850s, the Summary Punishment Act was enforced to govern future relations with Aboriginal tribes who had no contact with British law in new pastoral regions such as Champion Bay.

¹ Cameron, Ambitions Fire, p.172.
² Green, ‘Aborigines and white settlers’, pp.95-96.
³ The Inquirer, 8 September 1847; Green, ‘Aborigines and white settlers’, p.122.
The colonial government’s push for a separate criminal legal system would deliberately depart from the Colonial Office policy of formal legal equality of the late 1830s and early 1840s. This momentum had already commenced in 1839 when Governor Hutt rejected the official position that Aboriginal people should be subject to the full rights of British subjects. However, by 1848, there was a shift in Colonial Office policy and a new wave of Colonial Office officials, namely Herman Merivale (who replaced Stephen as Permanent Undersecretary) and Secretary of State, Earl Grey, who agreed with local officials of the necessity for a separate criminal legal system that would legally render Aboriginal peoples an inferior kind of landless subject. By this time the humanitarian influence had waned and this discriminatory practice would be entrenched in colonial law as the Summary Trial and Punishment Act 1849.

This chapter argues that in the late 1840s there was a deliberate departure by both the colonial and British government from the earlier policy of equal legal status for Aboriginal people. The decentralisation of the colonial criminal legal system was facilitated by economic reasons and particularly the rapid expansion of commercial activity that exploited Indigenous lands, primarily pastoralism but also cutting timber, sandalwood, kangaroo skins, as an official means to deal with encounters between settlers and newly encountered tribes. The colonial law was increasingly used by the colonial government in place of education and missionaries as a form of coercion towards labour especially around the York district which had expanded dramatically by the late 1840s.

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4 Russell to Hutt, 30 April 1841, BPP, *Papers relative to the Aborigines*, p.378.
5 The Summary trial and Punishment of Aborigines Act was passed in Western Australia on 18 May 1849. This was approved by the Colonial Office and gazetted on 18 June 1850. *The Perth Gazette*, 21 June 1850; Minutes of Legislative Council 18 May 1849, CO 20/6, Reel 1121, p.290.
The origin of a separate legal system.

The summary punishment of Aboriginal people for property offences was already established practice by settler and magistrate as early as the mid 1830s, when Perth had been the ‘frontier’. This included the illegal practice of detention and flogging Aboriginal people for the theft of settlers’ private property without trial, and even as hostages. The government adoption of this policy of summary punishment resulted after the meeting with Aboriginal representatives Munday and Miago in September 1833 who had protested against the shooting of their relatives for attempting to break into settler houses, which form of extreme punishment made no sense under Indigenous law. When confronted by an irate and threatening settler with a gun, some Aboriginal people had offered to be speared in the leg under their law but this had been rejected. In 1836 a proposal for co-existence on the same land had been made by local Indigenous people, but this had not been taken up; instead Indigenous people were regarded as trespassers and criminals. While Irwin had encouraged Munday and Miago to report any unprovoked shooting, this did not extend to ‘provoked’ attacks involving theft or the attempted theft of settlers goods, and the question of direct conflict over the ‘theft’ of settler property, trespass, and economic power remained unresolved. From this time onwards, Irwin encouraged magistrates to summarily punish Aborigines for cases of theft within the towns. In July 1835, Glenelg reminded Stirling of the necessity of applying the principle of equality under British law to Aborigines. This meant in practice, that from 1837 Aboriginal people were now prosecuted for theft of settlers’

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6 For example, The Perth Gazette, 18 June 1836, p.712.
7 See Chapter 2; The Perth Gazette, 7 September 1833, p.142 ; The Perth Gazette, 7 February 1835, p.439.
8 R v Boo-goon-gwert or Bugon, Court of Quarter Sessions, 3 April 1837. The Perth Gazette, 8 April 1837, p.880; Hallam and Tilbrook, Aborigines of the Southwest region, p. 30.
9 These involved orders of the governor or governor in Council or magistrates for ‘floggings’. The Perth Gazette, 3 May 1834, p. 279.
property in the Court of Quarter Sessions in Perth, with the full penalty of transportation to Rottnest Island prison that this entailed.

It has previously been outlined that during the mid 1830s retaliation by settlers against Aborigines for the loss of stock was widespread practice in regions such as York. Hutt responded by seeking to concentrate greater power of summary punishment in the hands of rural magistrates and to apply rules of enforcement, which was ostensibly a means to prevent settlers retaliating themselves, by ensuring an immediate conviction and punishment of Aboriginal accused. Hutt’s principle of following up every offence with some form of punishment was applauded by Bland who had recommended that the principle be continued in a colonial law. Bland had been appointed by Hutt in October 1842 as Protector of Aborigines in preference to other more philanthropic candidates, because Hutt believed that he had the respect of the farmers in the Avon district. In 1846 Bland employed Hutt’s principles as a rationale for a second push for legislation that expand magisterial jurisdiction to apply specifically to the summary punishment of Aboriginal people. Hutt's local Bill provided:

that it shall be lawful for any two or more Justices of the Peace, not interested in the subject matter of the complaint, to enquire into and try all offences, except as hereinafter mentioned, with which any of the Aboriginal race shall be charged, and if the person so charged shall be proved to have committed such offence, then it shall be lawful for such Justices as aforesaid to sentence the offenders to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or place of

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10 Bourke, *On the Swan*, p. 126. Examples are outlined in SRO, CSR 1839, ACC 49/12.

11 Nairn Clark to Secretary of State, 31 March 1843, PRO, CO 18/34, p.299; Hutt to Stanley, 6 April 1843, BPP, *Papers relative to Aborigines*, p.422.

12 Hutt to Russell, BPP, *Papers relative to the Aborigines*, p.386. Extract from the Instructions to Government Residents, ‘no offence which they may commit, if declared to be deserving of punishment, should ever be passed over; for however long a period the offender may escape, let the hand of justice reach him at last.’ R. Bland, Report of the Protector of Aborigines for 1845, dated 1 January 1846, *The Inquirer*, 28 January 1846; *The Perth Gazette*, 17 January 1846. Bland’s 1846 report is referred to in *The Inquirer*, 10 February 1847.
confinement appointed for such persons, for any time not exceeding one year, according to the nature and magnitude of the offence.\textsuperscript{13}

If the magistrates considered the offence to be of ‘so serious nature’ as to merit a ‘greater degree of punishment,’ then the offender could be referred to the Court of Quarter Sessions based in Perth.\textsuperscript{14} If the offence was considered to be of a ‘trivial’ nature then it was lawful for the magistrates to ‘substitute the punishment of whipping, of up to twenty four stripes, but only in relation to ‘male offenders.’\textsuperscript{15} Hutt’s proposal was for the executive control of magistrates, where all summary convictions were to be reported to him rather than the Chief Magistrate. At the time he drafted his proposal Hutt had not even told Mackie or the Legislative Council of it, except for his legal adviser, Moore.\textsuperscript{16}

The push towards the decentralisation of a modified British criminal law that would extend magisterial jurisdiction over Aborigines coincided with a hardened attitude by many settlers towards Aboriginal people in the mid 1840s, and a belief that adults could no longer be educated to become part of colonial society. This was increasingly blamed on the ‘superstitions’ and character of Aborigines as a racial group. It built on Hutt’s assumption that in their ‘natural state’ Aborigines had a propensity for theft.\textsuperscript{17} The modified criminal law was therefore regarded as a less severe measure of punishment

\textsuperscript{13} Part V of an Act to allow the Aboriginal Natives of Western Australia to give information and evidence in Criminal Cases, and to enable Magistrates to award summary punishment, for certain offences, No 8, LL, Acts of Council WA 1832-1842 (D).

\textsuperscript{14} Russell, \textit{A History of the Law in Western Australia}, p.133. A regular Albany Quarter Sessions was established from 1845 but it did not hear cases involving death sentences because Philip was not legally trained. Minutes of the Executive Council, 5 July 1847, CO 20/5, Reel 1120, pp.77-80. This problem resulted in a European being let off on a technicality for killing an Aborigine, despite Madden’s intervention. \textit{R v Martin}, 1848, BL, Madden papers, M945.

\textsuperscript{15} An Act to allow the Aboriginal Natives of Western Australia to give information and evidence in Criminal Cases, and to enable Magistrates to award summary punishment, for certain offences. No 8, LL, Acts of Council WA 1832-1842 (D).

\textsuperscript{16} Mackie to Colonial Secretary 18 November 1839 replying to the Colonial Secretary’s letter of 5 November, SRO, CSR, ACC 36, Vol 75, p.149.

\textsuperscript{17} Hutt to Stanley, 8 April 1842, BPP, \textit{Papers relative to the Aborigines}, p.413.
than the full application of penalties for theft, but could potentially be applied to a wider range of offences against Europeans. It was therefore viewed as a means of civilisation through coercion or punishment.\textsuperscript{18}

Even though Hutt recognised that Aboriginal people had claims to reparation for the loss of their land and resources, he saw the remedy in the form of less severe sentences of punishment under the criminal law, encouraging employment and education through missionaries. The problems of Aborigines getting bail and being detained in prison for long periods was also a major factor in Hutt’s rationale for different laws based on race.\textsuperscript{19} Although he planned to centrally control the local interests of the Justices of the Peace through the Government Residents, who would in theory have protectionist policy as their focus, the provision for a Resident to be at each trial was thrown out when the draft bill came up before the Legislative Council in July 1840.\textsuperscript{20} Hutt placed excessive faith in the impartiality of magistrates regarding them as protectors in the regions, who would impartially punish Aborigines for stealing or receiving a settler's sheep and also protect them against unscrupulous settlers. This was no doubt informed by Mackie’s opinion which Hutt finally sought and obtained in November 1839. Mackie supported summary and district tribunals on the basis of cost and expediency, and argued that petty juries comprised of labourers would be more likely to be biased against Aborigines than settler-magistrates who were better educated.\textsuperscript{21} Hutt wanted to save settlers the inconvenience of having to come to Perth to give evidence or make complaints in Perth, not to mention the increased costs which were a major concern.

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\textsuperscript{19} Hutt to Glenelg, 19 August 1840, BPP, Papers relative to the Aborigines, pp.374-5.
\textsuperscript{20} Hutt to Glenelg, 3 May 1839 enclosing a copy of the Act, BPP, Papers relative to the Aborigines, pp.366-7.
\textsuperscript{21} Mackie to Colonial Secretary, 18 November 1839, SRO, CSR, ACC 36, Vol 75, p.149.
\end{flushright}
The Summary Punishment Act had been in operation for one year before it was disallowed by Stephen and Russell. It had been described by Moore ‘as much as for their protection as for their control’, where the ‘slightest wanton aggression is as strictly inquired into as if it were committed against a white man; and on the other hand, the imprisonment of a few of their most daring offenders upon the Island of Rottnest, has been attended by the most salutary effect, both in the way of reformation and example.’

**Colonial Office policy in the early 1840s.**

When Hutt sent off his draft proposal on summary punishment on 3 May 1839 to the Colonial Office, Russell queried the cursory approach to the problem of dealing with Indigenous people encountered for the first time on the frontiers of settlement. Russell instructed Hutt to include a provision that the sentence and evidence should be confirmed by the ‘Chief Justice’ of the colony. However, Hutt refused to make this amendment, replying that the large extent of the territory made this impossible. This demonstrated that the purpose of the legislation was not solely to apply to the central Court of Quarter Sessions in Perth, but in the rural regions where there were more likely to be Indigenous people with little or no contact with British law. The application of a modified legal status which differed in application to other British subjects was justified on the basis that the punishment did not involve long prison terms under criminal law, and were similar to what Aboriginal law might accommodate. However, in reality, it

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22 The Inquirer, 31 March 1841, p.4  
23 Russell to Stephen, 19 October 1839, on back of despatch from Hutt to Glenelg 3 May 1839, PRO, CO 18/22, pp.232-3.  
25 Hutt to Glenelg, 3 May 1839, Papers relative to the Aborigines, pp.364-367.
was primarily an accommodation to the settlers, who viewed the defence of their own rights of private property as a birthright of their own British subject status.

It was not until the final version of the Act was sent to the Colonial Office that Russell objected strongly to the provision for summary punishment, particularly whipping. Russell refused to sanction the legislation arguing that if Aboriginal people were distinguished from other British subjects in this way then the ‘grossest oppression’ was likely. Stephen wrote a long minute to Russell saying that he did not understand the motivation for these provisions but believed that it was ‘very dangerous.’ In his opinion magistrates in such places as Western Australia have the prejudices of caste in high degree and all laws which distinguish in this manner between different races of men on the ground of national origin, tend to foster these prejudices, not only in the judges, but throughout Society at large. No difficulty can be much more intractable than that of legislating ought for tribes of savage men in juxtaposition with a civilized race.

Stephen undoubtedly understood the motive behind the Evidence part of the Act, but not the Summary Punishment provisions that seemed to run counter to the ideal of equal treatment under British law and the intended amalgamation of Aborigines on equal terms with the colonists. It was likely that he thought that a separate criminal legal system was incompatible with Hutt's vision for the amalgamation of Aborigines and colonists into colonial society, as it would entrench inequality in law between one race and another. Stephen also seems to have been concerned with some of Hutt’s assumptions about Indigenous character and society that necessitated a departure from equal treatment. However the realities arising from a centralised colonial administration

26 Russell to Hutt, 30 April 1841, BPP, Papers Relative to the Aborigines, pp.377-8.
28 Ibid., pp.260-65.
at a great distance from the regions where settlers and Aborigines were encountering
each other for the first time was not yet fully realised by the Colonial Office.29
Russell agreed with Stephen’s opinion and more emphatically disallowed the
legislation, adding that

by thus establishing an inequality in the eye of the law itself between the
two classes, on the express ground of national origin, we foster
prejudices, and give a countenance to bad passions, which unfortunately
need no such encouragement…maintaining the general principle of strict
legal equality, would maintain just opinions and moral attitude on the
subject of Aboriginal rights.30

This assumed a relationship between preserving equality under the British law and not
entrenching existing settler racial and cultural prejudices in law against Aboriginal
people.31 This disallowance resulted in Hutt reluctantly promising not to reintroduce the
bill during his term of office, which finished on 19 February 1846.32 Consequently, in
practice, it also meant that Aboriginal people who had been prosecuted under the British
criminal law for theft were sent to Court in Perth where penalties of up to seven years
transportation to Rottnest were still being imposed.33 However, almost immediately
after Hutt’s departure, the lobbying for its reintroduction commenced.

The expansion of pastoralism to the Victoria Plains

In February 1846, there was a renewed call for legislation to allow magistrates to try
petty offences by summary jurisdiction because of an increase in prosecutions for the
taking of sheep and other settlers property, and the rationale that it was costly to bring

29 Stephen to Vernon Smith, 17 October 1840 on Despatch from Hutt to Glenelg 3 May 1839, PRO, CO
18/22, p. 244 ; Stephen to Hope, 26 November 1841, on back of Despatch from Hutt to Russell, 10 July
1841, PRO, CO 18/27, p.52.
30 Russell to Hutt, 30 April 1841, BPP, Papers Relative to the Australian Colonies, p.379.
31 Hasluck, Black Australians, Ch. 1.
32 Battye, Western Australia, p.179.
33 By 1846 there were 49 Aborigines on Rottnest Island. Green and Moon, Far From Home, p.155.
Aboriginal offenders over 70 miles to Perth for trial.\textsuperscript{34} This renewed impetus came at the end of an economic recession, and during a period when licenses were being issued for commercial activities on what were regarded as Crown lands. This diversification included increased sheep numbers for the export of wool, mining, kangaroo skins, sandalwood cutting and the taking of timber for export.\textsuperscript{35} It was the Protector, magistrate and pastoralist, Bland who initially urged acting Governor Irwin to take up the cause for summary punishment legislation in 1846.\textsuperscript{36} This coincided with the push by the Agricultural Society to protect the pastoral economy by urging legislation to prevent bushfires by administering corporal punishment to Aborigines and European boys, and to control ‘native’ dogs.\textsuperscript{37} On September 1847, the Editor of \textit{The Inquirer} took up the call on behalf of the pastoral licensees for additional police to protect their sheep and shepherds’ huts, arguing that their licenses were contributing an additional 600 -1000 pounds to colonial revenue and demanding that additional police and magistrates be provided in the Gingin and Toodjay areas, near York.\textsuperscript{38} This followed an incident where Aborigines had speared sheep at an outstation, but when the pastoral licensee had searched for an ‘authorized person to redress their wrongs,’ it was discovered that the policeman could not proceed without a magistrate.\textsuperscript{39} The Editor echoed majority settler opinion when he argued that Aborigines in remote regions should be punished to stop them stealing, and more severely for the first offence.\textsuperscript{40}

On January 1846, Bland reported that incidents of violent resistance accompanied by robbery had declined. Increasingly the method of pastoralism meant that there were

\textsuperscript{34} \textit{The Inquirer}, 7 February 1846; \textit{The Inquirer}, 8 September 1847, p.2.
\textsuperscript{35} Cameron, \textit{Ambitions Fire}, pp.177-8.
\textsuperscript{36} \textit{The Inquirer}, 10 February 1847.
\textsuperscript{37} \textit{The Inquirer}, 16 July 1847, 26 May 1847. Lobbying of William Burgess, Secretary of York Agricultural Society.
\textsuperscript{38} \textit{The Inquirer}, 8 September 1847, p.2.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid., p.2.
more stray sheep and unattended shepherds huts, some of which were being robbed by opportunistic Aborigines while out hunting kangaroo.41 This was an increasing characteristic of the open grazing system (less so with agriculture closer to the towns) on the fringes of white settlement, where there were no fences, and sheep roamed over a large area on the same pasture as kangaroo. Aboriginal people who saw sheep for the first time would have regarded them as much their right to hunt as the kangaroo.42 The increased economic importance of this region to the colony and the unwillingness or inability of settlers to closely watch their stock, would lead to a resurrection of the proposal for a decentralised criminal legal system to be applied solely to Aborigines, many whom would encounter the colonial legal system for the first time.

Similar to arguments of the early 1840s, Bland recommended that Aboriginal people should be punished before magistrates in order to avoid the ‘immediate consequences of an irritated settler.’43 He urged that such a measure would avoid the need to send Aborigines to Rottnest regarded as a more severe punishment, when they had committed the act while hungry and coming across a stray sheep or hut left unattended, and where evidence could be procured with little expense.44 It was anticipated that encouraging Aborigines to work for settlers would remedy the problem of hunger. In addition, Bland reported increased rates of the taking of sheep by Aboriginal tribes on stations between Northam and Victoria Plains.45 In his opinion these offences were ‘minor’ because there was no longer any violence or ‘deliberation’ associated with the theft, and that settlers were often grateful to Aboriginal people for assistance with

41 The Inquirer, 28 January 1846. Bland was appointed Protector in October 1842- His impartiality was questioned by Nairn Clark.
42 Collard, A Nyungar Interpretation of Ellensbrook and Wonnerup Homesteads , pp.57-58.
43 R. Bland, Report to Colonial Secretary, 13 January 1847, SRO, CSR, ACC 36, Vol. 159, p.5; The Inquirer, 10 February 1847; 13 October 1847, p.2.
44 Ibid.
45 Ibid.
finding sheep, but admitted that settlers could be provoked to violence if their sheep
were stolen. He attributed the actions of Aborigines to their own inherent character or
customs which were no longer considered laws but ‘delinquencies.’ He recommended
that:

their conduct and that of the Europeans should be tested by somewhat
different rules, their habits and peculiar notions are such, as would
frequently justify in their eyes, what we consider an infringement of the
laws, these notions can only be rectified by time and experience, but, while they exist, should be borne in mind as mitigating circumstances,
and have their due weight when the natives’ delinquencies are under
investigation.46

Bland also emphasised the more urgent need for Indigenous labour at this time. In his
report to the colonial government he complained of the time and expense involved in
sending Indigenous offenders to Perth which meant that he had insufficient time for
mediating breaches of labour agreements, which he saw as essential to making
Aboriginal peoples part of a permanent workforce. By the mid-1840s, Indigenous laws
were increasingly perceived as a barrier to employing Aboriginal youth, and regarded as
requiring ‘rectification,’ particularly where they interfered with settlers’ property rights
or economic power.47 However, Bland believed that all offences involving European
property should be punished (albeit with mitigating circumstances) in order to assert
‘moral and physical influence over the cunning and successful savage.’48

Although a proposal for summary punishment had initially been regarded as a method
to be applied on the frontiers of agricultural and pastoral areas as settlement advanced
over a much wider region, it was now regarded as a form of management that assumed

46 R. Bland, Annual Report for 1845, 1 January, 1846, The Perth Gazette 17 January 1846; The Inquirer
28 January 1846.
47 Bland, Annual Report for 1846, The Inquirer 10 February 1847, Report to Colonial Secretary, 13
January 1847, SRO, CSR, ACC 36, Vol 159, p.5.
48 Ibid.
the criminality of Aboriginal people, rather than Indigenous agency and rights to their own land and game. The contest over resources and land was a form of economic warfare at a time when land regulations were being consolidated by pastoral licensees who wanted more certainty of title to land, and when labour was scarce in the lead up to the arrival of convicts in 1850. A modified form of British law was intended to be used in place of education as a civilising tool with summary punishment (without barriers to conviction) as the norm rather than the exception. The intent was not simply to make an example of the ringleaders but to punish all apprehended cases. By 1847, Bland was advocating that all cases except murder be subject to separate magistrates’ courts with extended summary jurisdiction over Aboriginal people, and that the maximum sentence of imprisonment be two years.

The Proposal for a Summary Trial and Punishment Act.

Irwin took the matter up vigorously when he was appointed Acting Governor in February 1847 and was strongly influenced by his cousin, chief magistrate William Mackie, who redrafted Hutt’s bill. On 10 February 1847, Irwin sought the endorsement of the Secretary of State for a law to be passed allowing for the extension of magisterial summary jurisdiction in relation to Aborigines, urging that it was for similar reasons that had been advanced by Hutt in his earlier despatch of August 1840. He pointed to the increased expense of sending Aboriginal accused up to 300 miles to Perth for trial, for the theft of settlers stock. The fact that pastoralism and squatting had expanded beyond what Hutt had contemplated was not mentioned, but may have been a factor in the Colonial Office shift in policy. In August 1847, Grey sought the

50 Ibid.
51 *The Inquirer*, 12 July 1847; *The Perth Gazette*, 25 March 1848.
52 Irwin to Earl Grey, 18 February 1847, (received 12 September 1847) CO 18/45, Reel 439–440, p.126.
advice of James Stephen about whether there should be a change in the law, shortly before Stephen retired as permanent undersecretary. At this stage, a bill had not been drafted but Stephen consulted in earlier memorandum on the Hutt legislation. Stephen advised that the adoption of the summary conviction of Aborigines for less serious offences would depend on the ability to prevent an abuse of power. Stephen saw no legal impediment to an extension of summary jurisdiction power and believed that it might prevent a ‘permanent feud’ going on between the ‘two races.’ However, he did not see why, in ‘mixed cases between Europeans and Aborigines, it should not extend indifferently to both.’ Although he seems to have had a different concept of the jurisdiction than Irwin there was a shift from his earlier position in the 1840s, which probably reflected the changing attitude of the Colonial Office in New Zealand and other colonies at this time which focused on ways to introduce some form of law in the regions. This was a response to the increasing belief that the priority should be to prevent ‘permanent feuds’ between Aborigines and settlers at a time when uncontrolled pastoral expansion onto Indigenous lands was taking place.

Grey agreed that such a law could check feuds between the ‘two races’, and warned Irwin that such legislation would have to be carefully crafted to avoid problems of the abuse of power by a local magistracy. At the same time, he also rejected a request that two mounted police to support the Sub-Protector of Albany be funded from the British Parliamentary grant. Stephen’s reference to mixed cases applying to settlers and Aborigines alike was not mentioned.

54 Earl Grey to Irwin, 12 September 1847 CO 397/7, Reel 774-5, p.372.
The Legislative Council debated the question of legislation when the budget came up for review on 24 June 1847. George Leake (who had been present in the earlier debate in the early 1840s) argued that the expenditure for the administration of ‘police and justice’ of Aboriginal people was excessive and that the British government should pay for some of it. He called for a Legislative committee to be appointed to investigate the matter. The committee comprising of three lawyers, Leake, Mackie and Moore, reported on 22 July 1847. While ostensibly about the overall question of expenses, in reality, the report took the form of the Executive Council’s agenda for convincing the Colonial Office to adopt summary punishment legislation. Mackie drafted the report which provided detailed arguments for a separate criminal legal system for Aborigines in cases of property offences, arguing that it was best from an economic viewpoint if Aborigines had an inferior legal status as a different kind of British subject.

While expenditure on criminal punishment for Aborigines rather than education reflected the shifting policy being adopted by the colonial government, revenue had not increased very much at all by 1847. Of the total amount of £8453, £1028 had been expended for ‘police and the administration of justice’ of Aboriginal people. It was not so much the current expense that reflected Mackie's and Irwin's concerns, but the increased expense that was likely in the near future as more pasture land and new tribes were encountered.

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55 Minutes of Legislative Council, 8 August 1847, The Perth Gazette, 10 August 1847; Minutes of Legislative Council 24 June 1847, The Perth Gazette, 26 June 1847; CO 20/5, Reel 1120, p.441.
56 Ibid.
57 Minutes of Legislative Council, 22 July 1847, The Inquirer, 28 July 1847; Richard Nash took over from Moore in the latter part of 1847 as Advocate General when Moore became Colonial Secretary, prior to Madden’s appointment as Colonial Secretary in 1848.
59 Ibid., for the financial year ending 31 March 1847.
On 5 January 1848, Mackie reported to the grand jury that the greater number of prosecutions of individuals, who had come across settlers for the first time, was increasing which was precipitated by the increase in sheep and cattle as a result of the ‘squatting system.’ He pointed out that the absurd system of regarding Indigenous people as subject to the law equally with whites, which was intended to be replaced with summary punishment legislation, but that it would continue until the views of the British government were known. This meant the retention for the time being of a penalty of up to seven years imprisonment on Rottnest Island for sheep stealing.

There appears to have been little effort to consider mixed juries, as Nairn Clark had recommended in 1842 and 1848. This proposal had been ridiculed by the Editor of The Perth Gazette who imagined what it would be like to have six Indigenous people in a jury with their ‘unkept hair’ and ‘entomological specimens.’ The proposal was disregarded by Mackie who responded that Aboriginal accused were being tried by British subjects, at a time when the amount of theft cases was increasing. Instead the Legislative Committee concluded that a system of summary trials through a Summary Punishment bill was necessary on the basis of expense and the primacy of settler interests.

Mackie rewrote the bill, but it remained in draft form and was not sent to the Legislative Council before being forwarded to the Colonial Office with the Legislative Council report on 23 December 1847. While it was similar to Hutt’s bill there were some significant changes. The latter bill changed the punishment of whipping from 24 to 36

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60 The Perth Gazette, 8 January 1848; The Inquirer, 12 January 1848. Mackie addressed the Grand Jury in the Court of Quarter Sessions on 5 January 1848.

61 The Inquirer, 12 July 1848; Nairn Clark to Secretary of State, 8 January 1842, PRO, CO 18/33, p.295.

62 Ibid.

63 Ibid.

64 Irwin to Earl Grey, 23 December 1847, CO 18/45, Reel 439-40, pp.295-297.
stripes, with imprisonment remaining at one year for more serious offences. In reality, in the 1850s, imprisonment would be increasingly used as the preferred form of punishment. Another important difference was that the 1847 bill did not refer to legal evidence and due process under British law. Instead it provided that an Aborigine’s confession was sufficient by itself without evidentiary proof, which when applied in the remoter regions would rely more on Aboriginal ignorance of British law to more effectively prosecute and convict. This reflected earlier current practice to a large extent but was now formalised in law. In practice, there would be few cases where the evidence or witnesses would be required, only the complainant’s statement.65

The Legislative Council report attributed the causes of ‘excess’ expenditure to the large numbers of Aboriginal people bordering settled districts ‘in proportion to the present number of colonists,’ which was likely to increase as new tribes were encountered and more land was taken for pastoralism.66 The gentry farmers’ (who included members of the Legislative Council) concern in the early 1840s had been that depasturing licensees located near to their fee simple holdings around York would be attacked by ‘native marauders.’67 This was at a time when transportation for export was relatively expensive. However the later 1840s, saw the increase in the number of entrepreneurs operating on lower economic margins who wanted to expand their pastoral leases and economic wealth in remoter regions, and who were now lobbying local government.68

The maintenance of infrastructure further from Perth for pastoralism was not emphasised as much in the report as the cost that potentially would burden the British treasury if a decentralised criminal legal system was not put in place. In the past the

65 An Ordinance to provide for the Summary Trial and Punishment of Aboriginal Native Offenders in Certain Cases. 9 May 1849, LL, Acts of Council WA 1832 to 1853. First paragraph.
68 Bourke, On the Swan, p.159.
Colonial Office had increasingly discouraged pastoral expansion for various reasons including the burden on the British parliamentary grant.\textsuperscript{69} The causes stated in the report were:

the greater inducements of stealing live stock, and robbing gardens, vineyards, and wheat fields, which inducements arise from their obviously greater facilities of avoiding detection and of escape- the absence of all restraint arising from “moral sense” or recognition of the rights of property- their precarious means of livelihood in the greater part of these districts, in which their usual resource of the chase has been destroyed, or greatly limited, and their natural indisposition to replace that loss by industry, for which ample opportunity is afforded them.\textsuperscript{70}

The report implied that the theft of gardens and vineyards was frequent which was more the argument employed by Hutt in the early 1840s, rather than the current rationale relating to different pastoral methods of protecting sheep and unprotected shepherds huts.\textsuperscript{71}

The Committee recommended that the only solution was to extend the power of summary jurisdiction of the Justices of the Peace, which would encompass a much larger class of offences with a wider discretion for punishment. The offences were described as: ‘larcenies of a petty nature and offences of a higher ‘legal grade’ ... which are committed by savages without any of that sense of wrong, that wilful violation of known and acknowledged law, which constitute the guilt, moral and legal, of the same acts committed by civilized men.’\textsuperscript{72} This law was intended to apply to individual Aborigines (not groups as had occurred in the early 1830s) who had had little contact with Europeans and had not been educated about British laws and ways. The law itself was regarded as a form of moral training through a process of punishment rather than

\textsuperscript{69} Colonial Secretary to Resident, Champion Bay, 11 July 1854, SRO, CSR, ACC 49/38, p.279.
\textsuperscript{70} Legislative Council report, 22 July 1847, (p.6), CO 18/45, Reel 439-440, pp.310-320.
\textsuperscript{71} Bland, Report for 1847; The Inquirer, 5 January 1848.
\textsuperscript{72} Legislative Council report, CO 18/45, Reel 439-440, p. 318.
education, to replace what were regarded as ingrained ‘habits’ of ‘stealing.’ The proposal for whipping as a punishment was also justified on the basis that it was similar to that which was inflicted by Aborigines among each other, but less severe than that of being prosecuted at the Court of Quarter Sessions in Perth where punishment involved long terms of imprisonment with hard labour on Rottnest Island.

Although Mackie had previously detected the possibility of a change of attitude in Colonial Office officials away from formal legal equality principles, the Committee framed the economic argument in anticipation of objections by British ‘statesman.’ They acknowledged that what they were proposing imposed an inferior legal status on Aborigines compared to other British subjects who had access to ‘perfect equality before the law under principles of English constitutional law.’73 However, instead of departing from the Blackstonian references to subjecthood, they adapted it, probably to avoid other implications that Aborigines were enemies, aliens or nations. Aboriginal peoples were portrayed as deserving of a different kind of ‘subject’ status based on an argument that the word British subject implied that there were different kinds of subjects associated with different kinds of obligations and rights. This rhetoric was relied on to justify different processes being applied to a different kind of Aboriginal subject that departed from the processes of British law and procedure normally applied to settlers who had given their allegiance to the Crown in exchange for protection, and had the full rights and privileges of British subjects.

The positivist concept of law where law was seen as deriving from allegiance to a single sovereign was now the focus of the argument to justify a different legal status for Aboriginal peoples from that of settlers and to claim the priority of the settlers’ rights.

73 Ibid., p. 316.
The category of British subject which conferred full rights and obligations was reserved to settlers and those who were ‘morally aware of the fact of his subjection to the law, and to the Sovereign’, and who has learned about

the great social compact; that he has given up certain rights, inherent in every man by the law of nature, but of very uncertain operation and observance, in return for a right to protection in person and property from that Sovereign and those laws in every part of the globe, so long as he retains his loyalty to both.\(^74\)

Aboriginal people were therefore excluded on this basis. The Committee had anticipated the racial inequality argument by arguing that the settler was more likely to regard the imposition of the summary punishment legislation as a grievance whereas an Aboriginal person would not. The settler therefore had a greater right to equal participation than Aboriginal people who had not engaged in any such implied or express social compact with the sovereign as a collective people. This opinion coincided with the hardened attitude that they were incapable of being amalgamated into colonial society other than by coercion through the criminal law as a landless labour force. This argument of subject hood was adapted in order to justify the conclusion that Aboriginal people were subjects with few rights especially when it came to settlers lives and property interests, and that they should be ‘subject to superior physical force’ because that is ‘all that they can as yet know’.\(^75\) The effect of this inferior legal status being imposed on them was similarly to the outlawry that Stirling and Irwin had employed against individual and Aboriginal tribes in the 1830s, except that instead of their being shot by settlers they were to be made into a labour force.

\(^{74}\) Legislative Council report, p.317.

\(^{75}\) Ibid.
It was not until the end of the report that a request was made to the Colonial Office to ‘relieve the scanty resources of the Colony from some portion of the public expenditure.’  

76 This strategy had been tried previously on numerous occasions and was unlikely to be successful. However, it was inevitable that enforcement would remain the greatest problem in implementing such laws and that additional funds for more police would be required. This was especially the case in the late 1840s when settlement was expanding over a large region.  

77 On former occasions the Colonial Office had urged restraint in exploration and the expansion of pastoral settlements that could not be funded from colonial revenue, and because of the problems associated with the dispersal of settlers and labour shortages.  

78 However, this was not really taken notice of. The reason that the committee gave, was that if something was not done then settlers would be forced to take their own measures of self-defence and that more prosecutions under British criminal law by the Protectors were likely.  

79 Mackie had earlier justified the departure from formal legal equality by arguing that the British government had departed from this principle in New Zealand.  

80 During the 1840s, after the Treaty of Waitangi, and Grey’s appointment as Governor, there was an increasing assertion of British legal authority in practice.  

81 By the time that Mackie’s report was received, the Resident Magistrates Court Ordinance had been passed in 1846, which established a court under Resident Magistrates.  

82 This asserted an assimilationist purpose through applying a modified British law to Maori people, and focused on resolving mixed disputes summarily. It applied to Maori people and European and

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77 Ibid.  
78 Earl Grey to Fitzgerald, 13 February 1849, CO 397/9, Reel 775, pp.58-59.  
79 Ibid.  
80 The Perth Gazette, 8 January 1848; The Inquirer, 12 January 1848. Court of Quarter Sessions, 6 January 1848.  
82 Ibid. The Resident Magistrates’ Court Ordinance was passed in 1846.
controlled lay magistrates’ powers. This was different to what Irwin and Mackie were proposing, but was moving in the same direction of controlling indigenous people in the regions. Mackie had correctly predicted an Imperial shift in attitude towards the legal status of Indigenous peoples which negated their agency as people and graded different kinds of rights based on assessments of society and political economics. Irwin and the Legislative committee also referred to remarks made by Secretary of State Lord Stanley to the Governor of New Zealand in February 1844:

In our dealings with the uncivilised Chiefs and Tribes of New Zealand it is, indeed, necessary to adhere as close as possible to the general principles of English law: but any close observance of the technical rules and forms of that conduct must, in a large proportion of cases, be either impracticable or unmeaning, or both. To apply our legal maxims, and our manner of judicial procedure, in our relation with savages, to whom our laws, our language, our religion, and our manners, are alike unknown, cannot be necessary; first, because it is not possible; and then because, if possible, it would not be just.

The committee argued that if Stanley had said this about the Maori people who were considered ‘several degrees above barbarism,’ then what did it say about the Aboriginal peoples of Australia who were a 'far more primitive race.' Mackie had accurately predicted the changing mood of the Colonial Office to differentiate between indigenous peoples based on their character and customs. A later dispatch in August 1844 indicates the back peddling over land rights and references to the different indigenous societies on the scale of civilisation. According to Ward, Stanley’s tenet was that multiple legal systems with ‘native Assessors’ were consistent with British sovereignty. Unlike the

83 Ward, ‘The politics of jurisdiction’, p.203; The focus was on Resident Magistrates more than Justices of the Peace similarly to what Hutt originally envisaged when first proposing Summary Punishment provisions although the Resident Magistrates did not have to be legally qualified, but the New Zealand Ordinance was different in that it included civil and criminal matters and applied to Maori and European. It also had a colonial focus and expanded powers over Maori people. P. Spiller, J. Finn and R. Boast, A New Zealand Legal History, Wellington, Brookers Ltd, 1993, p. 193.
84 Stanley to Governor of New Zealand, 10 February 1844, referred to in Legislative Council Report, CO 18/45, Reel 439-440, p.317.
85 Ibid., p.317.
86 Ibid.; Copy of Despatch from Stanley to Fitzroy, 13 August 1844, BPP, Papers relative to the affairs of New Zealand, 4 February 1845, Vol. 4, Shannon, IUP, 1968, pp.145-146
Western Australian Summary Punishment Bill, this was intended to apply to both Maori and Europeans, and involved civil and criminal law. Although an object of the Resident Magistrates Ordinance was to extend the pale of British law and summary jurisdiction ‘as a means to avoid a disorderly expansion on the frontier’ it was to be centrally controlled by stipendiary magistrates and not local magistrates.

The Colonial Office took its time to consider the request for a discriminatory law to apply to Aboriginal people. By 1848, Stephen had been replaced by the political economist Herman Merivale as permanent undersecretary and Russell had been replaced by Earl Grey as the Secretary of State. Merivale had access to Stephen's minute of 1840 that had previously argued for the disallowance of the Hutt bill. The rationale for the draft bill appears to have been treated on the same basis as the Hutt bill by the Colonial Office even though the focus was more on pastoral than agricultural expansion and the lower standard of evidentiary proof was not questioned. In a memorandum to Assistant under-secretary Sir Benjamin Hawes, Merivale stated that he was not aware of anything that would change the former response to Hutt's bill, however, he offered his own opinion that Colonial Office policy should be departed from. Merivale might not have pressed his opinion if he had not expressed strong views on the subject in 1841, when as Professor of Political Economy at Oxford University he supported the proposal for summary punishment legislation or what he described as ‘martial law,’ suggesting a suspension of formal legal equality in certain cases. In his opinion the Legislative Committee report led him to conclude that there

88 Ibid., p.203.
90 H. Merivale, to Hawes, 28 April 1848, CO 18/45, Reel 439-440, pp.303-306.
91 Ibid.
92 L. Stephen, D. Williams, ‘Herman Merivale’ Oxford Dictionary of National Biography; Oxford, 2004-6 online.] The series of lectures that Merivale delivered and later published referred to Summary
was no reasonable chance of civilisation or ‘fusion’ either in ‘blood or society between
the settler and the Aborigines’ of Western Australia, which justified an inferior legal
status corresponding to a lower social status being imposed on Aborigines as a racial
group. In Merivale's view it was surprising that neither the Governor nor Committee
had touched upon what he thought was one of the major reasons against the system of
trial by jury, and this was the temptation which it would give for settlers to take the law
into their own hands on account of the long delay caused by communication and
transportation over long distances.\(^93\)

This was different to Stephen’s assumptions. In 1841, Stephen, when responding to
Hutt's proposal for amalgamation, had been sceptical of success but had supported
Hutt’s efforts. However, he believed that the prejudice in the summary punishment
provisions would retard rather than assist any kind of effective relationship between
Aborigines and settlers, and any objective of amalgamation with colonial society. This
was considered then as now, in the context of the opinion that Aboriginal people would
disappear as a result of contact with ‘civilisation,’ unless some form of protection was
provided. Merivale summarised his rationale for the radical departure:

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\text{Does not the best, even the only hope for the natives, in our time, and for quite as long a future as we have any right to legislate for, consist in their being protected as well as possible- taught as well as possible- and – kept under a kind of tutelage or guardianship on the part of the government. But if this is the case, these exceptional laws, marking them, as no doubt they do, as inferiors, are, nevertheless consistent with the whole policy pursued towards them. They seem a natural part of it. You may treat men as equals. You may treat them as children- but to protect them as children and subject them to the same laws with their protectors as equals, seems somewhat anomalous.}\(^94\)
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punishment and made a great impression, leading to his appointment as Assistant undersecretary in
November 1847 and undersecretary in 1848 after James Stephen.
\(^93\) Mellor, \textit{British Imperial Trusteeship}, p.310.
\(^94\) H. Merivale to Hawes, 28 April 1848, CO 18/45, Reel 439-440, p.305.
This acknowledged the incongruity inherent in protectionist policy and the equality of law principle. However, instead of foregoing the guardianship policy which had been in existence from early times it was decided that it would be more practical to forego the equality principle.\textsuperscript{95} This came at a time when territorial status was now presumed for Australia which coincided with a general diminishing of land rights in relation to New Zealand.\textsuperscript{96} In his book on colonisation, Merivale had explained his ideal of ‘fusion’ which required that Aborigines not be admitted as citizens in some future point as a group, but as individuals who met the tests of civilisation. In his view, ‘fusion’ was more likely to be achievable in New Zealand without summary punishment legislation but not in the case of Western Australia, where such a law was required to maintain Aborigines in a master-servant relationship and as a useful labour force, even if it was an inferior legal status.\textsuperscript{97}

Irwin's argument that there were precedents existing for his proposal met with some scepticism from the assistant undersecretary of State, Sir Thomas Frederick Elliot who had been one of the Commissioners of Land and Emigration in the 1840s, and had influenced Russell’s policy on reserves for the protection of Aboriginal peoples.\textsuperscript{98}

The acting Governor refers to the principle adopted in the case of New Zealand. No doubt great benefit has resulted from the establishment of the district courts in that colony; but then they are for the trial of petty cases. European and native are alike subjected to their jurisdiction and the native of New Zealand is infinitely better able redress their own wrongs if he should meet with partial justice than the comparatively helpless native of Western Australia.\textsuperscript{99}

\textsuperscript{97} Ibid., p267.
\textsuperscript{98} \textit{The Perth Gazette}, 27 February 1847.
\textsuperscript{99} Memo from Elliot to H. Merivale, 25 April 1848, on back of Despatch from Irwin to Earl Grey, 23 December 1847, CO 18/45, Reel 439-440, p.302.
Merivale also remarked that he had given his opinion based on the previous question raised by the Hutt bill and Stephen's minute, but that in the present circumstances a different question might arise. He therefore suggested that before a decision was made that it would be a good idea to find out how successfully the existing principle was working in other Australian colonies and whether they were likely to follow Western Australia’s lead, once word got out.100 Hawes went to some trouble to investigate former colonial despatches, noting that the subject had not been canvassed in recent times. He found copies of petitions from settlers in New South Wales and Port Phillip during 1838-40, seeking protection (and in one case proposing legislation) from the colonial government, or they would be forced to take measures to protect themselves from Aboriginal peoples.101 At the time New South Wales Governor, George Gipps, had told the settlers that such a proposal would probably be disallowed by the Colonial Office because its provisions would have to be extended to the white man as well as black, ‘especially in cases in which men of European origin may be bound to interfere with black women.’102 There were no objections received after the early 1840s and this was probably because (as Gipp's pointed out) it was believed that the Colonial Office was unlikely to change its policy, or that other remedies with the aid of adequate Land Funds had been found to deal with the problems. By 1848, unlike Western Australia, other Australian colonial governments were working towards representative and responsible government where they would have control over a range of affairs including revenue independently of the British government.

Hawes did find a reference to South Australia in 1847, which was relied on to afford a possible excuse for a departure from humanitarian policy in the case of Western

100 B. Hawes to H. Merivale, referring to Gipps enclosing the petition, CO 18/45, Reel 439-440, pp 307-8.
Australia. Chief Justice Cooper had pointed out the difficulties which ‘impeded’ the trial of Aborigines in the Supreme Court of South Australia, where ‘all difficulty would no doubt be removed as the country became more completely settled, and the means of interpretation were increased.’

This contrasted with Governors Robe and Young’s determination to retain a strict application approach.

Hawes relied on the Legislative Council report on Western Australia and Cooper’s comments regarding South Australia, to point out that the situation in Western Australia should be treated as a special case requiring a departure from the policy of equality under the law, rather than as the commencement of a new policy (which in practice was already taking place even in New Zealand), because it was a ‘thinly settled state of the country,’ which was perhaps chiefly to be attributed the difficulties experienced in Western Australia. There was no reference to any problems regarding the land regulations and the Land Fund in Western Australia, in the lead up to the political and financial independence of other colonies. Instead Western Australia was identified as a unique exception where there was a ‘population thinly scattered over a wide extent of country with very imperfect machinery for maintaining order and discipline amongst the natives.’ This was sufficient for the Secretary of State, Earl Grey to validate a different kind of subject status for Aboriginal peoples in Western Australia.

By contrast, the Governor of South Australia in 1847-8 wanted to control settler-magistrate demands to extend summary jurisdiction powers, and to press for Aboriginal people to be regarded under the British law like any other British subject, on the

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103 Ibid., pp309-10. This accompanied Governor Robe’s dispatch of 21 August 1847 and pointed out the various difficulties impeding the trial of Aborigines which difficulty would be removed once settlers were no longer dispersed.

104 Ibid.

105 Memo from Elliot, 16 May 1848, CO 18/48, Reel 441-2, p. 308.
grounds that the Governor's instructions prevented separate criminal procedures and penalties for Aborigines.\(^{106}\) In Western Australia by 1847, the colonial government, settler-magistrates and protectors’ opinions had merged to such an extent that no similar objection was put up. This was aided by the fact that the proposal for discriminatory legislation received wider official support and was pushed by the Executive Council and chief magistrate Mackie, where as a formal Supreme Court in South Australia was more independent of the governor and Legislative Council.\(^{107}\) The South Australian colonial government did not cave into pressure from the settler-magistracy until 1860, when a select committee decided to reject a strict application approach and adopt a wide summary jurisdiction by local magistrates which would promote ‘order’ and the effective use of Aboriginal labour.\(^{108}\)

It was Merivale that Earl Grey listened to in deciding to accept the draft proposal by Mackie and Irwin with the proviso that it operate as an experiment for two or three years while any potential abuse of power was assessed.\(^{109}\) Earl Grey apparently harboured similar views ‘that substantial justice and the real interest of savages require that they should be subjected to a very different system of criminal law from that which is applicable to civilized nations.’\(^{110}\) He asked to see Stephen’s minute and information on despatches in other colonies before making a final decision. While appearing to agree with Merivale he did not want to be seen publicly as departing from formal legal equality, stating that the main reason for allowing the legislation was to provide a measure so that settlers did not take the law into their own hands against Aborigines in

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\(^{107}\) Ibid., p.153.
\(^{108}\) Ibid., p.229.
\(^{109}\) Stephen and Williams, ‘Herman Merivale’, *Oxford Dictionary of Biography*, Oxford, 2004-6, [online], p.1. Merivale ‘was a person of great promptitude of judgment, and vigorous, if not combative, in defending it.’ The recommendation of two or three years as a trial was made by Merivale in a memo dated 26 May 1848, primarily as a means to getting an informed answer so as to be able to respond to any proposal made from other quarters, and to state that ‘we are only making an experiment.’
\(^{110}\) Earl Grey to Merivale, 3 May 1848, CO 18/45, Reel 441-2, p.306.
the regions. In addition to the objective of the physical protection of Aborigines, it may be that he also saw this route as a less costly expense for the British government than if the legal system remained centralised. Western Australia had not yet loosened its financial and political independence from Britain and was still potentially an additional expense.\textsuperscript{111} However, Earl Grey was unhappy with the large discretionary element in the draft bill that provided for protectors to attend the trials, and suggested that the clause provide that no ‘felony’ trial should take place without ensuring that a protector was present.\textsuperscript{112}

I must however, on the outset disclaim any such general principle as that native offenders generally throughout the British Dominions ought to be subject to a different course of criminal procedure from Her Majesty's other subjects. Such a principle would in many instances, contravene the plainest rules of justice, and might moreover interpose insuperable difficulties in the way of that gradual improvement and civilization of the native races to which we are bound to look, however discouraging the prospect in some instances as one of the highest objects of colonial government.\textsuperscript{113}

To lend weight to this objective he directed that the preamble to the draft Bill be changed from that which stated that there was a policy change involving a departure from the principles of the rule of law, to one that promoted the former equality policy but distinguished this legislation as an exceptional case.\textsuperscript{114} The reasons for the exception included: the small European population, the wide extent of the country occupied by settlers, the ‘character and habits’ of Aboriginal people, the distance of Perth from the frontier, the difficulties of communication that impeded a system of court circuits, and obstacles encountered in the administration of a trial by jury.

\textsuperscript{111} It was close to the time of the Australian Colonies Government Act 1850.
\textsuperscript{112} Grey to Fitzgerald, 2 June 1848, CO 18/45, Reel, 439-440, p.314.
\textsuperscript{113} Ibid., p.310.
\textsuperscript{114} Ibid.
In the end it was the greater weight of expediency over ideology that clinched the decision.\footnote{Grey to Irwin, 12 September 1847, CO 397/7, Reel 774-775, p.372. Regarding the request for extra funds for two mounted police force to assist the protector in King George Sound, ‘I regret that I am unable to sanction a further increase of establishment of any kind for the colony at the expense of this country’.} There was no response to the request for additional funds for a civil police. The increasing reluctance of the British government to fund the administration of the colony at a time when other colonies were becoming financially independent would have been a major factor weighing in favour of approval for the legislation.

Richard Robert Madden

The main opposition to summary punishment legislation was made by the new Colonial Secretary, Richard Robert Madden in 1848, after the draft Bill had received the approval of the Colonial Office, and before it was introduced into the Legislative Council. Stephen had recommended Madden's appointment to Earl Grey in May 1847 before he resigned from office.\footnote{J.Holland Rose, A.P. Newton and E. A. Benions (eds.), *The Cambridge History of the British Empire Volume II, The Growth of the New Empire 1783-1870*, Cambridge, Cambridge University Press, 1968, p.369. James Stephen retired in October 1847. Madden’s appointment was announced on 10 May 1847, CO 397/7, Reel 774-775, p.335.} Both were advocates of the anti-slavery movement and in favour of equal legal status and rights for indigenes under British law.\footnote{Letter, 8 November 1847, CO 397/8, Reel 775, pp.166-7.} Madden was born in Ireland, trained as a surgeon, and was employed as a special magistrate in Jamaica to resolve disputes under the Abolition of Slavery Act 1833.\footnote{Ibid; J.M. Rigg, L. Milne, ‘Richard Robert Madden’, *Oxford Dictionary of Biography*, Oxford, 2004-6,[online].} In 1836, he had been appointed Superintendent of Liberated Africans and judge arbitrator in the mixed court at Havana and Commissioner of Enquiry on the West Coast of Africa.\footnote{Ibid.} Madden strongly opposed the proposed legislation that provided for whipping as a punishment. His position brought him to loggerheads with most of the members of the colonial
government, and particularly the local elite, Irwin, Mackie, and Moore whom many settlers, (primarily the merchants) saw as a political barrier to their interests.  

By mid-1848, the Colonial Office despatch approving of the Summary Trial and Punishment bill had been received in Western Australia, but consideration of it was delayed until the arrival of the new Governor, Captain Gerald Fitzgerald in the colony. When the subject was first introduced into the Executive Council, Madden sought an adjournment in order to make a written protest, and was allowed time to do this. However, once the nature of his protest including criticism of Irwin’s government was discovered, his request for his protest to be included in the minutes was refused. Madden threatened to resign if the provision to subject Aboriginal women to whipping was not taken out, and if the bill authorising whipping was introduced while he was Colonial Secretary. Instead, on his insistence, his very lengthy submission was sent to the Secretary of State along with Irwin's protest under cover of a despatch from Fitzgerald.

Madden's written protest criticised Irwin's introduction of the bill, including the abandonment of British government principles which Madden believed were the colonial government’s duty to uphold in relation to Aboriginal rights, as well as to relate the true facts of the relations between Aboriginal people and settlers. Madden believed that the Colonial Office would not have approved of the proposed bill if all the facts were known to them which he said Irwin had failed to portray in his despatch.

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121 R. R. Madden, His notes on the Meeting of the Executive Council on 14 November 1848, M946.
123 Ibid.
Madden also endorsed the then Secretary of State Lord Russell’s early disallowance of the bill in 1841, and protested vehemently at the degrading treatment of whipping which he termed ‘torture’ because it would formally entrench prejudice against Indigenous peoples, affecting the relations between them and the settlers. To Madden, this was his role as he saw it, to make sure that British Government policy was implemented which he regarded as the principle of formal legal equality reflected in the anti-slavery and humanitarian movements. In his opinion, British law was a just theory that could be applied fairly and impartially to all British subjects, as one of the benefits of civilisation. Madden also lamented the change in policy from industrial and religious education to punishment under Irwin's government, which he argued was reflected in the reduction in expenditure in the former, and increase in the latter. He was not alone in this opinion as the Editor of The Inquirer had also criticised the government on this policy change. Prior to Madden’s appointment, Earl Grey had received a letter from the Roman Catholic Bishop Brady objecting to the shift in policy away from education and towards the punishment of Aboriginal people under British criminal law.

Madden questioned the reasoning that assumed that the punishment of whipping was better than other forms because it was more consistent with ‘wild notions of justice and habits of retaliation and expiation of the natives,’ stating that the Legislative Council might as well have argued for the custom among Aboriginal people ‘of punishing females by driving an unbarbed spear through the fleshy parts of the leg or other parts which might be preferred to prolonged imprisonment.’

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124. Madden (ed.), The Memoirs, pp.225, 232. ‘Govt is a kind of patrimony or family property in the management of individuals here, who undertake to manage public affairs so as to spare a new Governor too much trouble.’
126. The Inquirer, 10 November 1847, p.3.
127. Brady to Grey, 24 December 1846, CO 397/7, Reel 774-775, p.139.
128. Madden, Submission to Legislative Council, CO 18/48, Reel 441-442, p.359.
recommended whipping (similar to Hutt’s argument) was more consonant with Indigenous ‘notions of justice,’ was a remark that had also puzzled Colonial Office officials, but they had not sought clarification. In Elliot’s view, the remark was not a recommendation, as it connected the idea of punishment with retaliation, something that he thought was what they wanted to eliminate. Merivale replied that he thought that Irwin had intended it to apply to the promptness of the punishment.

The Legislative Council Committee had earlier justified whipping as a punishment by arguing that it was more like ‘personal chastisement’ than any intention to instil moral guilt or disgrace. However, the instillation of moral guilt or shame was clearly the intent of other colonial legislation passed in 1848 which also punished Aboriginal offenders with whipping, and which prohibited the lighting of fires at certain times of the year to hunt kangaroo and other animals for food, where it interfered with agricultural activity. The proposal to fine Europeans and whip Aboriginal people similarly to young European boys under 16 years was justified on the basis that it was a suitable punishment to convey a ‘feeling of disgrace to the minds of the natives’ which it was claimed was preferred by them to that of imprisonment. This legislation was intended to apply in cases of arson, and was viewed far more seriously as an economic threat, warranting up to 50 lashes. Unlike the Legislative Council committee, Madden thought that punishing Aborigines by whipping would lead to retaliatory action against settlers, and referred to an example where this had taken place in Western Australia where an Aboriginal person had retaliated after being flogged.

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130 The Inquirer, 26 January 1848.
131 An ordinance diminish the dangers resulting from bushfires which aimed to prevent anyone but the ‘occupier’ of land from firing the bush between September and April, CO 18/45, Reel 439-440, pp.249-250.
132 Ibid., p.271.
133 Madden, submission, CO 18/48, Reel 441-442, p.362.
Above all, Madden questioned the main argument in Irwin's despatch that relied on excessive expenditure as a reason for adopting a discriminatory legal system, when it denied Aborigines rights accorded to British subjects, and imposed an inferior legal status on them. Madden believed that the real reason for the legislation being introduced, was that settler magistrates wanted to protect the pastoral economy by punishing Aboriginal people for the theft of unenclosed sheep pasture while taking their land. In his opinion, the proposed Summary punishment Act was delivering over the Aborigines to the jurisdiction of the flockowners on the magisterial bench whose neighbors cattle or sheep have strayed into the bush or been speared in a country without enclosure fence, ditch, or wall to prevent the straying of their herds. And such are the rewards to the Aborigines for their peaceable conduct, for their abstinence from all sanguinary outrages of late years.134

Madden emphasised that the reputation of Aboriginal people had been misrepresented, and that the need for such legislation did not reflect the reality of the beneficial and good relationship between the Aborigines and settlers. He argued that to assume that they were all criminals that stole sheep was wrong, as many had assisted settlers in explorations and displayed peaceable characteristics as documented in explorer Captain F. Lort Stokes and George Grey’s journals.135 Madden clearly recognised that certain assumptions had been made regarding Aborigines as a whole, based on behavioural characteristics attributed to membership of a racial group. He argued that the ‘criminal’ character was attributed to Indigenous peoples to suit settler interests, and added

we hear nothing of our intrusions, our encroachments, and continual advances, where augmenting flocks make extensively of pasture lands a regular periodical necessity. We hear of no cases of provocation in the progress of colonization and driving back of the Aborigines. We take into

134 Ibid., p. 371.
135 Ibid.
no account the consequence to the natives of our advances into their country, we lose sight altogether in questions of stolen sheep or speared cattle, of occasional outrages or other property of settlers by the aborigines of all incentives in our conduct, and the natives of our relations with them to anger, to retaliation, to rapacity, and to revenge.\(^\text{136}\)

In Madden's view the claims of Aboriginal peoples had been totally disregarded by an Executive government keen to support the local interests of a settler-magistracy. He referred to Irwin’s book published in England in July 1835 where Irwin had reported on the obligations of governments’ towards the ‘abstract rights’ of Indigenous peoples, which rights Madden protested were now being subsumed by the ‘abstract rights’ claimed by settlers.\(^\text{137}\) He argued:

> When a Christian nation invades the territory of savage tribes, and establishes itself in the country of the latter, it is not in virtue of any abstract right that belongs to it that its people seize on the new soil. They profess to do so in virtue of the power and privileges of civilization which confer great authority on governmental missions for the sake of the extension of great social and religious advantage which imposed deep and lasting advantages on those who take on them the duties and responsibilities of such agents. On any other grounds to deprive a savage people of the means of subsistence by enlarging our possession in their lands, step by step encroaching on their grounds for hunting, their shores for fishing, diminishing their game, and holding it criminal in them to retaliate on our untended wandering cattle, that are suffered in many districts to rove at large in “the bush” - continually driving the natives back on the hunting and fishing grounds of other tribes and making war a necessity between them and their neighbors, in a word making our superior skill and power disadvantageous to the simple pursuits and rude customs of savage life, would be a murderous policy.\(^\text{138}\)

Madden’s advocacy for Aboriginal rights arose in terms of what civilized society could provide Aborigines which included their equal participation as citizens in colonial society. These advantages did not arise from the recognition of Indigenous agency or perspective, but from what Madden perceived as equality under British law, education

\(^{136}\)Madden, submission, CO 18/48, Reel 441-442, p.376.  
\(^{137}\)Irwin, *The State and Position of Western Australia*, p.27.  
\(^{138}\)Madden to Earl Grey, 24 November 1848, CO 18/48, Reel 441-442, p.373. Madden claimed to have the support of the ‘respectable’ settlers for his views.
and grants of land for each individual as compensation for depriving Aboriginal peoples of their lands and means of subsistence.

Irwin responded to Madden’s protest by regarding it as a personal affront at the damage to his reputation and criticism of his government, and did not focus on the detailed arguments on government policy, except to state that Madden’s opinion was a minority view, and wrote:

I shall not of course intrude upon your Lordship's time and patience by any comments on the Secretary's views of the abstract relative rights and obligations of the Settlers and the Aborigines; or his arguments, when not personal, against the justice and expediency of the projected Law, conceiving that in the present cases the Local Legislature is the proper arena for such discussion. 139

Fitzgerald supported Irwin's protest and the legislative proposal and thought that Madden had ‘very peculiar opinions.’140 Fitzgerald and Irwin were both veteran soldiers who thought that if the navy and military personnel could be flogged for disciplinary action, then so could Aborigines.141 However, Madden pointed out that the difference between those officers comprising a court martial and the court of settler-magistrates were, ‘antagonism of race, colour, creed or condition that engendered animosities between the accused and accuser, particularly of interests that must lead to great abuses of authority.’142 He questioned how three protectors and eight constables could adequately defend Indigenous people in summary tribunals scattered over a large region of Western Australia.

139 F. C. Irwin, Submission to Earl Grey, attached to Despatch from Fitzgerald to Earl Grey, 21 December 1848, CO 18/48, Reel 441-442, pp.344-48.
140 Ibid.
141 Fitzgerald to Earl Grey, 10 December 1848, CO 18/48, Reel 441-442, p.357; Madden, Notes on Meeting of Executive Council, 14 November 1848, BL, M946.
142 R. R. Madden, submission, CO 18/48, Reel 441-442, p.361.
Earl Grey focused his attention on the criticism of Irwin and the validity of whether the minutes should have contained Madden’s protest, rather than responding to Madden’s detailed argument about Aboriginal policy which was largely ignored, except for a couple of specific clauses in the Bill which Madden pointed out required rectification, especially the provision relating to the whipping of females. It is likely that Madden hit too close to home with his critique of current Colonial Office policy towards Aboriginal peoples, considering the way in which Colonial Office officials had debated the issue and reached their decision by distinguishing Western Australia from other colonies. In his reply to Fitzgerald on 19 May 1849, Earl Grey said he had nothing to add to his previous despatch approving the proposal subject to the changes made in the last dispatch, except to direct that the punishment of whipping should only apply to males.\footnote{Earl Grey to Fitzgerald, 19 May 1849, CO 18/49, Reel 442, pp.82-3.}

Despite Madden's efforts, he was outnumbered by those officials and settlers who favoured a modification of British criminal law, which as Evans describes it, was a ‘suspension’ of the fundamental principles of the rule of law.\footnote{Evans, ‘The rule of law,’ p.167.} This departure had happened a lot earlier in Western Australia because of the close alliance between the untrained magistracy, the settlers and the government. Similarly to outlawry, it was a device to get around the problem of providing Aboriginal people with rights as British subjects and negotiating with them as people for their lands. By 1848, Bland, who had encouraged the proposal, was now Fitzgerald's private secretary and former Advocate General Richard Nash had also become a major opponent to Madden's views. In January 1849, Madden was forced to take a leave of absence and was not to return to the colony, resigning a year later in January 1850.\footnote{Mellor, \textit{British Imperial Trusteeship}, p.311. Madden formally resigned in January 1850.} Fitzgerald had recommended that
Madden not return to Western Australia but be given another appointment, such as in Malta.\textsuperscript{146}

When he arrived back in England in mid-1849 (while still on leave), Madden continued his advocacy, writing a letter to a senior official in the British government on the situation in Western Australia, and proposing legal rights for Aboriginal peoples in the forthcoming Imperial Australian Government Bill.\textsuperscript{147} It is possible that the official was James Stephen who in 1849 was still working on proposals on constitutional reform for the Australian colonies for Earl Grey, or more likely Lord John Russell who was prime minister at the time. It was probably the latter, because a year later in May 1850, (while Madden was not one of the APS delegation that met Lord Russell), the proposals put to Russell by the Aborigines Protection Society delegation were strikingly similar to those made by Madden.\textsuperscript{148} Among Madden's private papers are drafts of these proposals on legal rights for Aboriginal peoples which he made in a last ditch attempt to entrench rights into an Imperial law that could apply in all Australian colonies, and which he saw as a way to ‘stay’ the process of ‘extermination’ of Indigenous peoples in Australian colonies. His proposals included: provision for the achievement of equality under the law, taking Aboriginal evidence without an oath, the reservation and appropriation of land for the benefit of Indigenous peoples as well as land for missionary schools, the replacement of the protectorate system (which Madden thought was not working) with a lawyer as Crown advocate for the defence of Indigenous people in all felony cases, and the same judicial rights and privileges in court as other British subjects.\textsuperscript{149} It is not known if he submitted his proposals formally, but he did attend Aborigines Protection

\textsuperscript{146} Fitzgerald to Earl Grey, 21 December 1848, CO 18/48, Reel 441-442, p.350.
\textsuperscript{147} The official is not named but is more likely Russell as it also contained a list of evils associated with colonisation. APS, Twelfth Annual Report, 1849, pp.9-10. This Bill was passed in mid 1850; Burroughs, Britain and Australia, pp. 376-7.
\textsuperscript{148} APS, The Colonial Intelligencer, or Aborigines Friend, Vol II, 3 April 1850, pp 408-409.
\textsuperscript{149} Madden, Statement on legal rights, BL, M 946, pp.17-20.
Society meetings in May 1849 and contribute to a report of a Society committee, before returning to Ireland. 150

The Trial and Summary Punishment Act was passed on 6 May 1849 a few months after Madden left the colony with little debate. 151 Earlier, in 1848, Irwin had sought to introduce a ‘native constabulary’ similar to that in South Australia, starting with two appointments, one in Bunbury and one in Albany. The 1849 Act was more specific about the kind of offences that came under it (unlike the 1840 Act) and the length of imprisonment while intended to be one year, was cut back at the urging of the Colonial Office to six months. However, during the 1850s pressure would be asserted by settler-magistrates in remoter regions to increase the length of imprisonment. Ironically, it seems to have gone unnoticed that the instruction from Merivale to Grey that the Act be temporary for two or three years was omitted from the despatch that was sent to Western Australia. The Act continued in operation until 1883, after being amended in 1859 so as to extend the length of imprisonment to three years. 152 It would become the forerunner of early twentieth century discriminatory legislation. In addition to their own traditional laws, there were now two colonial criminal legal systems to which Aboriginal peoples who had any contact with whites were subjected. These were summary punishment for ‘minor’ offences, and prosecutions in the Court of Quarter Sessions for serious assaults and murder, with trial by jury, which by the 1850s were predominantly inter se murder cases punishable by death.

151 Minutes of Legislative Council, 6 May 1849, CO 20/6, Reel 1121, p.222. This was approved by the Colonial Office and gazetted on 18 June 1850. The Perth Gazette, 21 June 1850.
152 Russell, A History of the Law in Western Australia, pp.318, 320; 23 Vic No 10, 1859. The Act was repealed in 1883 by 47 Vic No 8, the Aboriginal Offenders Act which enacted similar provisions.
The operation of the Summary Punishment Act of 1849

The Act had the effect of combining labour and punishment in the outlying settled districts of York and as a form of legal authority and governance in more remote regions. The reports on the implementation of the Summary Punishment Act relied on the discretion of the magistrates and varied widely. Imprisonment or hard labour on public works or settlers farms was favoured more by magistrates as a punishment than whipping. Symmons reported that the new Summary Punishment Act was working well because it afforded Indigenous labour on roads and public works at low cost. When Fitzgerald submitted the Protector’s reports on the operation of the Summary Punishment Act to the Colonial Office in 1850, Hawes remarked that it ‘was curious to observe that the inference from these reports would almost appear to be that the state of punishment appears to be that from which best hopes are afforded of the moral training and improvement of the native.’ The colonial law was increasingly used as a coercive force, enforced through the use of police in rural regions, replacing the education and gradual pluralism of the earlier 1840s. Protectors increasingly played the role of policemen protecting settlers’ interests.

Irwin emphasised that it was difficult to persuade Indigenous adults to work continually, and that one of the best ways of forcing them to do so was as part of their punishment. Fitzgerald had similar beliefs but he thought that Rottnest should be leased to save money and in 1849 the remaining prisoners (and any Aboriginal people convicted in the Court of Quarter Sessions) were put to work on road gangs constructing

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153 For example, 1855, SRO, CSR, ACC 36, Vol. 339, p.20; Mungaroo. Cowan, A Colonial Experience, p.44.
public works until 1855, when the new Governor, Kennedy reinstated the prison. Fitzgerald advocated for religious education and industrial training for Indigenous youth if funds were available, and had asked the Colonial Office for funds to enable youths to be sent to be trained as clerics and teachers in England so that they could return and train others. However, the Colonial Office rejected this idea unless it came from colonial revenue.

There was also a wider variety of ‘offences’ that were created under the Summary Punishment Act, such as absconding from service (which was subject to wide interpretation), *inter se* spearing in the leg (commonly implemented in the Avon district) or instances where an Aborigine speared a settler in the thigh for a transgression under Indigenous law and was summarily punished for assault. Questions of breaches of oral agreement were settled informally or through magistrates in the rural regions, whereas in Perth, other legislation would apply such as Master and Servants legislation.

The most detailed records and reporting of summary jurisdiction cases were made by the Protector (and later Guardian) and magistrate Walkinsaw Cowan in the Avon district which was also the area where more Aboriginal people were being employed in pastoral

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158 Grey to Fitzgerald, 19 July 1849, CO 397/9, Reel, 775, p.134; Memo from Hawes to Merivale and Elliot, 9 May 1850, on back of despatch from Fitzgerald to Earl Grey, 4 February 1850, p.123; Hawes stated that in relation to industrial training ‘the charge would of course legitimately fall on the revenue derived from lands if any such there were, but in WA no such fund exists.’
159 W Cowan. Report of convictions under the Aborigines Summary Jurisdiction Act, 21 July 1856, SRO, CSR, ACC 36, Vol 348, pp.157, 171. Yinquat was charged with having speared I. Higgins, shepherd to Mr Burges through the thigh. Yinquat had been provoked and this provocation had been taken into account by Cowan who sentenced him to 3 months imprisonment.
160 W. Cowan, Report, 16 January 1851, SRO, CSR, ACC 36, Vol, 450, p.8. Cowan reported several incidents of verbal agreements regarding Indigenous labour at the ensuing harvest. An example is given where the agreement was ratified ‘by a prepayment of money and provisions’ and this contract to Cowan’s knowledge had not broken faith. Other general legislation was applied to Aborigines. Eg; An Act to provide a summary remedy in certain cases of Breach of Contract, August 1842 and extended to fishery contracts in 1847. *The Perth Gazette*, 12 August 1843.
and agricultural pursuits. Since 1840, work on sheep stations was increasingly viewed by many settlers as more suited to the traditional lifestyle of Aboriginal people who would be employed as herders or shepherds while remaining on their own country.\footnote{N. Ogle, *The Colony of Western Australia*, London, James Fraser, 1839, p.143. The remission certificate system was introduced in 1841 and was abandoned in 1847 and did not recognise pastoral work (often thought to be less civilized than agriculture) so the early figures of Indigenous employment may be an underestimation. The official census statistics were Madden’s initiative and only referred to Aborigines in 1848 for the first time.} When administering summary punishment under the Act, Cowan offered Aboriginal people the choice of working with settlers on their farms in place of imprisonment. In October 1848, the first official census to include Aborigines recorded that 541 Aborigines worked for settlers on a casual or longer term basis in the ‘settled districts’.\footnote{The Perth Gazette, 23 December 1848; Nos. of sheep 141,123.} While Fitzgerald wanted Aboriginal people who had been sentenced in the Court of Quarter Sessions to work off their sentences on road gangs, Cowan convinced him to let them work off their sentences in their own districts on their lands. The effect of administering summary punishment on the spot also meant that an Aborigine could be put to work in their own district, and Cowan favoured the Act for this purpose.\footnote{Cowan to Colonial Secretary, 26 August 1850, SRO, CSR, ACC 36, Vol. 199, p.202. Cowan wanted to see what effect it would have on other Aborigines if the Governor granted Conit an allotment in York.} It also meant that there were less escapes and that Aboriginal people were not far from their kin-relations. However, Kennedy reversed the decision in July 1855 on the grounds that the expense of Aboriginal people escaping was too high.\footnote{Colonial Secretary to Assistant Police Magistrate in York, 19 July 1855, SRO, CSR, ACC 49/38, No. 1758, Kennedy had inherited a large debt which meant that stringent financial measures were taken.} Aborigines had resisted the training and education on missions particularly as if took them away from their traditional obligations, relatives and their land.\footnote{Cowan, *A Colonial Experience*, p.45.} Smithers pointed out how Aboriginal youth from tribes around Swan District did not want to move to the York mission, but it was Cowan who sought to understand why, and utilised this knowledge to encourage Aboriginal people to work for wages on pastoral stations. He was also prepared to arbitrate disputes where agreements had been made.
There were various kinds of labour arrangements. Symmons argued that the process of assignment worked best if an application was made by a settler for the services of a farmer's servant who belonged to that particular district of the settler. In both Albany and York in the 1850's settlers requested longer indentured agreements for Aboriginal labour. A period of six months had been prescribed in the past, but now the settlers sought a period of years. Fitzgerald responded by pointing out that they should be kept to a maximum of six months and that while it was true that Aborigines were British subjects, they could not be expected to understand contracts and these must be explained to them. However there is some evidence to suggest that settlers made their own informal arrangements for longer indentures.

Cowan in York and Phillips in Albany attributed various reasons to the absconding of Aboriginal employees, one of these being the need for Aboriginal youths to return to their traditional law obligations which often was not treated sympathetically by many settlers. Phillips pointed out that many Aborigines who returned to their relations were not reimbursed for the time that they had worked, which made them reluctant to engage in future agreements. While there were wages paid to Aborigines for their labour this was at a rate lower than for other workers and many settlers paid in flour or rice rather than in wages, which often was not sufficient to meet subsistence needs.

Those Aborigines who returned to hunt found that there were less kangaroo than before,

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166 Symmons to the Colonial Secretary, 4 December 1850, SRO, CSR Vol. 199, p.275.
167 Symmons to Colonial Secretary, 5 November 1850, SRO, CSR, Vol 199, p.247.
168 A. Trimmer to Colonial Secretary, 30 April 1855, ACC 36, Vol. 317, p31.
169 Ibid.
171 Ibid.
172 J.R. Phillips to Colonial Secretary, SRO, CSR, ACC 36, Vol 199, p.252. Phillips was made Sub-Protector and Chair of the General Sessions of the Peace on August 1847.
173 Phillips to Colonial Secretary, December 1850, SRO, CSR, ACC 36, Vol. 199, p. 252.
and when the question of necessity was raised, it was argued that they could find work from settlers who would provide food.\textsuperscript{174}

Cowan had lobbied Fitzgerald for interpreters for the local court along with Aboriginal police. This request was originally granted, but once convicts were employed, by the mid 1850s, the government lost interest and instead recruited Aboriginal people to track escaped convicts.\textsuperscript{175} The arrival of convicts also released more funds from the British Parliamentary Grant and boosted the Western Australian economy.

The Avon district extending to the Victoria Plains was the main focus of the intent and application of the extension of summary jurisdiction, but it also became an increasing feature in Albany and Vasse (Salt River) in the late 1840s as pastoralism took hold. The reason for a Summary Punishment Act coincided with the greater commercial exploitation of Indigenous lands not only for pastoralism but for other activities as well. Settlers supplemented their incomes by hunting kangaroos for their skins and collecting sandalwood. However, the Summary Punishment Act, which was initially intended to protect settlers in agricultural regions closer to settlement, was being applied to public land where no effort was made to guard private property. The ‘waste’ land, along with its trees and kangaroos, became regarded more as a valuable economic commodity as time went on.

One of the few instances where there was official recognition that kangaroo should be protected as part of Aboriginal hunting rights was in the Southwest, where settlers increasingly exploited kangaroo as an export resource. In 1848, Captain J. L. Stokes drew public attention to the impact on Indigenous traditional life from the export of

\textsuperscript{174} The Inquirer, 28 January 1846, p.2.
8000 kangaroo skins, with up to 20,000 skins planned for export in 1849 in Albany.\textsuperscript{176} He reported that kangaroos that grazed on the pastures were easily shot by pastoralists on outlying stations, where the carcasses were left on the ground and Aboriginal families often followed them to obtain food. Stokes stated that in England, the practice would be prevented by severe laws ‘which fence in the owner’s right to game at home, and in every other European country, where its pursuit and capture are not indispensable to existence, but are resorted to solely as relaxation and sport.’\textsuperscript{177} Stokes questioned why it was necessary to drive Aborigines from their hunting grounds which were their birth-right, as were those of the most ‘aristocratic’ landholder at home, and which had the consequences of forcing them into conflict with neighbouring tribes.\textsuperscript{178} It was not until 1853, that there was a legislative attempt to control the numbers of kangaroos being killed in order to ensure there were enough left for Aboriginal peoples to hunt. A local Act was passed that required settlers to obtain a license to shoot kangaroos and which imposed an export duty on each skin.\textsuperscript{179} However, two years later, settlers asked the Protector for Albany, Arthur Trimmer, to submit their petition urging the government to lift the duty and arguing that it would not affect Aboriginal peoples’ subsistence, and that in fact they could even benefit from the trade.\textsuperscript{180}

The Summary Punishment Act had a broader purpose in that it was a means to assert legal authority and governance over Aboriginal peoples who previously had little contact with settlers and whose lands were being taken for pastoral activities. An example of colonial criminal law being used as governance was in the expansion of pastoralism into Champion Bay in 1850. John Drummond, who had formerly worked in

\textsuperscript{176} Capt. J Lort Stokes, Letter to the Editor, 8 August 1848, The Inquirer, 13 September 1848.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid.
\textsuperscript{179} 16 Vic No 14 Licenses to kill kangaroos. Repealed in 1878 by 42 Vic No 9.
\textsuperscript{180} A.Trimmer to Colonial Secretary, 5 July 1855, SRO, CSR, ACC 36, Vol. 371, p.130.
York as Superintendent of police was transferred to assist the Government resident William Burgess in administering the Summary Punishment Act in Champion Bay. It was estimated that there were 400 Aborigines in the region.¹⁸¹ The implementation of the Act was used at the onset as a means of management in conjunction with military force.¹⁸² Burgess, (contrary to the intention of the legislation) sent Aboriginal offenders to Perth to be detained in gaol in order to prevent them escaping.¹⁸³ In October 1850, an anonymous correspondent to The Inquirer protested at the priority being given to pastoralists’ interests at the expense of Aboriginal rights, and demanded to know on what terms the land was to be occupied, and what conciliatory proposals were being made.¹⁸⁴ An anonymous respondent pointed out that the value of the land was not appreciated by Aboriginal peoples who were incapable of turning the land to profit, and that this justified using the superior laws, arms and other powers at the disposal of ‘civilized’ society.¹⁸⁵ By 1855, after initial contact, violent confrontations were reported as Aboriginal people realised that their families and land were being threatened economically and physically. This resulted in calls for more soldiers to the region.¹⁸⁶

The Summary Punishment Act and the assumptions upon which it was based were regarded as a means to impose colonial legal authority on Aboriginal peoples which was alien to their own value system. The application of the Act would also be of little use with squatters on isolated outstations who thought the punishment was not severe enough, or where there were no Aboriginal police or constabulary employed, but it may have prevented some settler violence.¹⁸⁷

¹⁸¹ Letter to the Editor, The Inquirer, 5 October 1850.
¹⁸² Colonial Secretary to Resident, Champion Bay, 11 July 1854, SRO, CSR, ACC 49/12, p.23. A military contingent was sent after violent conflict broke out.
¹⁸³ Cowan, A Colonial Experience, p.45. Escapes were common from regional gaols- at times in Champion Bay there was no trial if a magistrate was unavailable and the person was simply locked up.
¹⁸⁴ Letter to the Editor from V, The Inquirer 10 October 1849.
¹⁸⁵ Letter to the Editor, The Inquirer, 24 October 1849.
¹⁸⁶ Colonial Secretary to Resident, Champion Bay, 11 July 1854, SRO, CSR, ACC 49/12, p.23.
In 1850, the first convicts arrived (along with free labour which the British government promised). This gradually had a dramatic impact on Aboriginal labour by 1855, after initial settler suspicions about the usefulness of convicts had abated. In his report to the governor in 1856, Cowan noted that Aboriginal youth continued to be useful on the farms at harvest time and as herders, but that these days more white men were being employed.\(^{188}\) This meant that Aboriginal people were spending more time hunting and burning the bush, which brought them into conflict with pastoralists. Cowan sought to deal with this conflict by recommending additional police who could understand Indigenous languages and by suggesting that individuals could be appointed as ‘governors’ who would be given some authority to reward the well-behaved and punish offenders.\(^{189}\)

Indigenous prisoners charged with offences punishable by transportation and convicts worked alongside each other on road gangs. In the 1850s, there was pressure to apply more severe summary punishment under convict legislation, such as 100 lashes for absconding to Aboriginal prisoners, but this was rejected by Mackie.\(^{190}\) This decision was made on the basis that the Aboriginal prisoners could not be expected to understand the reason for the distinction between those charged with transportation and those with minor offences who absconded and received a lesser punishment and would be likely to perceive it as a ‘gross act of injustice.’\(^{191}\)

This chapter has demonstrated that the Summary Punishment Act had the effect of formally shifting economic and legal power over Aboriginal peoples into the hands of the settler magistrates in the regions who also held extensive pastoral interests. While

\(^{189}\) Ibid., p. 42.
\(^{190}\) C. Symmons to Colonial Secretary 25 February 1850, SRO, CSR, ACC 36, Vol.199, p.46.
\(^{191}\) Ibid.
the application of the Act was initially focused on agricultural regions closer to Perth, as settlers expanded pastoralism into new territory owned by newly encountered Indigenous tribes, the colonial law that denied the rule of law was increasingly applied as a form of governance. This continued the trend from the 1830s of negating Indigenous agency, (which was acknowledged by some correspondents at the time), avoiding the question of having to negotiate with Indigenous peoples over land and rights. It may also have muted some of the temptation for revenge by settlers when Aborigines stole sheep or other property. As settlement expanded the decentralised criminal system would become a form of management tool which aimed at appeasing the majority of settlers who could not control their stray cattle or sheep on large stations. It also meant that in conjunction with enforcement, conviction was guaranteed after suspects were apprehended, because under the Act there was little evidence required. In practice, an Aboriginal accused’s ignorance of British law was often relied on to exact a confession. This trend was becoming accepted practice even in the courts at Perth during the mid 1840s despite Nairn Clark’s protests, and until a formal judiciary was appointed.

The use of summary punishment can be traced back to the 1830s when Irwin decided to respond to the Indigenous protest in Perth at the wounding and deaths of Aboriginal people from theft or attempted theft. Shortly afterwards there was an increase in the use of detention and flogging of Aborigines’ accused of theft. The question of indigenous laws and conflict over land was never properly dealt with or accommodated. Hutt, who was increasingly becoming a settler-governor, then introduced a bill to deal with minor offences of sheep stealing, which pastoralists regarded as a more serious offence than even he realised. By 1846 protectors and magistrates made a renewed push for a separate criminal legal system which was intended to apply along the borders of
expanding pastoral settlements with the additional bonus of linking punishment to a labour force. Closer to the towns, the legal status of Aborigines coincided with a form of economic status that involved the payment of some wages at a time when industrial training was a focus. However by 1847 the colonial law was used as a form of ‘moral training’ to replace education and a temporary legal pluralism, and later became a form of governance applied to new regions such as Champion Bay. This resulted in demands for an extension of sentences under the Act to three years imprisonment by 1859. The effect of the Summary Punishment Act conferred a discriminatory legal status on Aboriginal people to that of ‘Natural Born British subjects.’

This adoption of discriminatory legislation relates back to the early 1830s where the problem of encroachment and trespass first presented itself in Perth, and the opportunity for conciliatory methods had been debated but dismissed. From early 1830s the civil law was employed by settlers to enforce their own rights and to argue that a contract had been made with the British government for quiet enjoyment which included the protection of settlers from Aboriginal clans. Even though Moore pointed out that a moral injustice had taken place whereby treaties should have been negotiated with Indigenous peoples he largely conferred that responsibility onto the British government. Later he would use a similar argument in October 1836 when Aboriginal people proposed an agreement of co-existence on the land in the Swan District. This argument employed the civil law but also the terminology of British subject hood which had been used to differentiate Aborigines from ‘other’ when justifying a discriminatory legislation based on race. Now in the Legislative Council’s Committee’s opinion, Aborigines had apparently not given up most of their natural rights but neither did they have any legal assertions against the invader. This had achieved a similar effect as outlawry in that it was determined that Aborigines had no chattels goods or land as
British subjects or as Indigenous people. Both were devices to avoid acknowledging that Indigenous peoples’ individual and collective rights should be recognised. The only difference being that there were now Aboriginal people on the borders of settlement who were regarded as economic labourers in the pastoral economy. Instead of reminding the British government that they had not adopted any measures to negotiate with the Aborigines directly for their lands in 1830s the Committee now reminded the British government of their own rights as Natural Born Subjects under contract law. The argument employed the rhetoric of British subject hood and civil contracts which avoided any unpleasant reference to the unjust taking of Indigenous lands which argument Moore himself had made fifteen years earlier. 192 Moore's influence is apparent here. Earlier in 1833, he had advocated that settlers were the invaders dispossessing the original inhabitants of their land for which an agreement should have been negotiated by the British government regarding Indigenous rights.193 In 1847, the perceived injustice to settlers took greater priority, where settlers were described as ‘voluntary intruders’ invited by the British government, ‘under whose assumed sovereignty’ the intrusion took place, and such invitation carried with it a pledge of protection from the Sovereign.194

By the mid 1840s the Colonial Office was receiving feedback from the colonies regarding policy and the application of British law to Indigenous peoples. The departure of Colonial Office policy away from the ordinary procedures of law was regarded as the best and most economical way of ensuring the physical protection of Aboriginal people at a time of uncontrolled and expensive settler expansion. For the settlers and colonial government it ensured a rapid commercial exploitation of Indigenous lands and

192 The Perth Gazette 27 July 1833, p.119.
193 Ibid.
194 Ibid.
attempted to exert coercive control over newly encountered Aboriginal people in the regions. Even though the departure for Western Australia was held up as an exception by Colonial Office officials, the trend for greater legislative control of indigenous peoples and their lands in order to forward British colonial interests was increasing during the mid 1840s. This was taking place even in New Zealand with the erosion of Maori land rights by 1844. By contrast, in Western Australia (and other Australian colonies) Indigenous rights had never been politically and legally recognised in the first place.

There was no real attempt by the colonial government or the courts to consider the question of equal legal status as much as there had been in South Australia in the 1850s. This was because in Western Australia there was no true judicial independence and the magistracy under the guidance of Mackie was more closely aligned with settler interests. Other colonies with a Supreme Court were less likely to give up on principles underpinning the upholding of the rule of law. It was not until the introduction of a formal judiciary from England in 1857 that lawyers were again appointed who defended Aboriginal people tried for murder and serious offences. However, there were no recommendations for mixed juries or Aboriginal adjudicators as in New Zealand. By the 1860s this would change in South Australia where there was pressure to introduce regional summary punishment. In Western Australia, the summary punishment system lasted well into the 1870s and with it a form of guardianship or tutelage was entrenched in colonial legislation which would form the precursor to other discriminatory legislation in Western Australia.
In December 1859, lawyer Edward Landor returned to Western Australia from England after an absence of 13 years, to be shocked at the change in policy that had taken place since the Hutt period. He found that Aboriginal people from the new pastoral regions were now being executed for tribal murder under British law. In 1859 all murder cases continued to be heard in Perth, but by a professional judiciary that adhered strictly to English legal procedure.

On 18 April 1862, Landor wrote a letter to the Editor of The Perth Gazette objecting to the rigid enforcement of the death sentence for tribal murder and raising questions about the legal status of Indigenous peoples and their laws. As in the Wewar case, Landor continued to argue that Aboriginal people were still bound by their own laws because they were a conquered people who had not consented to be British subjects. He referred to a passage from Vattel on the Law of Nations, (which is probably the extract that he also used in the Wewar case),and North American court cases:

The celebrated Jurist, Vattel, in discussing the rights of nomadic tribes, declares that “no other nation has a right to narrow their boundaries, unless it be under an absolute want of land. For in fact they possess their country; they make use of it after their manner; they reap from it an advantage suitable to their mode of life, respecting which they have no laws to receive from anyone.”

Landor referred to earlier cases in the United States in which

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1 The Perth Gazette, 27 July 1833, p.119.
2 The Perth Gazette, 18 April 1862.
3 Ibid.
The principle laid down by their Judges is that the Indians possess a right of occupancy in the land so far as regards the privileges of hunting and residence; and that they are not to be dispossessed without at least a nominal equivalent. They follow their own laws and customs in all matters among themselves.\(^4\)

Landor was probably referring to the *Worcester* case decided by Chief Justice Marshall in the 1830s which, according to McHugh, recognised the distinct sovereign status of the ‘Indian tribes.’ \(^5\)

On 20 November 1862, Landor also wrote to the Aborigines Protection Society arguing for a policy change to be made on the grounds that Aboriginal people who did not know any better were acting in accordance with their own laws (no matter how ‘barbarous’). He was critical of the focus of the Supreme Court judge who exercised British law to the exclusion of policy, concluding that it was a moral injustice being perpetrated under the name of ‘law.’ Landor suggested that the only ‘privilege’ under British law that Aborigines being tried for tribal murder possessed was the ‘gallows’, which was civilising by coercion (rather than by education over several generations). He argued that Aboriginal people could not become plaintiffs or prosecutors, or give instructions to their lawyer to commence an action of ‘crim con’ or ‘file a Bill for the enforcement of equitable rights’. \(^6\) He added that the Aborigine was ‘not aware of any of these rights and therefore his only right to redress for wrongs against him were his own laws. How can we hang him for not being able to work out the difference between his own laws and British laws – and the ultimate result is the same, a life for a life.’ \(^7\)

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\(^6\) *The Perth Gazette*, 18 April 1862.

Other settlers wrote to the Aborigines Protection Society against the death penalty for *inter se* murder: Patrick Taylor and Edwin Read Parker both sought a change in policy. The Society protested to the British government in 1862, hoping that an inquiry would be conducted, and that ‘more human instructions’ would be sent to the colonial government in Western Australia. However, its influence had long since waned. It reported three years later that nothing had been done and that Aboriginal people continued to be convicted on the evidence of their own ‘countrymen’ without any defence. The treatment of the witnesses who were forced to walk long distances to Perth was contrasted with the useful service that Aboriginal peoples had given as trackers, and in assisting the squatter and explorer. This new policy was to some extent reacted to by jurors in the 1860s appointed from Perth who heard cases involving Aboriginal peoples in more remote parts of the colony and increasingly recommended mercy; others found individuals guilty of manslaughter instead of murder in order to avoid the maximum penalty.

While judges and jurors realised that there were anomalies, there was no revision of policy except by the action of juries on a case by case basis. One commentator from Western Australia observed the inequities of the policy that relied on the discretion of the governors, pleading: ‘Might not some portion of the proceeds derived from the sale of waste lands, or the duty levied on the export of kangaroo-skins, be appropriated to explaining and defining the position of the Aborigines before they are exterminated?’

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8 Edwin Read Parker had a pastoral station at Dangin 40 miles east of York in 1859.
Chapter 9
Conclusion

This thesis has determined the nature and application of policy regarding the legal position and rights of Aboriginal people in the early nineteenth century in Western Australia, within a political and economic historical context. This has involved determining the extent of the role of British law in the process, and an analysis of the intention and implementation arising from the policy. Most of the debates about policy occurred during the 1830s and 1840s, after which there was a narrowing of the intention of Imperial policy by the late 1840s that was limited to the physical protection of Aboriginal people. These early debates resulted from immediate local and British humanitarian influences.

Stirling was a pragmatic governor who developed his own responses to the conflict between Aboriginal people and settlers and disregarded the inadequacy of British government policy that had failed to recognised Aboriginal legal status and rights. He was not as concerned with principles as Hutt, his successor Governor was to be, and this was mainly because Stirling was a founding governor with settler interests of his own. Even Hutt who started with the intention of following the policy of strict legal equality would become a settler-governor as he found it more difficult to control pastoral expansion and exploration to remote regions. This convergence between settler and official interests set the Swan River Colony apart from other colonies, notably South Australia, whose governor was more aligned with Imperial policy regarding Aboriginal peoples at the height of the humanitarian influence.
The early 1830s marked an unusual period of innovation by Stirling, his legal adviser Mackie, and members of the Executive Council, which operated more like a military tribunal until 1837. This innovativeness arose during a period of acute economic and political uncertainty in the colony which was exacerbated by the conflict between settlers and Aboriginal people within a year of settlement. The conflict highlighted dilemmas arising from the British government’s act of colonisation that took possession of ‘wild and unoccupied’ land, thereby negating the Indigenous presence and rights.¹

Due to the legal status of ‘occupancy’ that followed the pattern of New South Wales and Tasmania, Imperial policy provided no practical guidance for regulating relations between Aboriginal people and colonists. This initial lack of reference by the British government to Indigenous land rights suited the initial purposes of Stirling and well connected settlers like Thomas Peel, who had selected choice grants of land before they left England. In general, it was considered that Indigenous people would not be a significant obstacle to their ambitions of forming an English landowner- based society, which was contingent on unfettered access to land. Stirling’s proclamation that Aboriginal people were to be provided with the protection of British law ushered in a minimalist approach, which focused on their protection from physical harm rather than the need for conciliatory measures. This was despite the receipt of Goderich’s dispatch by Irwin in April 1833, enclosing Arthur’s proposal for an agreement with Aboriginal ‘tribes’ to purchase their land.

The absence of a policy to deal with Aboriginal legal status and rights in practice was noticed by some settlers after violent conflict between Aborigines and settlers took place. Robert Lyon made an early public protest that Aborigines had neither consented to be British subjects nor been informed of their new status. This raised practical

¹ Russell, A History of the Law in Western Australia, p.329.
problems when it came to asserting British legal authority over a people who had no idea that it applied to them or what it meant. Moore believed that settlers should have questioned how the land was gained so cheaply and without negotiation with Indigenous people. However his position was tempered by his concern that the British government had breached a ‘civil contract’ with settlers who had taken up land grants, which implied a guarantee of protection from attacks from Aborigines. There was widespread criticism and resentment from settlers towards the British government that the role of the military was only to apply to defence against combined attacks by Aboriginal people, and which placed the onus on settlers to pay for the protection of their own property. The priority of the colonial government became one of applying its limited resources to protecting settlers’ lives and property, using innovative legalistic and military devices. It was not until after major clashes at Pinjarra and York had occurred that Stirling realised that Aboriginal people were a more formidable opponent to ‘physical occupation’ than he first thought and by 1835 he had concluded that ‘settlement’ was really an ‘invasion’ that involved the conquest of a ‘formidable enemy.’

Chapter 2 concluded that the main official response by the Executive Council (based on Mackie’s legal advice), was to declare individuals identified as ‘troublesome’ leaders, ‘outlaws’ rather than enemies or aliens or ‘nations’ fighting for their lands. This relied on the uncertainty surrounding the legal rights of Aborigines as nominal British subjects who were in theory under the protection of British law. Outlawry was used as a legalistic device that assumed that Aboriginal people had consented to be protected under British law and that settlers could now shoot them on sight on the grounds of ‘self-defence.’ This was despite the fact that they derived no benefit from their nominal status through access to courts or inquests like other British subjects, even bushrangers
who had been tried and then made outlaws. In fact, coronial inquests were used instead
as a way to prosecute, convict and sentence Aboriginal leaders and their tribes in their
absence for wilful murder. The first inquest into the death of a settler (Entwhistle) at the
hands of Aborigines resulted in a precedent where recommendations for outlawing the
tribe were made to the Executive Council, which would create a future policy whereby
the Council would offer a reward to settlers for the capture of the outlaws. By offering a
reward, it resulted in a more hostile environment for Aboriginal people and also
prevented settlers from being prosecuted for shooting British subjects. This was the
main reason for gazetted notices which were aimed at enlisting the assistance of settlers
in the capture of outlawed Aborigines. There were no prosecutions of settlers for
shooting non-outlawed Aborigines.

Midgegooroo’s capture and execution had been remarked on negatively by
commentators in England and the Eastern colonies as similar to the exercise of military
law. While there are similarities to the situation in New South Wales when Governor
Macquarie proclaimed ten Indigenous leaders outlaws in July 1816, there were
important differences. In Western Australia, the device was used by Irwin and Stirling
as a way to deal with an enemy under the guise of outlawry and to avoid giving effect to
the protection of Aboriginal people as British subjects. While initially it operated to
provide indemnity to settlers involved in capturing Aboriginal leaders, it was applied to
troublesome leaders who resisted the settler presence and the taking of Indigenous land.
Subsequently although there was no formal proclamation of outlawry or martial law,
troublesome groups were targeted after lists of offences were drawn up and a more
punitive approach taken. In part, this policy developed because of the official perception
that Indigenous laws involved retaliation of a life for a life and that collective
punishment was required in order to break the resistance. This device was applied by
Stirling in Pinjarra in October 1834 and again in York in July 1837. In 1837, the Aborigines Committee concluded that punitive actions in Western Australia and New South Wales were based on ‘principles of enforcing belligerent rights against a public enemy.’\textsuperscript{12} Glenelg had likened Stirling’s action at Pinjarra to retaliation or revenge, rather than the apprehension of individual ‘criminals’ under British law.

A significant group of settlers from the Upper Swan questioned the legality of outlawry, and argued that Aboriginal people had neither consented to become British subjects nor were answerable to British law, which raised the question of how they could be lawfully regarded as outlaws. Twenty two settlers, who lodged a petition in July 1834, argued that Weeip was guided by his own sense of reprisal for the loss of his ‘countryman.’ They recognised that Weeip had acted from a sense of injustice at the death of his relative after a theft and that this was regarded by him as an excessive punishment under his own law. This belief that Aboriginal consent to British subject status was required, was held among several settlers in the 1830s and early 1840s and was made on the basis that Indigenous people did not understand British law and were ineligible to seek redress under it.

The second major Executive Council response to the conflict occurred when Stirling recommended the appointment of a mounted police force, or ‘Hottentots’ from the Cape Colony to track Aboriginal ‘offenders.’ This took place in September 1832, after Upper Swan farmers protested at the loss of their livestock and urged the colonial government to take urgent ‘conciliatory or coercive’ action if the advantages of remaining in the colony were not be outweighed by the danger to their lives and property. Stirling chose coercive measures and mechanisms such as outlawry. While the British government had

\textsuperscript{2} BPP, \textit{Report}, 1837, p.83.
continually maintained the official position that the legal basis for annexation was occupancy, by the mid 1830s, Stirling and some other officials came to regard it more as an invasion, but were neither prepared to accept that Aboriginal people had to consent to the imposition of British law upon them, nor formally recognise their rights as the original owners of the land. Instead the device of outlawry was used until the late 1830s, after which it was replaced by the criminal law. This shift occurred more quickly as a result of overcoming the problem of Aboriginal evidence and would later be followed in the 1840s by a separate criminal legal system in the regions which would lead to a similar outcome to that of outlawry, of depriving Indigenous people of legal rights both as British subjects and as owners of land.

This path was chosen despite proposals for agreements with Aboriginal people which took place in the 1830s firstly after Stirling had returned to England in September 1832, where he argued the settlers case during a period of economic and political uncertainty, and secondly in 1836 in the wake of the humanitarian influence on Colonial Office policy in England. The first proposal arose primarily as a result of Lyon’s advocacy and following an Agricultural society meeting which had expressed support for conciliatory or coercive measures being taken by the colonial government. A subsequent meeting was held by a significant group of farmers and magistrates at a time when the colony’s economic ruin appeared imminent, and when the potential cost of violent conflict (as in Tasmania) seemed unacceptable. This proposal for an agent to negotiate an agreement of peace had been put to the Executive Council, but instead Irwin chose to implement Stirling’s plan for a mounted police primarily to control Aboriginal people.

The second proposal by Arthur was received by Stirling’s successor, Irwin, from the Colonial Office in early 1833. The proposal forwarded by Goderich was similar to that
which was also sent to the Colonial Office in relation to South Australia, and which Glenelg had forwarded to the South Australian Commissioners. It too assumed that a ‘trifling amount’ would satisfy Indigenous tribes, which reflected Arthur’s assumptions about Indigenous societies as less civilized and important than European proprietary values under British law. Similarly to the first proposal it was put forward as a way to avoid further conflict at low economic and physical cost. It recommended that agreements be negotiated by agents appointed by the colonial government with Aboriginal tribes to purchase their land before it was physically occupied by settlers. Although it did not revise the legal basis of annexation of occupancy, this initiative was supported by Goderich, on behalf of the British government and marked a significant shift in British government policy which up to this point had pretended that Aboriginal people had no proprietary rights. While the plan provided for a trifling compensation, the British government acknowledged that there were tribes who were the original owners of the land with rights that survived sovereignty that should be recognised by the settlers and by the colonial government. Unlike the British government, Stirling, Moore, Landor and perhaps even Mackie came to recognise that the actual occupation of land in Western Australia was conquest. However, there was no offer from the British government to finance the proposal, which reflected the Colonial Office’s general economic attitude to the colony in general. Goderich expected that proceeds from a Land Fund would cover any economic cost in order to ensure the settlers peaceful occupation.

Irwin had responded to the Colonial Office by continuing Stirling’s plan for a mounted police force. It was not until protests from the Aboriginal tribes at encroachments on their land, and after Yagan’s death that more serious consideration was given to conciliatory policy. This was in September 1833 after a meeting was held at the
instigation of Munday who protested on behalf of the Indigenous tribes in the Swan district at the disappearance of kangaroos and settler encroachment on Indigenous land. The colonial government response was to provide rations of wheat to 350 Aboriginal people in the settled districts as reparation for loss of their food and as a means of keeping them away from settlers’ crops and livestock. However, there was no reference to negotiating an agreement to purchase Indigenous rights in land which could have provided the framework for future relations with Indigenous peoples. This was despite Moore’s anonymous publication which raised the question of reparations in the colonial press. In mid-1833, during a period of substantial public debate, Moore recommended that the British government enter into an agreement to purchase lands from Indigenous peoples as a national measure, along similar lines to that brought by William Penn. Although not denying the right of Europeans to colonise new lands, the method of colonisation that failed to compensate Aboriginal peoples for their lands was condemned, especially since it impacted on settlers’ quiet enjoyment. Moore had made the proposal before Buxton’s parliamentary motion in July 1834 calling for the protection of the civil rights of indigenous peoples in British settlements. Irwin later agreed with Moore that any offer of reparation or recognition of legal rights had to be a ‘national measure’ instigated by the British government who should pay for it. In both proposals, the motivation was a combination of moral conscience and an appeal to economic pragmatism.

The economic and legal implications were again raised by Moore in September 1836, this time in his official capacity as Stirling’s legal adviser, when a third proposal was made, this time by Aboriginal people to retain their rights to land and to negotiate for dual occupation. This came at a time when Goderich’s successor, Lord Glenelg was urging the recognition of Aboriginal rights in South Australia, when the Batman
‘treaty’ in Port Philip banned the question of private agreements with Indigenous people, and when Stirling expected that new Imperial policy might be forthcoming. However, settlers wanted exclusive possession and security of title to lands and the opportunity for negotiating agreements with Aboriginal peoples was deliberately avoided on similar grounds as before, namely economic cost and the implications for the expansion of agricultural and pastoral settlement. Moore influenced the Executive Council by pointing out that it was something the British government should be paying for and not struggling settlers. At this time the colonial government’s doubt about the ability to raise funds from the sale of Crown land and the uncertain outcome of the settlers’ protests over land regulations, curbed any interest in treaties that may have existed. Aboriginal people along the Swan and Canning Rivers had wanted to retain access to the rivers and lands and Stirling regarded the proposal as a possible solution to the problems of encroachment as well as giving effect to the British government policy at minimal cost or for a trifling amount. Instead, Aboriginal people were warned that ‘trespass’ was a criminal offence. By 1837, the opportunity to address the consequences arising from the Imperial policy on the annexation of the territory and dual occupation of the land was replaced with the settlers’ preoccupation with securing certainty of title over land. Any expectation that some direction might come from the British government regarding Indigenous rights also disappeared, once the outcome of the Batman ‘treaty’ and Glenelg’s land regulations were known.

The preoccupation of settlers with their own interests under the British government land policy became dominant. Glenelg had approved a compromise which allowed settlers to exchange existing land already held for new pasture. However, this inadvertently resulted in an expansion of pastoralism in the Avon District and Kojonup area, and also tied up the best pastoral land which meant that there was unlikely to be any Land Fund
for the local government for some time. By 1837 the faint moral whispering that Moore referred to in 1833 had disappeared, with only William Nairn Clark protesting at the absence of Indigenous land rights from the British government’s land regulations and the failure to negotiate a Penn-style agreement.

The pattern of official policy that avoided acknowledging and giving effect to the rights of Indigenous peoples continued. Legalistic and military devices were employed in the early 1830s when Irwin continued Stirling’s policy of outlawry. Indigenous leaders were nominal British subjects who had no property, chattels or goods, neither as former British subjects nor as Aboriginal peoples. The irony was that a similar effect to the device of outlawry had already been established by the Imperial Act establishing the colony of Western Australia which declared lands as ‘wild and unoccupied.’ This Imperial Act was similar to the South Australian Act (1834) which was criticised by the Aborigines Committee, who stated that the British parliament had created an injustice by disregarding the rights of the ‘possessors and actual occupants’ of the land.\(^3\) This presumption however was continued in Western Australia with further attempts to define a different kind of subject status during the late 1840s in the wake of pastoral expansion. Hutt and Moore employed Blackstonian terminology to distinguish the legal rights of natural born subjects from Aboriginal people as a different kind of subject. Although there was only one kind of British subject in law, this construct would be employed to argue for a different legal status for Aborigines as landless subjects, especially when arguing for a departure from racial equality under the law. This different subject status precluded access to the civil law, which Nash argued in the debates on an Aboriginal Evidence Act was not applicable to Aborigines as they had no property, and did not understand civil law. There was also the fear that Aboriginal

\(^3\) BPP, *Report*, 1837, p.4.
people might be able to sue for their civil rights. Hutt’s proposal to modify British criminal law was taken further by Irwin and Mackie with the Summary Punishment Act in 1849 which permanently suspended the equality principle that applied to natural born subjects and operated as a tool of coercion to generate Aboriginal labour, and attempted to regulate the actions of Aboriginal people in order to facilitate pastoral expansion in more remote regions.

The Summary Punishment Act which conferred a separate magisterial jurisdiction over Aboriginal peoples would ensure that they remained as subjects under the control of British legal authority as settlement spread, not agents with whom negotiations should be made for their rights. This was recognised by one anonymous commentator at the time in relation to the new settlement of Champion Bay in 1850, when he criticised the colonial government’s focus on the protection of the settlers’ interests, at the expense of Aboriginal rights. He demanded to know on what terms the land was to be occupied and what conciliatory measures were to be taken. An anonymous respondent replied that the value of the land was not appreciated by Aboriginal people who were incapable of turning the land to profit, and that this justified using the superior laws, arms and other powers at the disposal of civilized society. This summed up the prevailing settler attitude that influenced the development and implementation of an inferior legal status for Aborigines and avoided the question of Indigenous land rights. This was also the reason why Russell criticised Hutt’s proposal for the extension of magisterial summary jurisdiction powers to apply solely to Aborigines in 1839, remarking that it was a ‘crude’ way to govern relations with new tribes in the regions.

4Letter to the Editor from V, The Inquirer, 10 October 1849.
5The Inquirer, 24 October 1849.
The major official debate on the legal status and rights of Aborigines over an Aborigines Evidence Act reflected the different motivations of Colonial Office officials and colonial officials in the early 1840s. It was not until 1836, when Glenelg insisted that Aboriginal people be regarded as equal subjects under British law that questions about how these instructions could be practically implemented were raised by Moore, who invoked the notion of the ‘pale’ of British law. Moore and Mackie adopted the position that regardless of whether the legal basis for colonisation was mere occupancy or conquest, British legal authority must be applied as a priority to protect settlers’ lives and property and by implication to protect Aboriginal people as long as they refrained from theft and violence against settlers.\(^6\)

Therefore, the concept of the ‘pale’ focused on punishing Aboriginal people under British criminal law for property and other offences against settlers. There was no reference to restraining unprovoked attacks arising from settler prejudices towards Aboriginal people. Moore argued that to do any more than apply British law in this instance would be unjust because they would be unable to seek redress under British laws. The conclusion was reached by Stirling, Moore and subsequently Hutt, that Aboriginal people would be better off seeking redress under their own laws to settle their own grievances where this did not interfere with settlers’ interests. This resulted in a pragmatic policy of temporary legal pluralism which lasted until 1848, after which there was a hardening of attitudes towards Indigenous society and laws. This policy assumed that settler interests in property and land were a higher priority than Indigenous rights. The policy also recognised problems associated with the enforcement of criminal law which included the ineligibility of Aborigines to be witnesses and complainants because their evidence could not be taken on oath. It had already been ascertained in

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\(^6\) \textit{R v Durgap 1837, The Perth Gazette, 7 October 1837; p.229 ; The Swan River Guardian, 5 October 1837, pp. 984-5 ; Court of Quarter Sessions, 2 October 1837.}
1835 that even the minimal protection under Stirling’s proclamation could not be implemented when John McKail was prosecuted for killing Gogalee. However, Stirling did not introduce an Aboriginal Evidence Act at this time. The real motivation for an Evidence Act in the early 1840s arose primarily out of the necessity for protecting settlers’ private property, whereas the objective of Colonial Office officials was more to extend the legal rights available to Aboriginal people as equal British subjects.

The motivation for an Aboriginal Evidence Act also resulted from the lack of direction on how to deal with the gulf between the ‘legal maxims’ and practice which Glenelg himself admitted in his despatch to Governor Bourke in New South Wales of July 1837. An examination of the local motivation for an Evidence Act also demonstrates that there was never any intention by Hutt or Mackie that Aboriginal people were to be given the full rights of British subjects in theory, let alone in practice. Russell’s rationale for rejecting a local Evidence Act, to which summary punishment provisions were attached, was that it would entrench prejudices of racial inequality in law, imparting a contradictory message to settlers that would make it more difficult for Aboriginal people to be regarded on equal terms as colonial citizens. Russell and Stephen argued for an expansion of legal rights so that the admission of evidence would be allowed, not only when liberty and life were involved but when proprietary interests also were at stake, which expansion was strongly resisted by the Legislative Council.

Mackie also ruled out that any civil cases would arise where Aboriginal evidence was involved, thereby preventing Aboriginal people from being able to sue for their rights to land, which Hutt thought was possible. There is no evidence that any of the Legislative Council members in the early 1840s had considered that an Aboriginal labourer might want to sue for outstanding wages. This was despite the fact that Hutt encouraged
Aboriginal employment from the time that he arrived in the colony. This issue was not raised until 1849 when the Evidence Act came up for ‘revival,’ at the same time as the enactment of the Summary Trial and Punishment Act. By 1848, the number of employed Aboriginal people had sharply increased near York and Albany, and lawyer George Leake proposed that civil actions be included in the Evidence Act, in case Aboriginal people in settled districts wanted to recover wages under their indentures. The Summary Punishment Act was regarded as beneficial because it ‘civilized and reformed’ Aboriginal prisoners by inducing them to work on district roads and public works as punishment.7

Hutt was primarily driven by his vision of inducing Aboriginal people towards civilisation through labour and education as a form of reparation, and in order to prevent their ‘extermination’ in the face of advancing settler intrusion. While influenced by the humanitarian policy of the late 1830s, Hutt was also concerned with finding ways to improve the colonial economy in which he envisioned Aboriginal people could share, by becoming mechanics, labourers, artisans, and even small farmers. He believed that this policy would convince settlers of the usefulness of Aboriginal people and make the Legislative Council more amenable to releasing funds from colonial revenue rather than from a Land Fund that was virtually non-existent. However, even when the Land Fund was available as the Colonial Office had envisaged, there was no change.

Hutt’s vision also led him to make early comparisons between Indigenous societies and laws measured against ‘civilized’ standards, and to work out inducements for Aboriginal people to attach themselves to settlers in towns and on farms. While Moore had a better understanding of Indigenous laws and their dispute resolution mechanisms,

most settlers had very little understanding and regarded these laws as ‘barbarous.’ Therefore, there was never a likelihood of a formal legal pluralism. Instead, Hutt continued Moore’s concept of the ‘pale,’ extending the protection of British law to employed Aborigines in the settled districts where practically possible. The pluralist policy was later abandoned in relation to Aboriginal people who had very little contact with Europeans and by the 1850s the first legal execution took place for an _inter se_ murder. While Hutt was acting to a certain extent from humanitarian motives, the legal framework that he established would be used as a coercive tool once other avenues such as training and education had been abandoned.

During the early 1840s, Hutt proposed the departure from the equality principle for a number of reasons which included the difficulty of enforcing a strict application of British law to all situations. This resulted in the recognition of the status of Indigenous law in cases where it did not interfere with settlers’ lives and property. The colonial tolerance in the 1830s and 40s for Indigenous laws also arose out of a sense of injustice at the strict application of British law when Aboriginal people could not be expected to understand it or consent to be bound by it. This raised questions of legal status and rights and the jurisdiction of the courts in relation to _inter se_ offences and led to the test case of _Wewar_. Captain Grey attributed the rationale of non-interference in _inter se_ offences by the colonial government to the concept of conquest, which he did not agree with because of the implications that Indigenous laws would also apply to settlers, which in his opinion would set an unfortunate precedent.

The _Wewar_ case raised the question of the jurisdiction of the court and amenability of Aboriginal peoples to British laws for _inter se_ offences. Landor argued in January 1842 that if the British government had acquired the territory by conquest, then Indigenous
people had not expressed consent to be bound by British law. He also argued that even if it was ‘mere occupancy,’ that some form of implied consent by Aboriginal peoples to British law was required. Although Landor favoured conquest as reflecting the true state of affairs which could theoretically mean that Indigenous laws should also apply to settlers, he did not believe that this was the case in practice. Landor believed that British law had to apply to Aborigines to protect lives and property regardless of the legal status of the territory. This was similar to what Mackie had concluded in Durgap, when he said that regardless of whether the territorial acquisition by the British government had been occupancy or conquest, British law applied to Aboriginal people in order to protect settlers’ lives and property. This decision was made more for the pragmatic purpose of managing conduct between Aborigines and settlers, and also reflected the avoidance of dealing with the issue of Indigenous proprietary rights. In September 1836, Moore argued that even if it was conquest or occupancy, an agreement should still have been made by the British government with Aboriginal peoples to purchase their rights in land.

While Mackie adhered to the principle of occupancy espoused by the various Secretaries of State, there is some evidence to suggest that he and others did not really believe that either of these principles complied with the facts. Landor later criticised Mackie for not following his moral conscience, and instead following Colonial Office instructions that assumed that British law applied in all cases. The reality of whether the legal position was conquest or occupancy was never resolved. Although Stirling, Moore and Landor believed that the principle was more like conquest the implications that Indigenous law might apply to all situations was not practically acceptable. The legal and political impetus to protect settlers’ lives and property was crucial to the economic wealth of colony and empire.
The official tolerance of Indigenous laws was decreasing by the late 1840s. Mackie’s response was actually still sympathetic on the *inter se* question in 1847, when as part of a Legislative Committee he argued that if inter-tribal conflict did not directly interfere with settlers’ interests then it was not necessary to enforce British law over Aboriginal people. It was therefore different from the argument employed to persuade the Colonial Office that Aboriginal people should be subjects with an inferior legal status in order to protect settlers stock and land interests. This was a deliberate permanent strategy of suspending natural justice and equality principles through a decentralised summary punishment system, which Hutt had intended to be temporary until education and training had provided a social status for Aborigines that would make them mechanics and small farmers. However, Hutt had underestimated the prejudices of settler-magistrates and their ability to be impartial. In fact his own assessment of Indigenous society was radically altered after his arrival in the colony. By 1847, Mackie correctly predicted that the Colonial Office would be more receptive to a discriminatory proposal than in the 1840s, when there was some back peddling by the British government on the land rights of the Maori people of New Zealand.

The motivation to push for a modified legal position for Aboriginal people which suspended legal equality principles, arose from the principal objective of protecting settlers economic interests in a wave of pastoral expansion. A terrible irony therefore arose. In the early 1840s, Colonial Office officials believed that the Evidence Act was a victory for equality principles. However, the colonial government never intended to give effect to equal legal status and rights, and the Colonial Office disallowance of the Evidence Act in 1841 only delayed the inevitable Summary Punishment provisions until 1849, when arguments about the cost of centrally administering the criminal law (to the
exclusion of other measures), became stronger. The rapid pastoral expansion came with a second generation of settlers with increased lobbying power who were not interested in Aboriginal peoples, their languages and laws or making reparation, except to exploit cheap pastoral labour and obtain Indigenous lands. The fact that the new Summary Punishment legislation bypassed the legal forms and rights normally available to natural born British subjects, and entrenched prejudice and racial inequality into law did not concern the colonial government or Colonial Office officials in the late 1840s. This was because the Colonial Office wanted to achieve a minimum physical harm policy for Indigenous peoples, but without providing financial assistance for Aboriginal policy when rapid pastoral expansion was taking place in Western Australia. This was at a time when other Australian colonies were achieving independence from the financial and political control of the British government, in the lead-up to representative and responsible government.

William Nairn Clark maintained his opinion that the question of compensating Indigenous people for their land remained to be addressed by the British and colonial governments. He even suggested as Bannister had stated in his evidence to the 1837 Aborigines Committee that there should be mixed juries so that an Indigenous perspective had an opportunity to be heard. Nairn Clark recommended juries of six Aborigines and settlers, because ‘[an Aboriginal person] may be regarded in the light of an alien until the British government provide recompense for their lands.’8 Mackie replied that ‘the aborigines were British subjects, and that a jury of British subjects were there to try them.’9 By 1849 Nairn Clark had left the colony, and the power to punish Aboriginal peoples using colonial law as a tool of governance had been transferred to

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8 W. Nairn Clark, Letter to Secretary of State Russell, 8 January 1842, PRO, CO 18/33, p.295; The Perth Gazette, 5 January 1848.
9 The Inquirer, 12 July 1848.
settler-magistrates in the regions. By 1850, there were two separate legal systems (not counting the Summary Punishment Act for convicts), one in the regions that had abolished legal forms and procedure, and one in Perth that was more within the reaches of the new Supreme Court with its English legal forms and procedure. When Irish-born judge Alfred McFarland arrived in Perth in 1857 he came up against the problems of presiding over *inter se* cases where the death sentence for murder was automatic under British law and which took no account of the legal pluralism of the 1830s and early 1840s. This also marked the replacement of Mackie’s informal administration with lawyers and formal procedures.

The frontier of pastoral expansion whereby settlers encountered Indigenous tribes for the first time would continue into the early twentieth century in Western Australia. However, only more serious criminal cases involving homicide reached Perth and the Supreme Court. One was the *Bibby* case (1859), when a ticket of leave holder Richard Bibby was sentenced to death for the wilful murder of Billamarra. This was the first execution of a European for the wilful murder of an Aboriginal person and was primarily aimed at curbing a practice by settlers that was well known in the region, of which Bibby was made an example. It demonstrates that there was some distinction made between the legal status of convicts and Aboriginal people, which is also reinforced by Mackie refusing to amalgamate the Aboriginal summary punishment legislation (considered less severe), with the summary punishment legislation that applied to convicts which attracted a maximum penalty of 100 lashes. However, the separate legal system was a far cry from social and legal equality as for other British subjects.
By the 1850s, the government’s policy on temporary legal pluralism had disappeared in settled districts. Practices such as firing the bush were regarded as adversely affecting the pastoral economy and progressively legislated against or controlled. Increasingly, spearing in the leg was defined as an assault and punished under summary punishment legislation by magistrates. The creation of offences and procedure for Indigenous people that suspended the equality principle enshrined discrimination into law in theory and practice and also formed the basis for governance over Indigenes encountered at the ‘frontier. The defacto legal pluralism was being replaced by a system of differential legal status for Aboriginal peoples that set up a precedent to be expressed subsequently in special ‘protective’ legislation of the 1870s and 1880s and ultimately the 1905 Native Administration Act.10

Appendix

Circular from the Colonial Secretary’s Office - 15 January 1839

To G.F. Moore, R. H. Bland, F. Armstrong,

“Sir, I am directed by His Excellency the Governor to enclose you certain questions in regard to the natives he wishes information upon.

‘See Governors memoranda’

‘Information respecting the natives requested on the following points.’

1. Domestic manners

1. Have they any marriage ceremonies?
2. Is Polygamy practised among them?
3. Is Adultery punishable among them?
4. To what degree of kindred do they marry?
5. Do tribes intermarry.
6. What power has the husband over the wife?
7. What power has either parent over their offspring.
8. Do they shew, or do you suppose them capable of shewing strong affection in the several relationships of husband and wife - Parent and child.
9. Have they any sort of buildings?
10. What is the general nature of their food and clothing.
11. Do they subject their children to any training or education to fit them for their mode of life - as warriors and hunters.
12. Have they any funeral ceremonies and do they appear to pay any respects to the dead.

2. Their Social Life

1. From the different parts of Australia in which you have been should you judge the inhabitants to be all of one race.
2. It is generally understood that they are separated into Tribes, have these tribes distinct names, or are they more distinguished by the part of the country in which they reside.
3. Have they heads of tribes, and if so what authority do these exercise.
4. These tribes seem to be separated into families, has each family a chief and what authority if so does he exercise.
5. Are there any particular obligations due from individuals to their respective tribes and families.

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1 Circular, Colonial Secretary to Moore, Bland and Armstrong, 15 January 1839. SRO, CSR, ACC, 49/12, p. 86.

2 Hutt’s questions, CSR, ACC 36, Vol. 65, pp. 30-32.
6. Do different tribes ever enter into anything like offensive or defensive compacts with each other.
7. The natives claim possession of every rood of ground in the country. Are you acquainted with the nature of these claims. Is it as mere hunting grounds, or do they pretend to a proprietary right in the soil, and if so in whom is this right vested. In the Tribe - the family or the Individuals.

3. Their public life.

1. Have they any religious forms; any notion of a Supreme Being; or of Spirits; or of the immortality of the Soul- and if so what do they suppose accords[?] of them after death.
2. Have they any laws enforcing a distinction between moral right and wrong.
3. In what way are their laws or customs enforced.
4. Have they any even remote[?] Apparel[?] to judicial proceedings?
5. Have they any usages which have struck you as being peculiar to themselves?
6. As they claim to be owners of land in what way is the boundary of property whether as regards tribes, families or individuals distinguished and are the boundaries strictly adhered to.
7. Do they at all understand the transfer of the right in landed property from a party to another.
8. What are their laws of inheritance.
9. Are there any diseases to which they are more especially incident.
10. Have they any arts of cure or medicine.
11. What is the nature of their language is it copious –simple-or-complicated and are you aware of any one having studied it-or of any Grammar dictionary or Vocabulary of it having been attempted to be compiled.
12. Have you had any opportunities of ascertaining[?] whether the same language is spoken throughout Australia.
13. What inducements have you found most powerful to attach them either to yourself or to the Colonists,'
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