THE ORIGIN AND DEBATE SURROUNDING THE DEVELOPMENT OF ABORIGINAL EVIDENCE ACTS IN WESTERN AUSTRALIA IN THE EARLY 1840s.

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I Abstract

The article describes how the struggle for practical equal legal status and Indigenous rights signified by the 1967 referendum found its historical origins in the earlier debates which relied heavily on local legislatures to the exclusion of Indigenous peoples and their rights. In particular it examines the debate on formal legal equality by examining the Aboriginal Evidence Acts in Western Australia in the 1840s. The reliance on local legislatures comprised of settler-magistrates, resulted not only in the exclusion of Indigenous peoples and their rights but also entrenched discriminatory attitudes in the colonial legal system. This occurred in the context of economic and political pressures that settlers exerted early in the 1830s, and substantially delayed the legal capacity of Indigenous people to be able to sue for their civil rights (including land rights); a legacy that would provide the impetus for continuing activism for equal citizenship and Indigenous rights in the twentieth century.

II Introduction

This year is the 40th anniversary of the 1967 referendum which marks an important milestone in the struggle for Indigenous Australians' rights', the exact significance of which is still being debated.[1] A major expectation by activists at the time was that the Commonwealth government would

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1 B Attwood, *Rights for Aborigines* (Sydney: Allen and Unwin, 2003); B Attwood, A Markus, 'The Australian series – 1967 Referendum, 40 years on', *The Australian*, 5-6 May 2007, 26; M Dodson, F Chaney, S Rintoul, 'The Australian series – "A Great Victory of Sorts"', *The Australian*, 19-20 May 2007, 25.

legislate for the benefit of Indigenous peoples.[2] However, while the referendum resulted in the amendment of the Commonwealth Constitution to include Indigenous peoples in the census and provided the Commonwealth Government with increased legislative power to make laws for Indigenous people, it did not guarantee practical equal legal status or Indigenous rights. Behrendt has pointed out that the sole reliance on the benevolence of the legislatures to use their power to protect Indigenous peoples was misplaced, a position confirmed by examining legal history.[3]

The reason for the shift in emphasis to the Commonwealth government can be traced to the history of Indigenous-European relations in the nineteenth century and State governments' discriminatory legislation and policy relating to Indigenous people in the context of political, legal and economic agendas of the times. This article traces this pattern in Western Australia. The debate on formal legal equality occurred among colonial officials in the context of the development of an Aboriginal Evidence Act in the early 1840s for Western Australia. This debate ironically resulted in a 'special law' that discriminated against Indigenous peoples in Western Australia on the grounds of race, which resulted in a decentralised criminal punishment system.[4] Under British law, Indigenous people were excluded from giving evidence as witnesses or complainants until the 1840s, because it was considered illegal by colonial and British authorities for Indigenous people to swear an oath. An oath was usually made on the Bible as a divine sanction that was binding on a witness's conscience to tell the truth.[5] At that time, colonial authorities did not believe that Indigenous peoples had a religion on which an oath could be sworn. Where they were the only witnesses to an 'offence' or 'crime' under British law, their unsworn evidence could not be accepted, which often prevented a European or Indigenous suspect from being charged and convicted. These limitations on the application of British law increased reliance by colonial authorities on other punitive measures where violence was more likely the result.

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2 S Taffe, 'The 1967 Referendum: remembering the struggle', *Memento*, Winter, 2007, 15-17.

3 L Behrendt, 'No change without strong legal measures' *The Australian*, 19-20 May 2007, 25; L Behrendt, *Achieving Social Justice; Indigenous rights and Australia's future*. (Sydney: The Federation Press, 2003) 13.

4 A Hunter, 'A different kind of 'subject': Aboriginal legal status and colonial law in Western Australia from 1829 to 1861,' (PhD, Murdoch University, 2007) 296-346; K Auty, *Black Glass*, (Fremantle: Fremantle Arts Press, 2005) Ch. 1.

5 This was usually the Bible but in *Omychund v Barker* 1745 [1 Atk 21], this was extended to include any oath that made reference to divine sanction and that was binding upon the witness' conscience. J Stone and W A N Wells, *Evidence: its history and policies* (Butterworths: Sydney, 1991); 36, 550; *The Swan River Guardian*, 23 November 1837, 253.

This article examines the nature of colonial debates involving the first enactment of an Aboriginal Evidence Act in Western Australia in 1840 and its replacement in 1841, and how any Imperial push towards some form of legal equality was hijacked by the settler agenda.[6] It traces the origins of the Aboriginal Evidence Act in Western Australia as part of the British and colonial debate on the legal status of Indigenous peoples. It argues that there were two different, but related, motivations: the first originated from the humanitarian debate that was going on in England after the release of the British parliamentary Aborigines Committee Report in July 1837 (chaired by British evangelical MP Thomas Fowell Buxton) which highlighted the devastating impact of colonisation on Indigenous peoples in British colonies.[7] The other proposal by colonial magistrates in Western Australia sought to modify the principle of formal equality under British law in order to ensure that evidence from an Indigenous person could be used to incriminate him or herself and their compatriots, and convict them of what was regarded by settlers as the theft of their personal property.

Unlike New South Wales and South Australia, in the 1830s and 1840s, Western Australia was considered too small a European population to justify a formal professional judiciary with a Supreme Court.[8] Instead its magistracy comprised largely settler-farmers under the chairmanship of legally trained magistrate, William Mackie. The reluctance to formally recognise Indigenous land rights and autonomy, and the use of British legal policy and laws to deny these rights also resulted in the denial of equal rights under British law, which is a legacy that continued into the twentieth century. In Western Australia, the impetus was the perceived threat to settlers' lives and property, and the desire for more effective control and punishment of Indigenes under British law.[9] This arose at a time when inter-racial conflict was increasing as more settlers and their sheep invaded the York district and other regions of the South-West, and after the Colonial Office instructed Governor James Stirling to adhere to British law in protecting Indigenous people from physical harm by settlers.[10]

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6 An Act to allow the Aboriginal Natives of Western Australia to give information and evidence of Criminal Cases, and to enable magistrates to award summary punishment for certain offences, 1840, 4 Vic No 8 (hereafter referred to as the *Aboriginal Evidence Act 1840* (WA)); An Act to allow the Aboriginal Natives of Western Australia to give information and evidence without the sanction of an oath; 26 November 1841; 5 Vic No 22 (hereafter referred to as the *Aboriginal Evidence Act 1841*(WA)).

7 British Parliamentary Papers, *Report from Select Committee on Aborigines (British Settlements) Vol* 2, (1837), (Shannon, Irish University Press, 1968), 3.

8 Despatch from Goderich to Stirling 28 April 1831, AJCP (Australian Joint Copying Project) CO 397/2, Reel 304, 79-80.

9 As above n 5, 65-68; 74-75.

10 York was part of the Avon district which in 1837 comprised York and Toodyay, with Northam created from the two districts. There were 5000 sheep in York in 1836 with corresponded with a new demand for land; D S Garden, *Northam; An Avon Valley Histor*y (Victoria Park: Hesperian Press, 1979) 9-11.

In 1840, a year after the arrival of a new Governor, John Hutt, evidence legislation was passed by the Legislative Council and sent to England for approval, making the *Aborigines Evidence Act 1840* (WA) the first in operation in Australia.[11]

III The Imperial Impetus: Colonial Office Policy And The British Aborigines Committee

The impetus for Aboriginal Evidence Acts arose after the British government reminded the colonial government of the need to apply British law to Indigenous people as British subjects. This was not really raised in earnest until after Secretary of State, Lord Glenelg, wrote to Governor Stirling on 23 July 1835 reminding him that Indigenous people were to be treated as British subjects. He directed that this should be by 'competent authority' similarly to other British subjects and include the punishment of settlers for 'every act of injustice or violence on the Natives.'[12] This would avoid punitive expeditions such as the one which had resulted in the Pinjarra massacre of October 1834.[13] The despatch was sent in July 1835, the same year as the British Parliamentary Aborigines Committee led by Thomas Fowell Buxton heard its first witnesses (which report included extracts from this despatch).[14] A year earlier, Buxton had condemned the violence of colonisation which resulted in the dispossession of indigenous peoples from their lands in British colonies, including Tasmania and South Africa. Buxton's motion in the House of Commons calling for the protection of civil rights, civilisation and the Christianisation of Indigenous peoples had been sent as a circular to colonial governors as an expression of British government policy.[15] The Colonial Office endorsed the circular but provided little detail on how the protection of civil rights was going to be achieved in practice.[16]

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11 '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.' Passed 13 August 1840. Unlike the New South Wales Evidence Act which was sent to England for approval without being implemented the Western Australian Act was implemented at the same time as it was sent to England for Colonial office approval. *The Sydney Herald* 23 September 1839.

12 Glenelg to Stirling dated 23 July 1835, CO 18/14 Reel 300, 181-4; Extract of Lord Glenelg's Despatch was published in *The Perth Gazette* on 30 July 1836 as 'indicative of the views entertained by His Majesty's Government'.

13 As above n 5, 60-64.

14 Hereafter called the 'Aborigines Committee Report.' This was in two volumes. British Parliamentary Papers (BPP), *Minutes of Evidence before Select Committee on Aborigines (British Settlements) Vol 1,* (1836), (Shannon, Irish University Press, 1968); British Parliamentary Papers, *Report from Select Committee on Aborigines (British Settlements) Vol* 2, 1837, (Shannon, Irish University Press, 1968).

15 H Reynolds, *The Law of the Land*, (3rd edition, Camberwell, Penguin 2003), 103.

16 Thomas Spring Rice to Governor Bourke, 1 August 1834, *Historical Records of Australia*, Series 1, Vol XVII, 491-492.

The Aborigines Committee sat between 1835 and 1837 and heard evidence from missionaries, former colonial administrators and some Indigenous people from British colonies, but there were no Indigenous witnesses from Australia.[17] It highlighted the devastating impact of colonisation policies and practices on 'Aborigines' in British settlements, including Australia.[18] One of the witnesses was former Attorney General of New South Wales, Saxe Bannister, who in 1824 had called for Aboriginal evidence legislation to be enacted.[19] When asked what measures should be taken, he proposed the equality of Indigenous people under British law which (among other things) included 'Australian Aborigines' being admitted as witnesses in court without oath, on 'the same terms as regulate him in his own country.'[20] This was because at the present time justice was denied to them in colonial courts. Bannister gave an example of Maori people who worked on ships and were unable to bring complaints against their employers for assault or for their wages because they could not swear an oath in court.[21] Bannister also proposed that British courts write down Indigenous laws so that they could be referred to along with British law in 'certain cases' and the appointment of mixed juries and assessors.[22] He also believed that Indigenous people would regard the benefits of 'civilised' society more if they were included in that society both economically and politically while under the overarching British legal authority of Imperial agencies in London.This included Imperial rules to limit the discretion of Governors so that they would not undertake punitive expeditions.[23]

While its main focus was on South Africa, the Aborigines Committee made separate recommendations in relation to Indigenous people of Australia which also made assessments about their society and character. In relation to Australia, it recommended the gradual application of British criminal law to Aboriginal British subjects and a proportion of a Land Fund for reserves and 'protectors'.[24] The Aborigines Committee recommended that

17 Rice to Bourke, as above n 17.

18 Rice to Bourke, as above n 17; BPP, *Report from the Select Committee on Aborigines (British Settlements) with Minutes of Evidence and Appendices* Vols 1 and 2, IUP, 1968.

19 Saxe Bannister first gave evidence to the Aborigines Committee on 31 August 1835. Others who advocated an Evidence Bill for Aborigines to allow them to give unsworn testimony were Rev William Yate of NSW, who gave evidence on 13 February 1836, BPP, *Minutes of Evidence before Select Committee on Aborigines (British Settlements) (1836),* 174-178.

20 BPP, as above n 20, 176.

21 BPP, as above n 20.

22 BPP, as above n 20, 174-176; Bannister also gave evidence on 14 March 1837, BPP, *Report of the Select Committee on Aborigines (British Settlements),* Vol 2, 19.

23 BPP, as above n 20, 176.

24 BPP, Vol.2 as above n 23, 83.

special regulations should be introduced in the form of '…a temporary and provisional code for the regulation of the Aborigines until advancing knowledge and civilisation shall have superseded the necessity for any such special laws.'[25] These and any colonial constitutional amendments referring to indigenes would be initiated by the British Executive Government or colonial Governors rather than the local legislature in order to avoid settler interests dominating the agenda. It also recommended the appointment of protectors in Australia who could recommend special laws to the British or colonial Executive Government who would introduce them to the colonial Parliament.[26] However this did not take into account the practical problems where settlers were members of both Executive Council and Legislative Councils, which occurred in Western Australia in the early 1840s. Although acknowledging Bannister's evidence of inequality under the law in Australia and New Zealand, no specific Imperial laws or local Aborigines Evidence Acts were recommended by the Aborigines Committee. However Bannister and the Aborigines' Protection Society took the matter up in 1838-9, just as the Colonial Office was considering the matter. [27]

It was the British government's right of vetoing legislation (and the influential role of legal adviser and later permanent undersecretary James Stephen) that influenced the content of colonial legislation and led to the debate on equality under British law. Stephen had been influential in drafting the 'Abolition of Slavery Bill' which was enacted in August 1833 which included provisions relating to evidence and the gradual application of British law.[28] Stephen reviewed most if not all colonial legislation and often recommended to the Secretary of State for the Colonies whether they should be assented to or not.

IV The Motivation For An Aboriginal Evidence Bill In Western Australia

The difficulty of legally obtaining Indigenous evidence first came to the attention of the colonial government in May 1835 when settler John

25 BPP, Vol 2 as above n 23, 84.

26 BPP, Vol. 2 as above n 23, 77, 84.

27 Aborigines Protection Society, *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)*: reprinted with comments by the Aborigines Protection Society. London, 1837, vii, APS, *Second Annual Report of the Aborigines Protection Society presented* 21 May 1839. BPP, Vol. 2, n 23, 17.

28 R Smandych, '"To Soften the Extreme Rigor of their Bondage": James Stephen's Attempts to Reform the Criminal Slavery Laws of the West Indies, 1812-1833', (2005) 23 *Law and History Review*, 539. The Bill for the abolition of slavery received royal assent on 28 August 1833.

McKail was arrested for shooting Gogalee. Gogalee was a son of Indigenous leader Yellagonga, who was regarded as a peaceful chief of the Mooro people by the settlers.[29] The event was witnessed by other Indigenous relatives but there were no other Europeans present. Gogalee's brother, Narral (who had been wounded by McKail) gave evidence at the preliminary hearing that was held before Chief Magistrate William Mackie and another magistrate.[30] A few days later, Gogalee died from his wounds and McKail was charged with manslaughter. Fearful of retaliation under Indigenous law, the colonial government wanted to demonstrate that British law could protect Indigenous people and punish settlers when necessary. The magistrates and other colonial officials doubted that the unsworn evidence of Indigenous people as complainant or witness would be accepted by the jurors (for a Grand Jury had the task of weighing the value of evidence put before them).[31] It was therefore highly likely that McKail would be acquitted. Instead of a trial, Government interpreter Francis Armstrong, acting on behalf of the Executive Council, proposed to Gogalee's relatives that McKail be banished from the colony and that McKail make reparation in blankets and flour.[32] This was reluctantly agreed to after Indigenous elders came forward with whom the others acquiesced. McKail was banished to Albany where he ran a successful business. After this attempt there was no successful prosecution of a settler for assaulting or killing an Indigenous person until 1842, after the introduction of the *Aboriginal Evidence Act 1841*(WA).[33] Even this limited right of protection for Aboriginal British subjects had not been available to them. However, it was not the problem of protecting Indigenous people from Europeans that was the major impetus for Aboriginal Evidence legislation to be developed.

At the same time that the Secretary of State, Lord Glenelg was calling for the equal treatment of Indigenous people with settlers under British law, there was increasing reports of violent conflict in the regions occupied by settlers on Indigenous lands outside of Perth in the Upper Swan and York.[34] This period marked a renewed movement of settlers towards the Avon Valley, which was identified by the settlers as the best agricultural

29 Neville Green, *Broken Spears: Aborigines and Europeans in the Southwest of Australia*, (Perth: Focus Education Services, 1984), 118, 221.

30 *The Perth Gazette*, 30 May 1835, 501-2.

31 Stirling to Glenelg 10 July 1835, AJCP CO 18/14, Reel 300-1, 256.

32 *The Perth Gazette*, 6 June 1835; 507; 11 July 1835, 527.

33 *R v Bussell*, 1 July 1842, Court of Quarter Sessions, *The Inquirer*, 13 July 1842, Criminal Indictment File No 271, State Records Office (SRO), WAS 122, CONS 3472/52.

34 Donald S Garden, *Northam; an Avon Valley History,* (Melbourne: Oxford University Press, 1979), 9; Aborigines' Protection Society, *Extracts from the paper and proceedings*, No 1, May 1839, 6.

land for sheep and wheat. This intrusion was resented by the Nyungar people in the area and was followed by violent conflict during this period. The local people resisted settler encroachment on their lands and food sources, and were often shot at while escaping from attacks on sheep and food stores, and settlers were attacked in retaliation.[35] Settlers pressured Stirling to take action and many were keen for a punitive expedition as a final lesson, similar to that led by Stirling at Pinjarra in October 1834, which had resulted in the deaths of many Indigenous people.[36]

In May 1837, Stirling instructed Armstrong to go to York to 'remonstrate' with local Indigenous tribes and to report back on whether they would stop their violent resistance.[37] At the beginning of July, Durgap and his son Garbung (alias 'Tom') were captured and taken to Perth, where Durgap was charged with theft and breaking into a settler's farm.[38] They were also credited with the attack on a settler, William Heal, in Northam (near York) but the charge was not laid because Heal had made an agreement with the Indigenous men involved in the attack to work on his farm for a couple of months.[39]

Shortly afterwards, Stirling convened a meeting of the Executive Council and outlined his strategy for dealing with the worsening conflict.[40] He organised troops and magistrates with the intention of leading a surprise expedition to York in July 1837. Stirling argued that a severe example was necessary and listed the 'crimes' for which Indigenous people had evaded capture, except for Durgap and his son Garbung who had not been punished yet, due to a fear of retaliation. The deaths of two settlers, Peter Chidlow and Edward Jones, had been attributed by colonial authorities to the arrest of Durgap and Garbung.[41] Indigenous relatives feared that they would be executed.[42] Stirling's legal adviser, Advocate General and settler George Fletcher Moore, blamed the continuing violence on the arrests of Indigenous people under British law, writing in his private diary:

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35 Green, as above n 30, 120-2, 222; Letter from Bunbury to Colonial Secretary dated Aug 11 1837, CSO ACC 36, Vol. 55, Fol. 39, *The Swan River Guardian,* 3 Aug 1837, 213. *The Perth Gazette* 12 Nov 1836, *The Swan River Guardian* 6 July 1837, 198.

36 *The Perth Gazette* 13 May 1837, and 3 June 1837; J M R Cameron, (ed), *The Millendon Memoirs, George Fletcher Moore's Western Australia Diaries and Letters; 1830-1841*, (Victoria Park: Hesperian Press, 2006), 421; Hunter, above n 5, 61-64.

37 Francis Armstrong's report May 1837, SRO, CSO ACC 36; *The Swan River Guardian,* 8 June 1837, 185.

38 MacLeod's letter to the Colonial Secretary dated 7 July 1837, SRO, CSO ACC 36 Vol. 54, Fol 119; *The Perth Gazette,* 15 July 1837, messengers had been sent to York to find evidence for forthcoming trial for spearing Mr Heal and other acts.

39 *The Perth Gazette* 17 Dec 1836; Green, as above n 30, 122-123.

40 Meeting of Executive Council, 11 July 1837, CO 20/2, Reel 1118, 194.

41 *Millendon Memoirs*, as above n 37, 424.

42 *The Perth Gazette*, 19 August 1837; *Millendon Memoirs*, as above n 37, 429.

> Two other natives have been shot at York, which will render it more necessary to keep a look out here. It is understood that the two white men were murdered there merely because two natives were imprisoned, in obedience to the directions of the Secretary of State to act in all respects according to the English law. They speared a man through the head – luckily only through the jaws and tongue; then broke open a settler's house and stole his provisions. Well a warrant is regularly issued, and, in process of time they are taken, and their relations murder two white men immediately in consequence. We naturally defend our lives now, and thus vindicate the majesty of the law, but 10 to 1 we shall have an outcry in England that we should be called to account for it.[43]

Stirling proposed that two parties led by Lieutenant Henry Bunbury and acting Government Resident of York, Donald McLeod, (both recently appointed magistrates) be sent to York to 'apprehend offenders.'[44]

This expedition coincided with the first court cases held in Perth before the Chief Magistrate William Mackie in the first half of 1837.[45] Not only did Indigenous people resent being captured and taken to Perth, but many officials and settlers saw warrants under British law as ineffectual when it was more like a war.[46] Moore was particularly sceptical because of the problem of evidence. It was this difficulty in implementing British criminal law generally in relation to the conflict over resources, and fears of escalating violence if the settlers did not achieve a satisfactory solution that compelled Moore to write in his diary:

> …The five next graves to the one opened this day were of men murdered by the natives. The feelings of the settlers are just now greatly exasperated against them, and this sight did not tend to soothe them much. I want the Governor to apply to the Home Governor [sic] 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.[47]

However, settlers demanded action and Stirling was preoccupied with finding a solution to the more immediate crisis in York. The punitive expedition became more urgent and on 22 July 1837 Stirling issued a public notice informing settlers of the necessity of taking decisive measures.[48] The campaign led by Bunbury continued well into August. Moore remarks how Bunbury was 'particularly zealous' which had led to

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43 *Millendon Memoirs*, as above n 37, 427.

44 *Millendon Memoirs*, as above n 37, 427.

45 Eg; *The Perth Gazette*, 8 April 1837; *R v Boo-goon-gwert* Court of Quarter Sessions, 3 April 1837, SRO, CONS 3472/29.

46 *The Perth Gazette*, 29 July 1837, 945; Special meeting of Agricultural Society, 27 July 1837.

47 *The Perth Gazette,* 20 July 1837, 379.

48 *Government Gazette* 22 July 1837, *Perth Gazette* 15 July 1837, 937 and 22 July 1837, 940-1; Letter from CSO to Govt Resident, 9 July 1837, SRO, ACC 49/8, 691.

the 'complete intimidation' of the local Indigenous people.[49] Even though he acknowledged that evidence of Indigenous informants could not be legally used, Moore provided through Indigenous informants the names of no less than 42 Nyungar people of the area who were reported to have been involved in the deaths of the two settlers.[50]

The recently arrived European missionary, Louis Giustiniani criticised what he regarded as a contradiction between shooting Indigenous people in York and punishing others as if they were British subjects through the courts. Giustiniani arrived in the colony on 26 June 1836 to take up his appointment as missionary to Indigenes and settlers. He became increasingly unpopular in colonial circles, especially after he later teamed up with the editor of the radical anti-establishment newspaper *The Swan River Guardian* William Nairn Clark (a lawyer) to publicly criticise the colonial government and key officials in the small colony, in relation to the treatment of Indigenous people.[51]

Giustiniani called for a more positive view of Indigenous 'rights' and publicly criticised Stirling for his use of coercive force rather than prevention or education.[52] He reported military and settler attacks in York publicly through letters to *The Guardian*, including where Lt. Bunbury gave a 'shot of mercy' to an Indigene.[53] He urged Stirling to inquire into allegations involving settlers killing Indigenous people but these investigations failed to bring anyone to account.[54] His unpopularity for his public criticism of officials and the problems he experienced in the small colony led eventually to his return to England in February 1838, where he brought allegations of cruelty towards Indigenous people to the attention of the Colonial Office and the Aborigines' Protection Society.[55]

Even though the Secretary of State, Lord Glenelg, had warned against the liberal construction of the legalistic right of self defence, Stirling often failed to control settlers' actions when they argued self defence in protecting their property.[56] While Bunbury thought that soldiers and

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49 G F Moore, 'Brief Chronicle', *Journal of Agricultural and Horticultural Society*, Mitchell Library, 1842-3, xiv.

50 *Millendon Memoirs*, as above n 37, 429.

51 Michael J Bourke, *On the Swan: a history of the Swan District, Western Australia,* (Nedlands: University of Western Australia Press, 1987), 122.

52 Bourke, as above n 52, 122.

53 *The Swan River Guardian*, July 1837, 123.

54 Bourke, as above n 52, 126.

55 Hunter, above n 5, 106.

56 W Bunbury, and W P Morrell, (eds) *Early Days in Western Australia*, *Being the Letters and Journal of Lt H W Bunbury,* (London: Oxford University Press, 1930), 54; Glenelg to Stirling 19 June 1837, (No 61) SRO, WAS 178, CONS 41/2; Glenelg to Stirling, 23 July 1835, CO 18/14, Reel 300, 181-4.

magistrates acting under a form of martial law could validly shoot Indigenous people in certain circumstances, he did not necessarily think the settlers should do the same, and he was critical of Stirling's failure to deal with some of the settlers when they killed Indigenous people.[57] Bunbury attributed this tendency to the inability of the British law to fulfill its role, and particularly the problem of getting evidence against Indigenes, where they were the only witnesses when a charge of murder was made.[58] The punitive raids ordered by Stirling in the York area resulted in increased violence over the next few months, in which many Indigenous people were killed.[59]

A The Trial of Durgap

The trial of Durgap was postponed until after the expedition for fear of reprisals and was finally held in the first week of October 1837.[60] Instead of Durgap being charged with the attack on 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.[61] Giustiniani volunteered to defend Durgap at his trial before the Court of Quarter Sessions. Although he was not a lawyer, he was highly educated and had read Blackstone's Commentaries.[62] However, Mackie had anticipated any arguments regarding the jurisdiction of the court to hear the case, referring to Glenelg's instructions that Indigenes were to be tried as British subjects under British law.[63] In his opinion, the court had jurisdiction regardless of whether the legal basis for the annexation of the colony was occupancy or conquest, or whether the offender was or was not the subject of the territory. This was because of the practical need

57 Bourke, as above n 52, 126; Bunbury, H, *Book of Odds and Ends*, n.d, ACC327A, Battye Library (BL).

58 Bunbury, as above n 57.

59 Reports of McLeod and Bunbury SRO, CSO July 1839, ACC 36; H Bunbury, *Odds and Ends* (BL) which lists 11 Indigenous people killed at York, and *The Swan River Guardian* 16 November 1837, 249 where 18 Indigenous people were reported to have been killed. *The Swan River Guardian* 3 August 1837, 213: Giustiniani reported in August that some settlers were planning to shoot Indigenes. Letter from Giustiniani to Colonial Secretary dated 21 August 1837, SRO, CSO ACC 36, Vol 55, Fol. 48.

60 Other names for Derricap are Dergap, Derchap, Derharp, Derhaap, S Hallam, and L Tilbrook. (eds) *Aborigines of the Southwest Region 1829-1840*, *The Bicentennial Dictionary of Western Australia*, (Nedlands: University of Western Australia Press, 1990), Vol VIII, 58.

61 *R v Derricap or Durgap* Court of Quarter Sessions *Perth Gazette* 7 October 1837, 984-5; *The Swan River Guardian* 13 July 1837. Derricap appears in Fremantle lists from Jan to May - Tilbrook and Hallam (eds), as above n 61.

62 *The Swan River Guardian,* 13 July 1837, 202.

63 *R v Derricap or Durgap* Court of Quarter Sessions *The Perth Gazette*, 7 October 1837, 985.

for the settler to be confident that he could obtain satisfaction from the courts against Indigenous people or else he would be liable to take matters into his own hands.[64] A Petty Jury was then sworn in and Giustiniani attempted to introduce an Aboriginal witness on Durgap's behalf but Mackie ruled that 'the evidence of an Aboriginal witness was not admissible in the courts of law.'[65] However, his defence had little effect as Durgap was sentenced to seven years transportation beyond the seas.[66] His son Garbung had not been charged and was released whereupon he returned to his country around York.[67]

A couple of weeks after the trial Stirling instructed Moore to go to York, where Moore persuaded Garbung to act as an interpreter to convince the local Indigenous people he met along the way to give up their resistance.[68] Moore conveyed Stirling's instructions using the example of Durgap's capture and punishment as a warning to others of what would happen if they continue to resist settler encroachment on their land by 'stealing' sheep or attacking settlers.[69] On 23 October 1837, he reported:

> On my return to York having learned that a murderous hunting party consisting of about fifty men had encamped in the neighbourhood of Mount Bakewell, I sent a messenger requiring them to come in and hear what the Governor had desired me to say – only a few were found willing to obey the summons and amongst them I was glad to find the boy 'Garbung' above alluded to. In the meantime several had gathered from the South and from the East, and to them all I took the opportunity of saying that the Governor had desired me to ask "If the natives were now good, and if they would refrain henceforth from striking white men with the spear, or from stealing their property." Their immediate and reiterated [?] answer was "that the Noongar (Goongar) were now good, that they would spear no more, neither men, horses, cows, sheep, goats nor pigs, and that they would steal no more.
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> Then I said the Governor desires me to say "If the Noongar spear no more and steal no more, that he will shoot no more with the gun." They said "It is very good, the Noongar will spear no more, steal no more." Then they asked "if they might pick up or glean when the wheat is on the ground". I said "when the wheat is on the ground, ask the white men if you may pick up, if he says yes, then you may pick up, if he says no then you must walk away." I distinctly apprised them that such of the natives, as had been present at any of the murders of the white men, were not considered as friends, but that if they came to the white men, they would be taken away as 'Derhaap' had been taken.[70]

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64 *Perth Gazette*, as above n 62.

65 *Perth Gazette*, as above n 62. *The Swan River Guardian,* 13 July 1837.

66 As above n 62.

67 *Millendon Memoirs*, as above n 37, 432.

68 Moore to Colonial Secretary, 23 October 1837. Appendix (No 20) to Despatch from Stirling to Glenelg 29 December 1837, No 233, SRO, WAS 1180, CONS 342.

69 As above n 69.

70 As above, n 69; *Millendon Memoirs*, as above n 37, 433. Derchap/Derharp was the same person as Darricap/Dergap, Hallam and Tilbrook (eds), as above, n 61, 58.

The assertion of British political and legal authority over Indigenous people and their land was based on the attitude that they had no 'property,' as the land was not cultivated. This disregarded the significance of land to Indigenous peoples and subordinated their rights to be proprietors of their own land.[71] In September 1836 a proposal from Nyungar people around Perth to negotiate over their land had been rejected by the colonial government.[72] Its implication of an opportunity to find a solution to conflict over land and resources had been lost. Moore had advised Stirling that he believed that the British government should cover the costs of making agreements over a large region and not leave it to the settlers to pay for, or to 'conquer' Indigenous peoples.[73] The use of soldiers coupled with criminal punishment under overarching British legal authority, as a means of taking physical possession of Indigenous lands became a continuing practice. This failure would also lead to the use of colonial law to discriminate against nominal Indigenous British subjects under British law.

In May 1838, Stirling ordered Durgap's release as a reward for the restoration of peace in York.[74] By 1838 Stirling had announced his resignation as Governor and he left the colony in January 1839.[75]

V Hutt's Aboriginal Evidence Bill – Western Australia

John Hutt replaced Stirling as governor arriving in Perth on 1 January 1839, on the same day as Stirling's departure, which allowed them time to discuss the problems facing the Swan River Colony.[76] Hutt was more ideological than Stirling and a strong supporter of Edward Gibbon Wakefield's theory of systematic colonisation which involved raising revenue from the sale of land to settlers for an emigration fund. He was a strong believer in executive government control over policy and the development of legislation, having been a magistrate in Madras and a member of the East India Company, where he was exposed to

71 S Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23 (1) *Law and History Review*, 13.

72 A Hunter, 'Treaties? The impact of inter-racial violence in Tasmania on proposals for negotiating agreements with Aboriginal people in Western Australia in the early 1830s', [2006] ANZLH E-journal Refereed Paper No 10, 13. <http://www.anzlhsejournal.auckland.ac.nz.pdfs_2006/Paper_10_Hunter.pdf>.

73 Hunter, above n 5, 56, 201.

74 Letter from Colonial Secretary to Government Resident York dated May 17 1838, CSO ACC 49/8, Fol 353.

75 Pamela Statham-Drew, *James Stirling, Admiral and Founding Governor of Western Australia*, (Crawley: University of Western Australia Press, 2003), 371.

76 *Millendon Memoirs*, as above n 37, 458.

exceptionalist laws where Indigenous laws were to some extent a feature within an overarching British legal authority.[77]

In 1838, Hutt received instructions from the Colonial Office that Indigenous peoples were to be treated as 'British subjects' and fully amenable to and protected by English law, and he enthusiastically read a copy of the Aborigines Committee Report on the long voyage with a view to seeing whether it could be applied to colonial policy regarding Indigenous people in Western Australia.[78] Hutt and the new Governor of South Australia, George Gawler, were also briefed in a meeting with the Aborigines' Protection Society in London.[79] Moore continued as the Governor's legal adviser and would have informed Hutt of his interpretation of Glenelg's instructions on the application of British law.[80] He had expressed his opinion that the instructions should be subject to 'many qualifications' where Indigenes should be considered amenable to British laws only so far as it was necessary to protect the lives, persons and property of British settlers from 'molestation' within the 'pale' or boundary of European settlement.[81]

Hutt had arrived at a time when settlers demanded action to control the conflicts that were taking place in the Upper Swan and York.[82] During the first few months Hutt received reports from colonial officials and settlers of increased thefts of sheep by Indigenous people which resulted in increased warrants and arrests.[83] The problem of legally obtaining evidence from Indigenous people soon became apparent and became the major impetus for the push for Evidence legislation in order to arrest Indigenes and punish them for theft. By April 1839, Moore reported in his diary that Indigenous people were getting increasingly distressed at the

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77 A C Staples, 'John Hutt' in D Pike (ed) *Australian Dictionary of Biography*, Vol. 1, (Melbourne: Melbourne University Press, 1966), 575-7.

78 P Cowan, *A Colonial Experience: Swan River 1839-1888, from the diary and reports of Walkinshaw Cowan, secretary to Governor Hutt - clerk of the Councils, Perth, guardian of Aborigines, resident magistrate, York*, (Claremont: P Cowan, 1978) 5; Colonial Office Instructions to Hutt, 23 July 1838, SRO, ACC 621/1.

79 Aborigines Protection Society, *Second Annual Report of the Aborigines Protection Society presented 21 May 1839*, 15.

80 J M R Cameron, 'George Fletcher Moore' in B Reece (ed), *The Irish in Western Australia, Studies in Western Australian History*, Vol 20, 2000, 21-34.

81 Minutes of Executive Council 21 July 1838, CO 20/2, Reel 1118, 271-2.

82 Letter from Smithies to Wesleyan Missionary Society dated 18 Jan 1841 157 in Appendix of W McNair and H Rumley, *Pioneer Aboriginal Mission*, (Nedlands: UWA Press, 1981) reported that the Cook killings were in retaliation for the death of the wife of Ngy-lam by a party of white persons. However, Bland (resident of York) reports that they were in revenge for sending down the son of 'Hyam' to take his trial for sheep stealing. Letter to Colonial Secretary dated 6 July 1839, SRO, CSO ACC 36.

83 Bland to Colonial Secretary, SRO, CSR, ACC 36, Vol.74, 107, 111, 114.

number of their own being arrested for 'drawing away sheep' with eight taken prisoner and the issue of seven warrants against others.[84] In any event, Hutt's enthusiasm for working out if Indigenous laws and society could be accommodated by an overarching British legal authority soon gave way to settler demands for their stock and persons to be protected by government policy, and by May 1839 (just five months after his arrival) Hutt reported back to the Colonial Office that he did not believe that Indigenous people could be equal with settlers under British law.[85]

Hutt was also heavily influenced by the recommendations of the Aborigines Committee Report of 1837, particularly those relating to the gradual application of British criminal law and the role of the Executive Government in controlling not only the kind of legislation that was made but also the protectors.[86] In the same dispatch he urged the British government to finance and provide protectors for Western Australia as soon as possible to mediate between settlers and Indigenous people within towns.[87] However, settlers' and magistrates' demands for the imposition of rules to control Indigenous people took priority. In May 1839 Hutt proposed to the Colonial Office that a local Act be passed that would allow unsworn Indigenous testimony, and which would give magistrates sweeping powers to summarily punish Indigenous people for theft of settlers' stock, which he acknowledged would be contrary to the Colonial Office policy of equal legal status.[88]

The objective of the proposed Act was that two or more Justices would try Indigenes for certain offences summarily and without trial. Its primary purpose was to provide for Indigenous evidence where Indigenes were the only parties or witnesses at the scene of a theft of property or attack on a European.[89] Their evidence could lawfully be taken on affirmation before a magistrate or in court, whether the offence was committed by an Indigene or a colonist.[90] Where the inquiry was preliminary to the trial, the evidence of an Indigenous witness or complainant could be taken

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84 *Millendon Memoirs*, as above n 37, 462.

85 Hutt to Glenelg 3 May 1839, BPP, *Papers relative to Aborigines, Australian Colonie*s, (1844) IUP 1968, 363.

86 As above n 84; Hutt to Russell dated 10 July 1841, 392.

87 Two protectors whose salaries were funded by the British Government arrived in WA in early 1840; Hutt to Glenelg, 3 May 1839, and Hutt to Normanby, 11 Feb 1840, BPP, *Papers relative to Aborigines, Australian Colonies* (1844), IUP, 1968, 365, 371; *The Perth Gazette* 26 Oct 1839, 171.

88 Draft of a proposed Bill to enable the Magistrates to receive the Evidence of the Aborigines of Western Australia in certain cases, Enclosure to Despatch from Hutt to Glenelg, 3 May 1839, 366.

89 As above, n 89.

90 As above, n 89.

down in writing and verified by a Justice of the Peace and then used in the trial. An individual did not have to appear in court as they would if they were a European or 'natural born subject.'[91] Hutt explained that this was required in case Indigenous people could not be found at some future date, which he attributed to their erratic habits.[92]

The proposed Bill (which would be introduced into the Legislative Council in July 1840 without significant alteration) would provide magistrates with a great deal of discretion to decide whether an offence was considered serious enough so as to deserve a 'greater degree of punishment', and if it was serious then they could refer the matter to the Court of Quarter Sessions.[93] Magistrates could award prison terms of up to one year or 'whipping' for minor offences.[94] The types of offences that Hutt envisaged were 'robbing hen-roosts, plundering gardens or wheat-stacks, or stealing a stray pig or sheep'.[95] His rationale was that punishment for theft was less severe than for other offences such as seven years transportation for sheep stealing. The question of theft he realised was because Europeans had deprived Indigenous people of their 'game and hunting grounds' and was not something for which Indigenous people should be shot.[96] However settlers such as Charles Bussell in the remote Vasse region did not share this view, arguing that the 'smallest infringement' against property should be punishable by 'death.'[97]

The punishment was intended to be administered immediately in the region where the event occurred so that people need not be sent to Perth for trial which Hutt considered was more likely to result in 'retribution' from other relatives.[98] This would avoid lengthy detention prior to a trial; however there was no reference to the building of regional gaols that imprisonment would require. The proposal of whipping for male Indigenes by magistrates for 'minor offences' was intended to replace the practice in the mid to late 1830s by settlers of administering their own arbitrary form of summary punishment without a magistrate.[99] Hutt justified his proposal (knowing that the departure from the equality principle would not be well received

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91 As above, n 89**.** Hutt used the term 'natural born subject' in his draft. It was also included in the Aboriginal Evidence Act 1840 but taken out in the Aboriginal Evidence Act 1841.

92 Hutt to Glenelg, 3 May 1839, as above n 89.

93 As above n 89, 366.

94 As above, n 89.

95 Hutt to Glenelg, 3 May 1839, 363-7; Hutt to Russell, 19 August 1840, 373-77.

96 Colonial Secretary to Advocate General, 2 July 1839, CSR, SRO, ACC 49/12, .230.

97 R Jennings, *Busselton 'Outstation on the Vasse' 1830-1850*, (Busselton: Shire of Busselton, 1983), 186-189; E O G Shann, *Cattle Chosen, The Story of the first group settlement in WA, 1829-1841*, (WA: University of Western Australia Press, 1978), 93, 178.

98 Hutt to Glenelg, 3 May 1839, 363-7; Hutt to Russell, 19 August 1840, 373-77.

99 Hunter, above n 5, 131, 298.

in England) by stating that this form of punishment was more suited to the 'habits and disposition of these people.'[100]

Hutt's views were not unlike that of the Aborigines Committee's recommendations in that he believed that less 'civilised' people required laws that 'must, in some instances, be made to assume an exceptional form, so as to adapt them to the character and condition of those, with whom we have to deal'.[101] This was broad enough to include a range of laws that were primarily not concerned with promoting equal rights or Indigenous rights but asserting colonial legal authority and power. The preference was for a modified British criminal law rather than the incorporation of Indigenous laws which were regarded as valueless unless they were similar to British laws. Hutt briefly considered the question of formal recognition but had disregarded Indigenous laws as part of the colonial legal system. Instead he drew a hypothetical circle around colonial settlements where modified English criminal law would apply in relations between Indigenous people and settlers with the focus on settlers' lives and property, rather than laws to ensure that Indigenous people had their own legal personality in their dealings with settlers.[102] However, during the early 1840s there would be little interference by colonial law to control what were regarded as Indigenous people's private matters among themselves. Indigenous laws were tolerated as a form of legal pluralism outside colonial settlements particularly where it was impractical to enforce British law among Indigenous peoples.[103]

VI Civil Cases

Hutt's proposal, therefore, did not include the civil law which he considered to be the 'offspring of civilization.'[104] Even though Indigenous people were in theory considered British subjects, their exclusion from the application of civil law was justified on the basis that Indigenous societies were deemed not to possess anything like English civil law, except for rules regarding criminal punishment. The instruction of Indigenous people by protectors did not extend to informing them of their full civil rights as British subjects, (including suing for land rights

100 Hutt to Russell 19 August 1840, British Parliamentary Papers, *Papers relating to Aborigines, Australian Colonies* (1844) IUP, 1968, 374.

101 Hutt to Russell dated 20 January 1842 AJCP, CO 18/33, Reel 432.

102 Hutt's notations, Russell to Hutt, 8 October 1840, SRO, CONS 41 WAS 1178/4, 69.

103 Hunter, as above n 4, 363- 369; A Hunter, 'The Boundaries of Colonial Criminal Law in relation to inter-Aboriginal conflict ('Inter Se Offences') in Western Australia in the 1830s-1840s', in (2004) 8(2) *Australian Journal of Legal History*, 215-236.

104 Hutt to Glenelg, 3 May 1839, British Parliamentary Papers, *Papers relative to the Aborigines, Australian Colonies*, IUP, Vol 8, 1844, 363-4:

through the courts) but was limited to that which did not interfere with settlers' own rights.[105]

Indigenous people could not complain before the courts about the denial of their access to the civil law or sue for Indigenous land ownership under the British legal system. Even though the Aborigines Committee criticised the lack of legal recognition of Indigenous land rights it did not recommend that Indigenous people should be able to sue for their land rights. Rather it recommended the gradual application of the British criminal law to Aboriginal British subjects. Hutt pushed for a modified criminal law, pointing out to the Colonial Office in May 1839 that:

> As subjects with ourselves of one and the same sovereign, justice and humanity require that they should participate with us in the benefit of the leading principles of the English constitution, perfect equality before the law, and full protection of their lives and liberties; I cannot add properties, because the only substantial property they ever did possess is the soil, over each separate portion of which some individual claims an inherited right, and of this we have long ago divested them, not being aware of such claims.[106]

Hutt was not simply departing from this principle of equality before the law but also discriminating on the basis that Indigenous people did not have suitable laws that could be recognised by the colonial authorities, especially when it came to settlers' demands for their property to be protected.This was convenient because as Hutt would later acknowledge, settlers resisted the legal capacity for Indigenous people as British subjects to be able to sue for their land rights, which accounted for the absence of court cases contesting rights to land.[107]

Hutt had doubts about whether the British government had divested Indigenous peoples of their property rights at the time of colonisation, acknowledging but at the same time downplaying the priority of those rights in favour of those of the 'intruding' or 'invading' settlers.[108] He acknowledged that it would be strange if Indigenous people (were as a consequence of any formal equality) be able to sue for their legal rights in civil courts. He added that 'it would be in strange opposition to the hold which the Crown assumes to possess over the lands of the country, if the right of one of them was to be admitted to bring an action for the recovery of a property, which had been disposed of by the Government to a colonist.'[109] This was largely because of

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105 Hutt to Stanley, 8 April l842, 411-2 BPP, *Papers relative to the Aborigines, Australian Colonies*, IUP, Vol 8, 1844, 387-389.

106 Hutt to Glenelg, 3 May 1839, BPP, *Papers relating to the Aborigines*, IUP, 1844, 364.

107 Hunter, as above n 5, 189-236.

108 As above, n 107, 366.

109 Hutt to Russell dated 15 May 1841, Hutt to Russell 10 July 1841, *Papers Relative to the Aborigines, Australian Colonies, British Parliamentary Papers*, 380-2, 392-393.

the problems that it would cause the government and the settlers, raising economic, political and legal issues that continue to the present day. In 1841, Hutt rejected the concept of reserves proposed by the Secretary of State, Lord John Russell, where Indigenous people could cultivate the ground because he believed that the reserves would only be valuable to Indigenes as hunting grounds and even then he had concerns that settlers would resent the use of prime agricultural land for this purpose and force the government to move the reserves.[110] Instead he regarded that adequate compensation would be provided by the provision of education and labour to Indigenous people which was in a time of scarce labour shortage in the colony more likely to be amenable to the colonists. It was far better to offer compensation in the form of education and employment (which was consistent with his systematic colonization and amalgamation ideals) with the rights of equality under the law being modified to please the settlers, than to confront the question of Indigenous rights from an Indigenous perspective. There was also the added complication of resolving Indigenous land claims which Hutt thought would be too difficult.[111]

The purpose of the *Aboriginal Evidence Act 1840* (WA) allied to summary punishment provisions in effect would serve settler interests and narrow the application of British law to particular issues of concern to them.[112] Unlike 'natural born subjects' (which Blackstonian term was used by Hutt to refer to the Europeans in the draft bill he sent to England) who were eligible to give evidence in court, an Indigene's evidence did not carry the same weight, with the 'degree of credibility' of their evidence to be decided by the Justices or Court and all white Jury.[113] Their evidence had to be supported by 'strong corroborative circumstances,' which relied on corroboration by Europeans**.** Any affirmation perceived to be falsely made was punishable by a jail sentence.[114]

Hutt wanted magistrates to have increased power to impose summary punishment in order to prevent the settlers relying on the legal right of self-defence, when they shot at Indigenous people who took their provisions or livestock. In his despatch to Glenelg, Hutt argued that while

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110 Hutt to Russell 15 May 1841, as above n 110, 381-2.

111 As above n 111, 382-3.

112 No 4 Vic No 8, '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'.

113 Enclosure in No 1, Draft of a proposed Bill to enable the magistrates to receive the Evidence of the Aborigines of Western Australia in certain cases, Hutt to Glenelg, 3 May 1839, BPP, *Papers relating to the Aborigines*, (1844) IUP 1968, 366.

114 As above, n 114, 364-66.

the proposed bill might appear to be 'coercive' towards Indigenous people (and not equal), he viewed it as a form of protection which would prevent settlers taking the law into their own hands for losses of their property by 'exterminating the weaker party.'[115] In what appears as a secondary consideration, Hutt added that it would also have the 'additional possible advantage to the native that he may obtain from Europeans, for injuries inflicted, that redress, which as the law stands at present is entirely out of his reach'.[116]

The draft bill was sent to England in May 1839 and received in principle support from the new Secretary of State, Lord John Russell, on 29 October 1839.[117] Russell made very little comment on Hutt's proposal, except to approve the concept of an Evidence Bill, but what he did say in relation to the new decentralised summary powers of magistrates was significant. While he gave in principle support for a Bill, he insisted on the inclusion of a clause stating that sentencing not be implemented until the legally trained chief judge of the colony had before him the evidence of the case and confirmed the sentence.[118] The reason for this addition can be found in a note on the file that was not relayed to Hutt where Russell noted that: 'the larger question of Aboriginal tribes cannot be dealt with in this cursory way.'[119] Russell's comment demonstrates some concern with the purpose of the legislation and its application of a discriminatory decentralized summary punishment system to Indigenous people, by punishing Indigenous tribes as individuals who having little contact with Europeans could not be expected to understand their rights or obligations under British law.[120] However, Hutt ignored the recommendation when instructing Moore to draft up the 1840 local Bill, arguing that it was impractical to implement due to the large distances involved.[121]

By mid 1839 the conflict over land and resources in York had escalated. Magistrate R. H. Bland reported to Hutt of the difficulty in catching suspects and obtaining convictions because of the inability to procure Indigenous evidence under British law, when the only witnesses had been Indigenes.[122]

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115 As above, n 114.

116 As above n 114, 365.

117 Russell to Hutt, 29 October 1839, *Papers relating to Aborigines*, 367.

118 As above n 118, 367.

119 Russell, Memorandum to J Stephen and R Vernon Smith, 19 October 1839 on the back of dispatch from Hutt to Glenelg, 3 May 1839, PRO, CO 18/22,232-3.

120 Hunter, as above, n 5, 166.

121 Hutt to Russell 11 February 1840, 372-3.

122 Letter to CSO dated 20 May 1839 ACC 36, and 4 November 1839, SRO, ACC 36, Vol. 74, Fol 125. Hutt had issued a list of seven names of those who had been present at the murder based on information provided by an Aborigine. Letter dated 13 Jun 1839, CSO Acc 49/12, Fol 341. In July 1839 Hutt ordered a wide search of the country without success. *The Perth Gazette,* 13 July 1839.

Hutt regarded theft as a different situation to murder requiring less severe steps than when a European was killed which warranted immediate action. In relation to the situation where settlers were killed by Indigenes near York, Hutt improvised by developing rules in response to demands by Bland.[123] Hutt replied that where 'native evidence was borne out by circumstantial testimony such as have no reasonable doubt, in a magistrate's mind, of a party accused, being at least a participator 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.'[124] When Indigenous people were apprehended for particular offences based on this new policy, the problem of the legal validity of charging and convicting accused relying solely on Indigenous evidence remained. Hutt later acknowledged the illegality of this process when he introduced proposals for Evidence legislation.[125] The legality was put to the test during the prosecution and trial of two Indigenous men charged with the wilful murder of Sarah Cook and her infant child on July 1 1840.[126] Despite concerns expressed at the lack of European evidence, reliance was placed on Doodjeep and Barrabong's 'confessions' which were accepted as evidence in the trial, which resulted in them both being sentenced to death for wilful murder. There was renewed impetus for an Evidence bill to be passed but not before they were convicted largely based on their alleged confessions.[127]

There was a corresponding push in England to promote an Aboriginal Evidence Act after reports of violence against Indigenous people in Australia (including Giustianiani's allegations) galvanised the Aborigines Protection Society(APS), first locally and then to press for an Imperial Act.[128] By 1839 the APS had received reports from other parts of Australia, (including the McKail example) which demonstrated the lack of justice for Indigenes under British law and the various massacres of Indigenous

123 By July 1839 Hutt likened the conflict in York to a 'declaration of war as for civilised people' letter from CSO to Resident York 8 July 1839 Acc 49/12; Letter to Moore 2 July 1839, SRO, CSO ACC 49/12. On February 1, 1839 Bland had reported the spearing of a bullock by an Aborigine which he had learned solely from Aboriginal witnesses. In response Hutt wrote a notation on the file was: 'To take evidence from natives on the point and if he thinks such evidence deserving of credence to apprehend offenders…' SRO, CSO ACC 36, Vol 74/107.

124 R H Bland was Government Resident of York in 1839. 23 May 1839, SRO, CSO ACC 49/12.

125 Legislative Council 6 August 1840, *The Inquirer* 12 August 1840, 7.

126 *R v Doodjeep* and *R v Barrabong*, Court of Quarter Sessions, 1 July 1840. *The Perth Gazette* 4 July 1840. Both Doodjeep and Barrabong were found guilty and sentenced to be 'hanged in chains on the scene of the murder.' They were both executed a week later. *The Perth Gazette,* 11 July 1840.

127 *The Perth Gazette* 16 May 1840, 6 June 1840; Executive Council Minutes No 22, 2 July 1840, 41.

128 Hunter, above n 5, 20-21.

people on the frontier that were taking place.[129] They assumed somewhat naively that the legislation would empower Indigenous people to bring complaints against Europeans.

VII The Debates In The Legislative Council On Aboriginal Evidence Acts In Western Australia

For the first time in October 1839 Hutt told the Legislative Council that he had sent a proposal to the Colonial Office because of the difficulties of implementing British law according to what he described as 'strict justice,' or equality under British law as Glenelg had instructed him to do.[130] He argued that it was required in order to balance settler demands to protect their property with what he termed the 'principles of the British legislature.'[131]

After Hutt had received the Colonial Office response, he formally introduced the Bill in the Legislative Council in July 1840 shortly after the Cook trial.[132] Even though the New South Wales Evidence Act had been passed in October 1839 (and awaiting royal assent) and published in the local *Perth Gazette* by this stage, there was little change to the Western Australian Bill which was similar to Hutt's original proposal, except that the maximum sentence of imprisonment had been changed to six months.[133] The Bill would expand the power of magistrates and legitimise their actions. Hutt added that

> it was necessary to shew [sic] 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.[134]

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129 APS, *Second Annual Report*, 21 May 1839, 16; Hunter, as above, n 5, 108-109.

130 Minutes of the Legislative Council 23 October 1839, *The Perth Gazette* 26 October 1839, 171.

131 As above, n 131, 171.

132 Introduced to the Legislative Council in July 1840, Second reading 6 Aug 1840, *The Perth Gazette* 8 August 1840.

133 *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.'This was passed by the NSW parliament on 8 October 1839 but not approved in England. Unlike the Western Australian Evidence Act 1840 it was not put into local operation pending approval from England. It therefore was not operational (until 1876 when an NSW Act was successfully passed and given assent). N Wright, 'The problem of Aboriginal evidence in early colonial New South Wales' in D Kirkby and C Coleborne (eds), *Law, history, colonialism: the reach of Empire*, (Manchester, 2001), 140-155.

134 Legislative Council meeting dated 6 August 1840, *The Inquirer*, 12 August 1840, 7.

Although Moore and Hutt believed that the legislation would specifically address situations where Indigenous people were to give evidence where they were the only witnesses, and where settlers' lives or property were at risk, Hutt also intended it to benefit Indigenes who might bring complaints against Europeans under criminal law. Hutt also anticipated that the Act would apply to protect Indigenes who were employed or living with settlers from attacks by others.[135] As it was intended as an experiment for two years and had been canvassed by Hutt in the previous year, it received little opposition, except from magistrate and wealthy settler William Tanner who was concerned at possible abuses by untrained magistrates.[136] Hutt replied that the magistrates would act as protectors, to prevent such abuses.[137] The Surveyor-General, John Septimus Roe, and one of the richest settler's, lawyer George Leake, applauded the Act on the basis of how successful the summary punishment provisions had been in controlling Indigenous people.[138]

The settler newspaper, the *Inquirer* was established in August 1840, as a 'guardian of the public,' and the editor took a special interest in the local Act.[139] While the editor made little comment on the summary punishment provisions, he strongly opposed the inclusion of unsworn Indigenous testimony in court on moral grounds.[140] He objected to what it regarded as the dangerous precedent of allowing Indigenous people to give evidence against Europeans, even if in practice this may not occur. There was no reference to the practicality of implementing the legislation other than to the impracticality of expecting sworn interpreters (of whom there were few) to take depositions from Indigenous people in the regions.

The local Act was passed with little debate by the Legislative Council on 13 August 1840.[141] However, it was in operation for little more than a year

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135 Hutt refers to this in his later despatches to Russell dated 10 July 1841 and 20 Jan 1842, BPP, *Papers relative to the Aborigines, Australian Colonies*, 399.

136 Legislative Council meeting 6 August 1840 reported in *The Inquirer*, 12 August 1840, 7. The Act was passed on 13 August 1840 as No 4 Vic No 8, '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'.

137 Hutt to Russell 20 Jan 1842, BPP, *Papers relative to the Aborigines, British Colonies*, 399; Report of Legislative Council, 6 August 1840, *The Perth Gazette*, 8 August 1840; *The Inquirer*, 12 August 1840, 7.

138 Legislative Council meeting 26 November 1841, SRO, WAS 1250, CONS 311/1, 45-49; *The Inquirer,* 1 December 1841, 4-5.

139 *The Inquirer,* 5 August 1840, 2.

140 *The Inquirer,* editorial 19 August 1840, 26 August 1840, 14.

141 See Minutes of Legislative Council dated 13 August 1840, *The Perth Gazette*, 22 August 1840, 8 August 1840 and 29 August 1840. The copy of the Act published in the *Perth Gazette* on 22 August 1840 had the date of passage as 2 July 1840 but the Act had been passed at the Legislative Council meeting of 13 August 1840. *The Perth Gazette*, 8 August 1840.

before news was received from the Colonial Office of its disallowance.[142] By this time the New South Wales Evidence Act 1839 had been rejected by legal officers on the basis that it was contrary to British jurisprudence.[143]

VIII The Colonial Office Response

The new Secretary of State Lord John Russell objected to the Act on the basis that it departed from principles of formal equality under British law. Russell (and permanent undersecretary James Stephen) particularly objected to the linking of an Evidence Act to a system of summary punishment that delegated increased power to untrained magistrates and which discriminated against one group on the basis of 'national origin.'[144] He also objected to the exclusion of the application to civil cases; and the inclusion of a statutory prescription on the extent to which the judge and jury could deduce the worth of the evidence.[145]

Russell encouraged the re-submission of the Act but strongly rejected the concept of summary punishment and particularly flogging, which he saw as discriminating against Indigenous people by establishing an 'inequality in the eye of the law itself between the two classes.'[146] He added:

> I more decidedly object to the summary jurisdiction of any two justices of the peace, in the case of aborigines, especially connected as it is with the power of whipping. So great is the difficulty of legislating aright for the protection of savage tribes living in juxta-position with a race of civilized men, that it is not without great hesitation that I object to any attempt made for that purpose, especially when conceived, as in the present instance, in the spirit of humanity and zeal for their welfare. Yet I must observe, that the delegation to justices of the peace of summary powers of punishment over the inferior race, from which the colonists of European descent are to be exempted, is a measure dangerous in its tendency, as well as faulty in principle. 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. It is wise to sacrifice some immediate convenience with a view to maintain the general principle of strict legal equality, because, in the continued

142 Russell to Hutt dated 30 April 1841 which was received towards the end of 1841. Reply by Hutt to Russell acknowledging the receipt of the despatch and sending a new Act was dated 20 Jan 1842. BPP, *Papers relative to Aborigines, Australian Colonies*, (1844) IUP 1968, 377, 398.

143 R Smandych, 'Contemplating the Testimony of 'Others': James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa, 1839-1849.' (2004) Vol 8, *Australian Journal of Legal History*, 253.

144 Russell to Hutt, as above n 143, 377-8; Russell to Vernon Smith PRO, CO 18/25, 257; J. Stephen to Vernon Smith on handwritten copy of Despatch from Hutt to Russell, 19 August 1840, Public Records Office (PRO London), CO 18/25, 260- 265.

145 As above, n 143, 378.

146 As above n 143, 378-9.

> 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.[147]

Hutt did not consider that such prejudice entrenched in law would present a barrier to his longer term plan for 'amalgamation' of Indigenous people as a class of colonial society, whereas Stephen and Russell believed that the education of settlers was required and that this was unlikely to be achieved by changing British law in this way.[148] Stephen had his own ideas about the effect of prejudice on the minds of colonists and how ensuring the equal treatment of Indigenous people and settlers under British law would be more likely to lead to amalgamation (with the assistance of missionaries) to act on the minds on both parties.[149] He had been requested to provide written advice on the local Aboriginal Evidence Act and elaborated on his concerns.[150] Unlike Hutt, Stephen did not equate ignorance of the law with a lack of religion or culture as a basis for denying Indigenous people the ability to give evidence in court. Russell replied to Hutt

> 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.[151]

In relation to civil cases, Russell 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.'[152] He did not give an example but it is clear that the inclusion of civil cases was consistent with the principle of equal legal status. The disallowed Act was redrafted along the lines required by the Colonial Office, and reintroduced by Hutt without the summary punishment part. Stephen's influence was instrumental in the resulting removal of the clause which required that Aboriginal unsworn testimony be corroborated from other sources, so that what remained was the requirement for the degree of credibility to be attached to the evidence to be decided by Court and jury or Justices of the Peace.[153]

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147 As above, n 143.

148 Hutt to Glenelg, 3 May 1839, BPP, *Papers Relative to the Aborigines*, 363-4.

149 Memorandum from J Stephen to R Vernon Smith 17 October 1839, CO 18/22, Reel 426, 244.

150 As above, n 150.

151 As above, n 143, 378.

152 As above, n 143, 379; Stephen to Russell and Vernon Smith, 5 April 1841, PRO, CO 18/25, 260-265.

153 An Act to allow the Aboriginal Natives of Western Australia to give information and Evidence without the sanction of an Oath, 26 November 1841; 4 & 5 Vic No 22 Section 3; Acts of Council B 1832-1853, UWA Law Library.

IX THE SECOND ABORIGINAL EVIDENCE ACT

In November 1841, Hutt presented a revised Bill to the Legislative Council which incorporated the Colonial Office's amendments.[154] Hutt expressed his disappointment about the exclusion of summary punishment provisions and continued to push for their endorsement but to no avail.[155] By this time, Chief Magistrate William Mackie, who supported the legislation, had replaced Tanner as an unofficial member on the Council and Richard W. Nash had replaced Moore as Acting Advocate-General. Nash strongly thought that the Bill had gone too far.[156] While he argued that the new Bill was contrary to the fundamental principles of evidence, his main objection (similar to that of two other Legislative Council members, Septimus Roe and George Leake) was the perceived advantage that it would provide to Indigenes over settler interests.[157] The only concession that he gave was the necessity for British law to protect their physical security 'affording them the protection which was due to human beings' but only in a very limited sense.[158] To Nash's mind these were the only rights that Indigenes possessed, that is, 'the admission for a short period of the assertions of the savage to a very limited degree of credence in matters affecting the only rights they possessed, namely, those of personal safety,' which was only intended in 'compassion to their condition.'[159]

The Legislative Council strongly objected to the application of the Bill to civil cases. Mackie was not worried as he stated it was unlikely to be applied in practice.[160] Hutt persuaded the Council that the Colonial Office was unlikely to change its mind and that it would be necessary to accept unpalatable provisions in order to get the Bill passed. The Act was passed by the narrowest of margins with the deciding vote of Hutt who concluded that it was more important than not having it at all. The Editor of the *Inquirer* expressed his disappointment at the result as it had strongly opposed the amendments and objected to the interference of 'Exeter Hall.'[161]

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154 'Bill to allow the Aboriginal Natives of Western Australia to give information and Evidence without the sanction of an Oath.'

155 Hutt to Russell, 20 January 1842. Hutt had urged the Colonial Office to reconsider. Summary Trial and Punishment of Aborigines Act 1849 12 Vic No 18. BPP, *Papers Relative to the Aborigines, Australian Colonies*, 398-400.

156 This occurred in 1841. E Russell, *A History of the Law in Western Australia*, Nedlands, 1980, 37-8. *Government Gazette* 15 Jan 1841 No 234.

157 Minutes of the Legislative Council for 26 November 1841; *The Inquirer*, 1 December 1841, 4-5; *The Inquirer*, 8 Dec 1841.

158 *The Inquirer*, 1 Dec 1841, 4-5.

159 *The Inquirer*, 8 Dec 1841.

160 *The Inquirer*, 1 Dec 1841, 5.

161 *The Inquirer*, Editorial, 24 November 1841, 2; The *Aboriginal Evidence Act 1841* (WA) was continued by 7 Vic No 7, 1843 which lasted for five years.

Unlike the *Aboriginal Evidence Act 1840* (WA) which focused on the application of summary punishment provisions to Indigenes and which relied more on corroborative evidence by Europeans, the operation of the second *Aborigines Evidence Act 1841* (WA), (in combination with Hutt's policy of directing investigations into attacks by Europeans on Indigenes), resulted in a number of prosecutions and convictions of Europeans.[162] There was also the rare case when an Indigene prosecuted a European for his wages in the Court of Requests.[163] However this relied on the magistrate allowing this to happen and providing the environment by which Indigenous complaints could be heard. In practice most disputes relating to employment were more likely to be resolved informally.[164]

There were other inequities in the legal system, including the prejudices of white juries whose interests weighed against a just result.[165] Despite Hutt's policy of not interfering in conflicts *inter se* (intra-Indigenous conflict), the Act was increasingly used where Indigenous individuals were charged with killing other Indigenous persons who were under the protection of a settler.[166]

X THE IMPERIAL ACT

Russell and Stephen were not happy with their Law Officers' advice that local Evidence Acts were contrary to British jurisprudence as this was not consistent with their policy, which was the main reason why the *Aborigines Evidence Act 1841* (WA) had been rejected.[167] Stephen was heavily involved in drafting an Imperial Bill that would get around this obstacle.[168] In addition the Aborigines' Protection Society had anticipated the disallowance of the Western Australian Act on grounds similar to those

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162 For example, the Evidence Act 4 and 5 Vic No 22 was referred to in the *Perth Gazette*, 6 January 1844, 2 reporting the case *R v Steel* in the Court of Quarter Sessions of 3 Jan 1844. William Steel was a victualler, and Elup (a Ballaroke), was about 16 years old at the time and in 1840 at 14, had attended Rev Smithies Sunday school. Steel was charged with assaulting Elup on Elup's evidence, and convicted by a jury. However, he was only given a fine of 5 pounds. See Tilbrook and Hallam, *Aborigines of the South West region, 1829-1840,* 110.

163 Hunter, as above n 5, 181.

164 Hunter, as above n 5, 181.

165 This was recognised in 1837 by Giustiniani (see for example, *Swan River Guardian* July 1837), Lawyer, Nairn Clark (letter to Secretary of State dated 15 December 1841 CO 18/30, Reel 431, Fol 142) and Hutt. Hutt to Glenelg dated 3 May 1839, British Parliamentary Papers, *Papers relating to Aborigines, Australian colonies* (1844) IUP, 1968, 364.

166 *R v Wilbeer*, The Court of Quarter Sessions, 1 April 1842; *The Perth Gazette,* 9 April 1842.

167 R Smandych, as above, n 144, 271; Hunter, as above, n 5, 176.

168 As above n 144, 271.

of the New South Wales legislation and continued to press the Colonial Office for an Imperial Act.[169] This finally took place with the enactment of an Imperial Act that provided the power for local legislatures to enact their own evidence legislation in 1843.[170] By August 1843 Hutt had already enacted an Act that extended the operation of the *Aboriginal Evidence Act 1841* by five years and in March 1844 the Imperial Act had been accepted by the local legislature.[171] This was the APS's only real success in getting imperial based legislation implemented.

It was not until April 1849, after the *Aboriginal Evidence Act 1841* (WA) had lapsed and its resurrection was being considered, that the question of its application to civil cases was again raised in the Legislative Council, which referred to examples of evidence legislation in New South Wales and South Australia.[172] Leake informed the new Governor, Gerald Fitzgerald, that Indigenous labour was now so important that an Indigene may want to sue for his or her wages under the law.[173] The first census which included Indigenous people in October 1848 states that 541 people were casually or regularly employed out of an estimated population of 1960 in the 'located districts'.[174] This was in a settler population of 4430.[175]

Mackie was more concerned about a summary punishment Act and correctly discerned a change of attitude by the British government,

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169 Aborigines Protection Society, *Extracts from the Papers and Proceedings*, Vol II, No VI, December 1841, 169-70. Stanley to Hutt dated 15 Feb 1843, British Parliamentary Papers, *Papers relating to Aborigines, Australian Colonies*, 401-2.

170 The imperial Act 6 Vic Ch 22 –was an 'Act to authorise the Legislatures of certain of Her Majesty's Colonies to pass Laws for the Admission, in certain Cases, of unsworn Testimony in Civil and Criminal Proceedings.' *The Statutes Revised Edition*, Vol IX, 1843-1846, UWA Law Library. Hutt learnt of the disallowance of the Aboriginal Evidence Act 1841 in late 1843 (Stanley to Hutt dated 15 Feb 1843, 401 BPP papers), which included notification that the Colonial Office were contemplating imperial legislation, a copy of which was received from the Colonial Office with its despatch dated 4 July 1843. (BPP, *Papers Relative to the Aborigines*, 426-7).By this time the *Aboriginal Evidence Act 1841* was due to expire in 1843 and a new local Act was passed on 3 August 1843 which extended the 1841 Act for a further five years. News of disallowance of the 1843 Act did not reach Hutt until 1844 by which time the imperial Act had passed on 31 May 1843.

171 The 1843 Act does not appear to have been sent to the Colonial Office perhaps because Hutt was aware of the impending Imperial Act.

172 Minutes of Legislative Council, 18 April 1849, 25 April 1849, CO 20/6, Reel 1121, 265-277.

173 As above n 173, 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.' Noted as making perpetual the 1841 Act with 12 Vic No 14, 1849. Acts of Council B 1832-1853. UWA Law Library.

174 *Western Australian Almanack* 1849, Census, BL, 34, 45.

175 As above, n 174.

referring to the case of New Zealand in 1847 where British criminal legislation was increasingly being applied to Maori peoples.[176] By this time the British government was reneging on the promises made under the Treaty of Waitangi of 1840.[177] This time, the Colonial Office distinguished its former policy of equal legal status on the basis that it covered a huge area of unexplored land and that the economy was better served by this legislation. In fact the exception to equal legal status was becoming more the norm by the 1850s; the impact of the evangelical movement had waned and the focus was on physical protection of Indigenous peoples in British colonies.[178]

The *Aboriginal Evidence Act* was revived around the same time as a separate *Summary Trial and Punishment Act* was passed in May 1849 the implementation of which coincided with increased settler expansion into Indigenous lands in the North West.[179] Similarly to Russell's earlier comment made in 1840 on the first Evidence Act, there was criticism levelled at the time by an astute commentator in relation to the new settler invasion into Champion Bay in the North of Western Australia in 1849-50. In October 1850 an anonymous correspondent to *The Inquirer* protested at the priority being given to pastoralists' interests at the expense of Indigenous rights, and demanded to know on what terms the land was to be occupied, and what conciliatory proposals were being made.[180] An anonymous respondent pointed out that the value of the land was not appreciated by Indigenous 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.[181]

XI Conclusion

Both the imperial and local impetus for Evidence legislation made the assumption that British law was to be imposed on Indigenous peoples. As settlers encroached on Indigenous lands, a significant increase in inter-

176 Hunter, above n 5, 316.

177 C Orange, *The Treaty of Waitangi*, (Wellington, Bridget Williams Books Ltd, 2004), 132.

178 P Hasluck, *Black Australians*, (Melbourne, Melbourne University Press, 1970), 19. Hunter, as above n 5, 345.

179 'An Ordinance to revive and continue an ordinance entitled An Act to allow the Aboriginal natives of WA to give information and evidence without sanction of an oath'; No 14; Minutes of Legislative Council 18 April 1849, 25 April 1849, 3 May 1849, 9 May 1849, CO 20/6, Reel 1121, 273, 277, 284, 289. 'An Ordinance to provide for the Summary Trial and Punishment of Aboriginal Native Offenders in Certain cases', 9 May 1849; Acts of Council WA, 1832-1853, UWA Law Library; Minutes of Legislative Council 6 May 1849, CO 20/6, Reel 1121, 122; Both Acts were approved by the Colonial Office and gazetted on 18 June 1850; *The Perth Gazette*, 21 June 1850.

180 Letter to the Editor from V, *The Inquirer*, 10 October 1849.

181 Letter to the Editor, *The Inquirer*, 24 October 1849.

racial violence occurred in Western Australia during the late 1830s.[182] Subsequently there was mounting pressure from the British government for colonial governments to treat Indigenous people as British subjects under the protection of British law. However, it was impossible for Indigenous people to argue for their civil rights under British law even if they wanted to. In Western Australia this was used as part of a continuing strategy that denied them their own legal and political personality.

Although both pushes assumed Indigenes would be under an overarching British legal authority which departed from recognizing Indigenous land rights, the rationale for the local impetus in Western Australia was somewhat different from the imperial push. The British government's insistence that the Western Australian Evidence Act be modified (through its veto power over legislation) resulted in a theoretical expansion of legal rights for Indigenous people under British law as British subjects which extended to civil cases. However the development and implementation of the Aboriginal Evidence Act relied on the discretion of the colonial magistracy (who were also settlers after cheap land) which resulted in the early deliberate divergence from the theory of formal legal equality in the early 1840s.[183] Even though the Act was extended to include civil cases in 1841 it was at the Colonial Office insistence, but in 1849 it was contemplated that there may be circumstances were Indigenous people employed as pastoral workers might want to sue for their wages. This was at a time when employment of Indigenous people was at its height. However, even here the trend was towards a more informal arrangement which relied on the discretion of colonial officials rather than the courts. *The Summary Trial and Punishment Act 1849* (WA) also differentiated Indigenous people from other British subjects based on race.[184]

In Western Australia there was a close alliance between the magistracy and settlers, and governors were often influenced by more seasoned colonial campaigners such as those who were members of the executive and legislative councils. This reflected continuing problems with relying on legislatures and constitutions to make laws for Indigenous people, especially when other issues concerning Indigenous rights and participation were unresolved.

There was also the avoidance by governments of enacting Imperial laws which may have ensured some Indigenous rights even among humanitarians in the early 1840s and by the late 1840s, the humanitarian

182 Hunter as above, n 5, 67-69.
183 Hunter, as above, n 5, 186-188.
184 Hunter, as above n 5, 297-346.

influence had waned.[185] The British government's objective had shifted to a more limited policy that sought to physically protect Indigenous peoples in the stampede to get their land. Both motivations for an Aboriginal Evidence legislation paid little attention to Indigenous perspectives on their own sovereignty. Both impetus (imperial and local) avoided the land question but the settlers' determination to hold on to the land at low cost meant that even the British 'humanitarian' ideal of compensation in the late 1830s and early 1840s through citizenship and equality under British law was unlikely to be achieved.

The concerns that Russell and Stephen had expressed of entrenched racism in law were foregone by 1849 in favour of economic expediency and the furtherance of the objects of an invading British Empire. Instead Indigenous peoples were regarded as a labour force to assist with the pastoral industry over a vast region including the North West. The reliance on legislatures to modify laws so that they departed even further from formal legal equality principles and discriminated on the basis of race, is a legacy which would survive into the twentieth century and make it more difficult for Indigenous Australians to sue for their civil rights within the system and become citizens under Australian law.[186] The Summary Punishment legislation would become the forerunner to the protectionist legislation of the late nineteenth and early twentieth centuries, which would ironically lead to the shift away from State governments and a lobbying for the Commonwealth government to legislate with respect to Indigenous rights.[187] This translated in the 1960s to an increased political will to change relations between white and black Australians, but which relied on legislatures with policies that still failed to respond to the legacies of the past.[188]

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185 Hunter, as above n 5, 115.

186 B Kercher, '"Native title in the Shadows" The origins of the Myth of Terra Nullius in Early New South Wales Courts' in G Blue, M Bunton, R Croizier (eds), *Colonialism and the Modern World, Selected Studies*, London, M E Sharpe, 2002, 100-117; A Haebich, *Broken Circles, Fragmenting Indigenous Families, 1800-2000*, (Fremantle, Fremantle Arts Centre Press, 2000), Ch 3.

187 K Auty, *Black Glass*, *Western Australian Courts of Native Affairs, 1936-54*, (Fremantle; Fremantle Arts Press, 2005), Ch 1.

188 B Attwood, *Rights for Aborigines* (Sydney: Allen and Unwin, 2003)*;* B Attwood, A Markus, 'The Australian series – '1967 Referendum, 40 years on', *The Australian*, 5-6 May 2007, 26;. M Dodson, F Chaney, S Rintoul, 'The Australian series – "A Great Victory of Sorts"', *The Australian*, 19-20 May 2007, 25; L Behrendt, *Achieving Social Justice, Indigenous Rights and Australia's future* (Sydney, The Federation Press, 2003) 6-19.