Travelling Laws: Burton and the Draft *Act for the Protection and Amelioration of the Aborigines* 1838 (NSW)

Shaunnagh Dorsett*

Introduction

In 1838 Justice William Westerbrook Burton, puisne judge of the Supreme Court of New South Wales, apparently at his own behest, drafted an *Act for the Protection and Amelioration of the Aboriginal Natives of the Territory of New South Wales*.[i] This was a compendious Act which covered a range of matters directed, as he saw it, towards the 'amelioration' of the situation of the Aborigines. In form the Act joins together a number of strands – the idea of 'amelioration' itself (drawn from legislation and policy relating to slaves); the simultaneous protection and freeing up of indigenous peoples as a labour force (here drawn in part from the Cape Colony) and the need to provide for legal protection for the indigenous peoples of British settlements, particularly in New South Wales in the face of on-going frontier violence **(**most recently addressed by the 1837 Report of the House of Commons Select Committee (British Settlements).[ii] Never enacted, Burton's Act predates by some considerable margin the first known 'protectorate' legislation in the Australian colonies.

The draft Act is part of a collection of miscellaneous materials relating to Aborigines at Archives New South Wales, ostensibly collected by Burton (and brought to light by Kercher and Salter of the Colonial Case law project).[iii] The purpose of this miscellaneous collection (other than that the materials all concern Aborigines) is difficult to see from the collection itself. However it might reasonably be hypothesized that these materials were collated by Burton for an intended work on the state of the indigenous population, a companion to his "State of Society and of Crime in New South Wales" (1840) and *The State of Religion and Education in New South Wales* (1840).[iv] As he noted in the latter, some matters were omitted from that text as "the notice of them will properly belong to another part of the writer's intended observations, viz "On the State of the Aborigines in New South Wales"".[v] Why the third text was not written or, if it was, why it has not survived, or been found, remains unknown.

Burton's Act was probably drafted in late May 1838. Its purpose, as suggested by the title, was to provide for the protection and amelioration of the Aborigines. Amelioration was a concept which traversed Empire, circulating through various colonial places and shifting contexts from slavery to colonial indigenous populations.[vi] In each place it took on a particular character, inflected by local circumstance. This chapter examines the concepts of amelioration and protection as instantiated in one colonial legal site (Burton's draft Act) and in one time/place (New South Wales, at a key moment in frontier relations). In drafting his Act, Burton drew both on long-established ideas which had currency throughout Empire (what Tomlins calls the 'discursive *extrastructure* of ideas' that explain and justify), as well as on detailed legal forms and provisions from other contexts ('the more detailed *instrastructure* of institutions and processes'.[vii] Both extrastructure and infrastructure, therefore, were a form of legal transplant. From 1824 the idea of amelioration and protection was bound up with the newly revived office of the Protector – first of Slaves and later of Aborigines. At heart, for Burton amelioration was a matter of

moral improvement, to be effected, as had been so many earlier attempts by colonial administrators to 'improve' the circumstances of Aborigines, through settlement and labour. In drafting his Act, arguably the first attempt to place such ideas as the heart of a comprehensive legal regime to regulate settler-Aboriginal relations, Burton transplanted forms and provisions from slave legislation in Trinidad, and labour regulation of the Khoikhoi in the Cape.

The influence and importance of humanitarian lobbyists in London in working to reshape Empire has been described by a number of authors.[viii] They were a node on a vast network of empire – composed of missionaries, philanthropists, colonial and metropole administrators and politicians – and were at the heart of the 1836/7 Select Committee on Aborigines. Of the Committee's recommendations a number eventually made it into policy, less into law. For example, in the Australasian colonies Protectors of Aborigines were appointed, albeit ultimately with little success.[ix] Unsworn testimony provisions were enacted in some few jurisdictions (New Zealand and South Australia), but had to wait until later in most.[x] The key recommendation for New South Wales – that some 'short and simple rules … for the regulation of the aborigines' be passed – did not happen at that time.[xi] Only Burton's Draft stands as an example of an Act which might have brought the Committee's Report fully to life. Yet, as Burton himself made clear, he conceived of, and drafted, the Act prior to seeing the Committee's recommendations. Rather than directly drawing on the committee report, both he and the committee itself drew upon a similar range of sources. For Burton, the resources he drew upon were not new; what was new was the context in which he employed them.

Part I considers the background to the drafting of the Act. Part II briefly loos to the legal status of Aboriginal Australians as 'subjects', a status which underpins the Act. Part III examones some of the provisions of the Act, while Part IV considers the resources upon which Burton drew to construct his Act. There are some brief concluding comments.

I. Background: Legislating Amelioration and Protection

Not only never implemented, the Burton's draft Act has left surprisingly little trace. It does not seem to have been widely circulated.[xii] On June 12, 1838 Burton transmitted his finished Act to Governor Gipps, but, as he wrote the next year to Henry Labouchere, then Undersecretary of State for War and the Colonies, 'it was not laid as I had hoped it would be before the Legislative Council, in consequence, as I presumed, of a recommendation of a Committee of the House of Commons, that no measure of that kind should be of Colonial Origins'.[xiii] Burton wrote to Gipps of his conviction that it was necessary to 'adopt some more effective – and decisive course than has yet been pursued for the amelioration of their moral condition, and therein for the prevention of crimes by them, and for their personal protection'.[xiv] Burton noted that although 50 years had passed since the British had arrived, and there had been ongoing legislation for the 'peace, welfare and good government' of the colony, not a single Act, Imperial or local, had been passed 'in which there is a single mention of the Aborigines, with a view to regulating or restraining the intercourse of the white inhabitants, free or Convicts, with them, or for their protection or civilisation or moral improvement.'[xv] In 1839 while on leave in London, he showed the Act to Labouchere, presumably in the hope that it might be found appropriate as a template for legislation by the English parliament.[xvi] Nothing came of it.

Although frontier violence was a serious on-going problem in the Australian colonies, this was a particularly turbulent period. In June 1838 the notorious Myall Creek (or 'Big River') Massacre occurred. But it was not the only massacre – of white or black – reported in the Sydney newspapers in that immediate period. The area around Ovens River (Port Phillip District) was, for example, particularly troublesome and a number of men were reported as having been killed by the 'Ovens River Tribe'. Most notable was the death on 11 April of seven or eight (the number is unclear) of Mr Faithfull's men at Broken River while moving sheep. It seems this may have been in retaliation for the earlier killing of several Aborigines by some members of the party.[xvii]

It appears, however, that the immediate trigger for the Act was the case of *R v Long Jack*, heard early in May before Burton.[xviii] Long Jack was indicted, and found guilty, of murdering his wife Mary. Unlike a number of attempted trials both before and after the drafting of the Act, this trial was allowed to proceed. Despite the problems of finding an adequate interpreter who could be sworn, Burton determined that Long Jack understood sufficient English for the trial to go ahead.[xix] This was rarely the case. The year before in *R v Wombarty*, for example, the prisoner, accused of murdering four Europeans, had been discharged in part because of the impossibility of obtaining an appropriate interpreter.[xx] In summing up in *Long Jack*, Burton stated, in terms to be repeated to Gipps a few weeks later, 'that it was lamentable, that although it is now upwards of fifty years since the Colony was first inhabited by the British, so little has been done for the amelioration of the black natives;'.[xxi] For Burton, *Long Jack* exemplified the dire condition to which the Aborigines had been reduced. Long Jack and his wife had gone to the town of Maitland, performed some basic labour in return for liquor, an argument had ensued, and he had murdered his wife 'at midday in a public street at Maitland' by 'beating her with a waddy'.[xxii]

Burton's view of Aboriginal-Settler relations generally was bleak. According to his letter, Burton was of the opinion that in the time since settlement the Aborigines had 'not progressed in civilisation at all'. They had not even learned to build huts to protect themselves from the elements, liquor was *the* problem and that a 'system of licentious and depraved immorality was carried on between their women and dissolute white persons … their husbands frequently hiring out their wives for liquor'. In short, they got drunk, failed to protect themselves from the elements, and this, along with prostitution, was leading to the diseases that were wiping them out. Women were raped by stockmen, there was retaliation by aboriginal men, both against the stockmen and the women, and half-caste children were often left to die. Murders, both by and against stockmen, would 'sicken the heart'.[xxiii]

Given Burton's blunt diagnosis of the situation, amelioration, broadly speaking, required strict legal regulation of settler-Aboriginal relations. Given continual failures to undertake measures over the preceding 50 years, Burton stated in *Long Jack* that:

> Sitting as a Christian and a British Judge, I could almost say, that it would have been better if at the first planting of the Colony the native had been driven beyond the boundaries (although I, of course, deny any right to do so), where they could not have come into collision with the Europeans, and would not have been exposed to the temptations they now are, but would have been regulated by their own laws, which they are bound to obey;

The idea that some enactment might be appropriate in order to afford legal protection was in general circulation at the time in both New South Wales and in the metropole. The Rev Lawrence Threlkeld, in his 1837 Report on the Mission at Lake Macquarie, a document also in Burton's possession, railed against the position of Aborigines before the Supreme Court. Commenting on *R v Wombardy* he stated that the 'just and equitable, principle' which declares, that:

> "The Aborigines are subject to and under the protection of British Law", becomes a mere Legal Fiction in consequence of means not being duly provided to meet the case and afford legal protection to its subjects in its own courts, and thus the strictness of the administration of the law becomes the height of injustice to all. … but it remains to be ascertained whether this age of Intellect will provide a suitable remedy in some specific enactment, or, suffer, year after year, the Aborigines to be frittered away from the land by private vengeance injuries publicly sustained … . Surely it is a matter worthy the prompt attention of Legislators."[xxiv]

More importantly, in 1837 the recommendations of the House of Commons Select Committee on Aborigines in British Settlements were handed down. A number of recommendations in the Report related directly to legal protection. The report called, in the context of the Australian colonies, for the formation of legal regulations to protect Aborigines, in the form of 'short and simple rules as may form a temporary and provisional code for the regulation of the Aborigines, until advancing knowledge and civilization shall have superseded the necessity for any special laws'.[xxv] Burton had been, as he put it, 'favoured with a sight of the report' by Gipps, albeit after he had drafted most of his Act. He felt, therefore, that his conviction that some regulation must be attempted had been confirmed by the 'High Authority of that Committee'.[xxvi]

II. Subjects of Her Majesty

The underlying premise of the draft Act was that Aborigines were 'subjects of Her Majesty' and that therefore some provision must be made for their legal protection. The status of Aborigines had long been a matter of uncertainty. Indeed, in the famous decision of the New South Wales Supreme Court in *R v Murrell*, two years earlier, while Burton determined that English law applied to the Aborigines with regards matters *inter se*, but he did not do so on the specific basis that they were subjects of the Crown.[xxvii] In fact, he deliberately avoided making that finding: subjects or aliens temporarily residing amongst British subjects, in either case they were entitled to the protection of the law:

> "…They are clearly entitled ~~in part~~ to all the protection privileges & advantages which ~~is necessary~~ the ~~Executive Council~~ laws of England have bestowed upon & subjects of the King & are subject to the same restrictions. For there is no distinction in law between them & others & the objection on that ground fails - If aliens then they are subject as long as they reside in the Colony to the laws, & must conform to them - they owe a temporary allegiance like all other aliens - & are entitled to equal protection whilst they remain - & may sue in the Courts of law for any rights which they may have been deprived or injuries which they have sustained."[xxviii]

In cases directly after *Murrell* the judges did not directly address the status of the Aborigines as British subjects – but all agreed that they were both entitled to the protection of the law and in turn that white settlers were entitled to protection from them. When the decision was made that Aboriginal Australians were to be considered subjects it was made not by court determination, but by the Colonial Office. A year after *Murrell*, Glenelg in a despatch to Governor Bourke in response to the news of the killing of members of the Barkindji tribe on the banks of the Murray River by Major Mitchell's party, stated, perhaps for the first time unambiguously, that aborigines were to be considered subjects:

> "Your Commission as Governor of N. S. Wales asserts H.M.'s Sovereignty over every part of the Continent of New Holland which is not embraced in the Colonies of Western or Southern Australia. Hence I conceive it follows that all the natives inhabiting those Territories must be considered as Subjects of the Queen, and as within H.M.'s Allegiance. …"[xxix]

Gipps was aware that both aborigines and settlers were entitled to protection, issuing a public notice to that effect in April 1838, reiterating that "[a]s Human Beings … and as subjects … the natives of the whole territory have an acknowledged right to the protection of the government". Similarly, in response to the killing of Faithfull's men, the Colonial Secretary, Edward Deas Thompson, was quick to reiterate to the local magistrates that the local inhabitants were subjects 'and not aliens', and that 'proceedings are to be adopted similar to what the laws of England would authorise if any company of depredators or murderers had been guilty of similar atrocities'.[xxx] Buchan points out quite correctly that while declaring the aborigines to be subjects was part of the efforts of colonial authorities to assert control over frontier violence - by declaring them subjects the British could not be considered at war with the Aborigines - the means of their protection remained unclear.[xxxi]

III Burton's Act: Civilisation through Labour

For Burton, the problem of protection could not be disentangled from that of the failure to 'uplift' the Aboriginal population. What was necessary was compendious regulation, which both insisted on amelioration and provided the necessary legal framework for legal protection. Not just amelioration in physical circumstances, but moral improvement, were, for Burton, tied to labour. Burton was hardly the first to make this connection. The enlightenment trope of civilisation through labour – often cultivation – and its particular ties to stadial theory, has a long and well-known pedigree.

Civilisation through labour had underpinned many earlier practical schemes, both in New South Wales and around Empire generally. One of the first programs in NSW was launched by Governor Macquarie in 1814. Macquarie attacked the problem of 'civilising the natives' on two fronts. The first was to establish a 'Native Institution' at Parramatta for the purpose of 'educating, Christianising and giving vocational training to Aboriginal children'.[xxxii] Like most attempts to force Indigenous Australians to conform to European ideals, this was a failure, and closed nine years later. The second prong consisted of granting land to Indigenous Australians in order that they could learn to farm. In a dispatch to Earl Bathurst, Governor Macquarie outlined his plans for dealing with 'this Uncultivated Race':[xxxiii]

> I have Also in contemplation to Allot a piece of Land in Port Jackson bordering on the Sea Shore *for a few of the Adult males*, Who have promised to Settle there and Cultivate the land. Such an Example Cannot, I think, fail of Inviting and Encouraging other Natives to Settle on and Cultivate Lands, preferring the productive Effects of their own Labor and Industry to the Wild and Precarious Pursuits of the Woods.

Similarly, this was also a failure. Nevertheless, attempts to teach the arts of civilisation continued. In 1827, for example, Archdeacon Scott proposed to establish institutes, where it was proposed to unite 'Farming occupations with Instruction'.[xxxiv]

Burton's Draft Act provided places of residence; a 'more certain means of obtaining subsistence'; encouraged them to labour; and 'protected them from injury by their own people, and ours'. The 'great end in view' from these measures was their moral improvement. In order to achieve the first object, Burton was clear that land needed to be set aside for the Aborigines.[xxxv] Reflecting this, s 1 of the Draft Act conceived that 'places of residence' would be set aside for 'Aboriginal Natives, whereby they would receive the loan of tools and implements 'for the creation of huts, houses and fences. … and for their own use in obtaining a lawful subsistence by cultivation of the ground or by other lawful means'. It was generally assumed that missionaries, or 'other pious and well-disposed persons' would also reside there (s 2) in order to encourage moral improvement.

Specifically noting that the Report of the Aborigines Committee had not recommended that land in New South Wales be set aside, he nevertheless pointed out that the Governor had always had the power to grant the waste lands of the colony – a 'power which has been exercised to the total exclusion of the Aboriginal inhabitants'.[xxxvi] He added 'it is but just to the Aboriginal Natives, and not only just but necessary, that in the apportionment of their country they should have a share…'. This was necessary to avoid them ending up in the situation of the 'Hottentots' at the Cape: landless vagrants 'wandering about a country that had been theirs'. Burton was not the only person agitating for such measures at the time. There were ongoing attempts by missionaries to have land set aside, and Burton's confident, the Rev Orton was at that time involved in proposals by the Wesleyans for the creation of Mission stations in the Port Phillip region.[xxxvii]

In terms entirely reminiscent of earlier attempts in New South Wales to civilise through labour, Burton envisaged that 'Black villages' could be established in the neighbourhood of all most towns. Burton also had pragmatic reasons though for insisting on the provision of work. Labour would reduce reliance on subsistence hunting, and the consequent killing of flocks when the 'chase' proved inadequate. This alone would prevent many of the conflicts between stockmen and Aborigines that led to frontier violence. Aborigines were therefore required to work – they could find work themselves or it would be provided. Where private labour was not needed, the Magistrates could employ Aborigines to build their own shelters, fence their huts and watch the crops, for which they would receive payment:

> In this way I imagine a village might be established, of whose inhabitants some might become fishermen, and obtain a ready subsistence in that way, others might pursue some daily labour of their own choice ….

Burton's insistence on compulsion to labour explains the provisions in the Draft Act which were designed to regulate Aboriginal labour. Given the small aboriginal labour force at the time they seem unduly complex. However, if Aborigines were to labour, then they must also be protected in regards to any contracts that they might be induced to enter. The Act provided that no Aboriginal Native could be engaged for more than one calendar month unless contracting in the presence of a protector or magistrate. Contracts for one month could be oral, but if a longer term was desired than the contracting must be done in writing, otherwise they were 'null and void'. Overall, the period of employment was not to exceed 12 months. During the contract the employer was bound to provide the servant and his or her children with sufficient food and decent clothing (s 12). Every contract for 12 months was to be signed and executed in three parts (s 13). Children could remain with their parents, without being required to work (s 15). Aborigines of particular ages could bind themselves as apprentices for a maximum of three years, but could bind their children for a period of 7 – or until the age of 21 (s 17). A system for complaints by workers and against workers was also included in the Act (ss 20-21).

Under the draft Act, one of the chief strategies for the protection of the aborigines was the appointment of protectors. Even prior to the final report of the Select Committee on Aborigines arriving in NSW, the Colonial Office had already sent instructions to appoint Protectors.[xxxviii] A number of roles were envisaged for them by the Colonial Office, including that the protectors '… watch over the rights and interests of the natives, protect them, … from any encroachments on their property, and from acts of cruelty, oppression, or injustice …'. It was envisaged that they would, therefore, be appointed magistrates.[xxxix] Burton agreed that protectors should be appointed to oversee the legal protection of the Aborigines, although he specifically provided that they were not to be appointed as magistrates (ss 5, 6). Rather, protectors were required to be present at any trials involving murder *inter se* or a question of the right of any Aboriginal to property; they were also to bring actions on behalf of Aborigines with respect to any civil or criminal proceedings; and in cases where an Aborigine was charged, to either defend the accused or appoint a lawyer to do so (ss 8-10). Orton wrote to Burton that he thought the appointment of Protectors made it necessary that some regulation, such as those contained in the Draft Act, be promulgated.[xl]

IV Travelling Laws: Trinidad, Cape Town, Sydney

The idea of 'amelioration' drawn primarily from laws relating to slaves some decade earlier, had always been connected in some way with regulating labour. The idea of amelioration had originated in the mid-eighteenth century in Barbados and Jamaica, and had been primarily economically focused. Ameliorating the living condition of slaves (and particularly of women slaves) could drive up birth rates, lower death rates, and thereby cutting the costs of producing sugar and increasing output.[xli] In the 1820s amelioration became the focus of the anti-slavery lobbyists in London, and the idea of amelioration took on a broader remit to civilise and christianise. Amelioration projects were commenced. The legal framework for amelioration was the Order in Council of 10 March 1824 (sometimes called the *Code Noir*), which applied to Trinidad, and the cornerstone of the amelioration movement was the creation of the Office of Protector of Slaves.[xlii] The role of the Protector was to provide legal protection and to work towards civilising the slaves, thus preparing them for eventual emancipation.[xliii] The Protector had a number of roles, including as Magistrate

(adjudicating disputes between slaves and their Masters) and as advocate before the courts.[xliv] Enslaved persons were able to buy their own manumission. However, the 1824 Order also continued to allow flogging and punishment in the stocks and by treadmill in prisons, as well as a pass system which restricted free movement.

Burton drew upon amendments in 1830 for his Draft Act. He noted specifically that his inclusion of the Office of Protector of Slaves had come from 'the Order in Council of 2 February 1830', although he further noted that the final report of the Aborigines Committee also specifically recommended the appointment of Protectors for New South Wales.[xlv] In fact, he takes a little more than this idea from that Ordinance. The 1830 Order in Council was intended to further amelioration by increasing legal protection and mitigating some aspects of the 1824 Order and of those ordinances and proclamations which had followed in other colonies. It was, therefore, from this 1830 consolidation that Burton drew inspiration - the Office of the Protector, the right to take masters to court for misuse or neglect, the need for provisions to allow Aborigines to give unsworn testimony in court, and the protection of private property. The form of the Protectors' oath in Burton's Act is identical to that of the 1830 Order, changing only Slaves to Aborigines, and colony to county (Order in Council s 3; *Draft Act* s 5). One notable change that had been made in 1830 in order to reduce conflicts between the role of the Protector *qua* protector, and as enforcer of the slave codes, was removal the earlier right of the Protector to act as Magistrate. His role was now limited in this regard to prosecution and defence in court on behalf of slaves.[xlvi] Presumably taking his queue from this, Burton was emphatic that Protectors of Aborigines should not be magistrates (Order in Council s 9; *Draft Act* s 6). They should, however, Again, Burton duplicates the form of s 9, as he does those provisions under which Protectors are required to appear in court on behalf of Aborigines (Order in Council ss 10, 11; *Draft Act* ss 9, 10).

However, when drafting the core of his Act - those provisions designed to regulate the use of aboriginal labour, and the form of contracting in particular - Burton looked not specifically to the 1830 Order in Council, but to the Cape specifically, and its famous Ordinance 50. This Act was more than just a clear 'inspiration' for Burton's 1838 Draft Act. Many of the 1838 Act's provisions duplicate sections of Ordinance. Burton drafted Ordinance 50 in 1828 during his appointment as puisne judge of the Supreme Court of the Cape of Good Hope.[xlvii] While ideas of amelioration and protection generally were circulating Empire, Dooling points to the particularly colonial origins of the form of labour reform of Ordinance 50, which was designed to reform earlier labour laws "Hottentot" (Khoikhoi) and to "free persons of colour" at the Cape and which derived from the particular history of labour relations with the Khoikhoi in the eighteenth century.[xlviii] Much has been written about Ordinance 50 – although Burton's role is almost entirely unnoticed.[xlix] In his autobiography, Andries Stockenström, who was appointed Commissioner-General of the Frontier Provinces by Governor Burke in 1827, claimed the credit for suggesting the ordinance but also credited Burton with the 'legal shape and details' of the drafting.[l] Of course, while Stockenström may indeed have suggested the policy of the Act he was only one player in a complex web of people, at the centre of which was arguably the missionary John Philip and the London Humanitarians. It was Philip's reformist zeal and connections forged with the London humanitarians (and in particular Buxton) which was crucial to the success of the push for reform of the Khoi labour laws.

Ordinance 50 removed two decades of piecemeal ordinances and proclamations which regulated Khoi labour. The most significant of these earlier laws had enacted a pass system, allowing considerable control of labour by European employers. However, they also were designed to enforce the payment of wages and to outlaw debt bondage. While the 1809 Proclamation had supposedly been introduced to protect the Khoi as a 'free people', in practice illiteracy, and the pass system both held Khoi to farms and depressed wages. A further 1812 Proclamation exacerbated the problem by allowing farmers to keep Khoi children as 'apprentices' for ten years. This last measure most securely tied them to farms after the end of their contracts.[li] The Proclamation also required all labour contracts to be signed in triplicate and registered before a state official. Although pass systems were abolished by Ordinance 50, during the period of the Committee's work there continued considerable agitation at the Cape for the reintroduction of vagrancy laws and a pass system. It was exactly this kind of regulation which the Aborigines Committee wished to ensure was not re-enacted.

In comparison to Burton's 1838 draft Act, Ordinance 50 is more limited. It had two purposes – removing legal disability from the Khoi (referred to by some Cape Colonists as being their 'emancipation') and providing the conditions under which their labour could be hired, thereby supposedly freeing up the labour market and allowing the Khoi to improve their situation through their own labour. It did, however, maintain certain facets of the earlier Proclamations, for example the requirement of signing contracts in triplicate and registering them. The core of Burton's 1838 Act - relating to labour contracts - is clearly taken from Ordinance 50. For example, those provisions on contracting 'in triplicate' are duplicated, changing only the designated responsible officer – eg from Field-Cornet at the Cape (a civilian government official empowered to act as a Magistrate) to Magistrate or Justice of the Peace in New South Wales.

However, Burton's Act also includes a number of the less draconian elements of the earlier 1809 and 1812 Proclamations. As did Burton's later draft Act, the Proclamations specifically required the provision of the necessities of life (excluding alcohol) to Khoikhoi workers and also made provision for complaints to local authority by Khoikhoi against ill-treatment by their Masters, including their prosecution under Cape law (*Draft Act* ss 12, 20, 21). It also required the recording of all births. This provision was intended to stop the illegal 'apprenticing' of children (*Draft Act* ss 23, 32).[lii]

Burton's original draft also included provision that 'wandering' Aborigines could be apprehended as vagrants, but the final draft removes this. As originally drafted, s 11 allowed Aborigines 'found wandering' and who could not give a good account of a place of residence or lawful means of subsistence to be apprehended. The final version gave Magistrates the power to appoint Aborigines to places of residence if they (the Aborigines) so elected. Burton noted to Gipps that he had been 'persuaded otherwise' from his original plan and that, in any case, such a provision would be opposed to the views of the Select Committee on Aborigines. When Burton first arrived at the Cape, vagrancy laws were in place. A key element of the 1809 Proclamation was that the Khoikhoi were required to have a 'fixed place of abode'. They could not leave without a pass and if they could not produce one they were classified as vagrants.[liii] Similarly, there was a pass system under the original 1824 Order in Council for Trinidad. While in the Cape the vagrancy provisions were removed by Ordinance 50 in 1828, there was

considerable agitation over the next decade to reintroduce them.

Orton, in his comments on the draft Act, had been against vagrancy laws, suggesting that the Aborigines had to be 'induced' to adopt civilized behaviours. For Orton 'though the Natives are to a certain extent to be viewed as children in our plans for the amelioration of their condition it, notwithstanding, appears to me that much caution is necessary in any aggression that may be made, or invading, what may be convinced to be their natural rights' … '[e]very thing attractive and inducing in its nature I conceive is desirable to be held out to them – consistent with the great object of Evangelization and the formation of habits of industry, comfort and Utility.' In his marginal comments, Burton notes in response (somewhat defensively) that he was persuaded to give up such a plan, 'long before I received [Orton's] communication'.[liv]

The House of Commons Select Committee on Aborigines was significantly influenced by the experience of the Cape. A large proportion of the testimony heard by the Committee came from the Cape, and Buxton, the Committee's Chair, had ties with humanitarians and missionaries at the Cape, dating back to the agitation for Ordinance 50. The Committee recommended that contracting provisions – generally based on those of Ordinance 50 – be considered by Parliament. The committee further recommended that no vagrancy laws should be allowed if they prevented the 'natives 'selling their labour at the best price'.

V. Conclusion:

While the idea of amelioration itself underwent subtle transformations across time and space, each particular iteration a response to a specific combination of metropolitan and local forces, it remained tied in some way in all three colonial locales to labour. For Burton, work could both 'lift up' the Aborigines and provide a useful source of labour for the colony. In the Caribbean, at the Cape and in New South Wales, alongside the loftier ideals of Christianisation and civilisation, there was also a pragmatic side to amelioration: to ameliorate living conditions, improve labour outcomes and, in the case of New South Wales, therefore halt the frontier violence and decline of the Aboriginal peoples.

In Burton's Act, not just discursive, but specific legal, forms, are drawn from different colonial contexts and incorporated into a new legal framework. The core of Burton's Act arrives along a number of trajectories: from Trinidad; from the Cape; and from the Metropole. What results is a kind of legal bricolage. It was also, however, the most ambitious and broad ranging framework for amelioration and legal protection of Indigenous peoples in Empire. Unfortunately, as the Act was never enacted it is impossible to know to what extent, and with what results, these provisions would ultimately have been domesticated and transformed through application and interpretation in the new social and legal environment.[lv] Burton's Act is by no means the only example of the legal transplant of particular provisions from one colonial locale to another, but it provides a striking example of the mobility of legal forms in Empire.

References

Bassett, J. (1989) 'The Faithfull Massacre at the Broken River, 1838' *Journal of Australian Studies* 13: 18-34.

Broome, R., (1994) *Aboriginal Australians*, 2nd ed., Sydney: Allen & Unwin

Buchan, B. (2008) *The Empire of Political Thought: Indigenous Australians and the Language of Colonial* Government, London: Pickering and Chatto.

Burton, W.W. (1840a) 'State of Society and of Crime in New South Wales' *The Colonial Magazine and Commercial Maritime Journal* Vol II, May-August 1840, Fisher, Son & Co, London, 34; W.W.

Burton, W.W. (1840b) *The State of Religion and Education in New South Wales*, London: J Cross.

Connor, J. (2002) *The Australian Frontier Wars 1788-1838*, Sydney: University of New South Wales Press.

Dooling, W. (2008) *Slavery, Emancipation and Colonial Rule in South Africa*, Athens OH: Ohio University Press.

Dorsett, S. (2012) ''Destitute of the Knowledge of God': Māori Testimony before the New Zealand Courts in the Early Crown Colony Period' in Kirkby. D. (ed) *Past Laws, Present Histories: From Settler Colonies to International Justice*, Canberra: ANU E-Press.

Dunn, R. (1972) *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624-1713*. London: Jonathan Cape

Elbourne, E. (2002) *Blood Ground: Colonialism, Missions and the Contest for Christianity in the Cape Colony and Britain, 1799-1853*, Kingston: McGill-Queens University Press.

Elbourne, E. (2003) 'The Sin of the Settler: The 1835-36 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire' *Journal of Colonialism and Colonial History*, 4:

Elphick, R. & Malherbe, V. (1989) 'The Khoisan to 1828' in Elphick, R. and Giliomee, H. (eds) *The Shaping of South African Society 1652-1840*, Cape Town: Maskew, Miller, Longman.

Fergus, C. (2006) "Centring the City in the Amelioration of Slavery in Trinidad, 1824-1834" *The Journal of Caribbean History* 40(1): 117-139.

Fergus, C. (2008) 'The *Sieta Partidas*: A Framework for Philanthropy and Coercion during the Amelioration Experiment in Trinidad 1823-1834" *Caribbean Studies*, 36(1): 75-99.

Great Britain Parliamentary Papers (1969-), Shannon: Irish University Press

Hutton C.W. (ed) (1964) *The Autobiography of the Late Sir Andries Stockenstrom*, Vol I, Cape Town: Struick.

Laidlaw, Z. (2012) 'Investigating Empire: Humanitarians, Reform and the

Commission of Eastern Inquiry', 40:5, 749-768.

Legrand, P. (1997) 'The Impossibility of Legal Transplants' *Maastricht J. Eur. & Comp. L.* 4: 111-124.

Lester, A, & Dussart, F. (2008) 'Trajectories of Protection: Protectorates of Aborigines in early 19th century Australia and Aotearoa New Zealand' *New Zealand Geographer*, 64, 205-220.

Nance, B. (1981) 'The Level of Violence: Europeans and Aborigines in Port Phillip, 1835-1850', *Historical Studies* 19:532-552.

Newton-King, S. (1980) 'The Labour Market of the Cape Colony' in Marks S. and Atmore A (eds), *Economy and Society in Pre-industrial South Africa*, London: Longman.

Tomlins, C. (2009) 'Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery', *Theoretical Inquires in Law* 10, 389-421.

Report from the Select Committee on Aborigines (British settlements); with the minutes of evidence, appendix and index, House of Commons, GBPP 1837 (425)

Ward, D. (2010) ' in Dorsett, S. & Hunter, I. (eds) *Law and Politics in British Colonial Thought: Transpositions of Empire*, New York: Palgrave McMillan

---

* Professor of Law, Faculty of Law, University of Technology, Sydney. My thanks to Shaun McVeigh, Peter Moore and to Bruce Kercher and Brent Salter of the Colonial Case Law Project at Macquarie University.

i *An Act for the Amelioration and Protection of the Natives of the Territory of New South Wales* (1838) in Miscellaneous Correspondence relating to Aborigines 1797-1840", State Records New South Wales (SRNSW), NRS 13696 [5/1161] (*Draft Act*).

ii *Report from the Select Committee on Aborigines (British settlements); with the minutes of evidence, appendix and index*, House of Commons, Great Britain Parliamentary Papers 1837 (425).

iii The Colonial Case Law Project: see <www.law.mq.edu.au/ research/colonial_case_law/>

iv Burton, W.W. (1840a) 'State of Society and of Crime in New South Wales' *The Colonial Magazine and Commercial Maritime Journal* Vol II, May-August 1840, Fisher, Son & Co, London, 34; Burton, W.W. (1840b) *The State of Religion and Education in New South Wales*, London: J Cross.

v Burton, *The State of Religion, ibid.*

vi Lester, A, & Dussart, F. (2008) 'Trajectories of Protection: Protectorates of Aborigines in early 19th century Australia and Aotearoa New Zealand' *New Zealand Geographer*, 64, 205-220

vii Tomlins, C. (2009) 'Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery', *Theoretical Inquires in Law* 10, 389-421, 392.

viii See, for example, Elbourne, E. (2003) 'The Sin of the Settler: The 1835-36 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire' *Journal of Colonialism and Colonial* ***History*****, 4: ;** Lester & Dussart "Trajectories", above n 6; Laidlaw, Z. (2012) 'Investigating Empire: Humanitarians, Reform and the Commission of Eastern Inquiry', 40:5, 749-768.

ix Lester & Dussart, ibid.

x Dorsett, S. (2012) ''Destitute of the Knowledge of God': Māori Testimony before the New Zealand Courts in the Early Crown Colony Period' in Kirkby. D. (ed) *Past Laws, Present Histories: From Settler Colonies to International Justice*, Canberra: ANU E-Press; Ward, D.

(2010) 'Imperial Policy, Colonial Government and Indigenous Testimony in South Australia and New Zealand in the 1840s' in Dorsett, S. & Hunter, I. (eds) *Law and Politics in British Colonial Thought: Transpositions of Empire*, New York: Palgrave McMillan.

[xi] Select Committee 1837, above n 2, 84.

[xii] It was circulated to two persons for comments. The first was the Rev Joseph Orton: Orton to Burton, 20 June 1838, in Miscellaneous Correspondence, above n 1. The Reverend Joseph Orton was a Wesleyan Missionary. Originally appointed as Chairman of the organisation to the District of New South Wales, in 1836 he moved to Tasmania to take up the role of Chairman to the newly created District of Van Diemen's Land. In January 1835 Burton and Orton formed the Strangers' Friends Society in Sydney. For its purpose and practice see *Colonist* 14 August 1839, 4; *The Australian* 6 August 1839, 3, *Sydney Herald* 5 August 1839, 2. The second was a 'Gentleman of the Colony well acquainted with the Blacks, and to whose perusal it was submitted; but in his sentiments respecting them Mr. Justice Burton did not agree": Burton to Labouchere, 17 August 1839, enclosure No. 3 in Normanby to Gipps, 31 August 1839, *HRA* Series I: Governors' Despatches to and from England, 1788-1848, vol XX, Library Committee of Commonwealth Parliament, 1916, 302, 305 (*HRA I*). Burton often wrote in the third person.

[xiii] Burton to Labouchere, ibid.

[xiv] Burton to Gipps, 12 June 1838, SRNSW [4/1013], loose bundle, unpaginated.

[xv] Ibid.

[xvi] Burton to Labouchere, above n 3.

[xvii] Bassett, J. (1989) 'The Faithfull Massacre at the Broken River, 1838' *Journal of Australian Studies* 13: 18-34. On violence in this period see generally Nance, B. (1981) 'The Level of Violence: Europeans and Aborigines in Port Phillip, 1835-1850', *Historical Studies* 19:532-552; Connor, J. (2002) *The Australian Frontier Wars 1788-1838*, Sydney: University of New South Wales Press.

[xviii] Burton to Gipps, above n 14; *R v Long Jack* [1838] NSWSupC 44, 2 May 1838, Supreme Court of New South Wales, Burton J, available at the colonial case law project, above n 2 (accessed 10 January 2013).

[xix] Burton, W.W., *Notes of Criminal Cases*, vol. 34, SRNSW, 2/2434, 103.

[xx] *R v Wombarty*, 1837, Supreme Court of New South Wales. The trial initially came on before Burton J on 14 August 1837, as reported in the *Sydney Gazette*, 19 August 1837. Burton remanded the case over to the next Session so that an interpreter could be found. The case was discharged by Dowling CJ on 18 November 1837, as reported in the *Sydney Gazette*, 23 November 1837. *Wombarty* is available at the Colonial Case Law project, above n 2 (accessed 10 January 2013).

[xxi] As reported in the *Sydney Gazette*, 5 May 1838. See also the *Sydney Herald*, 7 May 1838.

[xxii] Burton to Gipps, above, n 14; *R v Long Jack*, above n 18.

[xxiii] Burton to Gipps, ibid.

[xxiv] Threlkeld, L., *Threlkeld's Written Report for 1837 of Mission at Lake Macquarie*, in Miscellaneous Correspondence, above n 1, 312 at 321-322.

[xxv] Select Committee 1837, above n 2, 84.

[xxvi] Burton to Gipps, above n 5. Burton confirmed, however, that he had commenced the Act prior to seeing the report in total. Had he seen the report then he would have known that the Committee had recommended that measures with regard to aboriginal matters should generally originate in the metropole – the reason he thought that his Bill was ultimately not enacted by Governor Gipps. Perhaps more obviously, the report arrived in the colony via the "Maria" on the 24th June 1838: after Burton had drafted the Act.

[xxvii] *R v Murrell and Bummaree*, 19 February 1836, New South Wales Supreme Court, Forbes CJ, Dowling and Burton JJ. While this case was reported at [1836] 1 *Legge* 72, the preferable source is that of the Colonial Case Law Project [1836] NSWSupC 35, available at Colonial Case Law Project, above n 2.

[xxviii] William Westerbrook Burton, *Arguments and Notes for Judgment in the case of Jack Congo Murrell. February 1836*, in Miscellaneous Correspondence above n 1, 218 at 241. The words which have been crossed out are included from the original.

[xxix] Glenelg to Bourke, 26 July 1837, *HRA I*, vol XIX, 48.

[xxx] Instructions, Deas Thompson to Magistrates, enclosure 5 in Gipps to Glenelg, 21 July 1838, in GBPP, 1839 (526), 33.

[xxxi] Buchan, B. (2008) *The Empire of Political Thought: Indigenous Australians and the Language of Colonial* Government, London: Pickering and Chatto, 90-91.

[xxxii] Broome, R., (1994) *Aboriginal Australians*, 2nd ed., Sydney: Allen & Unwin, 31.

[xxxiii] Macquarie to Bathurst**, [date]** *HRA I*, vol VIII, 369-370.

[xxxiv] Darling to Huskisson, 27 March, 1828, Enclosure No. 1: Archdeacon Scott to Governor Darling, 1 August 1827, *HRA I*, Vol XIII, 59.

[xxxv] Burton to Gipps, above n 14.

[xxxvi] Ibid. In fact, this was not entirely correct – Governor Macquarie had granted some small tracts of land to individual aborigines in around 1819.

[xxxvii] For example, McLeay (Colonial Secretary, New South Wales) to Orton, 10 December 1836, in Miscellaneous Correspondence, above n 1.

[xxxviii] Glenelg to Gipps, 31 Jan 1838, GBPP (526), 4.

[xxxix] Ibid, 5.

[xl] Orton to Burton, above n 12, 488.

[xli] Dunn, R. (1972) *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624-1713*. London: Jonathan Cape.

[xlii] This Order was followed by further Orders, ordinances and Proclamation for other parts of the Caribbean, Mauritius and the Cape of Good Hope.

[xliii] Fergus, C. (2008) 'The *Sieta Partidas*: A Framework for Philanthropy and Coercion during the Amelioration Experiment in Trinidad 1823-1834" *Caribbean Studies*, 36(1): 75-99.

[xliv] Fergus, C. (2006) "Centring the City in the Amelioration of Slavery in Trinidad, 1824-1834" *The Journal of Caribbean History* 40(1): 117-139.

[xlv] Burton to Gipps, above n 5.

[xlvi] Titus, N. (2009) *The Amelioration and Abolition of Slavery in Trinidad 1812-1834*, Bloomington, IN: AuthorHouse, 142

[xlvii] *Ordinance for Improving the Condition of the Hottentots and other free Persons of colour at the Cape of Good Hope, and for consolidating and amending the Laws affecting those Persons*, Ordinance No 50 of 1828 (Cape Colony).

[xlviii] Dooling, W. (2008) *Slavery, Emancipation and Colonial Rule in South Africa*, Athens OH: Ohio University Press.

[xlix] Newton-King, S. (1980) 'The Labour Market of the Cape Colony' in Marks S. and Atmore A (eds), *Economy and Society in Pre-industrial South Africa*, London: Longman; Elphick, R. & Malherbe, V. (1989) 'The Khoisan to 1828' in Elphick, R. and Giliomee, H. (eds) *The Shaping of South African Society 1652-1840*, Cape Town: Maskew, Miller, Longman; Elbourne, E. (2002) *Blood Ground: Colonialism, Missions and the Contest for Christianity in the Cape Colony and Britain, 1799-1853*, Kingston: McGill-Queens University Press.

[l] Hutton C.W. (ed) (1964) *The Autobiography of the Late Sir Andries Stockenstrom*, Vol I, Cape Town: Struick.

[li] See generally Dooling, *Slavery*, above n 48, 63-64.

[lii] Ibid, 65.

[liii] Ibid, 63.

[liv] Orton to Burton, above n 12, 484.

[lv] Legrand, P. (1997) 'The Impossibility of Legal Transplants' *Maastricht J. Eur. & Comp. L.* 4: 111-124.