

**The limits of jurisdiction: law, governance and Indigenous peoples**

**in colonised Australia**

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**Published in:**

**Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial***

***Thought: Transpositions of Empire* (Palgrave, 2010): pp. 149-168.**

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In events well known and controversial in Australia, the last year of the Howard Government (1996-2007) saw a federal “intervention” in one of its own territories with the aim of restoring order in Aboriginal communities. Under the mandate of an “Emergency Response” the government designed a comprehensive program of policing (including military aid to the civil power), welfare reform and criminal law amendment. The response comprised both material and symbolic elements. Among the latter was a widely publicised announcement that “customary law” would no longer be an excuse for criminal behaviour. Some months later the Commonwealth Parliament amended the *Crimes Act* to delete a requirement passed only in 1994 (with bi-partisan support) that a court take account of “cultural background” in sentencing decisions. Today the Crimes Act directs that “a court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.”<sup>1</sup>

Such a determined government attack on “customary law and cultural practice” more than two centuries after the British settlement of Australia prompts us to consider how such traces of Indigenous authority and even assertions of jurisdiction have survived. For it will be argued here that far from being resolved in 1836, the question of Indigenous amenability to imported British criminal law in Australia remained surprisingly open. Historians as well as jurists have generally agreed that when the New South Wales Supreme Court affirmed in the case of *R v Jack Congo*

*Murrell* in 1836 that “the aboriginal natives of this Colony are amenable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord the King”, a line was drawn against the survival of Indigenous law. The most subtle recent inquiries into the extension of British jurisdiction over Australian Indigenous peoples in the first half of the nineteenth century stress the evidence of early colonial legal pluralism, while concluding that *Murrell* marked the turning point. The courts in New South Wales as in Georgia argues Ford, completed in the 1830s “what they had started a decade before: they perfected settler sovereignty by subordinating indigenous jurisdiction”.<sup>2</sup> Similarly for McHugh, the assertion of Crown sovereignty in *Murrell*, with its subsequent affirmation by the imperial and colonial authorities, brought to an end a period during which there had been fitful recognition of “Aborigines being outside colonial jurisdiction”.<sup>3</sup> For Dorsett and McVeigh, “*Murrell* commenced the process of erasing the legal memory of a time in which the common law’s jurisdiction was anything other than complete and unified”.<sup>4</sup> These accounts enrich our understandings of the plurality of the legal worlds of the early nineteenth century, but unite with long established views acknowledging the authority of *Murrell*.<sup>5</sup>

In what follows I do not seek to displace the significance of *Murrell* as legal authority for the principle of British jurisdiction over Aboriginal crimes committed between themselves (ie *inter se*). Rather I want to explore the limitations of that assertion of a comprehensive and untrammelled jurisdiction when confronted by the practical circumstances of governing in colonial and post-colonial conditions in Australia. In the brief space available here I consider some of the ways in which successive generations of Australians - governors and governments, settlers and their institutions, and Indigenous peoples - confronted the reality of persisting Aboriginal

difference in customs, norms and perspectives, difference that is from those holding among the ascendant settler populations. The persistence of that difference helps to explain why more than two centuries after British settlement, Australian governments might still be seeking to terminate recognition of “customary law or cultural practice” in determination of criminal guilt. It will be suggested that the persistence of Aboriginal difference in criminal law was an effect not only of contradictions and shortcomings in criminal justice procedure but also of the competing demands and interests of the various domains of governance (religious, through missions and administrative, through reserves, policing powers, status distinctions and population controls) in which Indigenous peoples were rendered as objects of potential transformation into self-governing citizens. These were domains of governance before or beyond which criminal jurisdiction was another threshold. While Indigenous peoples shared this subjection with some other status groups in the increasingly saturated government of populations (juveniles, for example, or mentally ill people), they brought to this arrangement something else altogether – a different linguistic, cultural and ethical universe, with its attendant structures of law and mentality, constituting worlds of difference from the settler populations. While the integrity and autonomy of those Indigenous cultures was challenged, in very many cases shattered, the historical displacement was uneven. That uneven displacement is expressed in the evidence reviewed here of the way in which Indigenous practices, beliefs and norms challenged the certitudes of criminal jurisdiction.

After considering briefly the significance of the assertion of sovereign command and later extension of jurisdiction over Aborigines in early NSW, I examine some of the ways in which criminal jurisdiction was constrained in its encounter with Indigenous peoples, both by the illegibility of their practices and perspectives and by

its tension with the regimes of social governance which developed in Australia. This theme is explored first in the colonial and early post-colonial conditions of Queensland, one of Australia's three northern jurisdictions, and second in the unique conditions of the Northern Territory, a federal territory administered by the Commonwealth government after 1911 and to this day. The case materials gathered here from both judicial and administrative domains suggest that in northern Australia in the late colonial era and especially after the federation of the Australian colonies, there was continuing disquiet in government about the means, ends and impacts of criminal justice routines applied to Aboriginal people. A twentieth century discourse of customary law developed as a loose set of propositions about the rules, norms and practices of Indigenous societies that constituted a legacy of pre-settlement life. In changing political and policy contexts there even emerged attempts to recognise the continuity of such law through modifications of procedure and sentencing outcomes.<sup>6</sup> Far from *Murrell* resolving the jurisdictional question in 1836 it appears that it was only the beginning of a protracted and still incomplete argument about the place of Indigenous peoples in settler Australia's law.

## I

For nearly 50 years following the first settlement at Sydney in 1788 it was unclear whether colonial courts could exercise jurisdiction over Aborigines committing offences against settlers or their own. The erosion of early attempts at conciliation between the invading settlers and Indigenous people of the Sydney region was a prelude to later conflict in which retaliation was the preferred mode of response to violence on either side. When law started to intervene, through rare cases of prosecution of Aborigines for killing settlers, the results were mixed – and disturbing to settlers as much as Aborigines. Doubts about the practicality, the wisdom or the

justice of trying Aborigines in criminal courts were early expressed; these doubts developed as a discourse that was of remarkable longevity, if uneven impact. During a period in which settlers and Aborigines lived in constant contact, frequenting the streets of Sydney and the colony's few other towns, or occupying in uneasy contiguity the same lands, there were continuing aggravations to government policy that sought a measure of accommodation. Aboriginal ownership of land might not be tolerated, but there was a heavy sense of prior occupation and continuing attachment to land and customs.<sup>7</sup>

Long before courts came to consider whether they had a jurisdiction to try Aborigines for offences committed *inter se*, the governor of New South Wales, Lachlan Macquarie (1810-1821), embarked on a program intended to transform the Aboriginal peoples of the Sydney region into the kinds of person that might inhabit a British settler colony in the antipodes. His measures included institutions of transformation of Aborigines into civil subjects (encapsulated in his Natives Institution for the education of children) and measures of enforcement of the peace which entailed an end to Aboriginal customs which offended contemporary notions of civility, even in the rough conditions of a convict colony.

In May 1816, following military operations against hostile Aborigines in the farming lands west of Sydney, on the periphery of settlement, Macquarie issued a Proclamation aimed at curtailing Aboriginal violence. The Governor's Proclamation combined the promise of violent response to Aboriginal "Outrages and Barbarities" with an enticement to those who were peaceable to become settlers (through land grants) or servants, as they were inclined. But in a move designed to address the behaviour of Aborigines within the bounds of the colony's towns, he drew another line between barbarism and civilisation. Here Macquarie simultaneously recognised

the persisting practice of Aboriginal punishments “on Transgressors of their Customs and Manners” and proscribed them “as a barbarous Custom repugnant to the British Laws, and strongly militating against the Civilization of the Natives”. The practice he objected to was the periodic assembly of Aborigines in Sydney for ritualistic punishments through spearing and fighting.<sup>8</sup> Unlike the military operation and threats of retaliatory violence in the first part of his Proclamation, Macquarie’s proscription of these rituals was quasi-legislative, resting on the assumption that Aborigines were already (before the fact had been decided) subject to the jurisdiction of the courts for behaviours which were formally *inter se* in character. By the Proclamation “Any Armed Body of Natives” assembling for these purposes would be “considered as Disturbers of the Public Peace and shall be apprehended and punished in a summary Manner accordingly”.

At the same time, we cannot read this edict as oriented only to Aborigines already within the bounds of settlement. Attached to it was a much broader objective: “The Black natives are therefore hereby enjoined and commanded to discontinue this barbarous custom not at or near the British Settlements, but also in their own wild and remote places of resort.”<sup>9</sup> On close reading, Macquarie’s Proclamation sets out an ambitious set of policy objectives – determined opposition to Indigenous violence against settlers; enticement to come into the fold, but on condition of abandoning their way of life, especially those repugnant customs that were now penalised in summary jurisdiction; and command to reform their way of life even in places remote from settlement.

Macquarie’s sovereign command thus enjoined the Indigenous people of NSW to behave in ways that accorded with civilised standards. But what did this mean for criminal jurisdiction? Before 1836 there was a reluctance to prosecute Aborigines. In

Ford's conclusion, "local magistrates, governors and soldiers thought it impossible, inappropriate or unnecessary to bring them into court".<sup>10</sup> It was a missionary, Lancelot Threlkeld, who in 1836 advised the attorney-general that other Aborigines wanted Murrell and his accomplice Bummaree tried 'by the English', on a charge of murdering another Aborigine.<sup>11</sup> While *Murrell* settled the question of jurisdiction in New South Wales, its impact on jurisdictional practice was less evident. The possibility that assertion of jurisdiction might not be enough to bring Aboriginal offending within the purview of the criminal law in the conditions of colonial society was already contemplated by the Supreme Court in that case. But the author of the court's judgment, Justice William Burton, dismissed the problems that might flow from the assertion of jurisdiction. He thought much over-rated the "difficulties and inconveniences and hardship which have been referred to as likely to arise from this decision".<sup>12</sup>

The difficulties to which Burton referred included the possible increase in court business that would flow from making Aboriginal offending justiciable, and the problems of testimony and evidence that already constituted an impediment to their standing in courts as witnesses. The challenges however were not limited to these matters. To make jurisdiction more than formal, to give it practical effect, required in the conditions of a colonial society other measures of government and policy. Over the longer term these would include the institutions of policing as well as the establishment of a court system that was capable of administering justice according to those high standards established in the judgments of the superior courts and the communications of the Colonial Office. Measures of policy followed from the discovery of how far short of competent jurisdiction the law really fell when it came to dealing with Indigenous offenders. In policy would need to address the conditions

of an oath, the provision of interpreters, the compellability of “wives” as witnesses, the meaning of a jury of one’s peers, the availability of a jury, the status of a plea of guilty, the “tariff” of punishment. Running through policy discussion, in judicial opinion, in the public media and in government offices would run another theme, the risk of double jeopardy for offenders who might be subject to Indigenous punishments (the product of some other kind of jurisdiction) as well as that meted out in settler courts.

In the developing Australian (and other settler) polities criminal jurisdiction constituted from the mid-nineteenth century only one point in an increasingly complex field of social governance. From the founding of Governor Macquarie’s Native Institution through the missionary endeavours of the mid and later nineteenth century to the formal establishment of protection regimes in a number of jurisdictions in the early twentieth century, the lives of Indigenous peoples were increasingly organised by systems of religious transformation, tutelage and welfarism. As we will see below, the determination that certain behaviours constituted a criminal offence that should be managed within the systems of policing and prosecution and punishment of the settler majority was a contingent matter. The debates around jurisdiction over Aboriginal “crime” form part of a much deeper discourse around the conditions under which Indigenous peoples would be accommodated in settler societies. When Aborigines committed crime, government responded sometimes with a decision that a person was an offender, at other times with a decision that the behaviour indicated a moral, educational, or psychological deficit that might be better met through a non-criminal justice response. Uneven and ill at ease as they may be, the discourses framing such decisions spoke of the tribal or native or “customary” character of Indigenous practices, from the beginning of settlement and persistently as

settlement ranged out over Australian territory in the two centuries after 1788. In the next section we examine how such recognition was evident in the seemingly uncongenial conditions of late colonial Queensland.

## II

Detailed attention to prosecutions of Aboriginal offenders for *inter se* as well as inter-racial offences in the middle years of the colonial period has shown how insecure were the claims of settler jurisdiction.<sup>13</sup> In late colonial Queensland (separated from New South Wales in 1859), a place widely reputed to be among the worst examples of Aboriginal repression<sup>14</sup>, the reality of law in everyday life exhibited the continuing undercurrent of Indigenous jurisdiction. Amenability to jurisdiction brought many Indigenous *inter se* homicides to the Queensland courts from the 1860s.<sup>15</sup> As they struggled to deal with the realities of Aboriginal difference, police, prosecutors, courts and the executive council (responsible for clemency decisions in capital cases) were faced repeatedly with evidence that referred to experience and belief systems beyond their understanding.

Before the Supreme Court sitting in the northern city of Charters Towers in 1886 Aborigines Paddy and Wills were charged with murder of another man, Billy. The defendants and victim were described as “Aboriginal natives of Queensland”. Billy was out of his country, having been recruited for employment on a pastoral station some 500 miles from his home. In Indigenous space, Billy was likely in places where he was not welcome, since Paddy at least was from a local people. There was counsel for defence but no interpreter; the judge later expressed some doubt about the defendants’ ability to understand the trial adequately. Defence argued that the prisoners were ignorant of the laws of the country, an argument that built on evidence from the white station owner that indicated there was a “tribal” element in

the killing: “generally if two blacks belonging to different tribes meet and one gets an opportunity to kill the other he will do it”. There was little other evidence of motive but some confessional evidence making the case more one of manslaughter. The judge told the jury “that the Prisoners’ ignorance of the law, a preference for their own tribal observances was no excuse for or justification of the crime if they were satisfied of its commission, though it might be a subject of consideration by the Executive in the event of a conviction”. In delivering their verdict after long deliberation the jury found both men guilty “& strongly recommended them to mercy on the grounds of ignorance of the laws of the country”.<sup>16</sup> This muted recognition of “tribal observances” thus effected a result that found its justification not in a discovery of motive but in a postulation of the defendants’ ignorance of settler law.

For most settler Australians objectionable tribal practices were accompanied by incomprehensible tribal beliefs. The intrusion of Aboriginal belief systems into the courtroom persisted well into the years of protection regimes. In the mixed economy of the pastoral districts of northern and western Queensland, cattle stations relied on Aboriginal labour, usually employed after 1897 under the administration of the local Protector (typically a police officer). At the Supreme Court sitting in Townsville in March 1913, one such Aboriginal worker Paddy Flynn was convicted on a charge of fatally shooting another Aboriginal man Roderick. The two had been among a large group of 50 to 60 Aboriginals employed on western pastoral stations who congregated at Hughenden after Christmas 1911, camping around a local hotel or on the river bank. Both men were well regarded workers. Interviewed by the police, Paddy Flynn said “that he shot Deceased because the Deceased had given him a bone or poisoned shell”, a hostile act reputed to be an act of sorcery. In court the same justification led to some debate over the nature of Aboriginal belief. In spite of the strong direction of the

judge regarding evidence of wilful murder, the jury found Flynn guilty of murder, but with “a strong recommendation to mercy owing to delusion through prisoner’s tribal beliefs”. While the rider had no legal force it was the kind of thing calculated to weigh in an executive consideration of clemency.<sup>17</sup> As the police inspector first reported the case, drawing on the amateur ethnography that commonly characterised police practice: “I have known for years past that Aboriginals have a strange superstition in respect to the giving of a bone, and a great many of them believe that there are certain aboriginals who have the power to kill them with a bone which has been taken from the dead body of an aboriginal...”.<sup>18</sup> The standing of such accounts of sorcery, like allusions to any kind of Indigenous beliefs and practices was unstable in the policing and court systems – capable of attracting notice, rarely provoking detailed inquiry for the purpose of establishing criminal responsibility or mitigating guilt and amenability to the penal tariff at this time of capital punishment, but having the potential to sway juries, judges, and executive council that they were dealing with other, impenetrable, worlds that needed to be judged somehow differently to the usual run of defendants.

Such cases from the judicial and executive record suggest the impediments to achieving a knowledge of beliefs and practice, a translation of one set of cultural understandings into another, that would render these Indigenous people subjects of a uniform jurisdiction. At the end of the nineteenth century this difference was institutionalised through the development of a comprehensive Protection system. The *Aboriginals Protection and Restriction of the Sale of Opium Act, 1897* established in Queensland a model of population management that was influential in other jurisdictions, especially Western Australia (where protection was established in 1905) and later the Northern Territory under Commonwealth administration (1911). Just at

the point when the Australian colonies were federating, for what proved initially to be a limited set of national objectives (especially the protection and advancement of a “White Australia”, the object of the Commonwealth’s first legislative instrument), the distinctive administrative regimes of the established colonies in respect of Indigenous peoples hardened. A critical result in the context we are addressing here was the preservation of a patchwork of jurisdictional arrangements, in which the comprehensive jurisdiction implied in *Murrell* continued to be sacrificed to the varying demands of legal, policing, reformatory and administrative regimes. Thus, after 1897, and beyond Federation in 1901., the amenability of most Aborigines in Queensland to the standard procedures (and procedural protections) of the criminal law was significantly affected by Protection. The extreme paternalism of this system is well known, its subjection of Aboriginal people to an absolutist welfare control with executive powers of removal from one place to another especially notorious.

What is less well known is the infra-legal structure of authority in the reserves and missions administered under the regime of a Chief Protector. These were places in which the quotidian routines of policing and law court were set aside for the sake of transforming Aboriginal subjects into the governable and rights-bearing subjects of Australian law, at some point in the indefinite future. The scope of these regimes in objective and method may be learned from the diaries of the missionary Rev William Mackenzie of Aurukun, a mission on the western side of the Cape York Peninsula “ruled” by Mackenzie for some four decades from 1925. Mackenzie ruled his subjects with an iron fist, sometimes literally, but always with the object of effecting the transformation of individuals and community into the God-fearing citizenry that might one day emerge from his transformative regime, were they to survive its excesses. Thus evidence of abortion was not prosecuted, but made the subject of

homily; adulterers were lectured and punished; homicides in some cases not prosecuted but made the occasion of removal to the Palm Island settlement. Mackenzie's punishments were harsh, unorthodox, and arbitrary – they included the use of banishment, corporal punishment, including flogging and beating, use of his fists, use of the “electro magnet”, binding the mouth with tape to stop verbal abuse and swearing. Not surprisingly, his subjects were not beyond protesting his regime. An inquiry by the Chief Protector, prompted by an anonymous complaint, found the punishments justified. Anthropologists visiting Aurukun were appalled by the brutality. In 1932 one of them, Donald Thomson, photographed three men and two women in chains at Aurukun, at the start of their long trek under police escort to Palm Island. Thomson aired his complaints and photograph in a Melbourne newspaper but failed to get the Presbyterian Church or government at any level to intervene.<sup>19</sup>

In such a domain the spaces administered under a Chief Protector based in Brisbane were environments in which Aboriginal difference was sustained, mostly for worse than better. The most serious inter-personal offences were indeed brought before the Queensland criminal courts between 1897 and 1940; but when the realities of Aboriginal life circumstances rendered prosecution uncertain, inconvenient or too expensive, an alternative to the criminal court was banishment by executive order. After the Palm Island settlement was established in 1918, it served not only as a place for removal of the troublesome in other districts, but became a banishment place for those who had committed murder or manslaughter, either subsequent to formal trial and sentence, or in place of these.

Prosecutors as well as police and protectors worked in and around the law to secure their objective of removing the troublesome from the fringes of white settlement and into the centres of segregated black reserves. The negotiations around

difficult cases involving killings express even into the 1930s the discomfort in dealing with cultures and practices that remained opaque. In 1934 a trial of a number of Aboriginal men from the Herberton region in north Queensland went badly wrong for defence counsel and police after defence applied successfully for a separate trial of the person regarded as the principal in a killing. 65 year old Alick Brown had died after being subjected to treatment widely reported as involving a ritual “cleaning” ceremony, during which pieces of flesh had been cut from his back. The case was sensational, reported in the Brisbane papers, and occasioning a flurry of correspondence from pastoral stations which employed some of the men. Police reports spoke of some of the defendants as Aboriginal “doctors”, skilled in the use of “Aboriginal weapons of war”. As one pastoralist reported, in an allegation passed up the line through the police hierarchy, “both Wild Jimmy & Jacob are looked upon as Doctors amongst the other blacks... The blacks all state that what ever the Doctor’s tell them to do they have got to do it, or else the Doctor’s will kill them”. While the defence tactic of applying for separate trials for the five defendants succeeded in the acquittal of the alleged principal (Jacob), the others, seemingly less culpable, were found guilty and punished with terms of imprisonment. In a remarkable commentary on the way in which such people were now caught in the tidal flows between courts, policing and administrative regimes, the consequences of acquittal or conviction seemed to make little difference. Agreeing with the sentiments of another station owner that it would be best for Wild Jimmy to be “kept in confinement for the rest of his life”, police before the trial had already initiated steps to have the Chief Protector make arrangements for their “freedom to be restricted as they are a cause of dread to the blacks and whites, who reside in the District”. In the event Wild Jimmy was convicted and received the heaviest sentence of 5 years, while the acquitted Jacob was

dealt with in the alternative register of the Chief Protector's Office. As described by the Sub-Inspector of Police at Cairns: "The Aboriginal Department was advised of the character of Jacob, and the fact that he had been found not guilty, with the result that instructions were received that an order for his removal to Woorabinda Aboriginal Mission Station [in the south] was issued and he was escorted there".<sup>20</sup>

Evidence of Aboriginal ritual associated with this killing was once more a sign of the incomplete transformation of Indigenous people into fully responsible subjects of the common law, justifying their continuing subordination through the Protection regime. The more intense settlement of Queensland, reflected in its more comprehensive policing and Aboriginal protectorate, made such cases rarer than might be encountered across its western border, in a territory that since 1911 was also a responsibility of the Commonwealth government. In what follows, we see another kind of history - the distinctive combination of a majority Indigenous population (their languages and cultures intact) in a jurisdiction overseen by the national government, its policies informed by new knowledges (especially anthropology) – multiplying the patchwork of jurisdiction in Australia by the mid-twentieth century. Once again it appeared that the doctrine announced in *Murrell* described a jurisdiction that was little more than aspiration, its comprehensive reach qualified by other forces of government and the persistence of Indigenous cultures.

### III

A century after *Murrell* the realities of governing in domains that were marginal to effective jurisdiction were brought home repeatedly to the Australian government by a sequence of well publicised trials of Aboriginal men in the Northern Territory. Inside the territorial spaces of Australian jurisdiction lay domains of social life that were still little comprehended by non-Indigenous observers and beyond the

ken of the judiciary and policy makers. The range of problems presented to government policy in the administration of justice were many – and they all flowed from the persisting sense of a separate Indigenous world, one in which actions and belief lay outside the realm able to be understood within the Australian courts

Prior to 1884 there were no murder trials held in the Northern Territory, which was a territory of South Australia and so administered from Adelaide. The problems of administering justice in small communities on the fringes of country which was still frontier were brought home time and again from the date of the first trial in 1884 up to the eve of the First World War. In 1913 the single judge of the Supreme Court sitting in the Northern Territory (since 1911 a jurisdiction under the Commonwealth) together with the Administrator of the Territory were joined in viewing jury trials as unreliable in their outcomes, especially in cases involving Aborigines.<sup>21</sup> “In my mind”, wrote the Administrator to the Minister,

there is no doubt that it would be impossible to secure a jury in the Territory which would convict a white man of the murder of a native solely on aboriginal evidence, no matter however strong; while there would be comparatively little difficulty in securing the conviction of a native for killing a white man on much more slender evidence. In this the Judge concurs.<sup>22</sup>

The management of justice in small communities in which juries might be suborned or biased, resulted by 1921 in trial by jury being abolished in the Northern Territory for other than capital offences.

Justice on Australia’s northern frontiers proved a headache to the national government through the inter-war years and especially in the 1930s. When prosecutors, police and courts attempted to deploy the criminal law to respond to

Aboriginal offending they faced intractable problems that forced constant policy change to accommodate Aboriginal difference. Were Aboriginal wives compellable witnesses? Progressive opinion in Canberra and Sydney said no, informed by an increasingly influential anthropology based on field-work in northern Australia. A protracted and often ill-tempered policy debate canvassed legal opinions, which considered not only the prior colonial case law (of Victoria and NSW) but also cases and statute law from New Zealand and South Africa. The government finalised the matter in a 1937 Aboriginals Ordinance declaration that “any Aboriginal living as consort, husband or wife of any Aboriginal” charged with a summary or indictable offence was not compelled to give evidence against the person charged.<sup>23</sup>

Should evidence of Aboriginal custom play a role in adjudging guilt and determining punishment? A radical nostrum of the inter-war years drew on Australian colonial experience in Papua and New Guinea, where Governor Hubert Murray had created a “native court”.<sup>24</sup> In the early 1930s a “native court” for the Northern Territory was favoured by some in government, especially the Chief Protector of Aborigines, and by anthropologists. But the scheme’s proposals for a completely separate jurisdiction in which the relevance of native custom to offending would be recognised and capital punishment abolished went beyond the Murray scheme and faced strong judicial objection. The result was a more modest if distinctive amendment to the Northern Territory criminal law. A 1934 amendment to the Crimes Ordinance directed the Court to receive evidence as “to any relevant native law or custom” in mitigation of penalty.<sup>25</sup> That amending legislation also entailed a partial abolition of the death penalty, with the penalty becoming discretionary only for Aboriginal defendants convicted of murder. When the Northern Territory’s sole judge (T A Wells) later failed to exercise his discretion and sentenced

8 Aboriginal defendants to death for the murder of two white prospectors, there was a public outcry in the metropolitan south-east. Anthropologist AP Elkin was influential publicly and behind the scenes urging the relevance of Aboriginal justice (“a revenge expedition”) as a motive in the killings – and the government responded with clemency.<sup>26</sup>

Behind these policy and judicial struggles with the conditions in Australia’s north, there remained other procedural challenges, a consequence of both geographical and cultural conditions. These issues were compellingly brought to attention in the 1940 prosecution of Jakala, a youth charged with the murder by spearing of an Aboriginal elder during a tribal “affray” in Arnhem Land. After the judge dismissed the jury in a protest against inadequate accommodation, it was suggested within the administration that the Crown might enter a *nolle prosequi*. This was consistent with the reluctance of other observers to see this case prosecuted – the cabled report of the killing by a local missionary feared it would be “difficult prevent further loss life in revenge...[p]ersonally do not desire legal action but think removal murderer Darwin for formal questioning would satisfy everyone”.<sup>27</sup> The response of law officers was to recommend a change in procedure for Aboriginal defendants. The discourse informing the change exhibits a remarkable degree of continuity with that which puzzled over jurisdiction in *inter se* killings a century before. The long-serving Secretary of the Department of the Interior, J. A. Carrodus, preferred a principle of non-interference in purely Aboriginal disputes. His advice to the Minister reflected a view that killings in Aboriginal communities should be viewed contextually. Public policy should have regard primarily to securing peace and not so much the protection of individual subjects:

I think it is a great pity that these natives were brought in for trial. The killing occurred in country which was not under control and where the natives are living according to native custom. Unless there are a large number of killings and it is essential that peace be brought about by the Government interference, I am of opinion that the Administration should not interfere in these tribal disputes.<sup>28</sup>

As in Queensland, such policy advice did not contemplate an absolute indifference to conditions on Aboriginal lands since lurking in the background was always the possibility of the exercise of a Protector's powers of removal of troublesome elements, without the difficult business of a trial to establish guilt or innocence. Such powers continued into the post-war years, amplified by the development in the Northern Territory of a new style of administration centred on the role of Patrol Officers in a welfare system that was intended to circumscribe the responsibilities of police. The Patrol Officer administration (its officers were trained to the task in a way unknown to the police) was interventionist but more finely attuned to procedural justice. When in 1956 a patrol officer advised Darwin that, "whether guilty or not", a suspect in the killing of two Aboriginal men might be "removed to a southern district for at least ten years", his superior annotated heavily in blue pencil, "Guilty or not ten years banishment? Democracy!".<sup>29</sup> In the 1959 case of Timmy, a man who feared payback, in spite of his acquittal on a charge of murder, the Chief Welfare Officer commented: 'I would respectfully point out that we would be acting in contempt of court if we were to commit Timmy to Beswick Creek [a northern Aboriginal settlement], because he was found Not Guilty in the Supreme Court and was discharged by the Judge. If we were to take further action by a committal, then it could be argued that we did not agree with the processes of law and had, in fact, pre-judged the defendant'.<sup>30</sup>

The kind of thinking that had contemplated a native court as a solution for jurisdiction in cases of Aborigines living outside the effective boundaries of white settlement infused mid-century thinking at a number of levels in the Northern Territory administration, providing compelling evidence of negotiation between the domains of law and welfare. Evidence of the use of infanticide in desert communities during times of food scarcity resulted in a departmental consensus that “with regard to infanticide the constructive approach should be stressed rather than the punitive one”<sup>31</sup>. An alleged killing at Ti Tree in 1954 was considered by the patrol officer investigating to be entirely explicable in terms of the cultural status of the suspected defendants: “The defendants in this action can best be described as bush people of a semi-nomadic nature who have lived within the influence of their tribal law during the whole of their lifetime./ ...tribal law is still the dominating factor governing the lives and habits of the greater majority of natives in this District”.<sup>32</sup>

At the heart of many murder trials in the Northern Territory in the 1950s was the dilemma of adjudication in a context of such contested cultural commitments, prompting the first sustained Australian judicial reflections on the problem. The single justice of the Territory Supreme Court in this decade was Judge Martin Kriewaldt, a judicial officer of Lutheran background.<sup>33</sup> Kriewaldt was determined that Australian justice should prevail over Aboriginal violence, but its impact in penal consequences be mediated by a regard for the context of offending, mentality and life circumstances. In 1959, not long before his premature death, and at a time when he was still composing an extended treatise on the application of the criminal law to Aborigines in the Territory, he presided over a case typical of his experience. In the western desert community of Papunya two men had died after what appeared to be a punishment spearing directed at one of them. Tried before a jury on charges of murder, one man,

Timmy, was acquitted (and subsequently removed from the community for his safety) and another, Jack Wheeler, found guilty of manslaughter. In sentencing remarks, Kriewaldt J was brief but incisive.

I cannot allow myself to be influenced in this case by the failure of the authorities to bring well merited prosecutions in respect of the other non-fatal spearings. I have also come to the conclusion that since the criminal law is one of the means which must be used as an aid in the process of the assimilation of the Australian aboriginal into an integrated community, the sentence must give the aborigines at Papunyah notice that spearing will not be tolerated.

In coming to his conclusion that a sentence of 16 months for manslaughter was appropriate in this case Kriewaldt balanced two considerations – one that the death was indeed accidental, since “in the majority of cases where aboriginals spear each other, death does not follow”; the other that although the defendant had little contact with “white civilization” he was then living in a government settlement and “obviously the custom of “pay back” cannot be permitted to continue on settlements staffed by Government officials”.<sup>34</sup>

Kriewaldt’s reasoning highlighted the unease still prevailing in exercise of criminal jurisdiction in this Australian territory. In a direction to the jury in the related prosecution of Timmy Kriewaldt had already alluded to that unease, centred on the question of whether an “Aboriginal native” should be tried in the same court and by same rules as “a white person”. As he commented, “[p]eople have argued for 150 years or more whether this is a good thing. Perhaps it is, perhaps it is not.”<sup>35</sup> When Kriewaldt justified sentencing not on the basis of the characteristics of the offence (motive, aggravation, consequences) but on the necessity of drawing a line in the sand

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against the custom of “payback” surviving in a government settlement he also illuminated the intersection of law and governance regimes. In this respect he stood in the long line of those, judges, administrators, protectors, and anthropologists, who looked to law as an instrument for the shaping of a particular type of person, and a particular kind of community, one void of Aboriginal jurisdiction. In other ways Kriewaldt’s self-conscious conclusion was consistent with the development of his original contribution to the development of a sentencing approach that would take account of the conditions of Aboriginal life while asserting the authority of the court and government policy. In that respect he initiated a contemporary discourse that grapples still with the consequences of criminal jurisdiction over Indigenous peoples in Australia.

*Conclusion*

In the contemporary era, pre- and post-*Mabo* (1992), the High Court of Australia has been consistent in its affirmation of the jurisdictional reach of the criminal law. *Mabo* made no difference to this fundamental postulate. When Aboriginal activist Dennis Walker optimistically challenged the jurisdiction of the court in 1994 he was slapped down without hesitation by the Chief Justice, Sir Anthony Mason:

In *Mabo* (No.2), the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo* (No.2) to provide any support at

all for the proposition that criminal laws of general application do not apply to Aboriginal people.<sup>36</sup>

Such judicial affirmations of the general reach of the criminal law do not comprehend the history on which they rest. From *Murrell* to *Mabo* the courts in Australia asserted jurisdiction but the stories briefly traced here show the distance between territorial jurisdiction's aspiration and its shortcomings in adjudicating over Indigenous peoples. In the century after *Murrell* those shortcomings were recognised and addressed through the multiplication of regimes, institutional and statutory. These regimes, taking different forms across time and space, constituted a governance of Indigenous peoples in which amenability to Australian criminal law was a threshold crossed in exceptional circumstances and with exceptional consequences.

The persistent intrusion of Indigenous difference exhibits a remarkable continuity through more than two centuries of Australian settler history, constantly raising the possibility of an alternative body of law and practice that government policy and criminal justice institutions have struggled to understand and contain. From Macquarie's uneasy assertion of jurisdiction in 1816 to the Howard Government's ill-informed "abolition" of the so-called "customary law defence" in 2007, government in Australia has struggled to come to terms with Indigenous claims and dispositions that are at odds with the immigrant cultures of the Australian settlement. The archaeological work of excavating the law as it is practised, avoided or subverted helps us to understand why jurisdiction remains less complete than contemplated by Burton J in *Murrell* in 1836.

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<sup>1</sup> Crimes Act 1914 (Consolidated), sec 16A (2A). Research for this chapter has been assisted by the Australian Research Council (DP0771492). I am grateful to John Myrtle and Jonathan Richards for research assistance; to Ian Hunter and Lisa Ford for their comments on an earlier draft; and to the participants at the ‘Transpositions of Empire’ symposium in Prato, April 2009 for the stimulus of their own work and conversations.

<sup>2</sup> Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America And* (Cambridge, Mass: Harvard University Press, 2010), p. 183.

<sup>3</sup> Paul G McHugh, *Aboriginal societies and the common law : a history of sovereignty, status, and self-determination* (Oxford ; New York: Oxford University Press, 2004), pp. 159-164.

<sup>4</sup> Shaunnagh Dorsett and Shaun McVeigh, ‘Just So: “The Law Which Governs Australia is Australian Law”’, *Law and Critique*, 13 (2002), 289-309, at p. 296.

<sup>5</sup> Bruce Kercher, ‘The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836’, in *Land and freedom : law, property rights and the British diaspora*, ed. by A. R Buck, John McLaren and Nancy E Wright (Aldershot: Ashgate, 2001), pp. 93-97; Alex Castles, *An Australian Legal History* (Sydney: Law Book Co., 1982), pp. 526-529.

<sup>6</sup> There is not space here to document the extensive literature, governmental and research, which developed around customary law: see especially Australian Law Reform Commission, *The Recognition Of Aboriginal Customary Laws*, 1986; Western Australia Law Reform Commission, *Aboriginal Customary Laws: Final Report*, 2006.

<sup>7</sup> For the most recent accounts see Grace Karskens, *The Colony: A History of Early Sydney* (Crows Nest, N.S.W: Allen & Unwin, 2009); Ford; Alan Atkinson, *The*

*Europeans in Australia : a history* (South Melbourne, Vic.: Oxford University Press, 1997); Inga Clendinnen, *Dancing with strangers* (Melbourne: Text Publishing, 2003).

<sup>8</sup> Karskens, *Colony*, pp. 440-442.

<sup>9</sup> Proclamation By His Excellency Lachlan Macquarie ..., 4 May 1816, *Historical Records of Australia*, ser. 1, vol. ix (Sydney: Library Committee of the Commonwealth Parliament, 1917), pp. 141-145.

<sup>10</sup> Lisa Ford, 'Indigenous Policy and Its Historical Occlusions: The North American and Global Contexts of Australian Settlement', *Australian Indigenous Law Review*, 12 (2008), 69-80.

<sup>11</sup> "Miscellaneous Correspondence Relating to Aborigines, 1797-1840" (State Records NSW: NRS 13696, [5/1161]), Document 41, on-line at *Original Documents on Aborigines and Law 1797-1840*, <<http://www.law.mq.edu.au/scnsw/Correspondence/documents.htm>>. In this respect the case compares with that of Rangitapiripiri in New Zealand in 1847, indicted for murder of another Maori, who was brought in for trial by his own people: Shaunnagh Dorsett, 'Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s', *The Journal of Legal History*, 30 (2009), 175-197, at p. 186.

<sup>12</sup> *R v Murrell*, 1836 (Supreme Court NSW), <<http://www.austlii.edu.au/au/journals/AILR/1998/27.html>>.

<sup>13</sup> Ann Hunter, 'The boundaries of colonial criminal law in relation to inter-Aboriginal conflict ('Inter Se Offences') in Western Australian in the 1830s-1840s', *Australian Journal of Legal History*, 8 (2004), 215-236; Libby Connors, 'Traditional law and Indigenous Resistance at Moreton Bay 1842-1855', *ANZLH-Ejournal*, 107-117 (2005); Simon Cooke, 'Arguments for the survival of Aboriginal customary law

in Victoria: a case note on R v Peter (1860) and R v Jemmy (1860)', *Australian Journal of Legal History*, 5 (1999), 201-241; D Ward, 'Constructing British authority in Australasia: Charles Cooper and the legal status of Aborigines in the south Australian Supreme Court, c. 1840-60', *Journal of Imperial and Commonwealth History*, 34 (2006), 483-504.

<sup>14</sup> For McHugh: 'In Queensland Aboriginal peoples unluckily under officialdom's ken truly experienced a terrible century of suppression and confinement', McHugh, *Aboriginal societies*, p. 281; and see generally Rosalind Kidd, *The way we civilise : Aboriginal affairs - the untold story* (St Lucia, Qld.: University of Queensland Press, 1997); Thom Blake, *A dumping ground: a history of the Cherbourg settlement* (St Lucia: UQP, 2001).

<sup>15</sup> Mark Finnane and Jonathan Richards, "Aboriginal violence and state response: histories, policies, legacies in Queensland 1860-1940", *ANZ Journal of Criminology*, 2010 (forthcoming).

<sup>16</sup> "R v Paddy and Wills", 1886, EXE/4, Queensland State Archives (hereafter QSA)—sentences commuted.

<sup>17</sup> "Re death of Roderick on 30 Dec 1912", A/49730, 95N, QSA; sentence commuted to life imprisonment: see 'Record of death sentences', PRI/19, QSA.

<sup>18</sup> "Re death of Roderick on 30 Dec 1912", A/49730, 95N, QSA; for police as amateur ethnographers, see Amanda Nettelbeck and Robert Foster, *In the name of the law : William Willshire and the policing of the Australian frontier* (Kent Town, S. Aust.: Wakefield Press, 2007); Derek John Mulvaney, Alison Petch and Howard Morphy, *From the frontier : outback letters to Baldwin Spencer* (St Leonards, N.S.W.: Allen & Unwin, 2000).

<sup>19</sup> Diaries of WF Mackenzie, AIATSIS Library (Canberra) Ms 2483; for some of the context see Kidd, *The way we civilise*, pp. 118-122; Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal* (Carlton, Vic: Melbourne University Press, 2009), pp. 1-5, 106-07, 178.

<sup>20</sup> “Alick Brown murdered”, POL/512N, QSA.

<sup>21</sup> “Trials for Murder N.T.”, Judge David Bevan, 3 Dec 1913, A3 (A3/1), NT1914/426, National Archives of Australia (NAA).

<sup>22</sup> “Trials for Murder N.T.”, J A Gilruth to Minister for External Affairs (P M Glynn), 27 September 1913, A3 (A3/1), NT1914/426, NAA.

<sup>23</sup> Northern Territory, *Aboriginals Ordinance (No 2) 1937*, s. 2; “Aboriginal prisoners – wives as compellable witnesses”, F1 1938/536, NAA; Tony Austin, *Never trust a government man : Northern Territory Aboriginal policy 1911-1939* (Darwin: NTU Press, 1997), pp. 242-244.

<sup>24</sup> Francis James West, *Hubert Murray : the Australian pro-consul* (Melbourne ; New York [etc.]: Oxford University Press, 1968), pp. 38-45, 216-235.

<sup>25</sup> Northern Territory, *Crimes Ordinance 1934*, s. 2, cl 6A.

<sup>26</sup> Austin, *Never trust*, pp. 226-7; and see “Alleged murder of Kock and Arinsky by Aborigines”, A659 (A659/1), 1939/1/9949, NAA.

<sup>27</sup> “The King v Jackala”, Director of Native Affairs, 9 Apr 1940, A432, 1940/377, NAA.

<sup>28</sup> “The King v Jackala”, minute of J.A. Carrodus, 17 Apr 1940, A432, 1940/377, NAA. For contrasting assessments of Carrodus see Austin, *Never trust*, pp. 231-2; and Andrew Markus, *Governing savages* (Sydney: Allen & Unwin, 1990), pp. 122-129.

<sup>29</sup> “Trial of Bullfrog”, F1, F1/0, 1955/172, NAA.

<sup>30</sup> “Papunya – tribal killing”, F1 F1/0, 1959/1502, NAA.

<sup>31</sup> “Tribal Murders - Reports and Investigations”, Walpiri 1954, F1, F1/0, 1955/172, NAA.

<sup>32</sup> “Tribal Murders - Reports and Investigations”, McCoy, 24 Nov 1954 F1, F1/0, 1955/172, NAA.

<sup>33</sup> Heather Douglas, ‘Justice Kriewaldt, Aboriginal identity and the criminal law’, *Criminal Law Journal*, 26 (2002), 204-222.

<sup>34</sup> “Papunya – tribal killing”, Sentencing remarks by Justice M Kriewaldt, 19 Aug 1959, F1 F1/0, 1959/1502, NAA. For Kriewaldt’s own reflections see: Martin Kriewaldt, ‘The application of the criminal law to the Aborigines of the Northern Territory of Australia’, *University of Western Australia Law Review*, V (1960), 1-50.

<sup>35</sup> Kriewaldt J, Summing up remarks, in *R v Aboriginal Timmy*, 18 Aug 1959, in John McCorquodale, *Aborigines and the law : a digest* (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal Studies, 1987), 364.

<sup>36</sup> *Walker v the State of New South Wales*, (1994) 182 CLR 45, <<http://www.austlii.edu.au/au/cases/cth/HCA/1994/64.html>>, par 6.