

## CHAPTER 1

### INTRODUCTION

When South Australia was established in 1836 it was British government policy that Aboriginal people within the colony's boundaries were to be considered as British subjects.<sup>1</sup> This meant that Aboriginal people were to be both subject to English law and entitled to its protection — there was to be 'one law for all' for inhabitants within the new colony. On arriving at Holdfast Bay in December 1836, Governor John Hindmarsh's first proclamation reinforced this policy, stating that Aboriginal people and settlers alike would be held accountable to British law and that settlers would be punished for violent or unjust acts committed against Aboriginal people.<sup>2</sup> This book examines this policy and its implementation, especially how and why it failed to be translated into practice within a colony expected to be more enlightened in its treatment of Aboriginal people than other Australian colonies. The approach adopted here is to provide, in this initial chapter, some contextual background before examining, in chapter 2, the 'one law for all' policy itself in some detail. Rather than describe the events and criminal cases involving Aboriginal people in chronological order, a thematic approach is used to provide the structure of this book. The themes are derived from the issues involved (e.g. admissibility of evidence, interpretation) and also the categories of crime (e.g. murder, property offences). Largely because these various themes and issues are played out by the early 1860s, the scope of this book is restricted to the first twenty-five years of settlement.

By the early 1830s the British colonies of New South Wales and Van Diemen's Land were well established and planning was underway for new colonial ventures. In London, Edward Wakefield and Robert Gouger were publicising their theories of systematic colonisation and lobbying for government approval and private support to put them into practice.<sup>3</sup> When news of Sturt's discovery that the River Murray reached

the sea near St Vincent's Gulf arrived in London, the location of this new venture was determined. Not so, however, the nature of the proposed colony. Initially the proposers of this new venture argued for a private colony, but when the Colonial Office's legal adviser, James Stephen, declared their proposal to be 'wild and impractical' they moved to form the South Australian Association and submitted a revised proposal, this time for a chartered colony.<sup>4</sup> However, during the early negotiations between the proposers and the Colonial Office, the promoters were forced to accept that South Australia would need to be established as a Crown colony.<sup>5</sup>

South Australia was meant to be different.<sup>6</sup> It was to have no convicts and to adopt a controlled land distribution system which would avoid the dispersion of settlement, economic stagnation and the evils of land-grant favouritism that had caused problems elsewhere. All land in the colony was to be sold at a fixed minimum price, with most of the funds raised earmarked to ensure a steady supply of willing migrant labourers. South Australia was also to be self-supporting, meeting its establishment costs through land sales. Its promoters hoped that this financial independence would guarantee that it would be more independent than other British colonies, and largely trusted by the Home Government to run its own affairs. To these planned differences was soon to be added another, neither planned for nor welcomed by the entrepreneurs promoting the South Australian venture in the early 1830s. For while they lobbied for approval for a new colony based upon the theory of systematic colonisation, another reform movement also looked towards the colonies — humanitarianism. This movement was to influence the policy on the treatment of Aboriginal people in all Australian colonies in the late 1830s, but particularly so within South Australia. Because it was being deliberately planned as a colony with important differences from other colonies in Australia, South Australia provided an opportunity for those humanitarians who came to positions of power in London in the 1830s to implement their views on the treatment of Aboriginal peoples. Lord Glenelg's appointment to the Colonial Office in early 1835 came just at the time when negotiations were underway regarding the arrangements for the new colony. The fact that the colonial planners and investors needed to gain Crown approval for their venture, and that they were eager to quickly overcome any obstacles, gave Glenelg an opportunity to modify their plans to fit in with humanitarian beliefs.

While the colonial planners and investors might have privately sneered at humanitarian attitudes towards Aboriginal people, they had no choice but to deal with a Colonial Office dominated by officials of a humanitarian bent. Believing that Glenelg's proposals were likely to impede their personal hopes for land speculation on a large scale, the South Australian Commissioners resisted them.<sup>7</sup> In July 1835, the Colonial Office made it clear that the issue of Aboriginal rights must be resolved before the colony could proceed, but it was not until later in the year that the Colonial Office announced the means by which they expected this to be achieved. In the meantime the Commissioners stonewalled, hoping that they could find a way around these demands. But Glenelg persisted, determined to try out a new model for relations with an Aboriginal people faced with British settlement of their territories.<sup>8</sup> He reaffirmed to the Commissioners the then official view on the issue of Aboriginal land rights, arguing that settlement would be confined to 'those limits within which they can show, by some sufficient evidence, that the land is unoccupied and that no earlier and preferable title exists'.<sup>9</sup> The colony would not proceed until assurances were given that Aboriginal land rights would be respected, land would be purchased from Aboriginal people, and that a Protector of Aborigines would oversee Aboriginal interests and all land transactions.<sup>10</sup> The *Letters Patent*, establishing the new colony, would also establish the rights of Aboriginal people,<sup>11</sup> while the Protector of Aborigines would ensure that the requirements of the Colonial Office would be met by both colonial administrators and private settlers. The Colonization Commissioners were unimpressed by these restrictions and set out to minimise the extent to which they would be implemented once the colony was established.

Land was central to the South Australian venture and the threatened appointment of a Protector of Aborigines, with power to control and restrict land sales, was resisted vehemently. Glenelg held firm, however, insisting that the settlement be delayed until it was clear that Aboriginal rights would be protected, placing his hopes for the practical achievement of this in the appointment of the Protector and government control of land settlement. By that stage the planners had little choice but to meet the Colonial Office conditions, given how advanced were their plans for establishing the new colony. If these plans were not to be abandoned the Commissioners would have to at least appear to meet Glenelg's demands. So it was that the Commissioners agreed to avoid selling land

clearly occupied by Aboriginal people, to provide them with educational opportunities and to reserve twenty per cent of land in the colony for the benefit of Aboriginal people.<sup>12</sup> Historians generally agree that the Commissioners probably had little or no intention of honouring these promises once the settlers were in South Australia.<sup>13</sup> They soon moved to ensure that all land in the colony would be open for public sale, and to deprive the Protector of any authority over land sales.

Another policy, amalgamation, was also intended to be implemented in South Australia. The view underlying this policy was that clashes between the two separate cultures within the new colony could be avoided by minimising their separateness in the first place. There should be an amalgamation of the two cultures — Aboriginal people were to be assimilated into South Australian society through the agencies of education and conversion. It was recognised that this would be a slow process bound to encounter considerable difficulties. Even so, South Australia was considered an ideal place to implement such a policy, particularly as it was not to be ‘tainted’ by convicts or ticket-of-leavers.

However, even settlers who accepted the amalgamationist approach would find it difficult to implement and sustain in practice once in the colony. Difficulties abounded: relatively few Aboriginal people were contacted initially, those who were had only selected interest in the newly transplanted culture, very few were interested in abandoning their own beliefs and customs, schools and missionaries reported difficulties and failure in educating Aboriginal young people, and close contact seemed often to lead to a breakdown of friendly relations. Nevertheless, the amalgamation policy underpinned a number of approaches that were given either theoretical support or practical trial in the colony’s early years, including creating Aboriginal reserves within or near each town, allocating land from each survey for Aboriginal use, setting aside a percentage of land sales for Aboriginal benefit,<sup>14</sup> establishing schools for young Aboriginal people,<sup>15</sup> and encouraging the employment of Aboriginal people by settlers.<sup>16</sup>

Perhaps the policy with the greatest potential to change the way Aboriginal people and settlers interacted with British law in South Australia was that related to land.<sup>17</sup> The intention of the Colonial Office, enshrined in the *Letters Patent*<sup>18</sup> and accepted by the Commissioners, was that Aboriginal tenure would be recognised through settlers paying for the land.<sup>19</sup> The requirements of this policy were to be met, the Commissioners determined in 1836, through reserving sixteen acres in

each eighty acre subdivision for the use and benefit of Aboriginal people. Eventually, they suggested, '20 per cent of all settled land would be held on their behalf, providing both land and income for their support'.<sup>20</sup> Unfortunately, land was also the path to personal fortune for leading colonists and once the colony was established the Commissioners retreated to the protection of the 1834 *South Australia Act*, which admitted no Aboriginal rights in the land.<sup>21</sup>

Some of the colonial planners in the 1830s were of the view that many of the problems encountered in the Australian colonies were associated with uncontrolled expansion of settlement. To avoid problems associated with an unplanned and dispersed frontier, settlement of new areas should be regulated to keep it in step with the growth of the population.<sup>22</sup> Accordingly, a fundamental approach adopted in South Australia was that of concentrating settlement by formally restricting its expansion. Not surprisingly, this was not a popular concept among those intending to emigrate (or indeed to speculate on land). The idea that colonists would have to ignore opportunities outside a prescribed area and that the best land would not be available to those who found it first did not make for an attractive proposition to potential colonists. While the colonial planners had some initial success in moderating this concentration principle, it was one which appealed to key humanitarians in the Colonial Office and so it was retained, with a limit of eight miles from Adelaide set as the boundary of settlement. However, it came under challenge within weeks of the actual landing in the colony.<sup>23</sup> With Light's surveying staff overworked, some land purchasers could not see why they should not simply 'squat' on a favourable site and have the survey catch up with their choice later. This pressure continued when settlers began to make their own private explorations of the territories outside the official limit of settlement. Those whose interests lay more in land speculation than establishing themselves in agricultural enterprise pushed even more forcefully for the restrictions to be dropped.

The concentration principle had considerable implications for colonial Aboriginal policy. If it had been adhered to strictly, it might have meant that most Aboriginal people outside the area of settlement could have continued their traditional lives largely unmolested for several more years than was the case. For those people within the decreed settlement zone, private and government resources might have been more effectively brought to bear to mediate when difficulties arose between settlers and the Aboriginal people. As the settlement expanded

later, these resources could have been freed progressively to address the education of Aboriginal people further afield, including about the law and its implications for them. Yet, what was seen by officials as a legitimate tool of a planned colony was regarded merely as a restriction to land-interested colonists — concentration implied congestion and limitation of profits to the latter group. Its abandonment, particularly so early in the life of the colony, was a major factor in the failure of overall Aboriginal policy, including ‘one law for all’. With the dispersal of settlement there was a serious loss of official control over race relations, the need to spread limited resources more widely, an increase of frontier contact outside of the view of the law, less likelihood of settlers and Aboriginal people learning each other’s language, and a greater incidence of settlers deciding to take the law into their own hands.

Despite South Australia being hailed as a planned colony, very little provision was made for the establishment and operation of a legal system before the settlers actually arrived.<sup>24</sup> John Jeffcott, formerly Chief Justice of Sierra Leone, was appointed to oversee the administration of justice in the colony but delayed his departure until September 1836, and even then found time to break his journey in Hobart, before eventually arriving in April 1837. No magistrate accompanied the settlers and Hindmarsh swore in several colonists as magistrates soon after arriving at Glenelg. The assumption was that English law, its principles and procedures would operate in the colony. When Jeffcott eventually arrived in the colony the Supreme Court had not yet been established and in May 1837 he had to be granted a Special Commission of Gaol Delivery to enable him to try the cases outstanding. At the first sitting of the Grand Jury in May 1837 Jeffcott quickly confirmed that the forms and processes of English law would prevail in the new colony: grand juries were to be the structure used to legitimate prosecutions, all accused would have the right to counsel, and the use of juries would not be bypassed in his court.<sup>25</sup> Before the next sitting of the Court, the *Supreme Court Act*<sup>26</sup> formalised the court structures and defined its powers, which essentially concentrated legal functions into a single colonial court.<sup>27</sup> This Act also established an appeals system, through a Court of Appeals made up of the Council of Government (excluding any legal officials who might have a conflict of interest in matters before it). The intention was that a three-tiered system of justice be established but this soon proved too complex for the requirements of the small colony. Accordingly, the Supreme Court and the Resident Magistrate

Courts took on the bulk of the responsibility, with assistance from rural Justices of the Peace.

South Australian law as it would relate to Aboriginal people was also influenced by precedents and events in the other Australian colonies and so it is worthwhile briefly looking at the situation there. In the early years of New South Wales it was by no means certain that British subjectship was automatic for Aboriginal people and so there were doubts as to whether they were afforded protection under the law.<sup>28</sup> However, with the wider acceptance of New South Wales as a settled colony, Aboriginal people came to be more firmly considered as British subjects and thus amenable to British law.<sup>29</sup> As contact between colonists and Aboriginal people took place, with its attendant violent clashes, the pressures on the policy regarding their legal status acted to restrict the law's application to Aboriginal people. In 1805 Richard Atkins, the New South Wales Deputy Judge Advocate, advised Governor King that he did not believe Aboriginal people could be called on to plead before a court, despite their being 'within the pale of Her Majesty's protection'.<sup>30</sup> Not being amenable to such proceedings, Atkins argued, left only a resort to summary justice when Aboriginal people offended against the law. This remained the situation through Macquarie's administration, notwithstanding his proclamation of May 1816.<sup>31</sup> In 1825 London issued instructions that Aboriginal people should be protected in the enjoyment of their possessions and from violence and injustice.<sup>32</sup> Nevertheless, ambiguity remained and colonial governors had considerable room to interpret what such an instruction meant in practice.

In 1829 a well-known Sydney Aboriginal man was killed by other Aboriginal men in the Domain.<sup>33</sup> One of his alleged killers was arrested and the authorities were faced with the issue of extending British law to cover serious crimes among the Aboriginal people themselves. The Attorney General pondered the jurisdiction issue, referring the case to the Supreme Court for advice. Justices Forbes and Dowling advised that it would be unjust to apply British law in this circumstance.<sup>34</sup> So, despite the official view that Aboriginal people were subject to British law, there were clearly situations in which even the Supreme Court believed this not to be the case. The uncertainties which this apparent conflict caused did not again come to the fore in New South Wales until May 1836, at the same time as the first South Australian colonists were sailing to the new colony. In a trial of two Aboriginal men accused of murdering two other Aboriginal men,<sup>35</sup> in what became known as the

Murrell case, defence counsel questioned the court's jurisdiction over his clients, arguing that the presumption of citizenship could not be made in this case.<sup>36</sup> The Judges over-ruled this objection, stating that in New South Wales Aboriginal people were indeed 'amenable to the laws of the Colony for offences committed within it'.<sup>37</sup>

Despite the strength of this decision, not all of the judiciary agreed with it. When Bonjon came before Justice Willis in Melbourne on September 1841, charged with murder of a fellow Aboriginal man, the issue of jurisdiction once again was queried. Early in the proceedings, Willis stated his view that there was 'no express law which makes the aborigines subject to our Colonial Code'.<sup>38</sup> Perhaps realising that he had little chance of success given the Judge's views, the prosecutor decided not to proceed with the case,<sup>39</sup> thus avoiding a judicial decision contrary to the accepted view. The official position was that the Murrell decision held, but Willis' view struck a chord of agreement among many colonists. To many it hardly seemed practical, wise or expedient to push the influence of British law beyond the boundaries of relations between the two races into the largely unknown territory of Aboriginal customary law. The result was that, in practical terms within all the Australian colonies in the early 1840s, there was a reluctance to involve the courts and the police in dealings between Aboriginal people themselves. The policy might be clear but

[it] was tempered by practices of non-involvement by law enforcement agencies in disputes between Aborigines, and ways were sought to reduce the impact of non-recognition through non-prosecution and mitigation of sentences.<sup>40</sup>