

# WESTERN AUSTRALIA'S EARLY COLONIAL LAWS: AS REPORTED BY ARCHDEACON WOLLASTON

The Hon Justice RD Nicholson \*

Whatever motivated John Ramsden Wollaston at the age of fifty to leave the security of his cure at West Wickham in Cambridgeshire in 1840 for the unknown quantity of Western Australia,<sup>1</sup> it is sure that as part of the Anglican ministry he moved with the certain knowledge that divine law<sup>2</sup> would go with him. What is less sure is whether he knew it would be accompanied by the presence of the law of man. That he was - as an educated graduate in Divinity of Christ's College, Cambridge - aware of the distinction is apparent from his diaries when he wrote:

It has been observed by a eloquent Divine "Principles must be ever held above Rules. A good Rule, if it be not called into action by a good principle is in itself worthless"<sup>3</sup>

Yet in his assumption of his mission in a strange and distant land, the ready availability of the law and of good law in the youthful Colony was apparently assumed by him. His assumption proved not to be misplaced and he came to his endeavours in a society where, despite its youthfulness, the rule of law was established even if not always respected in remote districts<sup>4</sup>. In this regard Wollaston was fortunate in coming to a Colony where the foundation Governor gave his first priority to the need for 'the immediate and formal Establishment of Civil and Criminal Law and Law

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\* Judge Federal Court of Australia. This article was presented as the 1997 Wollaston Lecture to the Holy Trinity Church York Society on 21 September 1997.

1 The first Wollaston lecturer suggested abandonment of speculation of motive: G C Bolton, *John Ramsden Wollaston - The Making of a Pioneer Priest* York: Holy Trinity Church Society, 1985, 9. Other prior Wollaston Lectures have been: MN Austin, *John Wollaston - A Man of God* York: Holy Trinity Church Society 1986; C A Pierce, *John Ramsden Wollaston - Consistently Scriptural* York: Holy Trinity Church Society, 1987; N Green, *John Ramsden Wollaston and the Aboriginal Experience* York: Holy Trinity Church Society, 1988; H M Vose - *The Real John Wollaston. Rediscovered in Journals* York: Holy Trinity Church Society, 1989; and H E Hallam *John Wollaston - Family Man and Priest in a New Land* York: Holy Trinity Church Society, 1991.

2 *The Wollaston's Journals (Vol 1)*. Perth: University of Western Australia Press, 1992, 197

2 *The Wollaston's Journals (Vol 2)*. Perth: University of Western Australia Press, 1992, 93

3 *The Wollaston's Journals (Vol 2)*. Perth: University of Western Australia Press, 1992, 93

4 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press. 1992 262

Courts.<sup>5</sup> So much was this the case that the Governor took the initiative to establish a magistracy in the absence of any express authority to do so in his Instructions.<sup>6</sup> It was therefore into an environment of some legal order to which Wollaston arrived in 1841, only 12 years after the birth of the Colony. It should also be said the assumption made by Wollaston has also been made by today's historians and the story of the ready and early establishment of the law remains to be written.

## PROPERTY LAW

Wollaston's first contact with the law occurred immediately on arrival. He described it as follows:

Having happily, and Providentially collected our forces, we turned all our attention towards a Settlement. The Captain of an American Whaler (the "Samuel Wright") wh[ic]h had been wrecked in our Bay the Year before, had purchased the land & premises we now occupy; but being anxious to return to his country he, on the very day of my landing made me such an offer of this Property as I was glad, with a few modifications, to accept; & I shall ever consider it as God's merciful disposal, that such a circumstance occurred at such a time; putting me at once into possession of land & shelter for myself and family.<sup>7</sup>

By this means Wollaston acquired 115 acres.<sup>8</sup> He was also able to purchase on the spot a working oxen.<sup>9</sup> Subsequently he had assigned to him, on application to the Government, another block of 100 acres, on the opposite of the river, in consideration of having paid £100 in London to obtain bounty on servants.<sup>10</sup> It is apparent, however, that there was a lapse of time before he was able to conclude the bargain and take actual possession, for he wrote that this did not occur until 15 May 1841. He and his wife had been accommodated at a Mr Ommanney's in the interim and the boys and men remaining at an encampment on the beach.<sup>11</sup>

In these actions Wollaston was involved not only in the application of the law of contract but also in the law relating to the transfer of title

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<sup>5</sup> 4 *Swan River Papers* 74, 20th January 1830

<sup>6</sup> Russell, E. *A History of the Law in Western Australia and its Development from 1829 to 1879*, Perth: University of Western Australia Press, 1980, 11-12

<sup>7</sup> *The Wollaston's Journals (Vol 11)* Perth: University of Western Australia Press, 1992, 125-126

<sup>8</sup> *The Wollaston's Journals (Vol 11)*. Perth: University of Western Australia Press, 1992, 126.

<sup>9</sup> *The Wollaston's Journals (Vol 11)* Perth: University of Western Australia Press, 1992, 126.

<sup>10</sup> *The Wollaston's Journals (Vol 11)* Perth: University of Western Australia Press, 1992, 126.

<sup>11</sup> *The Wollaston's Journals (Vol 11)* Perth: University of Western Australia Press, 1992, 136.

to both realty and personalty. Today's law students would know these as aspects of Property Law

When the decision had been taken to settle the Colony of Western Australia, the Colonial Office issued regulations relating to grants of land. These were issued on 5 December 1828, 3 February and 28 August 1829. These provided for the conditions on which settlers could obtain land<sup>12</sup> On 6 March 1832 the Legislative Council passed an Act directed to providing 'for the Registration of Deeds, Wills, Judgments and Conveyances, affecting Real Property' In later times, each of these topics was to attract its own separate regulatory system.

The Western Australian Land Company had been formed by Marshal Waller Clifton, Chief Commissioner of the Company in Australia, to settle land at Port Leschenault near Bunbury in Western Australia on the principles of colonisation originally proposed by Edward Gibbon Wakefield<sup>13</sup> Wollaston had applied to the company for appointment as chaplain to emigrants but the company declined to use his services<sup>14</sup> He nevertheless went down to that area and it was there he made his purchase. Given his actions in that regard and his prior contact with the Company, it is a reasonable inference that he was aware of the conditions upon which land was being offered in the Colony.

Understandably, in a new Colony where settlement of the land was fundamental to existence, the acquisition of title to land was of general concern. Wollaston wrote that 'choice spots for farms are immediately taken up by all who discover them, and have the means to purchase.'<sup>15</sup>

Wollaston's property also had the advantage of being fenced.<sup>16</sup> This was unusual for he saw many 'vexations & troubles of the Settler in a wild uninclosed (*sic*) country'<sup>17</sup> He told of how the Bussells had lost some cattle for two years and then they had unexpectedly made a re-appearance with their increase - hence leading to the choice by them of the name for their property of 'Cattle Chosen'<sup>18</sup> It is not surprising therefore the issue of fencing occasioned enactment of some early laws.

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12 Colonial Office, General Regulations and Instructions relative to Crown Lands in Western Australia Circular A, 5 December 1828; Circular B, 3 February 1829; Disposal of Crown Lands, 28 August 1829; Ogle, N. *The Colony of Western Australia: A Manual for Emigrants 1839*. Sydney: Ferguson, 1930, 296-297

13 *Wollaston's Picton Journal 1841-1844* Perth: CH Pitman & Son 1948, 316 (appendix II).

14 *Wollaston's Picton Journal 1841-1844*. Perth: CH Pitman & Son, 1948, xiii.

15 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992 129

16 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press. 1992 126

17 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press 1992 141

18 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 141

On 7 April 1834 the Lieutenant-Governor assented to 'An Act to regulate the Fencing of Town and Suburban Allotments'<sup>19</sup> On 2 September 1847 Governor Irwin with the advice and consent of the Legislative Council passed an 'Ordinance to provide further remedies against trespasses by Live Stock, and to promote the construction of Fences'. This required owners of cattle or other live stock found trespassing, whether damage was proved or not, to forfeit three pence for each head of horses or other great stock and one penny for each head of sheep or other small stock<sup>20</sup> Rights to castrate trespassing horses, bull or rams were also provided for<sup>21</sup> Further amending and consolidating legislation was enacted in 1860<sup>22</sup>

The law of real property also intruded into Wollaston's life in relation to the acquisition of title to the land on which the Picton Church was situated. The site had cost nothing.<sup>23</sup> By June 1843 Wollaston had formed the intention to convey the church property to the trustees 'as soon as Sir James Stirling furnishes me with a Title to the 15 acres of wh[ich] it was a part.'<sup>24</sup> His wish was to have the conveyance expressed to be 'for the use of the Church of England in Western Australia, for ever.'<sup>25</sup> By June 1848 he was still awaiting a conveyance from the Governor, pending which 'Picton Church must remain on my hands.'<sup>26</sup>

Later in 1843 Wollaston was calling on Mr Lawrence, the lawyer, for the purpose of finally settling a conveyance of a Mr Northey's house at Bunbury.<sup>27</sup>

## COMPANY AND TRADE PRACTICES LAW

Wollaston's personal disappointment at failing to receive an appointment from the Western Australian Land Company and his subsequent conclusion the Company was hinting he had some connection with the enterprise,<sup>28</sup> certainly coloured his views of it. However, the nature and depth of his charges in respect of the activities of the Company support

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<sup>19</sup> *An Act to regulate the Fencing of Town and Suburban Allotments* 4 Gul IV No 4

<sup>20</sup> *An Ordinance to provide further remedies against trespasses by Live Stock and to promote the construction of Fences* 10 Vic No 13

<sup>21</sup> *An Ordinance to provide further remedies against trespasses by Live Stock, and to promote the construction of Fences* 10 Vic No 13.

<sup>22</sup> *An Ordinance to amend "An Ordinance to consolidate and amend the Laws relating to Trespass of Live Stock and to promote the Construction of Fences* 24 Vic No 8

<sup>23</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 243.

<sup>24</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 117

<sup>25</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 118

<sup>26</sup> *Wollaston's Albany Journals Perth* Paterson Brokensha Pty Ltd, 1954, 32.

<sup>27</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 153

<sup>28</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 169

the view there was an objective basis for his dislike extending beyond any motivation emanating from these questions. Those charges would today be thought to invoke the possible application of aspects of company law, the law of contract and of trade practices in addition to any other possible application of the criminal law

His opening salvo against the Company spoke of false colouring, illusive statements, implausible arguments, visionary schemes and industrious and dishonest puffing.<sup>29</sup> Later he wrote that 'the present grand Plan of Australind is all nonsense and never can or *will* be carried out, unless a barren, sandy Country covered with wood (*generally* speaking) be miraculously converted into one of fertility'<sup>30</sup> The Company was said by him to utterly neglect the production of the means of subsistence.<sup>31</sup> Wollaston went so far as to write of willful misrepresentations being the inducements to emigrate and of false representations too highly coloured.<sup>32</sup> The Company had told 'the poor people all *sorts of lies*.'<sup>33</sup> Nothing could exceed the puffing in 'the communications from Australind' in which Mr Clifton specially served the Company's views.<sup>34</sup> The 'humbug of the whole scheme' was 'terrible'.<sup>35</sup> He expected the Company would not go on, its expenses being far greater than its profits,<sup>36</sup> and it being inevitable any scheme based on Wakefield principles would 'come to nothing'.<sup>37</sup> He cautioned against 'anything in wh[ic]h Clifton & Co. appear to be concerned'.<sup>38</sup> By October 1843 he believed others would know the 'foolish scheme of Australind is a complete failure'.<sup>39</sup> Such bodies wished 'only to make the Church the means of advancing their temporal schemes'.<sup>40</sup> Ever since the Company had taken up the district of Australind, 'ungodliness has universally prevailed'.<sup>41</sup> All this because the Company had proceeded upon wrong principles without taking Christian motives into account.<sup>42</sup>

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29 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 147

30 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 206.

31 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 206

32 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 208

33 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 211

34 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 230-231

*The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 130

35 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 254

36 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 10

37 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 89

38 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 143

39 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 182-183

40 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 182

41 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 204

42 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 204

Today's law would give no remedy for failure to take Christian principles or motives into account but it would provide remedies intended to secure the recognition of principles of conduct having the underpinnings of their acceptance in the attainment of ethics in business. Company law today sets standards for directors conduct and regulates what a company can state to the public.<sup>43</sup> Contract law has provided remedies for both fraudulent misrepresentation as does the trade practices and fair trading legislation, both federal and state.<sup>44</sup> However, Wollaston, although aggrieved by what he saw of the conduct of the Company, would not himself have had standing to sue that company because he had not suffered damage as a consequence of the actions which he held in such low regard

## CRIMINAL LAW

Western Australia today is one of the three States (WA, Qld and Tas) and one Territory (NT) in Australia having a Criminal Code. It was enacted in 1913. Prior to that date the common law as modified by legislative enactments determined the content of the criminal law. Early criminal law followed by adoption the law in England.<sup>45</sup>

Wollaston was obviously concerned at the justifiability of the shooting of 'a native' (as he so described Aborigines) by Charles Bussell when the 'poor savage,' suspected of having stolen provisions, refused to stand when pursued and found. He considered it to be 'most unjustifiable homicide.' In a note to the text of his diary he records he had been assured the life of Mr Bussell's manservant had been in danger, which he accepted altered the case.<sup>46</sup>

Charles Bussell was involved in a second incident in which, in order to obtain a confession concerning the removal of flour, he had threatened a 'little native girl' with a gun, culminating in the gun going off and the ball passing through her. This Wollaston considered was

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<sup>43</sup> Director's standards and what a company can state to the public are regulated by the *Corporations Act* 1989 (Cth) (including the equivalent State Acts) and securities industry legislation Parts 3.2 and 3.2A of the *Corporations Law* regulate company officers and financial benefits to related parties of public companies respectively. Part 7.12 relates to the offering of securities and issuing of prospectuses. Takeovers are the subject of Parts 6.1 to 6.6. Corporations are in certain circumstances, also subject to the *Trade Practices and Fair Trading Acts*.

<sup>44</sup> *Trade Practices Act* 1975 (Cth); eg: *Fair Trading Act* 1987 (WA).

<sup>45</sup> eg: *An Act to extend the Jurisdiction and regulate the Proceedings of the court of Quarter Sessions* 2 Gul IV No 4; *An Ordinance for further improving the Administration of Criminal Justice* 16 Vic No 8. The history of criminal jurisdiction is traced in Russell E. *A History of the Law in Western Australia and its Development from 1829 to 1879*, Perth: University of Western Australia Press, 1980, 113.

<sup>46</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 193.

'perfectly illegal and unjustifiable.' He was glad to find Bussell summoned to Perth for proper investigation of the affair.<sup>47</sup>

The criminal law was ever present in Wollaston's life in the early community. Boats arrived with several prisoners on board.<sup>48</sup> Soldiers passed by with 'Natives manacled'. The natives were suspected murderers of one of two whites whose bodies had been found in the bush.<sup>49</sup>

Wollaston had evidence of liquor being supplied to the 'poor savages'.<sup>50</sup> 'An Act to Regulate the Sale of Spiritous Liquors by Retail' had been introduced in 1832 in which it was provided: that if from and after the first day of July next any Person shall upon any part of his or her House, Land, or Premises, sell, barter, exchange or retail, or permit or suffer to be sold, bartered, exchanged, or retailed, any Rum, Brandy, Arrack, Gin, Whiskey, Cordials, or other Spiritous Liquors, or any Ale, Beer, Wine, Cider, Perry or other fermented Liquors in a less quantity than forty Gallons, without having first obtained a License in manner hereinafter mentioned, he, or she, shall forfeit and pay for every such offence any sum not exceeding Fifty Pounds, nor less than Ten Pounds.<sup>51</sup> He found of the existence of this law and expressed his admiration for it.<sup>52</sup>

By far the most troubling incident involving the criminal law occurred in February 1843 in relation to Henry Hymus, a skilled thatcher, who, like Wollaston, was from Cambridgeshire.<sup>53</sup> Hymus was convicted of the shooting of Everet, who had also come from Cambridgeshire. The shooting occurred in circumstances where Hymus' wife was said to have aroused his jealousy which, under the influence of liquor, resulted in the wounding. Wollaston considered Hymus had 'received the heaviest provocation'.<sup>54</sup> The sentence for the offence of shooting with intent to inflict bodily harm was one year's imprisonment in Fremantle Jail and hard labour. Of the trial, Wollaston wrote:

'The trial took place at Bunbury the G[overnment] having commenced circuits at the Outposts sending the Posse of Functionaries for holding the Quarter Sessions round in the Champion. They have visited K G's Sound & the Vasse. It will have a most beneficial effect that the majesty of the Law is thus established in the diff[erent] Districts instead of as hitherto, confining all Trials to Perth; and far less expensive.'<sup>55</sup>

<sup>47</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 193-194.

<sup>48</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 203.

<sup>49</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 206.

<sup>50</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 16.

<sup>51</sup> *An Act to Regulate the Sale of Spiritous Liquors by Retail* 2 Gul IV No 8.

<sup>52</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 16.

<sup>53</sup> G C Bolton *John Ramsden Wollaston - The Making of a Pioneer Priest* York: Holy Trinity Church Society, 1985, 9.

<sup>54</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 29.

<sup>55</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 29.

Wollaston's sympathies were entirely with Hymus whom he considered to be 'a most industrious, painstaking inoffensive Man' whereas Everet was 'the most dogged, sulky and spiteful aggravating fellow when out of humour ...'<sup>56</sup> Wollaston's eldest son John had been summoned 'on the Grand Jury' but Hymus had pleaded guilty. Both Wollaston and Clifton spoke 'strongly to (his) Character' and considered they had succeed in obtaining a great mitigation of his sentence, the maximum penalty for the offence being transportation for seven years.<sup>57</sup>

Today, Grand juries are not empanelled. However, in 1832 provision had been made for them in the colony. The Act provided:

every Jury for the trial of any issue in any Civil Court of the said Colony, and every Petty Jury for the trial of any issue in any Criminal Court of the said Colony, shall consist of any number of Persons not less than thirteen, and not exceeding twenty-four, and that all such Juries shall be subject to the same rules and forms to which Juries for similar purposes are subject in His Majesty's Courts of Record in Westminster Hall Or in Courts of Quarter Session of the Peace in England so far as such Rules and Forms may not be altered by this Act.<sup>58</sup>

Wollaston's concerns for Hymus and his family were abiding. He obtained Hymus's authority to take charge of his personal property, in order to prevent dissipation by Hymus's wife.<sup>59</sup> He took in two of the children and extracted a promise from the wife to take in washing and attend to the younger ones.<sup>60</sup> Later he wrote that Hymus had been very ill in prison from mental distress. However, he had behaved well and Wollaston drew up a memorial to the Governor for the exercise of the prerogative to mitigate the sentence and for a Government allowance of bread for the children.<sup>61</sup> The petition proved to be of no avail because, when Wollaston took it to Perth he was unable to obtain the signature of the Committing Magistrate Eliot who withheld his signature on the basis of evidence produced at the time of commitment, untested at trial, that Hymus had used threatening language against Everet after the commission of the crime.<sup>62</sup> Of this Wollaston made an early plea for representation at trials of criminal offences when he wrote 'where the law awards such an awful punishment, every fair advantage ought to be

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Wollaston was referring to *An Ordinance to make provision for the Trial of Criminal Offences at Albany and other remote Districts of the Colony of Western Australia* 9 Vic No 4

<sup>56</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 29

<sup>57</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 30.

<sup>58</sup> *An Act for regulating the Constitution of Juries and the Office of Sheriff* 2 Gul IV No 3

<sup>59</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 30

<sup>60</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 30

<sup>61</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 60

<sup>62</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 162



given to the Prisoner.<sup>63</sup> The High Court of Australia has recognized the justice of these arguments where it held that Courts may stay criminal proceedings which will result in an unfair trial, as on a charge of a serious offence with lack of representation.<sup>64</sup>

Hymus was released from prison in December 1843,<sup>65</sup> a period apparently falling short of a full year and therefore perhaps shortened by remissions for good behaviour, the predecessor of today's more controversial parole. In his later diaries Wollaston was able to record the family, even the wife, had made a success of their resettlement in the Colony<sup>66</sup>

Wollaston, within the thinking of his time, also formed his own philosophical basis for the way in which the criminal law should be applied to Aborigines. Relying on the principle of ignorance of law, human or divine, Wollaston blamed the white man where his actions led the Aborigines into criminal conduct, for example, prostitution.<sup>67</sup> He supported the justice in punishing white men with imprisonment and hard labour at Fremantle when they had very cruelly treated Aborigines.<sup>68</sup> When a white man was tried at the Albany Quarter Sessions for shooting a 'native' woman, Wollaston wrote 'it is noble thing that the majesty of British law and justice can be orderly upheld in a far distant corner of the world like this'.<sup>69</sup> Yet he considered the sentence of 10 years transportation was too severe,<sup>70</sup> visited the prisoner Martin in gaol<sup>71</sup> and joined in supporting a plea of mitigation to the Governor<sup>72</sup> which resulted in commutation of the sentence to one of banishment from the Colony.<sup>73</sup>

Arising from the application of the full measure of the law against Aborigines convicted of murder, Wollaston was led to the idea, along with others, that the salvation of Aborigines lay in a greater effort being made to promote civilization and Christian education of 'native children'.<sup>74</sup> The definition and effects of the development of that policy is a matter of present-day controversy of which here the only relevance is that

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63 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 162-163

64 *Dietrich v The Queen* (1992) 177 CLR 292.

65 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992 210

66 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 188

67 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press. 1992. 91-92

68 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd. 1954 30

69 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd. 1954, 51

70 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd, 1954, 53.

71 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd, 1954, 55.

72 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd, 1954 57.

73 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd. 1954 67

74 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd. 1954, 109

knowledge of the law, including particularly the criminal law, and of the moral basis of society was seen as creating the need for such an approach

Wollaston conducted prison visits in the course of his tours as Archdeacon.<sup>75</sup> In his second Archdeaconal visitation in April 1851, he assisted in administering communion at Fremantle Church to ten convicts and the next day spent a morning inspecting the prison system.<sup>76</sup> He arrived prejudiced against the system of convict management but left full of praise for the experimental plan of having as its object reformation rather than punishment.<sup>77</sup> Criminology has continued ever since to debate the proper goal of sentences and the theories of how those goals may best be obtained.<sup>78</sup> The popular view at the present time is surely that imprisonment has failed in its goals of rehabilitation and reformation and there is a real probability the public patience with those goals is becoming exhausted. Wollaston reminds us all of the humane objective in sentencing policy in the criminal law. However, it is clear when the crime was serious, such as murder or assault on a girl of seven, he did not equivocate concerning the appropriateness of a severe penalty.<sup>79</sup>

Wollaston's concern for rehabilitation may partly have stemmed from what appears to have been a genuine concern among at least 'respectable people of the upper class' that their children should not grow up in what had then become a 'penal country'.<sup>80</sup> Nevertheless he shared the view that if 'John Bull' were to abolish transportation altogether, the prosperity of the Colony could be affected.<sup>81</sup> When convicts were withdrawn from the Albany Depot, he understood this had been compelled by the extortion practised there which had led to its prices being up to 100% greater than those elsewhere in the Colony.<sup>82</sup> He also accepted that ticket of leave men, properly supervised, made good schoolmasters.<sup>83</sup>

## CIVIL SUITS

In contrast with Wollaston's references to and involvement with applications of the criminal law, he rarely mentions civil suits. In

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- 75 Visiting Chaplains were also appointed to the convicts at each prison  
*Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 158
- 76 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 124
- 77 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 124-125.
- 78 eg: *Sentencing in Australia, Issues, Policy and Reform* Potas I (ed.): Australian Institute of Criminology and the Australian Law Reform Commission 1987
- 79 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 236
- 80 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 146, 176.
- 81 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 171
- 82 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd. 1954. 227.
- 83 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954. 236.

connection with the Company, he mentions a Mr Austin having 'successfully prosecuted' a law against Mr Clifton and the Company<sup>84</sup> (His use of the word 'prosecuted' appears to be in the non-criminal sense ) Later he expressed concern his son Henry had been subpoenaed as a witness in a suit brought by a passenger (Walters) against the Captain of the *Janet* on which Henry had travelled<sup>85</sup>

## FISHERIES

Early in his diaries Wollaston notes the impact of the whaling industry on the new Colony. He considered the Americans had the fishery 'all to themselves, so supine is our own Government; and a very lucrative business they make of it'<sup>86</sup> Doubtless he would have supported the enactment in 1847 of 'An Ordinance to provide a summary remedy for breach of Contracts connected with the Fisheries of the Colony'<sup>87</sup> However, it was not until 1860 that an Ordinance was passed 'to prohibit Aliens and foreigners taking whales and other Fish in the Waters of Western Australia.'<sup>88</sup>

## DEFAMATION AND SLANDER

The common law recognizes the rule controlling tortious conduct in respect of defamation and slander. Defamation is the communication by a person to the mind of another, a matter which is untrue and likely in the course of things substantially to disparage a third person.

Slander is defamation communicated in some non-permanent form by spoken words, or other sounds, or by gesture.<sup>89</sup> Wollaston was never required to avail himself of these remedies. That may have been surprising because he noted, again early in his visit, that 'gossiping and tale bearing are quite as rife here as in other parts of the world. *There is no such thing as privacy, even in the Wilderness.*'<sup>90</sup>

He perhaps would be comforted by the knowledge that in today's world there still is no general legal protection for privacy, although there is legislation directed to the use of personal information by government agencies<sup>91</sup>

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<sup>84</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 147

<sup>85</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 102

<sup>86</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 143

<sup>87</sup> *An Ordinance to provide a summary remedy for breach of Contracts connected with the Fisheries of the Colony* 10 Vic No 16

<sup>88</sup> *An Ordinance to prohibit Aliens and foreigners taking whales and other Fish in the Waters of Western Australia* 24 Vic No 12

<sup>89</sup> *Clerk and Lindsell on Torts* 17th ed London: Sweet & Maxwell, 1995, 1009-1010

<sup>90</sup> *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 141

<sup>91</sup> Privacy Act 1988 (Cth)

## BIRIHS, DEATHS AND MARRIAGES

Much of Wollaston's normal pastoral duties involved the conduct of baptisms, marriages and funerals. The law on these matters was introduced around the time of his arrival in the Colony.

'An Act to provide for the Registration of Births, Deaths and Mariages in the Colony of Western Australia' was enacted on 27 May 1841<sup>92</sup>

On the same day the Legislative Council approved 'An Act to regulate the solemnization of Matrimony in the Colony of Western Australia'<sup>93</sup> It provided 'all the rules prescribed by the Rubric concerning the solemnization of Marriage shall continue to be duly observed by every person in Holy orders of the Church of England, who shall solemnize any marriage in the colony of Western Australia Provided always, that where, by any law or canon in force before the passing of this Act, it is provided that any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner, on production of the Sub-registrar's certificate in the manner hereinafter provided'

In 1847 the Legislative Council passed an 'Ordinance to provide for the establishment of proper places for the Burial of the Dead'<sup>94</sup> This authorised the Governor to appoint by Proclamation places in each district for burials

In March 1842 Wollaston conducted the funeral service of his kind friend Dr Carpenter.<sup>95</sup> In November it was for 'a Roman Catholic Woman - who has died in Childbed - or rather in consequence.'<sup>96</sup> He performed the ceremony of marriage for Mr Eliot in Australind in June 1842.<sup>97</sup> In March 1843 he was concerned at an attempt to 'continue Church Mariages at a private House, chiefly for the *convenience of the Sub-Registrar*, who by the new Local Act is obliged to be present.'<sup>98</sup> By May 1843 he was able to record 'to this time my Registrar gives 20 Baptisms, 11 Mariages, 5 Funerals, 12 Churchings'<sup>99</sup> When up in Perth in August 1843 he 'had some conversation about blunders in the Marriage Act and was referred to Mr Stone, the Registrar-General'<sup>100</sup> After a long interview

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92 *An Act to provide for the Registration of Births, Deaths and Mariages in the Colony of Western Australia* 4 & 5 Vic No 9 amended later by 10 Vict No 17

93 *An Act to regulate the solemnization of Matrimony in the Colony of Western Australia* 4 & 5 Vic No 10

94 *Ordinance to provide for the establishment of proper places for the Burial of the Dead* 10 Vic No 12

95 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press 1992 195

96 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992 263

97 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 225

98 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992, 57

99 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press 1992, 205

100 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press 1992 158

with him he 'succeeded in getting some alterations respecting the improper interference of subregistrars.'<sup>101</sup> When November 1843 came around his son John had been gazetted as Sub-Registrar of the District in the place of Eliot, who had resigned.<sup>102</sup> Wollaston greeted this with enthusiasm because it would enable him through John 'to recommend as few Civil Marriages as possible, and to arrange better than I have hitherto done respecting the attendance (wh[ic]h is required by the Act) of the Sub-registrar.'<sup>103</sup>

Marriage licenses gave Wollaston trouble in 1856. The Bishop of Adelaide sent a packet of them to Rev Pownall without having them signed. Surrogates used them and put their own signature adjacent to the Episcopal seal, with the result Wollaston thought the marriages illegal.<sup>104</sup>

## CHURCHES AND STIPENDS

In 1841 there had been enacted 'An Act to promote the Building of Churches and Chapels, and to contribute towards the maintenance of Ministers of Religion in Western Australia.'<sup>105</sup> This provided:

it shall be lawful for the said Governor with the advice of the Executive Council by warrant under his hand as aforesaid, to authorise from time to time the issue from the Colonial Treasury of stipends towards the support of the Ministers of Religion duly appointed to officiate in any churches or chapels to be erected in manner aforesaid, or in any churches or chapels already erected and of which Trustees shall be appointed for the maintenance thereof as hereinafter mentioned, by virtue of this Act, such stipends being issued at the several rates hereinafter mentioned; that is to say, in case it shall be shewn to the satisfaction of the said Governor and Executive Council, that there is resident within a reasonable distance of the proposed church or chapel a population of 100 adults persons and such persons shall subscribe a declaration setting forth their desire to attend such church or chapel, it shall be lawful to issue to the Minister thereof from the Colonial Treasury in manner aforesaid £100 a year; and in case there should appear to the said Governor and Executive Council, to be resident as aforesaid, 200 adults who shall subscribe such declaration, then £150 a year; and in case there shall appear to the said Governor and Executive Council, to be so resident, 500 adults who shall subscribe such declaration then £200 a year which shall be the highest stipend to be issued from the Colonial Treasury under the provisions of this Act towards the support of any one officiating minister of religion

<sup>101</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992 158

<sup>102</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press 1992, 198

<sup>103</sup> *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 198

<sup>104</sup> *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954 224. Apart from 7 Vic No 13 and 31 Vic No 8, adopting Imperial legislation relating to validity of marriages there does not appear to have been any remedial legislation so that Wollaston's view may not have been correct

<sup>105</sup> *An Act to promote the Building of Churches and Chapels, and to contribute towards the maintenance of Ministers of Religion in Western Australia* 4 Vic No 6

PROVIDED always and be if further enacted, that in case the number of persons by whom or on whose behalf, such declaration as aforesaid shall be subscribed, shall be less than the number of 100 adult person it shall nevertheless be lawful for the Governor. with the advice of the Executive Council, to cause to be issued a stipend to the minister of any such church or chapel of £100 a year, if under the special circumstances of the case the said Governor and Executive Council shall deem it expedient

Wollaston's diary records that on 23 December 1843 the Colonial Secretary's Office announced that:

His Excellency, the Governor deems it expedient to give notice as early as possible that in the present state of the public fund it will be impossible for any such aid to be afforded and that therefore no application can be entertained until further notice 106

Earlier there had been a resolution of the Local Government not to grant stipends to clergymen whose names were on the list of Church Societies' Missions.<sup>107</sup> He was clearly rankled considerably by the executive decision not to enforce the letter of the law in this respect.

## COURTHOUSES AND THE JUDICIARY

This paper would not be complete without reference to the association which Wollaston had in the course of his work with courthouses. On 30 January 1842 he preached twice in the Perth courthouse which was then used in place of a church.<sup>108</sup> When in Perth again on 13 August 1843 he preached there again, although regarding it as 'a disgrace that Perth Church is not yet roofed in.'<sup>109</sup> In York in February 1853, the courthouse was the venue of the meeting which he attended to discuss a new church.<sup>110</sup>

As may be expected of a man of the cloth in a small new community, Wollaston knew the judges and magistrates. He had contact with George Fletcher Moore,<sup>111</sup> Broun,<sup>112</sup> Leake<sup>113</sup> and Mackie<sup>114</sup> and dined with one of the Police Magistrates when in Fremantle.<sup>115</sup>

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106 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press 1992, 307

107 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 88

108 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992 181

109 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 157

110 *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd, 1954, 143, 166

111 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992, 155

*Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd 1954 77-83.

112 *The Wollaston's Journals (Vol 1)* Perth: University of Western Australia Press, 1992 181

113 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992 255

114 *The Wollaston's Journals (Vol 2)* Perth: University of Western Australia Press, 1992 152-153

*Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd. 1954 83, 223 228.

115 *Wollaston's Albany Journals* Perth: Paterson Brokensha Pty Ltd, 1954, 151

It clearly gladdened his heart when some jurors on a trial in Albany donated their allowances towards a new church organ <sup>116</sup>

Wollaston's link with the law was forever cemented when his grandson, through his daughter *Sophy*, *Frederick Mann* became Chief Justice and Lieutenant-Governor of Victoria.

## CONCLUSION

Wollaston's pioneering ministry in Western Australia involved him in many contacts with early colonial law, a number of which have been referred to as they arise in his diaries. There are many other aspects unexamined: he wrote of issues of animal control, liquor, industrial conditions, banking, taxation, immigration, timber, maritime matters, customs, post, the *military*, education, fire and shipwrecks all of which today attract the application of State or Federal legislative and regulatory provision. His contact with the legal system was, of course, pre-federal, and there lies some legal fascination in examining the measures of the *Colony* used to regulate matters now in the federal domain. That must await research in the neglected area of law in Western Australia, the contribution of which to the establishment and progress of the early Colony can be sensed from Wollaston's contact with it <sup>117</sup>

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<sup>116</sup> *Wollaston's Albany Journals*. Perth: Paterson Brokensha Pty Ltd 1954 77, 52.

<sup>117</sup> The writer thanks his successive associates *Mason Hills* and *Nicholas McGlew* for research assistance