

STATE-SPONSORED ABDUCTION TO ENFORCE BRITISH LAW FOR AOTEAROA NEW ZEALAND PRE-ANNEXATION

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Prior to the annexation of Aotearoa New Zealand in 1840, British authorities sponsored and practised the abduction of suspects from the islands of New Zealand to New South Wales and Van Diemen's Land, where they could be charged and tried before British courts for infringing laws for New Zealand passed by the British Parliament, as well as orders for New Zealand issued by governors of New South Wales. The sponsorship and practice of state-sponsored abduction occurred in two distinct periods: between 1814 and 1823, governors of New South Wales sponsored "magistrates" to practise abduction; and, between 1833 and 1840, the British Government sponsored British Residents to practise abduction. Specific cases are examined where the sponsorship of abduction was put into practice. The unlawful, expensive and impractical nature of state-sponsored abduction contributed to the ineffectiveness of the British system of law and order for New Zealand pre-annexation, which ultimately influenced Britain's decision to annex New Zealand after first signing a treaty with Māori. With the arrival of Hobson, the signing of te Tiriti o Waitangi/the Treaty of Waitangi and Britain's annexation of New Zealand in 1840, state-sponsored abduction became unnecessary and was quietly discontinued.

I INTRODUCTION

In the contact period from the first visit of Captain James Cook in 1769 to the arrival of Captain William Hobson in 1840, the islands of Aotearoa New Zealand were divided into hundreds of territories: one territory for each hapū.¹ The territories were typically well known and often clearly

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1 Waitangi Tribunal *He Whakaputanga me te Tiriti – The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 30; ET Durie *Custom Law* (reprint ed, Treaty of Waitangi Research Unit, Wellington, 2013) at 2; and Māori Subject Headings Project "Iwi Hapū Names List" National Library <<https://natlib.govt.nz>>.

defined by natural features or other landmarks such as cairns.² Hapū were the tribes of the period; they were the fundamental units of political and economic organisation; they were based on common descent (several whānau) and interest; and they ranged in size from one hundred to several hundred people.³ There were no legal or state-like institutions above hapū.⁴ Hapū controlled the rights in land as well as other community resources (such as fishing grounds and cultivations) and assets (such as large waka and pā).⁵ Within each hapū, rangatira provided political leadership; their authority was delegated from Atua (Gods); and they exercised authority over their territory and people.⁶ A major political function of hapū was the defence of their territory against others and, accordingly, rangatira were "proven battle hardened warriors".⁷ Hapū had tikanga Māori (or Māori customary law), which used values, norms and principles to govern and maintain order within hapū (and their territory) and, to some extent, between hapū (and their territories).⁸ Tikanga Māori, which could vary from hapū to hapū, was flexible, open-ended and pragmatic.⁹ Fundamental elements of tikanga Māori were mana (delegated permission to act on behalf of Atua), tapu (spiritual purity, eg wāhi tapu were dedicated for the sole use of Atua) and utu (reciprocity in the pursuit of balance).¹⁰

Settlers in early New Zealand, including missionaries, lived under the protection and authority of a patron rangatira, on whom they essentially relied for their survival.¹¹ They were subject to the tikanga Māori of their host hapū, although its enforcement against them became more lenient in the 1830s.¹² Nevertheless, settlers were expected to respect rāhui (temporary prohibitions) and wāhi tapu, meet obligations to their patron community, such as gift exchange, and only engage in trade with the

2 Waitangi Tribunal, above n 1, at 30.

3 At 30; Durie, above n 1, at 16; Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c 1769 to c 1945* (Victoria University Press, Wellington, 1998) at 219; Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 33–36; and Rāwiri Taonui "Tribal organisation – The significance of iwi and hapū" (8 February 2005) Te Ara – The Encyclopedia of New Zealand <<https://teara.govt.nz>>.

4 Angela Ballara *Taua: 'Musket wars', 'land wars' or tikanga? Warfare in Māori society in the early nineteenth century* (Penguin Books, Auckland, 2003) at 103.

5 Waitangi Tribunal, above n 1, at 30.

6 At 30–31.

7 At 31. See also Taonui, above n 3.

8 Durie, above n 1; Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001); and Waitangi Tribunal, above n 1, at 33–34.

9 Durie, above n 1, at 2 and 4.

10 Waitangi Tribunal, above n 1, at 23–25 and 47.

11 At 266.

12 At 266.

permission of their patron, who often expected some control and economic return.¹³ Settlers who married into their host hapū were subject to additional rules.¹⁴ On most occasions a breach of tikanga Māori resulted in a direct sanction of taua muru, where settlers' goods would be taken in compensation.¹⁵ In the 1820s, mission stations were frequently subject to taua muru, with violence erupting if there was resistance.¹⁶ Settlers were not exempt from taua muru either: for example, James Boyle, who lived alone on the opposite side of the Bay of Islands to the missionaries, had possessions taken several times around 1820.¹⁷

Within their settlements, settlers lived mostly by their own customs.¹⁸ Their customs contained values, norms and principles of their religions and a tradition from their home countries of written rules-based institutional law "established by public authority".¹⁹ While tikanga Māori applied to relationships between Māori and between Māori and settlers, it did not apply to relationships between settlers. More troubling, tikanga Māori did not apply to visiting sailors, who resided on vessels outside the patronage of rangatira.²⁰ As such, tikanga Māori did not apply to relationships between sailors, between sailors and settlers, and, to some extent, between sailors and Māori. This became a problem due to the lawless actions of sailors, particularly against Māori.²¹ The problem was exacerbated by runaway sailors and convicts.²²

Pre-annexation settlers and visitors to New Zealand were primarily British.²³ To address the rules-based law-and-order vacuum that existed for British settlers and visitors, pre-annexation the British

13 At 266.

14 At 266–267.

15 At 266.

16 At 266.

17 John Butler *Earliest New Zealand: The Journals and Correspondence of the Rev John Butler* (RJ Barton (ed), Palamontain & Petherick, Masterton, 1927) at 63–66; and Paul Moon *A Savage Country: The Untold Story of New Zealand in the 1820s* (Penguin Books, Auckland, 2012) at 32–33.

18 Waitangi Tribunal, above n 1, at 267.

19 Emer de Vattel *The Law of Nations; or Principles of the Law of Nature; Applied to the Conduct and Affairs of Nations and Sovereigns* (Thomas M Pomroy for S & E Butler, Northampton (Mass), 1805) at 67.

20 While tikanga Māori did not apply to sailors, there are well-known examples where Māori exercised utu against sailors, such as the *Boyd* massacre in 1809 and the *Parramatta* incident in 1812: see "Memorial of the Committee of the Church of England Missionary Society" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 417 at 418–419.

21 At 417.

22 Waitangi Tribunal, above n 1, at 268–269.

23 Saxe Bannister "An Account of the Changes and Present Condition of the Population of New Zealand" (1838) 1 *Journal of the Statistical Society of London* 362 at 364.

Parliament passed laws and governors of New South Wales issued orders in relation to New Zealand, by which personal jurisdiction²⁴ could be exercised over masters, crew and British subjects (or any persons) from British vessels. Suspects could, for nearly all those laws and orders, be tried before British courts in New South Wales or Tasmania (then known as Van Diemen's Land). However, the problem was that there were no means for British authorities to legally detain, send and transfer suspects from New Zealand to the British courts in New South Wales or Tasmania. To address this problem and enforce British law for New Zealand, British authorities sponsored and practised state-sponsored abduction in two distinct periods: between 1814 and 1823, governors of New South Wales sponsored "magistrates" to practise abduction; and, between 1833 and 1840, the British Government sponsored British Residents to practise abduction.

II SPONSORSHIP AND PRACTICE OF ABDUCTION: 1814–1823

A Sponsorship of Abduction by Governors of New South Wales

Lachlan Macquarie, governor of New South Wales from 1810 to 1821, made the earliest British attempts to establish authority over New Zealand.²⁵ Underlying his attempts was an assumption of authority over New Zealand.²⁶ While he had no specific authorisation from the British Government to assume authority, his commission was ambiguous, with the territorial jurisdiction of New South Wales defined to include: "all the Islands adjacent in the Pacific Ocean" within the latitudes intersecting the northern-most and southern-most extremities of Australia.²⁷ Depending on the interpretation of "adjacent", the entire area of New Zealand north of Banks Peninsula potentially lay within the territorial jurisdiction of New South Wales.²⁸

24 Jurisdiction inaugurates law (brings law into being), opens the space for law (gives the extent of law), and delimits law (provides the boundaries of law). Territorial jurisdiction attaches to a specific territory, whereas personal jurisdiction attaches to a person's status: see Shaunnagh Dorsett and Shaun McVeigh *Jurisdiction* (Routledge, Abingdon, 2012) at 16 and 24.

25 PG McHugh "'A Pretty Gov[ernment]!': The 'Confederation of United Tribes' and Britain's Quest for Imperial Order in the New Zealand Islands during the 1830s" in Lauren Benton and Richard J Ross (eds) *Legal Pluralism and Empires, 1500–1850* (New York University Press, New York, 2013) 233 at 236.

26 *Report from the Select Committee of the House of Lords, Appointed to Inquire into the Present State of the Islands of New Zealand, and the Expediency of Regulating the Settlement of British Subjects Therein; with the Minutes of Evidence Taken Before the Committee, and an Index Thereto* (House of Commons, 8 August 1838) at 11.

27 "Governor Macquarie's Commission" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1916) series 1, vol 7, 183 at 183–184.

28 Waitangi Tribunal, above n 1, at 68.

Shortly after taking up his role as governor, Macquarie offered to appoint Thomas Kent a justice of the peace for New Zealand, although the appointment never became effective.²⁹ In an effort to address the outrages by British masters and crew against Māori in New Zealand, in December 1813 Macquarie issued a proclamation that vessels leaving New South Wales for New Zealand must sign a good behaviour deed for their visit, with a penalty of £1,000 for a breach.³⁰ The proclamation asserted that Māori were "under the protection of His Majesty", which was neither authorised nor subsequently endorsed by the Crown.³¹ With the forthcoming settlement of missionaries in New Zealand, on 9 November 1814 Macquarie issued an order indirectly asserting New Zealand was a dominion of New South Wales, an assertion that was "probably questionable at law".³² He appointed Thomas Kendall as "the resident Magistrate in the Bay of Islands", and ordered and directed:³³

... that no Master or Seamen of any Ship or Vessel belonging to any British Port, or to any of the Colonies of Great Britain resorting to the said Islands of New Zealand, shall in future remove or carry therefrom any of the Natives [nor discharge any sailor, sailors, or other persons] without first obtaining the Permission of the Chief or Chiefs [specifically, Ruatara, Hongi and Korokoro] of the Districts within which the Natives so to be embarked may happen to reside: which Permission is to be certified in Writing under the Hand of Mr Thomas Kendall ...

Neglect or disobedience of the order would "subject the Offenders to be proceeded against with the utmost Rigour of the Law" in New South Wales or England, even though there was no legal basis for enforcing compliance with the order in New South Wales.³⁴ This New South Wales order was the first specific to New Zealand, the first to refer to New Zealand as a dependency over which the full legal powers of New South Wales would purportedly apply, the first to designate specific individuals in New Zealand with purportedly official powers, and the first to recognise the power and authority

29 "Secretary Campbell to Messrs Lord and Williams, Alexander Riley, and Thomas Kent, 2 February 1810" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1916) series 1, vol 7, 296 at 297; and McHugh, above n 25, at 236.

30 "Proclamation" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 11 December 1813) at 1; and "Government and General Order, 1 December 1813" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 316. For examples of outrages, see McNab, above n 20, at 417.

31 McHugh, above n 25, at 236.

32 Wayne Rumbles "Spectre of Jurisdiction: Supreme Court of New South Wales and the British Subject in Aotearoa/New Zealand 1823–1841" (2011) 15 *Law Text Culture* 209 at 210.

33 "Government and General Orders" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 12 November 1814) at 1; and "Government and General Order, 9 November 1814" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 328 at 328.

34 "Government and General Orders", above n 33, at 1; McNab, above n 33, at 328; and McHugh, above n 25, at 237.

of New Zealand chiefs.³⁵ Three days later, a further order appointed Kendall "one of His Majesty's Justices of the Peace in the Bay of Islands, in New Zealand, and throughout the Islands of New Zealand, and those immediately contiguous thereto".³⁶ With the purported power and authority of a justice of the peace and resident magistrate, Kendall could detain suspects but had no power or authority to determine guilt or punishment.³⁷

There were signs and developments, however, that indicated Macquarie did not have the purported powers to assume authority over New Zealand. In June 1813, after receiving instructions from the Secretary of State for War and the Colonies, Earl Bathurst, Macquarie imposed import duties on produce arriving in or transiting Sydney.³⁸ There was no duty-free exception for New Zealand produce, which might have been expected if the British Government considered New Zealand a territory of New South Wales.³⁹ In January 1814, Macquarie wrote to Bathurst about the problem of jurisdiction in the South Seas, after he had been advised that there was no court in New South Wales competent to try Captain Theodore Walker, who allegedly executed a lascar in French Polynesia.⁴⁰ In June 1815, a full bench of New South Wales magistrates heard charges by Reverend Samuel Marsden against Captain Lasco Jones "for acts of fraud and cruelty committed upon the property and persons of the Natives of New Zealand, on a late and former cruise".⁴¹ Jones' successful defence was that the Court did not have jurisdiction over New Zealand: this defence had earlier been used against him after six seamen he accused of mutiny on the same cruise had been let go because "there was no

35 Waitangi Tribunal, above n 1, at 89.

36 "Government and General Orders", above n 33, at 1; and "General and Government Orders, 12 November 1814" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 329 at 330.

37 Richard Hill *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767–1867: Part 1* (VR Ward, Wellington, 1986) at 38.

38 "Government and General Orders" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 26 June 1813) at 1; and "Government and General Order, 26 June 1813" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1916) series 1, vol 7, 749.

39 Marsden recommended to Pratt that an application be made to the British Government for a duty-free exception for produce from New Zealand, even though Marsden had a personal exception from Macquarie: see "Marsden to Pratt, 15 June 1815" Hocken Library, MS 55/3.

40 "Governor Macquarie to Earl Bathurst, 17 January 1814" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1916) series 1, vol 8, 96 at 97–98.

41 "Proceedings of Magistrates' Court, 12 April 1815" Hocken Library, MS 55/28.

Court constituted in this Colony to try them".⁴² After the trial, Marsden wrote to the Secretary of the Church Missionary Society, Josiah Pratt:⁴³

There will be no possibility of punishing murder, or any other Crime committed in these Islands unless an Act of Parliament is past [sic] in Favor of the Natives. The Missionaries in these Seas, cannot be considered safe, if Masters of Vessels can commit any Crime upon the Natives with Impunity.

Marsden wrote to the Secretary of the London Missionary Society, George Burder, asking the Society to work with the Church Missionary Society to urge legislation.⁴⁴ In addition to Marsden, New South Wales judges recommended to the British Government that a court be established in New South Wales to try crimes committed in the South Seas.⁴⁵ The Church Missionary Society in London submitted a memorial to Bathurst in which they highlighted early atrocities by British subjects against Māori in New Zealand and observed:⁴⁶

... there is no competent jurisdiction in New South Wales for the cognizance and punishment of such offences as have been enumerated, nor any adequate means for their prevention; and that no remedy at present exists but sending persons charged with the perpetration of such enormities to be tried at the Admiralty Sessions in England.

The British Parliament acted, passing the Murders Abroad Act 1817 (UK): "An Act for the more effectual Punishment of Murders and Manslaughters committed in Places not within His Majesty's Dominions".⁴⁷ The personal jurisdiction of the Act was over any person from any British vessel (ie, master, crew, passengers and stowaways from British vessels). Under the extraterritorial Act, all murders and manslaughters in the islands of New Zealand could be tried, adjudged and punished in British territories where the King's commission was given under the Offences at Sea Act 1806 (UK), in the same manner as if the offence(s) had been committed on the high seas.⁴⁸ Since New South Wales did not possess such a commission, no jurisdiction was conferred on its courts to try offences under the Act.⁴⁹ This made the Murders Abroad Act impractical for murders and manslaughters in New Zealand, as the nearest colony whose courts were competent to try offences under the Act was

42 "Proceedings of Magistrates' Court, 12 April 1815" Hocken Library, MS 55/28; and Waitangi Tribunal, above n 1, at 96.

43 "Marsden to Pratt, 15 June 1815" Hocken Library, MS 55/3.

44 Andrew Sharp *The World, the Flesh & the Devil: The life and opinions of Samuel Marsden in England and the Antipodes, 1765–1838* (Auckland University Press, Auckland, 2016) at 379.

45 "Marsden to Pratt, 15 June 1815" Hocken Library, MS 55/3.

46 McNab, above n 20, at 420.

47 Murders Abroad Act 1817 (UK) 57 Geo III c 53.

48 Offences at Sea Act 1806 (UK) 46 Geo III c 54.

49 John M Ward *British Policy in the South Pacific (1786–1893)* (Australasian Publishing, Sydney, 1948) at 50.

Sri Lanka (then known as Ceylon).⁵⁰ Nevertheless, the Murders Abroad Act was the first British Act of Parliament to mention New Zealand, and the first to describe New Zealand as "not within His Majesty's Dominions, nor subject to any European State or Power, nor within the Territory of the United States of America".⁵¹ With this Act, Britain "expressly disavowed any sovereignty over New Zealand".⁵² The Act asserted personal jurisdiction over any person from a British vessel, including Māori. However, without territorial jurisdiction, it was doubtful that the Act could apply to any person who was not a British subject.⁵³ Furthermore, without territorial jurisdiction, there was no power and authority in the Act to detain or arrest in New Zealand, nor any power or authority to transfer suspects from New Zealand to a British court with the jurisdiction to try offences under the Act, nor any power and authority for justices of the peace, magistrates or constables in New Zealand.⁵⁴

While Macquarie's commission was ambiguous about New South Wales' territorial jurisdiction over New Zealand, the Murders Abroad Act made it clear that Britain, and by extension New South Wales, had no territorial jurisdiction over New Zealand. Macquarie's assumed authority over New Zealand was (now) unauthorised. Ward considered the appointment of Kendall as a magistrate "probably illegal".⁵⁵ Whatever its status, Kendall's position as a magistrate was without authority after the passing of the Murders Abroad Act. Macquarie should have withdrawn Kendall's commissions as a justice of the peace and magistrate at this time, but there is no evidence this occurred. By not withdrawing Kendall's commission as a magistrate, the unauthorised power of Kendall as a "magistrate" to detain and/or send any suspect from New Zealand to the jurisdiction of a British court was tantamount, in effect, to governor sponsorship of abduction.

Macquarie continued to sponsor abduction indirectly. The Murders Abroad Act did not recognise Māori hapū as having sovereignty over their New Zealand territories; and, under European-centric international law, "savage" territories not under the legal umbrella of a European power were considered uninhabited or terra nullius (nobody's land); so Macquarie may have felt emboldened to continue to assume authority over New Zealand.⁵⁶ In July 1819, without authority or authorisation, he appointed Reverend John Butler "to be a Justice of Peace and Magistrate in the Island of New

50 At 51.

51 Waitangi Tribunal, above n 1, at 96.

52 McHugh, above n 25, at 237.

53 "Commissioner Bigge to Earl Bathurst, 27 February 1823" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 587 at 594.

54 Murders Abroad Act.

55 Ward, above n 49, at 37–38.

56 Hill, above n 37, at 43.

Zealand".⁵⁷ Butler's commission as a justice of the peace asserted, without authority or authorisation, that the British settlements at New Zealand were a dependency of New South Wales.⁵⁸

The indirect sponsorship of abduction continued under Macquarie's successor, Sir Thomas Brisbane. Like Macquarie's commission, Brisbane's commission had the same ambiguous definition of the territorial jurisdiction of New South Wales.⁵⁹ After Brisbane took over as governor of New South Wales in December 1821, he issued orders establishing and confirming his justices of the peace. Based on the incorrect assumption that New Zealand was part of "His Majesty's said Territory and its Dependencies",⁶⁰ and on the recommendation of Macquarie, he reappointed without authority or authorisation Reverend John Butler as a justice of the peace.⁶¹

In 1819, John Bigge was commissioned:⁶²

... to enquire into the best means of preventing the commission of outrage and violence on the persons of the inhabitants of the islands of New Zealand by the crews of vessels navigating the Pacific ...

In his February 1823 report addressed to Bathurst,⁶³ Commissioner Bigge confirmed that past New South Wales governors' commissions "were too vague to support the exercise of criminal authority in New Zealand" and recommended that the governor of New South Wales be given the express authority to appoint magistrates, as well as constables, in the islands of New Zealand.⁶⁴ To address the problem that the courts of New South Wales did not have jurisdiction over crimes committed in New Zealand, he advised:⁶⁵

With a view to prevent a repetition of the outrages that have been committed by them [visiting sailors and convicts], it will certainly be advisable to declare by a legislative Act that they, as well as all persons

57 "Government and General Orders" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 24 July 1819) at 1. Butler was the first ordained missionary to settle in the Bay of Islands.

58 Butler, above n 17, at 28.

59 "Governor Macquarie's Commission", above n 27, at 183–184; and "The Commission of Sir Thomas Brisbane" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1917) series 1, vol 10, 589 at 589.

60 "By His Excellency Sir Thomas Brisbane" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 5 April 1822) at 1. In the newspaper Reverend John Butler's name was misspelt as Reverend Henry Butler.

61 Hill, above n 37, at 44.

62 McNab, above n 53, at 587.

63 At 587–596.

64 At 594.

65 At 593–594.

serving on board British vessels, are amenable to the Criminal Court of New South Wales, and liable to be tried by it, for any crime committed on the persons of the inhabitants of New Zealand.

The British Government responded with provisions in the New South Wales Act 1823 (Imp).⁶⁶ The Act provided for the separation of Tasmania from New South Wales and for each a Supreme Court, whose legal jurisdiction included treasons, piracies, felonies, robberies, murders, conspiracies and other offences committed at sea or in New Zealand by masters, crew and British subjects from British vessels. Compared to the Murders Abroad Act, the jurisdiction over passengers and stowaways who were not British subjects was removed. The same penalties applied as if the crimes were "inquired of, tried, heard, determined and adjudged in England". Notably, the Act made no assertion of territorial jurisdiction over New Zealand and, further, described New Zealand as "not subject to His Majesty". Similar to the Murders Abroad Act, there was no power and authority in the Act to detain or arrest in New Zealand; nor any power or authority to transfer suspects from New Zealand to the courts of New South Wales or Tasmania; nor any power and authority for justices of the peace, magistrates or constables in New Zealand. As such, any ongoing commission of a "magistrate" in New Zealand remained without authority, as did a "magistrate" detaining and sending suspects to New South Wales or Tasmania. Nevertheless, to reassure Māori that the British were taking steps to control master, crew and British subjects from British vessels in New Zealand, Brisbane issued a proclamation in May 1824, written in both English and Māori, informing readers of the recently passed New South Wales Act.⁶⁷

In November 1823, Butler consented to leaving the mission.⁶⁸ Brisbane could not appoint a replacement justice of the peace or magistrate at New Zealand after Commissioner Bigge's official report stated that his commission was too vague to support the exercise of criminal authority in New Zealand.⁶⁹ Brisbane would not seek jurisdictional clarification until 1825, when he asked Bathurst:⁷⁰

Whether the Commission of the Governor of this Colony gives any jurisdiction over the Islands of the South Seas, and what is the extent of the terms "the Islands adjacent" in that Commission?

⁶⁶ New South Wales Act 1823 (Imp) 4 Geo IV c 96.

⁶⁷ Thomas Brisbane *Proclamation* (R Howe: Government Printer, Sydney, 17 May 1824) in English and Māori; original copies held by Alexander Turnbull Library and Auckland Libraries. English-only version printed in "Proclamation" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 20 and 27 May 1824) at 1.

⁶⁸ Butler, above n 17, at 303.

⁶⁹ McNab, above n 53, at 594; and Hill, above n 37, at 50.

⁷⁰ "Sir Thomas Brisbane to Earl Bathurst, 8 February 1825" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1917) series 1, vol 11, 495 at 496–497.

Brisbane was withdrawn before an answer could be provided.⁷¹

B Practice of Abduction by "Magistrates" at New Zealand

There were few resident settlers and missionaries at the Bay of Islands during Kendall's active tenure as "magistrate" from 1814–1819.⁷² With the help of Marsden, Kendall had initial success taking evidence and sending three runaway convicts back to Sydney on the *Active* in early 1815, whilst three further convicts were left behind until the *Active* returned.⁷³ After that, by himself, he attempted to enforce law against crews of European vessels, without success.⁷⁴ In particular, Kendall's attempts to enforce Macquarie's 9 November 1814 order, or decree, were ineffective as Binney explains: "Scattered throughout the Kendall letters are references to attempts to enforce the decree: essentially powerless, he could do little without the support of the seamen."⁷⁵ For instance, when Captain Parker was denied permission to leave a sailor in New Zealand, he refused to accept Kendall's decision, retaliating by ordering his men to pull down his dwelling.⁷⁶ After his initial success, there is no evidence that Kendall detained and sent, or abducted, any suspect(s) from the Bay of Islands to New South Wales. Part of the problem was that the colony of New South Wales would only reimburse the cost of passage of suspects to Sydney, and the mission could not afford the costs for provisions while suspect(s) were detained, potentially for months, until a vessel arrived that could take them to Sydney.⁷⁷ With a lack of success, in early 1816 Kendall acknowledged that his magisterial authority

71 "Earl Bathurst to Sir Thomas Brisbane, 29 December 1824" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1917) series 1, vol 11, 429 at 430.

72 John Nicholas recalled no Europeans, except two runaway convicts, when he arrived in the Bay of Islands in late 1814. In June 1815, the total number of resident Europeans at the Bay of Islands, including men, women and children, was 25, all at the local mission station. By November 1819, the total number of resident Europeans was 52, made up of 45 at the local mission stations and seven members of the Hanson family: see Harrison Wright *New Zealand 1769–1840: Early Years of Western Contact* (Harvard University Press, Cambridge (Mass), 1959) at 22–23.

73 John Elder (ed) *The Letters and Journals of Samuel Marsden 1865–1838* (Coulls Somerville Wilkie and AH Reed, Dunedin, 1932) at 119 and 140.

74 McNab, above n 53, at 588.

75 Judith Binney *The Legacy of Guilt: A Life of Thomas Kendall* (2nd ed, Bridget Williams Books, Wellington, 2005) at 45.

76 "Kendall to Pratt, 19 Jan 1816" Hocken Library, MS 55/45; Robert McNab *From Tasman to Marsden: A History of Northern New Zealand from 1642 to 1818* (J Wilkie, Dunedin, 1914) at 196; and Hill, above n 37, at 39.

77 Hill, above n 37, at 38–39.

was "merely nominal".⁷⁸ Commercial shipping visits remained infrequent, with only 14 vessels visiting the Bay of Islands between 1816 and 1819.⁷⁹

Butler was more "successful" than Kendall in undertaking his role as "magistrate" albeit, in the first instance, after an eight-month gap between discovering a crime and being able to effect abduction. The case related to Captain Riggs who, without permission from the governor, departed Sydney in the American vessel *General Gates* in July 1819 with Butler and 10 convicts aboard.⁸⁰ Butler learned of the felons, but as resident magistrate he did not attempt to arrest them at the Bay of Islands, as there were no British ships in the harbour nor any jail in which to confine them. Instead, these convicts were employed in sealing like the rest of the crew. Eight months later, when Captain Skinner of HMS *Dromedary* visited the Bay of Islands, Butler advised him of the crime. In April 1820, Skinner reclaimed the prisoners for the Crown. Those prisoners, and Riggs, were transferred back to Sydney on the *General Gates*, under the command of an officer and crew of HMS *Dromedary*. When Riggs claimed Skinner and his crew unlawfully seized the *General Gates*, and arrested and falsely imprisoned Riggs and the convicts, the Judge presiding over the case set a precedent that how they came to be back in Australia was not part of the original felony and could not form part of the trial.⁸¹ Riggs was found guilty and fined £6,000.⁸²

Butler and Skinner teamed up again in late 1820. Butler was asked by Skinner of HMS *Dromedary* to take the depositions of witnesses to the murder of one of his sailors at Whangaroa.⁸³ Butler "charged" four soldiers with murder. He "committed them by warrant" to Skinner, who transferred the suspects to Sydney.⁸⁴ Butler and Skinner acted as if they had authority to arrest, detain, charge and send the suspects to Sydney. At a special criminal court, one of the suspects, James Dunleavy,

78 At 41.

79 Wright, above n 72, at 23.

80 *The Governor v Riggs* SC New South Wales, 15 September 1820 reported in *The Sydney Gazette and New South Wales Advertiser* (Sydney, 16 September 1820) at 3; and "The General Gates" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 521 at 521–530.

81 *The Governor v Riggs*, above n 80, at 3.

82 At 3.

83 Butler, above n 17, at 106.

84 "From Captain Skinner to Governor Macquarie, 15 December 1820" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 488 at 488.

was found guilty of wilful murder.⁸⁵ Furthermore, on the same voyage, Skinner reported on arrival at Sydney of:⁸⁶

George Mason, a convict given up by the master of the merchant ship *Cumberland* to the Rev J Butler at the Bay of Islands, and sent by him on board for a passage to Port Jackson ...

III SPONSORSHIP AND PRACTICE OF ABDUCTION: 1833–1840

A Sponsorship of Abduction by the British Government

The British Government's sponsorship of abduction occurred during the period that James Busby was British Resident. However, the events that led to the sponsorship of abduction began a decade earlier. In 1823, Commissioner Bigge recommended Britain assert territorial jurisdiction over New Zealand so that the Murders Abroad Act could be applied to any person from a British vessel, not just British subjects, and so that Britain could appoint magistrates and constables to New Zealand.⁸⁷ However, there was no political will in Britain, nor interest in the Colonial Office, for New Zealand to become a dominion (or colony) at this time.⁸⁸ The indifference of the British Government was reflected in the Australian Courts Act 1828 (Imp),⁸⁹ which renewed the New South Wales Act. Section IV of the Act remained almost identical to s III of the New South Wales Act: New Zealand continued to be described as "not Subject to His Majesty". The Supreme Court of New South Wales held that the Act gave an admiralty the jurisdiction to try in their territory criminal offences committed by British subjects in New Zealand.⁹⁰ As a result, in 1830, Marsden wrote to Governor Darling:⁹¹

85 "Special Criminal Court" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 30 December 1820) at 2–3.

86 McNab, above n 84, at 488.

87 McNab, above n 53, at 594.

88 "H Goulburn to R Sugden, 25 April 1821" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 532; "Secretary of State to William Jackson, 27 April 1822" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 580; and "Under-Secretary Horton to Baron Charles de Thierry, 10 December 1823" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 615.

89 Australian Courts Act 1828 (Imp) 9 Geo IV c 83.

90 *Ex parte McKey* (1832) NSW Sel Cas (Dowling) 225 (NSWSC); and Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 72.

91 "Rev S Marsden to Governor Darling, 2 August 1830" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 705 at 707.

Your excellency is aware there is no legal authority, civil, military, or naval, to restrain the bad conduct of the masters and crews of those ships which put into the harbours of New Zealand, nor to notice their crimes, however great ...

This lack of legal authority was highlighted in early 1831, when Darling learnt that British Captain John Stewart had facilitated warfare, torture, cannibalism, slavery and human sacrifice between Māori.⁹² Stewart provided charter services to Te Rauparaha, who wished to surprise his Ngāi Tahu enemy and avenge the killing and eating of several Ngāti Toa chiefs at Kaiapoi in 1829. Depending on the account, Stewart transported a war party of 40–300 warriors in the Brig *Elizabeth* from Kapiti Island to Banks Peninsula.⁹³ The Brig was used as a Trojan Horse, with Te Rauparaha and his warriors hidden in the vessel; the chief, his brother, two daughters and, later, wife and her two sisters went onboard, where they were seized by Te Rauparaha.⁹⁴ The chief's brother and one of the daughters were killed. Depending on the account, the warriors then killed up to 300 Ngāi Tahu, including women and children, and took about 20–50 prisoners.⁹⁵ The killed were cooked, cut up and placed in baskets.⁹⁶ Captain Stewart then transported Te Rauparaha, his warriors, prisoners and baskets back to Kapiti Island; enroute, the chief strangled his other daughter, so she would not suffer.⁹⁷ Once back at Kapiti Island, the chief and his wife were tortured to death, the wife's two sisters killed, the baskets of bodies provided a cannibalistic feast, and the prisoners went into slavery, except one old man who was sacrificed.⁹⁸ In Sydney, Captain Stewart was arrested and bailed.⁹⁹ The crew left New South

92 Robert Carrick (ed) *Historical Records of New Zealand South Prior to 1840* (Otago Daily Times and Witness Newspapers, Dunedin, 1903) at 179–195; "Records relating to the Brig 'Elizabeth'" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 578 at 578–603; and *Report from the Select Committee on Aborigines (British Settlements) with the Minutes of Evidence, Appendix, and Index* (House of Commons, 1837) at 16–17.

93 Ballara, above n 4, at 365; and Carrick, above n 92, at 186.

94 "Depositions of J Swan" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 586; Carrick, above n 92, at 187; and *Report from the Select Committee on Aborigines*, above n 92, at 16.

95 McNab, above n 94, at 587; Ballara, above n 4, at 366; and Carrick, above n 92, at 181.

96 Carrick, above n 92, at 181–182.

97 McNab, above n 94, at 587; and Carrick, above n 92, at 187–188.

98 Carrick, above n 92, at 182 and 188; "Depositions of JB Montefiore" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 580 at 581; and *Report from the Select Committee on Aborigines*, above n 92, at 16.

99 "Crown Solicitor, Sydney, to Colonial Secretary, 12 April 1831" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 590.

Wales before any of them could be arrested.¹⁰⁰ With no crew for witnesses, the case was abandoned, and Captain Stewart promptly left the colony.¹⁰¹

While Māori may have been following their warfare customs, the British Government was deeply concerned that such atrocities involving so much bloodshed had been facilitated by British subjects.¹⁰² Opinions were sought from the King's Advocate and the Attorney- and Solicitor-General on the practicality of bringing to trial the master and crew of the *Elizabeth*.¹⁰³ The Crown's legal opinion was that Captain Stewart and his mate were guilty of murder in New Zealand, under the Australian Courts Act.¹⁰⁴ Goderich instructed Darling to apprehend and try Captain Stewart and his mate if they returned to Sydney.¹⁰⁵

With the risk of Māori utu against innocent European settlers for the Captain Stewart affair, Marsden recommended to Darling a Resident be stationed in New Zealand.¹⁰⁶ Darling advised Viscount Goderich in an April 1831 dispatch that he "shall immediately send a person in the Character of Resident" to New Zealand, which he believed would appease disaffected Māori and concerned settlers.¹⁰⁷ In December 1831, the New South Wales Attorney-General advised that it was not possible for the British Resident to act in a judicial or magisterial capacity in New Zealand, as it was not a dependency of New South Wales.¹⁰⁸

100 "Governor Darling to the Secretary of State, 13 April 1831" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 592 at 594.

101 "Governor Darling to Viscount Goderich, 10 October 1831" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 403 at 405.

102 "The Treasury, London, to the Secretary of State, 3 October 1831" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 595 at 595; and "Secretary of State, London, to Governor, 31 January 1832" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 598 at 598–599.

103 "King's Proctor to the Lords of the Treasury, 5 December 1831" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 595 at 596.

104 "Opinion of His Majesty's Advocate and Mr Attorney and Solicitor-General" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1914) vol 2, 597.

105 "Viscount Goderich to Governor Bourke, 28 May 1832" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 650 at 650–651.

106 "Rev S Marsden to Rev D Coates, 18 April 1831" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 715 at 716.

107 "Governor Darling to Viscount Goderich, 13 April 1831" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 237 at 240.

108 "Copy of a Letter from the Attorney General to the Colonial Secretary, 12 December 1831" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 485 at 486.

In January 1832, Goderich wrote to Darling concerned about the possible extinction of Māori and the necessity for their protection.¹⁰⁹ He agreed with sending a British Resident to New Zealand but believed it should be a civilian, rather than a military officer with troops. He stressed the necessity of (unlawful) restraint and coercion, so the British Resident in New Zealand could detain and send any suspects to New South Wales or Tasmania:¹¹⁰

... the want of Legal Authority to seize and confine Persons found in the commission of outrages on these Islands would be a very serious difficulty; if the natives of New Zealand had made any approach towards a settled form of Government; Were there any established system of Jurisprudence among them, however rude, their own Courts would claim and be entitled to the cognizance of all crimes committed within their territory. As matters stand, any measures of coercion and restraint, which the Resident may reasonably adopt, may be vindicated on the ground of necessity, even if they cannot be strictly defended as legal. Against the risk of any litigation on such grounds, the Resident must of course be indemnified, whenever he shall appear to have acted with upright intention and becoming circumspection.

Given Goderich was the Colonial Secretary and a member of Cabinet (formerly a Prime Minister), at a very high level, the British Government was sanctioning state-sponsored abduction. While acting on the grounds of necessity, they were allowing a British Resident in New Zealand to unlawfully detain and send suspects to New South Wales and Tasmania. As there was no British court in New Zealand, the abductions could not be legally appealed by suspects in New Zealand, denying them the opportunity to apply for a writ of habeas corpus – which, if successful, would have enabled their release in New Zealand from false imprisonment.¹¹¹

In June 1832, Goderich wrote to Darling advising of the appointment of James Busby as British Resident at New Zealand and noting that there was no competent British authority to seize or detain offenders in New Zealand, no power compelling criminals or witnesses to resort to New South Wales, and no on-the-spot punishments for minor offences. Further, there were crimes specific to New Zealand that were not prohibited by any European code, such as fomenting war and trade in human heads. However, Goderich advised, there was a Bill before the House of Commons that, if passed, would overcome these problems.¹¹² The Bill, known as the South Sea Islands Bill, was:¹¹³

109 "Viscount Goderich to Governor Bourke, 31 January 1832" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 510.

110 At 511–512.

111 Even in Australia, the remedy for habeas corpus was not available in practice until 1824: see David Clark and Gerard McCoy *Habeas Corpus: Australia, New Zealand The South Pacific* (The Federation Press, Annandale (NSW), 2000) at 19–20.

112 "Viscount Goderich to Governor Bourke, 14 June 1832" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 662 at 662–664.

113 "South Sea Islands Bill 1832 (UK)" National Archives, CO209/1 102.

To authorize the Governor of New South Wales, with the advice and consent of the Legislative Council of that Colony, to make Provision for the Prevention and Punishment of Crimes committed by His Majesty's Subjects, in Islands situate in the Southern or Pacific Ocean, and not being within His Majesty's Dominion.

When the South Sea Islands Bill was brought before the British House of Commons in June 1832, William Burge MP pointed out:¹¹⁴

I do not understand the intention of this Bill. If these islands are within the King's dominions, the Governor can do what is necessary, without any law. If they are not, this House cannot legislate with respect to them.

While leave was given to introduce the Bill, the Bill did not go any further because "Parliament could not lawfully legislate for a foreign country".¹¹⁵ With the failure of the South Sea Islands Bill, Britain reluctantly accepted the unlawful use of state-sponsored abduction to get suspects from New Zealand to British courts in New South Wales and Tasmania. The British Government absolved itself of any criminal liability on the basis of its best endeavours to avoid state-sponsored abduction:¹¹⁶

Should the Bill not pass, ... His Majesty's Government will be acquitted of the reproach of an acquiescence in crime, which they will have done the utmost in their power to prevent.

Given the South Sea Islands Bill did not pass, Busby proceeded to New Zealand as British Resident with no legal authority over the British inhabitants. Instead, Governor Bourke proposed Busby work with the chiefs to maintain "tranquillity throughout the islands".¹¹⁷ Bourke gave Busby unlawful (but authorised) instructions in relation to the abduction of suspects:¹¹⁸

The law having thus given the Court the power to hear and determine offences, it follows as a necessary incident, that it has the power of bringing before it any person against whom any indictment should be found or information filed for any offences within its jurisdiction.

Necessity does not give a court the power to detain suspects in New Zealand and send them to New South Wales (or Tasmania). The Court simply did not have the power to detain suspects in New

114 (7 June 1832) 13 GBPD HC 505–506.

115 "J Stephen to John Backhouse, 18 March 1840" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 68 at 69.

116 "Viscount Goderich to Governor Bourke, 14 June 1832", above n 112, at 663.

117 John Beecham *Remarks upon the Latest Official Documents relating to New Zealand* (2nd ed, House of Commons, London, 1838) at 66.

118 At 67.

Zealand and send them to New South Wales (or Tasmania).¹¹⁹ To undertake abductions, Bourke advised:¹²⁰

I would here observe that I can propose no other means by which you can secure the offender than the procuring his apprehension, and delivery on board some British ship for conveyance to this country, by means of the native Chiefs, with whom you shall be in communication.

As Goderich instructed, Bourke provided Busby with an indemnity to abduct suspects, subject to his acting prudently:¹²¹

You will of course take every precaution to avoid the apprehension of a free person in mistake for a convict, as an action for damages would probably follow the commission of such an error. This Government will indeed be disposed to save you harmless in all such cases where becoming circumspection has been used.

In addition to the authority given to Busby, in July 1834, the Secretary of State for War and the Colonies, T Spring Rice, wrote to Bourke directing him, if he had no objection, to appoint Thomas McDonnell as an "additional British Resident at New Zealand", subordinate to Busby.¹²² In June 1835, Bourke nominated McDonnell to be additional British Resident in New Zealand, with the same authority as that conferred on Busby.¹²³ McDonnell took up his honorary role in the Hokianga district in the middle of 1835 and resigned in August 1836.¹²⁴

To address the ineffectiveness of British law in South Sea islands such as New Zealand, in 1837, the House of Lords Select Committee on Aborigines (British Settlements) suggested the appointment of consular agents with the power to arrest and: for lesser cases, commit for trial, try and punish all British subjects committing offences within the limits of the consul's commission; and, for more serious cases, send the suspects to a criminal court in a British jurisdiction, such as New South Wales, where the case could be tried.¹²⁵ If this was possible, then, in New Zealand, the British Resident could

119 The New South Wales Supreme Court ruled in 1835 that detaining and transferring suspects from New Zealand to New South Wales was unlawful (for more details, see Part IV).

120 Beecham, above n 117, at 67.

121 At 68.

122 "Right Hon T Spring Rice to Governor Bourke, 3 July 1834" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 17, 472 at 472–473.

123 "Colonial Secretary to Thomas McDonnell, 29 June 1835" in RAA Sherrin "Early History of New Zealand: From Earliest Times to 1840" in Thomson W Leys (ed) *Early History of New Zealand* (H Brett, Auckland, 1890) 1 at 459.

124 EJ Tapp *Early New Zealand: A Dependency of New South Wales 1788–1841* (Melbourne University Press, Carleton (Vic), 1958) at 94 and 102.

125 *Report from the Select Committee on Aborigines*, above n 92, at 85–86.

have been replaced or appointed as consular agent, and the need for state-sponsored abduction overcome. However, without Māori approval, this suggestion was "constitutionally impossible" as Britain lacked territorial jurisdiction over New Zealand.¹²⁶ Given the Committee claimed to have "a full perception of the defects of this system", they may have been advocating for "powers" that they knew were without authority and, when used, unlawful.¹²⁷ Their suggestion would have retained state-sponsored abduction and, compared to the British Resident, given the consular agent additional "powers", without authority to do so. While Hobson was commissioned by the Foreign Office as consul to New Zealand in August 1839, there is no evidence that he was given these suggested "powers".¹²⁸

The governor of New South Wales, Sir George Gipps, advised the Legislative Council of New South Wales in May 1839 that, upon the appointment of British Consul at New Zealand, the office of British Resident would be discontinued.¹²⁹ Accordingly, on the arrival of Hobson at New Zealand in January 1840, Busby was told that his duties ceased.¹³⁰

B Practice of Abduction by British Residents at New Zealand

Busby arrived in New Zealand as British Resident in May 1833.¹³¹ Under his "authority", there was a case where suspects were detained, sent and transferred to Sydney. In 1834, Captain William Hindson of the British whaler *Cape Packet* arrived in the Bay of Islands, expressing concern to Busby regarding the misconduct of two sailors. Busby directed him to Captain George Lambert, on the HMS *Alligator*, who was also in the Bay at the time.¹³²

Captain L at first was unwilling to interfere; but on Hindson declaring that if the plaintiff and another remained in the ship he must return to Sydney, and further, that he was apprehensive of their seizing the ship, Captain L took them out of the ship, and confined them on the gun deck in the *Alligator*, feeding them on prisoner's allowance, but not keeping them in irons, though under charge of a sentry.

126 Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts 1840–1852* (Auckland University Press, Auckland, 2017) at 40.

127 *Report from the Select Committee on Aborigines*, above n 92, at 86.

128 "Hon W Fox Strangways to Henry Laubouchere, 14 August 1839" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 36.

129 "Council" (12 June 1839) 423 *New South Wales Government Gazette* 671.

130 Eric Ramsden *Busby of Waitangi: HM's Resident at New Zealand, 1833–40* (AH and AW Reed, Wellington, 1942) at 232.

131 At 56.

132 "Law Intelligence" *The Australian* (Sydney, 24 March 1835) at 2.

Lambert then transferred the prisoners to Sydney. The Court discharged the case for lack of witnesses.¹³³

In a second case, Busby used the purported "authority" of the congress of the United Tribes of New Zealand to send two suspects to Sydney to face trial. On 18 June 1837, Golding and Edward Doyle, two of four persons suspected of robbery and assault in the Bay of Islands, had been captured by Māori.¹³⁴ Busby procured a "warrant" from the committee appointed by the chiefs of the congress of the United Tribes of New Zealand for the seizure and removal of the suspects, which was of this form:¹³⁵

We request that the four men who robbed the house of Captain Wright may be carried away in the ships of war of the King. We request that they may be tried by the King's Judge at Port Jackson and be punished there for their crime.

The "warrant" was signed by three of the five appointees on the committee.¹³⁶ Busby believed the "warrant" would avoid an action for false imprisonment should the proceedings fail.¹³⁷ While the "warrant" may have made the actions lawful under the congress of the United Tribes of New Zealand, it did not make them lawful under British law.¹³⁸ Hobson of HMS *Rattlesnake* took and transferred the suspects from the Bay of Islands to Sydney.¹³⁹ Hobson, aware of the questionable nature of the suspects' detainment and transfer, wrote to Bourke:¹⁴⁰

I am aware of the necessity of a British Act of Parliament ... to impart to the colonial courts of New South Wales, more perfectly than at present, jurisdiction over offences committed by British subjects in New Zealand ...

133 "Dowling, Select Cases, vol 4 (NSW)" Archives Office of New South Wales, 2/3463.

134 "Law Intelligence" *The Sydney Monitor* (Sydney, 20 November 1837) at 2.

135 NA Foden *New Zealand Legal History (1642 to 1842)* (Sweet & Maxwell, Wellington, 1965) at 41; and "Evidence of D Coates and Rev J Beecham" in *Report from the Select Committee of the House of Lords, Appointed to Inquire into the Present State of the Islands of New Zealand, and the Expediency of Regulating the Settlement of British Subjects Therein; with the Minutes of Evidence Taken Before the Committee, and an Index Thereto* (House of Commons, 8 August 1838) 243 at 269.

136 Foden, above n 135, at 41.

137 At 41.

138 See the similar case of *Pearson v Baker* (1840) NSW Sel Cas (Dowling) 483 (NSWSC) in Foden, above n 135, at 62–74; "Police Office – April 14" *New Zealand Gazette and Wellington Spectator* (Wellington, 18 April 1840) at 3; and "Pearson v Baker" *The Sydney Herald* (Sydney, 28 October 1840) at 2.

139 "Shipping Intelligence" *The Australian* (Sydney, 28 July 1837) at 2; and "Hobson to Bourke, 8 August 1837" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 9.

140 Colonial Office, above n 139, at 11.

On 1 August 1837, Golding was discharged and Doyle was committed to trial.¹⁴¹ Doyle complained to the Court about his unlawful detainment: he had "been shackled and ironed by a Mr Maher and by the missionaries", who had taken custody of him from Māori.¹⁴² Doyle was convicted and executed on 8 December 1837.¹⁴³ In a proclamation issued the same day, Doyle was made an example of:¹⁴⁴

... this example will afford a salutary warning to all persons who may be disposed to commit similar acts, and, by convincing them that, however remote, they are not beyond the reach of justice, will render such outrages less frequent in future.

After Doyle's sentencing, *The Colonist* wrote: "This case is highly important to the British residents, inasmuch as it determines that offences committed in New Zealand are punishable by the Supreme Court of New South Wales."¹⁴⁵

Under McDonnell's "authority", there was a case where he unlawfully detained suspects and sent them from the Hokianga to Hobart (then known as Hobart Town). When the schooner *Industry* arrived at the Hokianga harbour on 30 November 1835, the pilot was told by the mate that the crew had mutinied and thrown Captain Bragg overboard on 24 November 1835.¹⁴⁶ The pilot anchored the schooner in front of the residence of McDonnell. With friends, McDonnell apprehended the four suspects, took dispositions under "oath" and organised a duty of guards to watch over them. The suspects were transferred directly to Hobart in the *Industry*, with a Māori guard, under the control of Mr Oakes. The *Industry* arrived at Hobart on 4 January 1836.¹⁴⁷ Upon their arrival, the editor of the *Tasmanian* commented:¹⁴⁸

A "Mr McDonnell," who signs himself "additional British Resident of New Zealand," seems to have taken upon himself extraordinary authority in this matter. He not only took examinations, on oath, with all the accompanying forms of a British Magistrate, which he is not ... but he issued a very detailed series of

141 "Law Intelligence" *The Sydney Herald* (Sydney, 3 August 1837) at 2.

142 "Supreme Court" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 4 November 1837) at 2–3.

143 *R v Doyle* SC New South Wales, 18 November 1837 reported in *The Sydney Herald* (Sydney, 20 November 1837) at 6.

144 "New Zealand" (13 December 1837) 309 *New South Wales Government Gazette* 924.

145 "Execution" *The Colonist* (Sydney, 30 November 1837) at 4.

146 "Murder of Captain Bragg" *The Sydney Herald* (Sydney, 7 January 1836) at 2; and *The Hobart Town Courier* (Hobart, 8 January 1836) at 2.

147 "Shipping Intelligence" *The Tasmanian* (Hobart, 8 January 1836) at 3.

148 "Murder" *The Tasmanian* (Hobart, 8 January 1836) at 7.

"instructions" to Mr Oakes, who took the opportunity of the return of the industry here ... for his guidance in taking charge of four prisoners.

The case gained greater publicity when the sworn evidence of the mate was published in *The Sydney Herald*.¹⁴⁹ Three suspects – Hibbill, Harris and Smith – were charged with the murder of Captain Bragg, found guilty and executed, while the other suspect – Wells – was not charged.¹⁵⁰

IV DRAWBACKS OF ABDUCTION

By the late 1830s, if not much earlier, it was clear that the system of detaining and transferring suspects from New Zealand to New South Wales or Tasmania was unlawful, expensive and impractical.

In September 1835, the New South Wales Supreme Court ruled that it was unlawful to detain and transfer a suspect from New Zealand to New South Wales.¹⁵¹ This came about through a case taken up by James Lewis against Captain George Lambert of HMS *Alligator* who had imprisoned Lewis, and one other, and transferred them from the Bay of Islands to Sydney (as detailed in Part III(B)). The Court ruled: "There was no law by which Captain Lambert was justified in taking them. Verdict for plaintiff – nominal damages."¹⁵² The six-month delay in making the ruling together with the nominal damages of one farthing suggested that, whilst unlawful, the Court was aware of the necessity of the practice. The Court's decision was consistent with the earlier legal opinion of the New South Wales Attorney-General and the view of Goderich.¹⁵³

The detaining and sending of suspects from New Zealand to New South Wales or Tasmania, as well as the two-way movement of witnesses, was expensive. This was recognised by the New South Wales Supreme Court in the sentencing of Edward Doyle for murder, when the Acting Chief Justice, Mr Justice Burton, said:¹⁵⁴

149 "Copy of the deposition of William Keys, Mate, of the English Schooner 'Industry,' before Thomas McDonell Esq" *The Sydney Herald* (Sydney, 7 January 1836) at 2.

150 *R v Hibbill, Harris and Smith* SC Tasmania, 9 February 1836 reported in *The Tasmanian* (Hobart, 12 February 1836) at 6; and "Murder" *The Tasmanian* (Hobart, 8 January 1836) at 7.

151 *Lewis v Lambert* (1835) NSW Sel Cas (Dowling) 225 (NSWSC).

152 "Lewis v Lambert" *The Australian* (Sydney, 25 September 1835) at 2.

153 "Copy of a Letter from the Attorney General to the Colonial Secretary, 12 December 1831" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 485 at 486; and "Viscount Goderich to Governor Bourke, 31 January 1832" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 510 at 511–512.

154 "Supreme Court – Saturday Nov 18" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 21 November 1837) at 3.

Those who are charged with the administration of the law in this Colony would have failed in their duty, if, at any sacrifice of expense or trouble, they had neglected to bring this case home to the prisoner; the Court had reason to know that immense expense had been incurred in so doing, but at any expense it was necessary that the case should be prosecuted.

In the case of Captain Bragg, expense was incurred by McDonnell in holding the suspects in New Zealand.¹⁵⁵ Substantial further expense was incurred for the crew and guards that returned the suspects to Hobart on the vessel *Industry*, as well as the expense for the crew and guards to return.

The practice of detaining and sending suspects to Sydney (or Hobart) was impractical for many reasons. First, there were no constables to detain suspects. This was an issue identified in Commissioner Bigge's report, where he recommended the appointment of two constables at New Zealand.¹⁵⁶ In 1833, Bourke declined a request by Busby for mechanics to be paid a small wage to "act in the capacity of constables" partly because: "Without an Act of Parliament, Constables cannot legally act in New Zealand."¹⁵⁷ Secondly, there were no lock-ups to house suspects. For example, Kendall did not even have the promised leg irons and handcuffs.¹⁵⁸ Reverend Butler, in 1821, declined to take four stowaway convicts as he had "no means of restraining their persons".¹⁵⁹ And McDonnell had to temporarily house suspects in the murder of Captain Bragg at his residence.¹⁶⁰ Thirdly, there were no experienced guards to hold suspects. Settlers had to step forward to guard the suspects in the murder of Captain Bragg.¹⁶¹ And, with inexperienced guards, there was a nearly successful mutiny while transferring those suspects back to Hobart.¹⁶² Fourthly, there were no provisions to provide suspects while they were held awaiting their transfer to Sydney. For example, in 1816, Kendall refused to take five runaways unless Captain Hammont left six months' provisions for them.¹⁶³ Lastly, there was no dedicated transport for transferring suspects and witnesses to New South Wales or Tasmania. This could mean long waits for transport. Alternatively, in the case of Captain Wyer, who had convict stowaways onboard, Reverend Butler proactively piloted their vessel towards the Hauraki Gulf, where

155 *The Hobart Town Courier* (Hobart, 8 January 1836) at 2.

156 McNab, above n 53, at 594.

157 "Governor Bourke to Under Secretary Hay, 15 March 1833" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 17, 40 at 41 and 43.

158 Hill, above n 37, at 38.

159 Butler, above n 17, at 201.

160 *The Hobart Town Courier* (Hobart, 8 January 1836) at 2.

161 At 2.

162 At 2.

163 "Captain Hammont to Secretary Campbell, 4 October 1816" in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay: Government Printer, Wellington, 1908) vol 1, 408 at 409.

HMS *Coromandel* could have returned the convicts to New South Wales, before the Captain turned back due to poor weather.¹⁶⁴

The law itself was impractical for many reasons. First, with the exception of pirates, escaped convicts and mutineers, a suspect could not be legally apprehended without a warrant presented by an Australian magistrate.¹⁶⁵ Secondly, the Supreme Court of New South Wales held that it could not issue a warrant for arrest of an offender in New Zealand, since its writs did not run in New Zealand.¹⁶⁶ Thirdly, the admiralty advised the Colonial Office that authority could not be given to the commander of a King's ship, "so to interfere [onshore] in a territory not belonging to His Majesty, and with the Rulers of which he has no treaty either of alliance or commerce"; instead, interference was confined to giving protection to British subjects, who sought protection, once they were received on a King's ship.¹⁶⁷ Fourthly, sworn testimony was taken under religious oath, which excluded non-religious Māori.¹⁶⁸ For example, in a case before the New South Wales Court, the Judges gathered sworn testimony from European witnesses but only gathered information on the subject of the complaint from Māori witnesses.¹⁶⁹ Saxe Bannister, the first Attorney-General of New South Wales, believed the inability to take sworn testimony from natives would, in many instances, make the law "perfectly inoperative".¹⁷⁰ Fifthly, there was no power to take affidavits in New Zealand. Whilst Butler and McDonnell took evidence under "oath" in New Zealand, they technically did not have the authority to do so.¹⁷¹ On the other hand, Busby was aware of his limited power: when complaints of outrages were made to Busby, he "expressed his deep regret that he has not yet been furnished with authority

¹⁶⁴ Butler, above n 17, at 201–202.

¹⁶⁵ "Copy of a Letter from the Attorney General to the Colonial Secretary, 12 December 1831" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 485 at 486; and Hill, above n 37, at 47.

¹⁶⁶ *Ex parte McKey*, above n 90; Hill, above n 37, at 62; and Spiller, Finn and Boast, above n 90, at 72.

¹⁶⁷ "Mr J Barrow to Under Secretary Hay, 24 March 1832" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1923) series 1, vol 16, 573; Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland University Press, Auckland, 1977) at 60; and Ian Wards *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832–1852* (AR Shearer: Government Printer, Wellington, 1968) at 9.

¹⁶⁸ Ward, above n 49, at 52; and Hill, above n 37, at 47.

¹⁶⁹ "Proceedings of Magistrates' Court, 12 April 1815" Hocken Library, MS 55/28.

¹⁷⁰ "Attorney-General Bannister to Under Secretary Horton, 16 August 1824" in *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Sydney, 1922) series 4, vol 1, 554 at 555.

¹⁷¹ For examples of affidavits taken by Reverend John Butler, see Butler, above n 17, at 115, 169, 171, 174 and 192.

and power to act, not even the authority of a civil Magistrate to administer an affidavit".¹⁷² Sixthly, courts had no power to compel witnesses to attend from New Zealand. For example, Doyle in his defence called four witnesses at New Zealand who, he said, could prove his alibi.¹⁷³ While he could vouch that one of them would attend, there was no power to compel witnesses to attend and, after a postponement, the trial continued without them. Lastly, there was no power to force witnesses to stay in Sydney, once they were there.¹⁷⁴ For example, in 1838, Captain Edward Palmer was found not guilty of manslaughter at Preservation Inlet, Fiordland, after two key Crown witnesses left New South Wales before trial.¹⁷⁵

V ***INEFFECTIVENESS OF THE BRITISH SYSTEM OF LAW AND ORDER FOR NEW ZEALAND***

The drawbacks of state-sponsored abduction contributed to the ineffectiveness of the British system of law and order for New Zealand pre-annexation. Given its unlawfulness, impracticality and expense, the practice of abduction could only be justified for more serious crimes. Abductions were not used, for example, where the only crime was robbery, even though robbery was a specified crime in the New South Wales Act and the Australian Courts Act, and robberies were common in the Bay of Islands, with many complaints made to Busby.¹⁷⁶ Abductions could not be justified to control prostitution, either, which was rampant in the Bay of Islands with wāhine Māori acting as temporary wives to visiting sailors.¹⁷⁷ Furthermore, abductions could not be justified to control drunkenness, which was also rife.¹⁷⁸ Similarly, the use of abductions could not be justified for civil matters. As such, civil matters in New Zealand were not covered by the New South Wales Act or Australian Courts Act. This included land disputes, which were sometimes referred to Busby.¹⁷⁹

British law and the use of abduction did not generally extend to crimes committed in New Zealand by non-British Pākehā, such as Americans and the French. Nor did British law and the use of abduction extend to law and order between Māori, who had tikanga Māori to address law and order

172 T Lindsay Buick *The Treaty of Waitangi, or How New Zealand Became a British Colony* (S & W MacKay, Wellington, 1914) at 34.

173 *R v Doyle*, above n 143.

174 Rumbles, above n 32, at 211.

175 Robert McNab *The Old Whaling Days: A History of Southern New Zealand from 1830 to 1840* (Whitcombe and Tombs, Christchurch, 1913) at 204–220.

176 Buick, above n 172, at 34; and "List of correspondence with Busby" Archives New Zealand, AABS 8156.

177 "New Zealand" *The Sydney Herald* (Sydney, 20 March 1837) at 3.

178 "New South Wales Temperance Magazine" *Southern Australian* (Adelaide, 21 August 1839) at 4.

179 "List of correspondence with Busby" Archives New Zealand, AABS 8156.

between themselves.¹⁸⁰ Nor did British law and the use of abduction extend to crimes committed by Māori against Pākehā. Instead, there was sometimes a "meeting of laws",¹⁸¹ where Māori and Pākehā worked together to address this gap.¹⁸² An example was when Busby presided over an informal trial in May 1838 to hear evidence that a Māori slave murdered Pākehā Henry Biddle; the accused was found guilty and shot by a Māori executioner. Busby's involvement was later approved by the Secretary of State for War and the Colonies, Lord Glenelg.¹⁸³ From a tikanga Māori perspective, the offering up and execution of a slave as utu for the murder of a settler was a relatively straightforward and practical way of restoring the relationship with settlers.¹⁸⁴

The ineffectiveness of the British system of law and order for New Zealand came to a head in the late 1830s. There was broad agreement among the press, settlers, missionaries, Busby, Hobson and merchants that something needed to be done to address the effective lawlessness in New Zealand. In January 1837, the editor of *The Colonist* noted the "necessity for some measures to be pursued relative to the protection of British subjects and property at New Zealand".¹⁸⁵ In March 1837, about 200 "law-abiding" British settlers and missionaries of Russell (then known as Kororāreka) submitted a petition to King William IV seeking his protection:¹⁸⁶

... unless Your Majesty's fostering care be extended towards them, they can only anticipate that both Your Majesty's subjects and also the aborigines of this land will be liable in an increased degree to murders, robberies, and every kind of evil.

180 Instead, the British could influence tikanga Māori. The example was when, after a Māori admitted adultery with a chief's wife, McDonnell persuaded chiefs to commute the customary penalty of death to flogging and exile to Tasmania, with the flogging occurring at McDonnell's premises under the control of the chiefs, and with the Wesleyan mission paying the costs to deport the offender to Tasmania: see Foden, above n 135, at 40.

181 Dorsett and McVeigh, above n 24, at 98.

182 See for example Hill, above n 37, at 50–51, 63–65, 69–71, 73 and 78; and Waitangi Tribunal, above n 1, at 135–136 and 263–266.

183 Jennifer Ashton "'So Strange a Proceeding': Murder, Justice and Empire in 1830s Hokianga" (2012) 46(2) NZ J Hist 142.

184 Waitangi Tribunal, above n 1, at 265.

185 "New Zealand" *The Colonist* (Sydney, 26 January 1837) at 3.

186 Buick, above n 172, at 34. Likewise, on 4 January 1839, the British Resident and settlers presented an address to the Bishop of Australia asking for the protection of the British sovereign: see "Copy of an Address presented to the Bishop of Australia, at Kororarika, New Zealand, on the 4th January 1839" *The Sydney Herald* (Sydney, 4 February 1839) at 2.

Reverend Henry Williams forwarded a second copy of the petition to Britain, in which he wrote in his cover letter:¹⁸⁷

It is high time that something be done to check the progress of iniquity committed by a lawless band daringly advancing in wickedness and outrage, under the assurance that "there is no law in New Zealand".

Frustrated, Marsden wrote to the Church Missionary Society during his last visit to New Zealand:¹⁸⁸

Here drunkenness, adultery, murder, etc. are committed. There are no laws, judges, or magistrates, so that Satan maintains his dominion without molestation. Some civilized government must take New Zealand under its protection, or the most dreadful evils will be committed from runaway convicts, sailors, and publicans. There are no laws here to punish crimes.

In June 1837, settlers were reportedly concerned by the outbreak of war among Māori tribes in the Bay of Islands and whether they would be attacked by either side – a scenario which British law and the use of abductions did not protect.¹⁸⁹ In an implicit criticism of the current British system of law and order for New Zealand, Busby wrote:¹⁹⁰

Unless the country should be taken under the efficient protection of Great Britain, or some other foreign power should interfere, the natives will go on destroying each other, and the British will continue to suffer the accumulating evils of a permanent anarchy.

In August 1837, after a visit to New Zealand, Hobson reported to Bourke that there was much to be dreaded from the "abandoned ruffians from our own country".¹⁹¹ About this time, Busby advised another victim of crime that restitution required charges to be laid in Sydney, since he had no authority to take action.¹⁹² In December 1837, about 40 merchants and shipowners, engaged in the whale fisheries and trade with New South Wales and Tasmania, petitioned the British Government and warned:¹⁹³

187 "Henry Williams to the Reverend EG Marsh, 28 March 1837" in Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (Upton, Auckland, 1874) vol 1, 200.

188 "Marsden to Secretary of Church Missionary Society, 27 March 1837" in John Elder (ed) *The Letters and Journals of Samuel Marsden 1865–1838* (Coulls Somerville Wilkie and AH Reed, Dunedin, 1932) 523.

189 "Busby to Colonial Secretary of New South Wales, 16 June 1837" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 12 at 12–13.

190 At 14.

191 Colonial Office, above n 139, at 9.

192 Paul Moon *Fatal Frontiers: A New History of New Zealand in the Decade before the Treaty* (Penguin Books, Auckland, 2006) at 144.

193 "Merchant petition to Lord Viscount Melbourne, 16 December 1837" (UK) National Archives, CO 209/2 445.

... under the present state of affairs in New Zealand we find by experience the representative of the British Government has no sufficient power to check the evils already existing, much less to prevent a realization of our worst fears for the future ...

Given the state of anarchy in Russell and the "inability of Māori themselves to administer a remedy", the vigilante Kororaraka Association was formed by local residents in May 1838:¹⁹⁴

... in consequence of the absence of any Magisterial Authority in the Bay of Islands, to frame laws for the better regulation of matters connected with the welfare of the inhabitants, both European and Native.

Notably, given the need, the British Government did not take proceedings against the Association for their unlawful operation.¹⁹⁵ Furthermore, emigration schemes to New Zealand asked colonists to sign private law-and-order agreements. For example, in August 1837, Baron de Thierry advertised in Sydney for settlers to proceed with him to "his Territories" in New Zealand on the condition they subscribed to his "regulations, of the preservation of peace, sobriety and good order".¹⁹⁶ And, in 1839, the first Wakefield emigrants entered into a law-and-order agreement before they departed for New Zealand.¹⁹⁷ After the New Zealand Company (then known as the New Zealand Land Company) found the agreement was illegal, the Committee of Colonists in Wellington (then known as Port Nicholson) had their law-and-order agreement endorsed, in April 1840, with the authority of the local chiefs.¹⁹⁸ While the "endorsement" may have made the agreement lawful under the chiefs, it did not make it lawful under British law.¹⁹⁹

The innovative alternatives were symptomatic of the need for a more effective system of law and order in New Zealand. Some of these alternatives showed how Māori and settlers were willing to work together to develop a practical local system of law and order.

VI BRITISH ANNEXATION OF NEW ZEALAND

The ineffectiveness of the British system of law and order for New Zealand influenced the British decision to annex New Zealand. Hobson received instructions from the Secretary of State for War and

194 Church Missionary Society *Documents, Exhibiting the View of the Committee of the Church Missionary Society on the New-Zealand Question* (Richard Watts, London, 1839) at 50.

195 Foden, above n 135, at 61.

196 "New Zealand" *The Sydney Gazette and New South Wales Advertiser* (Sydney, 22 August 1837) at 1.

197 "J Stephen to GF Young, 19 September 1839" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 50.

198 "From John Ward to Lord John Russell, 23 November 1839" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 59 at 59–63; and New Zealand Company *New Zealand Journal* (London, 12 September 1840) vol 1 at 219–220.

199 Foden, above n 135, at 62–74; "Police Office – April 14" *New Zealand Gazette and Wellington Spectator* (Wellington, 18 April 1840) at 3; and "Pearson v Baker" *The Sydney Herald* (Sydney, 28 October 1840) at 2.

the Colonies, Marquis of Normanby, in August 1839, before departing for New Zealand.²⁰⁰ These instructions implicitly implied that the current British system of law and order for New Zealand was ineffective, and needed to be replaced by a settled form of New Zealand civil government with laws and institutions:²⁰¹

... it can no longer be doubted that an extensive settlement of British subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary laws and institutions, they will repeat, unchecked, in that quarter of the globe, the same process of war and spoilation under which uncivilized tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom. To mitigate and, if possible, to avert these disasters, and to rescue the emigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government. To accomplish this design is the principal object of your mission.

In the instructions, Normanby emphasised the importance of first agreeing a treaty with Māori.²⁰² With Hobson's arrival, the signing of te Tiriti o Waitangi/the Treaty of Waitangi, Hobson's annexation of the islands of New Zealand on behalf of Britain in May 1840, and the British Government's ratification of annexation in October 1840, Britain enforced British law from within New Zealand.²⁰³ As a result, the practice of state-sponsored abduction to enforce British law for New Zealand became unnecessary and was quietly discontinued.

VII AFTERWORD

Ironically, three years later, the British Parliament passed the Foreign Jurisdiction Act 1843 (UK), which could have helped British courts to enforce British law for New Zealand from New South Wales and Tasmania.²⁰⁴ The Act gave British courts jurisdiction over British subjects in any country or place outside of Her Majesty's dominion in which Her Majesty had jurisdiction and power by right of "treaty, capitulation, grant, usage, sufferance, and other lawful means".²⁰⁵ The Act made lawful the

200 "From the Marquis of Normanby to Captain Hobson, 14 August 1839" in Colonial Office *Correspondence with the Secretary of State relative to New Zealand* (House of Commons, London, 1840) 37.

201 At 37.

202 At 37–38.

203 Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) at 32–91; Waitangi Tribunal, above n 1, at 339–405; William Hobson and Willoughby Shortland *Proclamation [of sovereignty over the Northern Island of New Zealand], 21 May 1840* (Press of the Church Missionary Society, Paihia, 1840); William Hobson and Willoughby Shortland *Proclamation [of sovereignty over the Islands of New Zealand], 21 May 1840* (Press of the Church Missionary Society, Paihia, 1840); (2 October 1840) 19900 *The London Gazette* 2179 at 2179–2180; and Hill, above n 37, at 126–159.

204 Foreign Jurisdiction Act 1843 (UK) 6 & 7 Vict c 94.

205 At preamble.

powers and jurisdiction Her Majesty already exercised, or in the future would have, within such territories as if Her Majesty had acquired the territory by cession or conquest. Under the Act, authorised British representatives had the power to send British convicts and British subjects charged with crimes for trial to any British colony. Furthermore, within such territories, affidavits of defence witnesses could be taken and defence witnesses cross-examined by authorised British representatives, with a copy of the evidence then transmitted to the court, where it could be presented as if the witnesses were at the trial before the court.

If this law had been passed 30 years earlier and chiefs (say, in the Bay of Islands) had not objected to Britain enforcing its laws over its subjects in their hapū territories, then the appointment of magistrates, justices of the peace and constables in these territories would have been legal, as would have been the arresting, charging, sending and transferring of British convicts and British subjects charged with crimes for trial from these territories to New South Wales or Tasmania. In this scenario, there would not have been a need for state-sponsored abduction from these territories. Nevertheless, the British system of law and order for New Zealand would still have suffered from courts' being remote from New Zealand, and the practical challenges and costs of getting British suspects and prosecution witnesses before the courts.