

## 1 Protection and the Ends of Colonial Governance

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### Introduction

This book explores how the process of protecting indigenous people's rights around the British Empire was dependent upon their reform as governable colonial subjects, including through punishment under the law. The endpoints of this process remain visible today in indigenous people's over-representation in contemporary criminal justice systems and the related afterlives of colonial subordination, but its origins lie in unresolved debates within the nineteenth-century British settler world about the perceived nature of indigenous people's rights and responsibilities as nominal members of an expanding empire. From the 1830s onwards, imperial administrators, colonial officials, settler entrepreneurs, and the mixed assortment of humanitarians who closely observed the progress of British colonisation all grappled with these questions: what was the nature of indigenous people's recognisable rights – rights to legal equality, rights to land, rights to compensation for dispossession – and what obligations did those rights incur upon them?

There has been considerable recent interest in the politics of humanitarianism that swayed the directions of British imperial policy during the early to mid-nineteenth century, and in tracking how a post-abolitionist commitment to indigenous justice rose and then fell with the mid-century transition to settler self-government. One of the most influential of recent works, Alan Lester and Fae Dussart's *Colonization and the Origins of Humanitarian Governance*, traces how the goal to produce a humane British Empire was imagined and implemented between the 1820s and the 1860s as the key decades of almost unbridled colonial growth.<sup>1</sup> Their work sits within a wider body of scholarship that explores the scope and the limits of humanitarian responses to the expansion of empire, and the many ways in which those responses became translated across the administrative and philanthropic circuits which connected the

<sup>1</sup> Lester and Dussart, *Colonization*.

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imperial metropole and colonial peripheries to each other.<sup>2</sup> Concerns about the possibilities of humane rule were voiced from within the Colonial Office as well as from within Britain's colonies in ways that reflected a shared investment in the larger imperial polity and the future of colonial security.<sup>3</sup> But as other important recent scholarship explores, such humanitarian aspirations were followed by a later-nineteenth-century concept of colonial democracy in the self-governing settler colonies from which indigenous people were increasingly excluded.<sup>4</sup> These historical enquiries into the unstable trajectories of nineteenth-century indigenous policy around the British Empire have produced vital insights into a mutable political world in which high principles of humane governance became subsumed to the economic goals and administrative limits of an ever-growing, racially hierarchised empire.<sup>5</sup>

However, there remains much scope for exploring how nineteenth-century concerns to deliver indigenous rights accorded with the practical processes of colonial state-building, particularly in tying humanitarian obligations to the regulatory power of the law. This book traces how the relationship between humanitarian obligation and legal regulation evolved over the nineteenth century in governmental attempts to remake indigenous people as meaningful subjects of the British Empire. Its broader focus is on 'protection' as a wide-ranging program of legal reform and on the interlaced purposes it held in its applications to indigenous people: to extend to them equal rights as subjects under the Crown's dominion, to build the terms of their colonial citizenship, and to manage their place within the settler state. In these purposes, the institutional framework of 'Aboriginal protection' accrued both specific and general features, adapting an earlier program for the amelioration of slavery and overlapping with other applications of protection policy in the nineteenth-century British world.<sup>6</sup> By the early twentieth century, when Britain's global power was starting to decline, protection policies had been through numerous iterations around the colonial world and had come to represent something quite different from the defence of rights.

<sup>2</sup> For instance, Skinner and Lester, 'Humanitarianism and Empire'; Edmonds and Johnston, eds., 'Empire, Humanitarianism and Non-Violence'. On trans-imperial patterns, see Kamissek and Kreienbaum, 'An Imperial Cloud?', 164–82.

<sup>3</sup> See for instance Laidlaw, *Colonial Connections*; Lambert and Lester, eds., *Colonial Lives*.

<sup>4</sup> Evans et al., *Equal Subjects, Unequal Rights*; Woollacott, *Settler Society*, Curthoys and Mitchell, *Taking Liberty*.

<sup>5</sup> On the relationship between humanitarianism and imperial growth see Skinner and Lester, 'Humanitarianism and Empire', 279–347.

<sup>6</sup> Spence, 'Ameliorating Empire'; Twomey, 'Protecting Slaves and Aborigines'.

The nineteenth-century history of Aboriginal protection has most often been explored within the analytical frame of imperial humanitarianism, as a Colonial Office initiative to check the impacts of violence and dispossession in the settler colonies. It is orthodox to locate its humanitarian starting points in the anti-slavery campaigns which achieved abolition across the British Empire in 1833, and more specifically in the objectives of the House of Commons Select Committee on Aborigines (British Settlements) which released its final report in 1837. Scholars have often noted that the imperial design of Aboriginal protection was both short-lived and ambivalent, vacillating between indigenous advocacy and coercion.<sup>7</sup> But regarded through the filter of its humanitarian intention, Britain's scheme to 'protect' indigenous people has still remained widely understood as a vehicle for extending 'soft' forms of colonial power in the guise of moral suasion; much less often has it been regarded as a vehicle for exerting the law's surveillance over subjects-in-the-making.<sup>8</sup> Instead, the legal implications of protection policy as it was applied to indigenous people have most often been associated with the later statutory acts and government departments that oversaw the centralised management of indigenous lives in the British Commonwealth during the late-nineteenth and twentieth centuries.

However, protection policies have a long and intriguing history as a means of regulating colonial worlds and consolidating governmental authority through the mechanism of law, as a growing body of scholarship is now exploring.<sup>9</sup> Through this wider lens, concerns to protect indigenous rights during the 1830s reflected more than a humanitarian preoccupation with moral reform of the Empire; just as importantly, they reflected an imperial desire to improve governmental coherence within an increasingly mobile Empire that had developed until this point in uneven ways.<sup>10</sup> The purpose of a dedicated policy of protection for indigenous people – as for slaves before them and for indentured workers

<sup>7</sup> Much of the scholarship on nineteenth-century Aboriginal protection has focused on the Port Phillip protectorate and its aftermaths. Examples include Christie, *Aborigines in Colonial Victoria*; Broome, *Aboriginal Victorians*; Shaw, *A History of the Port Phillip District*; Rae-Ellis, *Black Robinson*; Reed, 'Rethinking William Thomas'; Clark and Heydon, *A Bend in the Yarra*; Mitchell, "'Country Belonging to Me'"; McLisky, "'Due Observance of Justice'"; Fels, *I Succeeded Once*; Standfield, 'Settler Politics and Indigenous Politics' and 'The Vacillating Manners and Sentiments'; Boucher and Russell, eds., *Settler Colonial Governance*; Attwood, *The Good Country*.

<sup>8</sup> Exceptions include Nettelbeck, "'A Halo of Protection'"; Dorsett, 'Travelling Laws'; Ford, 'Protecting the Peace'.

<sup>9</sup> Spence, 'Ameliorating Empire'; Benton and Ford, *Rage for Order*, chapter 4; Benton, Clulow and Attwood, eds., *Protection and Empire*; Twomey and Ellinghaus, 'Protection'.

<sup>10</sup> Benton and Ford, *Rage for Order*, particularly chapter 2.

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who became the backbone of the Empire's labour force after the abolition of slavery – was not just to safeguard their rights as newly clarified British subjects but also to bring the corrective influences of law and good government to the furthest peripheries of the British Empire.

This corrective purpose of protection policy was embedded in its correlative of 'amelioration', a philosophy of improvement directed towards reforming both the condition of subject peoples and the institutional character of colonialism itself.<sup>11</sup> The agendas of amelioration did not originate with the British Empire, although they have been particularly associated with Britain's anti-slavery era.<sup>12</sup> Lisa Ford notes that amelioration efforts took on a stronger legal aspect in Britain's anti-slavery campaigns, directing the energy of law towards turning slaves from 'latent' subjects into realised subjects who would be capable of 'the burdens of full British subjecthood'. But in this objective, she stresses, amelioration was not just contained to bettering the condition of slaves; as a legal project, it became integral to a larger process of imperial 'reordering' around the British Empire, working 'to transform the legal relationship among subjects, colonial states and the imperial centre'.<sup>13</sup>

It was with the entwined purposes of improving the indigenous 'condition' and improving colonial legal order that the key government representatives of Aboriginal protection policy, Protectors of Aborigines, were empowered as magistrates. Magisterial powers aligned Aboriginal Protectors with earlier magisterial offices established for the protection of other 'vulnerable subjects' in Britain's colonies, and well before that in older imperial settings.<sup>14</sup> Protectors held a duty to secure for indigenous people the protections of British law, but an equally important part of their duty was to bring these would-be subjects more effectively within the pale of law. Over the course of the nineteenth century, the process of creating indigenous people's amenability to the law involved a complex mix of strategies, ranging from efforts of conciliation and assimilation to measures of policing and incarceration. Indeed, the reformist impulse of protective governance itself was often driven by a conviction that if indigenous people could be made amenable to British law – whether through persuasion or punishment – their protection as British subjects would follow.

<sup>11</sup> Innes and Burns, 'Introduction', 11.

<sup>12</sup> On the longer imperial relationship between protection and amelioration, see Spence, 'Ameliorating Empire' and Dorsett, *Juridical Encounters*, Part II. On amelioration and anti-slavery in the British Empire, see for instance Titus, *Amelioration and Abolition of Slavery*.

<sup>13</sup> Ford, 'Anti-Slavery and the Reconstitution of Empire', 71–82.

<sup>14</sup> Benton and Ford, 'Magistrates in Empire', 10–18; Benton and Clulow, 'Introduction'.

It is important here to comment on this book's scope. It does not claim to be a history of indigenous rights as such, a project better explored by others.<sup>15</sup> Rather, it is a history of how a discourse of indigenous rights safeguarded in law, the initial basis of Aboriginal protection policy, became reconciled with coercive practices which worked over time to build indigenous colonial subjecthood. In tracking this process, the book examines how Aboriginal protection policy articulated with wider applications of protection policy in the British Empire, originally to organise the treatment of slaves and then to monitor the conditions and mobility of indentured labour forces and others. Within this broader domain, it aims to draw out how the humanitarian objective of protection policy to mitigate the misuse of colonial power carried with it a larger concern to manage colonised peoples in an Empire where the demands of humane governance and the rule of law jostled with colonial growth and mobility.

Like the connected imperial project of amelioration, protection policy did not originate with the British Empire. But its patterns across Britain's colonies, with their points of commonality and difference, help to illuminate how and why later expressions of Aboriginal protection became recast as a set of legally empowered institutions for indigenous management, in which the rhetoric of civil rights had all but disappeared.<sup>16</sup> These wider patterns in Britain's nineteenth-century history of protection also help to highlight how the 'pioneering violence' of settler colonialism shared structural equivalencies with the forms of violence that underpinned the colonial labour market, as Tracey Banivanua Mar has argued elsewhere.<sup>17</sup> This book does not attempt a comprehensive survey of the other protection offices established around the British Empire to oversee colonial labour systems, which have received their own attention. Rather, it considers them alongside Aboriginal protection as related programs of colonial governance in order to trace protection's scope and limits as a widely applied project of reform, and to better understand the relationship between the global and the local designs of Aboriginal protection as its own varied project.

Protection in an imperial context implied the Crown's authority to impose checks on abusive or capricious colonial practices.<sup>18</sup> In this

<sup>15</sup> For recent transnational examples, see, for instance, Pulatano, ed., *Indigenous Rights in the Age of the UN Declaration*; Richardson et al., eds., *Indigenous Peoples and the Law*; Langton et al., eds., *Settling with Indigenous People*.

<sup>16</sup> Chesterman and Galligan, *Citizens without Rights*.

<sup>17</sup> Banivanua Mar, *Violence and Colonial Dialogue*.

<sup>18</sup> Benton and Ford, *Rage for Order*, chapter 4.

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sense, Crown-appointed Protectors of Aborigines personified imperial values of legal transparency and amelioration. But while the name of their position was new, they did not forge an untrodden or solitary path. Locally, they came in the wake of a mixed milieu of personnel, from interpreters and government intermediaries to missionaries, magistrates and police, who undertook similar work in the settler colonies. Around the Empire, they were preceded by Protectors of Slaves and 'Indians', and they were contemporaneous with Protectors of Immigrants (or Immigration Agents) appointed in the post-abolition years to supervise the burgeoning indentured labour system. From the 1870s onwards, Protectors of Chinese were also appointed to administer Chinese labourers and diasporic communities in the Straits Settlements, and the same name applied to officials appointed in the 1850s in colonial Victoria to manage the considerable Chinese presence on the goldfields. In late colonial Queensland, these officials had an equivalent in the Inspectors of Pacific Islanders who oversaw the contracts and working conditions of people imported from the South Pacific to be the principal labour force of the sugarcane industry.<sup>19</sup> In effect, a policy of Aboriginal protection was never simply introduced into the settler colonies as a humanitarian intervention of the Colonial Office. Rather, it formed part of a wider schema of governance that was forged and revised in the space between metropolitan and local strategies for managing fluid colonial conditions.

The book's focus on Aboriginal protection as a project of reform that had its origins in both local and global practices centres most fully on the Australian colonies because, from everywhere across the British settler world, it was designed as having greatest relevance there. By extension, it was also in the Australian setting that protection policies would have the longest life, sustained in some institutional form or another from the late 1830s to the late 1960s. In its well-known report of 1837, the Select Committee on Aborigines argued that indigenous peoples in all British settlements deserved the safeguards of law and civil rights, but it saw especial urgency for establishing dedicated offices of Aboriginal protection in the Australian colonies. Relative to indigenous peoples elsewhere, Australian Aboriginal peoples were distinctly subject to an imperial assumption that their apparently 'undeveloped' civil life made them particularly vulnerable to dispossession and destruction. And because their land management practices did not activate a legal definition of possession, according to international law in an imperial context, British sovereignty was asserted without recourse to treaties, bringing

<sup>19</sup> Banivanua Mar, *Violence and Colonial Dialogue*, chapter 5.

them by default within the Crown's presumed 'allegiance' as people 'entitled' to its protection.<sup>20</sup>

Although the imperial policy of Aboriginal protection had special meaning for the Australian colonies, it was locally tempered in quite different ways, and here it must be remembered that the Australian colonies do not represent one colonial case but a rich trans-colonial history of their own. While geographically and culturally connected, they were founded at different moments under different philosophies and conditions of colonisation. In 1835, when the Select Committee on Aborigines sat for the first time, the vast continent of 'New Holland' comprised three colonies, with a fourth in development. The original colony of New South Wales had been in existence for almost fifty years, and the principles of its establishment on penal labour were quite removed from the principles of free settlement on which Australia's later colonies were independently founded. New South Wales's dependent territories included the penal settlement of Moreton Bay to the north (which became part of the colony of Queensland in 1859) and the emergent pastoral settlement of Port Phillip to the south (which became the colony of Victoria in 1851). New South Wales's sitting governor in 1835, Richard Bourke, was a seasoned colonial administrator who had brought from the Cape Colony a range of plans for indigenous people's 'civilisation' and assimilation.<sup>21</sup> Yet even when he arrived in 1831 as the colony's eighth governor, his predecessors had already tested a range of protective measures, from colonial diplomacy to martial law, in efforts to pacify unsettled race relations.

Across the ocean strip of the Bass Strait, the island colony of Van Diemen's Land (later Tasmania) was still reliant in 1835 on the transportation of convict labour, as it had been for over a generation. It achieved independence from New South Wales a decade earlier and was now just emerging from the impact of the most formidable frontier wars in Australia's colonial history. In contrast, the young colony of Western Australia (initially the Swan River Colony) was only six years old. The administration of the inaugural governor James Stirling was still very limited in its scope and powers, and European settlement was still clustered around a contained southern region. When the Select Committee on Aborigines first met, plans were still in formation to establish the new colony of South Australia which would absorb the vast interior of

<sup>20</sup> *Select Committee on Aborigines* report (1837), 83. On Britain's justification of sovereignty claims, see, for instance, Miller et al., *Discovering Indigenous Lands*. On Aboriginal land management technologies, see Gammage, *The Biggest Estate on Earth*.

<sup>21</sup> Laidlaw, 'Richard Bourke'.



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the continent. The *South Australia Act (1834)* was in place, but the arrival of settlers was still more than a year away. The northern pastoral, pearling and mining frontiers of Queensland, Western Australia and South Australia had not yet entered the settler imagination; fortune seekers would not begin to push their way into Aboriginal country in these more inaccessible reaches of the continent until later in the nineteenth century. By the time Australia became a federated nation in 1901, each of its colonies had been pursuing sometimes overlapping but often divergent strategies of Aboriginal governance for many decades, in ways that spoke to their own economic and demographic realities.

Beyond these differences, however, the premise that treaties offered an appropriate approach to colonisation elsewhere but not in the Australian colonies created a different model of protective governance there than in other British settler sites. In New Zealand, the signing of the Treaty of Waitangi in 1840 preceded the establishment of an Aboriginal protectorate which operated according to an official policy that Māori held proprietary rights in land and would (at least temporarily) continue to exercise their own laws amongst themselves. The relative peace that followed the treaty did not last, however, and questions of conflicted sovereignty triggered a series of frontier wars in the mid-1840s that endured for almost three decades.<sup>22</sup> Treaties were also seen as a pathway to British rule in the Cape Colony alongside other forms of government and missionary diplomacy, although as in New Zealand, periods of peace were interrupted by cycles of bitter warfare that erupted over decades.<sup>23</sup> In Canada, a long history of diplomatic and military allegiance between First Nations and European sovereigns again made treaties the preferred avenue through which the Crown gained access to indigenous lands. From this formal understanding of friendship and allegiance, a more institutionalised model of protective governance later emerged that prepared the ground for indigenous people's containment to government reserves and residential schools.<sup>24</sup>

Clearly, the Crown's negotiation of treaties elsewhere did not clarify shared understandings of sovereignty, resolve the future risk of warfare or provide indigenous people with secure interests in land protected from settlers' future encroachments. But while treaty making was not particularly successful in producing lasting peace or mutual diplomatic

<sup>22</sup> Belich, *The New Zealand Wars*.

<sup>23</sup> For instance, Mostert, *Frontiers*; Lester, *Imperial Networks*; Elbourne, *Blood Ground*; Price, *Making Empire*.

<sup>24</sup> For instance, Tobias, 'Protection, Civilization, Assimilation'; Haig-Brown and Nock, eds., *With Good Intentions*; Woolford, *This Benevolent Experiment*.



understanding, its notable absence as an approach to British sovereignty claims in the Australian colonies had far-reaching effects. This absence exacerbated interracial conflicts over land, and it bound the future of Aboriginal protection to the concept that British guardianship comprised its own compensation for dispossession. Although the imperial government saw a better model of humane governance as necessary to the future of colonisation across the Empire's varied territories, it was in Australia's colonies that this idea was most strongly grounded in the premise that the best means to protect indigenous people was to more fully exercise the Crown's assumed jurisdiction over them.

The history of Aboriginal protection opens onto the many ways in which government objectives to administer a humane British Empire became translated across time and space, as Lester and Dussart have argued.<sup>25</sup> At a local level, too, it tells a complex human story of colonial relations because it brought together such a diverse range of actors: governors and mid-level civil servants, magistrates and police, interpreters and would-be missionaries, together with indigenous people themselves. Policies of protection, then, not only encompassed a range of understandings about the making of colonial order but also prompted encounters between different groups of people who often held quite different agendas. The varied relationships and outcomes generated by protection reflect its capacity the capacities of protection for localised interpretation. But they also point to an unresolved set of questions within the British Empire about how to account for the continuing place of indigenous people within the settler colonial state following the processes of their dispossession, and about how to reconcile humanitarian idealism with more coercive strategies for securing colonial authority.

The second part of Chapter 1 takes up this story in the mid-1830s when the House of Commons Select Committee on Aborigines recommended protecting indigenous rights by improving the reach and influence of British law in unsettled colonial territories. This concern to protect indigenous people through legal reach was aligned with older understandings of protection as a mechanism for asserting imperial jurisdiction in distant colonial settings. It also expanded upon an existing template of protection in the British Empire that already regulated relations with other colonised peoples and that would continue to oversee colonial labour and mobility for the remainder of the nineteenth century. Whether 'vulnerable subjects' were slaves, indigenous people,

<sup>25</sup> Lester and Dussart, 'Trajectories of Protection'; Lester and Dussart, *Colonization*.

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indentured labourers or ethnic diasporas, programs of protection oversaw their obligations to colonial subjecthood as much as their rights as British subjects.

The questions that loomed large for colonial reformers in the 1830s about indigenous people's rights and obligations as British subjects opened onto other, trickier questions about how they might best be introduced to British law and made genuinely amenable to it. Chapter 2 considers these debates in the context of different colonial proposals on how to remake indigenous people as subjects of the Crown in more than name. Not surprisingly, these proposals varied according to imperial perceptions about the nature of existing indigenous law and sovereignty. Some colonial commentators argued for a transitional model of protective governance that would include indigenous people as active political agents and operate according to a hybrid code of laws. Others saw protective governance as a process of subjecting indigenous people to British law as early and fully as possible. Such arguments mirrored a tension felt around the Empire between the practical toleration of indigenous laws and the desirability of bringing indigenous people to a more uniform acceptance of British law.

By 1840, Crown-sanctioned departments of Aboriginal protection were in place in the Antipodean jurisdictions where young British administrations were still being established: the Port Phillip District of New South Wales, South Australia, Western Australia and New Zealand. The exception was Van Diemen's Land, where the famed 'conciliator' George Augustus Robinson had already removed Aboriginal survivors of the colony's frontier wars to Flinders Island.<sup>26</sup> While these departments represented the idea of metropolitan supervision, their working character was in many ways determined less by Colonial Office directives than by local colonial practices. Well before this moment, colonial governments were employing a range of strategies to conciliate indigenous people to colonial order or otherwise to assert the presence of law and government on unsettled frontiers. Chapter 3 explores how these local antecedents of imperial protection were trialled in practical schemes of colonial diplomacy and legal intervention; and how, even after the arrival of Crown-appointed Protectors, protection policy unfolded in ways that spoke to the different conditions of the settler colonies.

Through the 1840s and well into the 1850s, this first wave of Aboriginal Protectors worked to mediate indigenous people's encounters with British law, whether they were the victims or the perpetrators of crimes.

<sup>26</sup> On the longer history of Aboriginal Tasmania, see Ryan, *Tasmanian Aborigines*.