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Protection Regimes

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On 26 May 1997, the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* – the 'Bringing Them Home' report – was tabled in federal Parliament. It contained searing accounts of loss, suffering and survival experienced by people whose lives were dictated by the Aboriginal Protection or Welfare Boards that operated around Australia's States and Territories until the late 1960s. More than a decade after the report's release, the then Prime Minister Kevin Rudd delivered a national apology to the Stolen Generations who were systematically alienated from their families, Country and culture in the name of protection. In Australia today, the term 'protection' is perhaps most closely associated with these practices and institutions of assimilation imposed upon Indigenous people through much of the twentieth century. They were authorised by laws that granted state governments wide-ranging powers of control over Indigenous lives, purportedly for their own good. The human and cultural costs of Australia's protection laws have been multigenerational, and their impacts continue to resonate for Indigenous communities.[1]

Yet apart from the legal regime of assimilation that defined Indigenous policy through the mid-twentieth century, protection has a longer and more complex history in Australia, as it does globally.[2] This chapter will trace some of the different ways in which government programs of protection were conceived and applied to Indigenous Australians, from the appointment of

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[1] Commonwealth of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families Report* (Canberra: Human Rights and Equal Opportunity Commission, 1997); Anna Haebich, *Broken Circles: Fragmenting Indigenous Families, 1800–2000* (Fremantle: Fremantle Arts Centre Press, 2000).

[2] Lauren Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge: Cambridge University Press, 2018).

nineteenth-century protectors to the repeal of Protection Acts. Other chapters in this volume identify some of the consequences of protection policy in fracturing Indigenous families and perpetuating a system of minimal government welfare.[3] Complementing those points of focus, this chapter considers how protection evolved from a plan to extend the law's benefits to Indigenous people as 'new' British subjects to a regime of state governance that circumscribed their mobility, managed the distribution and earnings of their labour, and surveilled most aspects of their daily life.

Notably, as protection transformed over time into an ever more complex system of governance, its legal powers also grew more robust. The history of protection, then, is a history of state encroachment into Indigenous lives through incremental degrees of legal authority. But this history of state power also dovetails with the history of Indigenous political action. For as long as the project of protection has existed in Australia, Indigenous people have responded to it in strategic ways. From the earliest iteration of protection as an aspirational colonial project to 'improve' Indigenous people though rights of British subjecthood, through to its later expression as a legal program of state surveillance, Indigenous people have engaged with protection by petitioning for the return of land, calling for equal civil rights as British subjects and protesting the inequalities of exceptional laws.[4]

Early Protection Policy in the Australian Colonies

The application of protection policies to Indigenous Australians dates to the mid-1830s, when the imperial government determined to clarify their status as British subjects due the same legal entitlements as were due to settler subjects. The Colonial Office confirmed this position in 1834, emphasising that the rights of the king's Aboriginal subjects must be upheld by the law.[5] Before this moment, colonial governors had dealt with Indigenous people with mixed strategies of conciliation and military force. Nothing in their instructions clarified how they were to understand Indigenous people's legal status or how they were to deal with the problems of frontier violence that were endemic to Australia's pastoral frontiers. The legal fiction that the continent was settled without conquest was constantly undermined by the

[3] See Libesman, Ellinghaus and Gray, Chapter 18, and O'Brien, Chapter 21, in this volume.
[4] See Foley and McKinnon, Chapter 22 in this volume.
[5] Secretary of State to Governor Bourke, 1 August 1834, *Historical Records of Australia*, Series 1 (Sydney: Library Committee, Commonwealth Parliament, 1922), 17: 491.

ubiquity of frontier conflict wherever settlers took up land. Indeed, many settlers considered themselves to be openly at war with Indigenous people.[6]

Australian colonial authorities were hardly alone in finding that frontier violence accompanied colonial settlement wherever it spread. By the mid-1830s, widespread conflicts over land, including renewed hostilities on the eastern Cape frontier, persuaded imperial observers that Indigenous people in all British settlements must be compensated for their dispossession with clearly defined rights that could be defended in law.[7] But although Indigenous rights became an empire-wide concern, conditions in the Australian colonies appeared to demand an especially urgent response.[8] Escalating settler migration and pastoral expansion there was matched by intensifying frontier conflict, which the governors of New South Wales and Van Diemen's Land had tried to check during the 1820s with declarations of martial law. Yet such government tactics only had short-term effects; neither force nor diplomacy seemed to have enduring capacity to regulate the violence of Australia's unruly frontiers. In this fraught environment, the clarified status of Indigenous people as the king's subjects was meant to reinforce the Crown's jurisdiction in Australia's colonies and bolster the rule of law, ultimately replacing bloodshed with peace. By the late 1830s, it was a matter of policy that the law's protections extended to Indigenous and settler subjects alike.

The Colonial Office put this policy into action by appointing Protectors of Aborigines as officials who would monitor the rights and responsibilities of Indigenous people as British subjects. By the end of 1839, protectors had been dispatched to three Australian jurisdictions where pastoral investment was on an upward trajectory: the Port Phillip District of New South Wales (Victoria), and the newer colonies of Western Australia and South Australia. This placed protection agents in each of the existing Australian colonies except Van Diemen's Land, where a protection office was not seen to have practical relevance in the wake of the 'Black Wars' and the removal of Aboriginal survivors to Flinders Island. These colonial protectors were granted magisterial powers so that they could uphold the Crown's jurisdiction on disputed frontiers. Their legal duties included a responsibility to investigate acts of unlawful violence, activate prosecutions, arrange defence counsel for Indigenous people who came before the courts, and otherwise

[6] For instance, Henry Reynolds, *Forgotten War* (Sydney: NewSouth, 2013).
[7] British Parliamentary Papers (BPP), *Report from the Select Committee on Aborigines (British Settlements)*, No. 425 (1837), 82–4.
[8] Ibid.

educate them in codes of British justice. This last responsibility included a role to develop a 'provisional code' of rules that could serve 'for the regulation of the Aborigines' while they transitioned into meaningful life as British subjects.[9]

Beyond their magisterial powers, protectors had a more aspirational set of duties to build Indigenous people's practical British subjecthood by inducting them into all the 'arts' of settler society.[10] The imperial philosophy of humanitarian governance that underpinned protectors' duties was grounded in the idea that Indigenous people's fuller subjecthood would emerge from a combination of guaranteed legal rights, education and training. This was a philosophy that British abolitionists had already applied to slaves, but it was not only driven by an impulse to improve material conditions for exploited peoples. As Alan Lester and Fae Dussart write, the principles of humanitarian governance were also focused on achieving 'the more effective ordering and regulation of enslaved people' whose exploitation had become a moral problem of empire but who were not 'considered ready for an experiment in individual freedom'.[11] In a parallel way, Indigenous people were seen as needing development towards actualisation as British subjects, and Protectors of Aborigines were the agents who would oversee this process.

As the institutional vehicles of humanitarian governance, protection offices had numerous applications in the British Empire beyond the Australian colonies. From the mid-1820s until just after abolition, Protectors of Slaves operated in several British slave colonies to adjudicate master-slave disputes and (at least in appearance) uphold the new amelioration laws that were meant to mitigate the worst exploitations of the slavery system.[12] These protectors provided the model for Protectors of Immigrants, the government agents who represented legal oversight of the empire's post-abolition indentured labour system. Protectors were also appointed in New Zealand when it became a Crown Colony via treaty in 1840. Styled 'Protectors of Aborigines' as in the Australian colonies, the role of New Zealand's protectors was to mediate the transition from Māori to British sovereignty. Well before the British Empire, too, earlier empires pursued

[9] Ibid, 83–4.

[10] Lord Glenelg to Governor Gipps, 31 January 1838, BPP, *Aborigines (Australian Colonies)*, 34, No. 627 (1844), 166–7.

[11] Alan Lester and Fae Dussart, *Colonization and the Origins of Humanitarian Governance* (Cambridge: Cambridge University Press, 2014), 56.

[12] Trevor Burnard, 'A Voice for Slaves: The Office of the Fiscal in Berbice and the Beginning of Protection in the British Empire, 1819–1834' *Pacific Historical Review* 87, no. 1 (2018): 30–53.

similar protection arrangements to manage the behaviour of their mobile subjects, to consolidate their jurisdiction abroad, or to assert their centralising authority in times of political flux.[13] In effect, Australia's early Protectors of Aborigines fitted within a much wider global network of imperial protection agencies that existed to govern colonial relationships.[14]

But although Australia's Protectors of Aborigines adapted an existing office, their roles developed in distinctly local ways. Port Phillip's was the most robustly staffed of Australia's protection departments, reflecting the fact that, by the late 1830s, voracious settler occupation had already caused extensive Indigenous dispossession and upheaval in the district. The system of Aboriginal protection that emerged in Port Phillip through the 1840s was one in which protectors attempted to gather fractured Indigenous communities onto dedicated government stations where they might live as Christian farmers, sheltered from further settler interference. Rather than interpreting their role as one of legal reform, labour placement and social training, Port Phillip's protectors were largely motivated by missionary aspirations. This quickly isolated them from other colonial officials, who expected them to be more forceful in enlisting their magisterial powers to pacify troubled frontiers.

Such disconnection between protectors and the colonial administration was exceptional. Protectors in the newer colonies of South Australia and Western Australia fitted more seamlessly into the business of humanitarian governance, as that was interpreted by local governors. In South Australia, the work of protection was directed into practical efforts to integrate Indigenous people into colonial society through schemes of labour, education and settlement, and to adapt them to codes of British justice. Western Australia's system of protection was more distinctive for its alignment with policing. There, protectors exercised their magisterial powers more regularly to police and prosecute Indigenous crime, reasoning that demonstrations of lawful punishment would teach Indigenous people to obey the law and thereby deter settlers from illegal acts of retaliatory violence against them.[15]

[13] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, MA: Harvard University Press, 2016), 85–116; Lauren Benton and Adam Clulow, 'Introduction: The Long, Strange History of Protection', in Benton et al. (eds), *Protection and Empire*, 1–9.

[14] Amanda Nettelbeck, Indigenous Rights and Colonial Subjecthood: Protection and Reform in the Nineteenth-century British Empire (Cambridge: Cambridge University Press), 19–29.

[15] Amanda Nettelbeck, '"A Halo of Protection": Colonial Protectors and the Policy of Aboriginal Protection as Punishment' *Australian Historical Studies* 43, no. 3 (2012): 396–411.

However, regardless of local variations, none of these early protection offices enjoyed much success in systematically reducing frontier violence, influencing Indigenous people's reform, or upholding their rights and responsibilities as British subjects. Despite their magisterial powers, protectors had limited practical leverage: they were few in number and their authority as government officials was unequal to the weight of pastoral interests. But just as importantly, their magisterial powers were weakened by the limitations of colonial legal culture itself. Even when acts of frontier violence were investigated, conditions of vast distance, limited policing resources and settler secrecy obstructed the collection of evidence for prosecutions. When sufficient evidence did allow cases to be prosecuted, the criminal justice system proved ill-equipped to treat Indigenous people as legal equals. The inadmissibility of Indigenous evidence in courts, the prejudice of settler juries when it did become admissible, the protracted dearth of suitable interpreters, and the variety of ways settler violence could be mitigated, all created obstacles to the possibility of legal redress.

On the other hand, once Indigenous people had been claimed as subjects of the Crown, their supposed equality before the law made them more regularly subject to prosecution, incarceration and execution for attacks on settlers and their property. New South Wales governor George Gipps expressed this neatly in 1841 when he assured the Colonial Office that his government would treat Indigenous people with impartiality, as amenable to the law's defences and penalties as any other British subjects.[16] This position, that Indigenous people received the law's protections as British subjects, was not only unrealised in practice; it also blocked any official avenue for recognising Indigenous jurisdiction.[17] Colonial judges and juries often expressed doubt about whether the court's jurisdiction applied in a meaningful way to Indigenous defendants who had little or no experience with colonial society; but, at least formally, Indigenous jurisdiction was considered extinguished by Britain's assertion of sovereignty.[18] Practices of traditional law that openly clashed with codes of British justice rendered Indigenous people even more susceptible to criminalisation. The promise of Indigenous equality before the law might have carried strong utopian appeal

[16] Governor Gipps to Lord Russell, 7 April 1841, BPP, *Aborigines (Australian Colonies)*, No. 627 (1844),105.

[17] See Finnane, Chapter 27 on this volume.

[18] Judgment of Justice Burton, 4 February 1836, Document 47, 'Original Documents on Aborigines and Law', 1797–1840, Macquarie University, www.law.mq.edu.au/research/colonial_case_law/nsw/other_features/correspondence/documents/, accessed 15 January 2020.

for reformers in Britain, but the principle that one law prevailed for all proved a distinctive disadvantage to Indigenous people.

The idea that Indigenous protection would arise from enforcement of the Crown's uniform jurisdiction did not hold in the same way for New Zealand. The 1840 Treaty of Waitangi stamped Māori as British subjects, as was already true for Indigenous Australians. But in contrast to the Australian colonies, where Indigenous sovereignty was never officially recognised, Māori sovereignty had been formally recognised in 1835, and this laid a stepped pathway to British jurisdiction there.[19] While Britain's claim to sovereignty subjected Indigenous Australians by default to settler law, the Colonial Office was willing to accept that Māori could continue to 'live under Native Law and Native Custom' in matters between themselves (except where they conflicted with 'universal Laws of morality') until they transitioned to settler law.[20] As mediators of this transition, New Zealand's protectors were given powers of summary jurisdiction and were asked to 'make themselves conversant' with Māori laws, on an understanding that they would arbitrate between settler and Māori modes of justice while Māori accommodated themselves to British customs.[21]

No such familiarity with Indigenous laws was expected of Protectors of Aborigines in the Australian colonies, where the Crown's sole jurisdiction outwardly prevailed. Nonetheless, Indigenous people continued to practice their own laws, and – at least during the 1840s when terms of colonial interaction were relatively fluid – systems of protection offered a point of cross-cultural contact through which Indigenous people could assert their own expectations of lawful behaviour. Historians have suggested that Indigenous people imparted expectations of lawful or 'right behaviour' in their interactions with protectors and missionaries in order to safeguard interests in land.[22] In addition, their relationship to protectors could provide Indigenous people with an avenue to shore up resources, negotiate future

[19] Shaunnagh Dorsett, *Juridical Encounters: Māori and the Colonial Courts, 1840–1852* (Auckland: Auckland University Press, 2017).

[20] James Stephen to Mr Hope, 19 May [1843], CO 209/16, folio 455, National Archives, UK (NA).

[21] Lord Russell to Captain Hobson, 9 December 1840, CO 209/8, NA.

[22] Richard Broome, '"There Were Vegetables Every Year Mr Green Was Here": Right Behaviour and the Struggle for Autonomy at Coranderrk Aboriginal Reserve' *History Australia* 3, no. 2 (2006): 43.1–43.16; Joanna Cruikshank and Mark McMillan, 'Lawful Conduct, Aboriginal Protection and Land in Victoria, 1859–1869', in S. Furphy and A. Nettelbeck (eds), *Aboriginal Protection and its Intermediaries in Britain's Antipodean Colonies* (London: Routledge, 2020).

security, or remind colonial officials of reciprocal obligations.[23] At least some protectors were alert to the practice of Indigenous laws and, while not necessarily conceding to those laws, attempted to accommodate Indigenous expectations of lawful behaviour through acts of diplomacy.[24]

A shift in the politics of protection occurred through the 1850s when all the Australasian colonies except Western Australia became self-governing, and responsibility for Indigenous policy transferred from the Colonial Office to settler governments. By this time, earlier government objectives to build Indigenous colonial citizenship through a combination of legal rights and cultural training were widely perceived to have failed and, between 1849 and 1857, the original offices of Aboriginal protection were abolished or allowed to lapse. The system of protection as a set of dedicated magisterial offices appointed to build and uphold the rights and capacities of British subjecthood no longer existed. However, as Indigenous people became increasingly relegated to the fringes of settler society, vestiges of protection remained visible in distributions of government rations and blankets as a form of residual welfare.[25]

Settlers tended to regard these distributions dismissively as a dole to the destitute. In contrast, historians have suggested that Indigenous people received them as a form of 'right behaviour' from colonial authorities, and government blankets in particular became an important part of an adapted Indigenous economy.[26] As scholars have argued, protection arrangements also became privatised in this mid-century period as the pastoral sector became increasingly reliant upon Indigenous labour, effectively turning the pastoralist into an informal kind of protector, responsible for providing Indigenous workers with rations and other forms of material security.[27] This arrangement had some advantages in enabling Indigenous people to remain on their own country, although it was also inherently exploitative and left workers unpredictably dependent upon the temperament of their employer. Ann McGrath's landmark study of Indigenous workers in the cattle industry shows how much settler violence, or the threat of it, was

[23] For instance, Rachel Standfield, 'Protection, Settler Politics and Indigenous Politics in the Work of William Thomas' *Journal of Colonialism and Colonial History* 13, no. 1 (2012).

[24] For instance, William Thomas to George Augustus Robinson, 13 February 1844, VPRS 11, Item 8, File 1844/869, Public Record Office of Victoria.

[25] See O'Brien, Chapter 21 in this volume.

[26] Michael Smithson, 'A Misunderstood Gift: The Annual Issue of Blankets to Aborigines in New South Wales, 1826–48' *Push* 30 (1991):75.

[27] Ann McGrath, *Born in the Cattle: Aborigines in Cattle Country* (Sydney: Allen and Unwin, 1997), 100; Tim Rowse, 'A Short and Simple Provisional Code: The Pastoralist as "Protector"' in Furphy and Nettelbeck (eds), *Aboriginal Protection and its Intermediaries*.

interwoven with mutual dependency in pastoral labour relationships.[28] In these ambivalent ways, a semblance of protection vested in residual government welfare and private employment arrangements continued after the closure of the first Aboriginal protection offices.

Even in this fallow period of policy neglect, however, the official position that Indigenous people enjoyed the Crown's protection continued to provide them with strategic scope to assert their political concerns through petitions or personal addresses to authorities as high as the Queen herself.[29] On a famous occasion in 1863, a Kulin delegation gave Victoria's governor Barkly, at his Queen's Birthday reception, gifts and a message for the sovereign. Historians have widely understood this approach as a diplomatic strategy by the Kulin to protect their stake in the land that became Coranderrk station.[30] The Kulin's ongoing political agency in protecting their future at Coranderrk is particularly well known, but there were many other occasions in the history of Australia when Indigenous people leveraged the idea of the Crown's protection to call upon authorities for the rights of citizenship and equality that were due to them as British subjects.[31] The strength of Indigenous petitioning over time, in Australia as in other settler nations, charts the way that Indigenous communities continued to respond to the impositions of settler law and governance to challenge the loss of their lands, to question new policy agendas, and to call the attention of authorities to their unmet rights.[32]

By the end of the 1860s, the governmental conception of Aboriginal protection had fundamentally shifted from a transformative (and still unfulfilled) promise of legal equality to an uneven dissemination of government welfare, supplemented by employer paternalism. As Ann Curthoys and Jessie Mitchell argue, the emerging model of colonial democracy in this era of settler self-government was one that explicitly marginalised Indigenous

[28] McGrath, *Born in the Cattle*.

[29] Sarah Carter and Maria Nugent (eds), *Mistress of Everything: Queen Victoria in Indigenous Worlds* (Manchester: Manchester University Press, 2016).

[30] For instance, Maria Nugent, '"The Queen Gave Us the Land": Aboriginal People, Queen Victoria and Historical Remembrance' *History Australia* 9, no. 2 (2012):182–200.

[31] Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League* (Canberra: Aboriginal Studies Press, 2004); Ann Curthoys and Jessie Mitchell, '"Bring This Paper to the Good Governor": Aboriginal Petitioning in Britain's Australian Colonies', in Saliha Belmessous (ed.), *Native Claims: Indigenous Law Against Empire, 1500–1920* (Oxford: Oxford University Press, 2011).

[32] Ravi de Costa, 'Identity, Authority and the Moral Worlds of Indigenous Petitions' *Comparative Studies in Society and History* 48, no. 3 (2006): 669–98; Karen O'Brien, *Petitioning for Land: The Petitions of First Peoples of Modern British Colonies* (London: Bloomsbury, 2019).

rights.[33] However, arguably the most significant shift in the politics of protection took place between 1869 and 1912, as settler states consolidated their sense of entitlement to political independence and economic growth. In this window of time, the introduction of protection statutes across Australia incrementally created a more uniform and institutionalised protection regime; and, in contrast to the earlier nineteenth century, it was now supported by significant legal powers. Colony by colony and state by state, protection statutes gave protectors or their proxies a new level of authority to manage the place of Indigenous people within the white settler state, enabling them to direct the movement of individuals on and off reserves, to control marriages and family finances, and to set the terms of employment.[34]

The Evolution of Protection Statutes

The passage of Victoria's *Aborigines Protection Act 1869* marked the beginning of protection as a legally empowered project in Australia, and it recalibrated the terms of Aboriginal protection around a mixed agenda of segregation, labour management and child custody.[35] Victoria had been an independent colony since 1851, and its early adoption of protection legislation was precipitated by the sheer impact of Indigenous dispossession since the region's pastoral occupation in the mid-1830s as the Port Phillip District. Victoria was many times smaller than Australia's other mainland colonies and it offered more uniformly fertile land for grazing stock. As a result, pastoral takeover there was swift, within the space of two decades creating conditions for a closer model of Indigenous management than was yet possible in the other, much larger mainland Australian colonies. A decade before Victoria introduced this first Protection Act, its local government undertook a commission of inquiry to investigate future needs for Indigenous policy. A key recommendation of the Inquiry's 1859 report was for the government to establish a network of reserves, where 'remnant' Aboriginal tribes could live out their lives protected from 'abject want and misery'.[36] Following this recommendation, Victoria created Australia's first reserve system overseen

[33] Ann Curthoys and Jessie Mitchell, *Taking Liberty: Indigenous Rights and Settler Self-Government in Colonial Australia, 1830–1890* (Cambridge: Cambridge University Press, 2018).

[34] See also Kirkby, Chapter 29 in this volume.

[35] Aborigines Protection Act (33 Vic. No. 3[49]) 1869 (Victoria).

[36] Government of Victoria, *Report of the Select Committee of the Legislative Council on the Aborigines* (Melbourne: Government Printer, 1859), iv.

by a Central Board, although in its first decade the Board was not backed by statutory authority.[37]

But with Victoria's introduction of the Aborigines Protection Act 1869, an Australian colonial government for the first time granted itself wide-ranging legal authority to determine the place of Indigenous people's residence, to manage the terms of their employment contracts, to apportion their earnings, and to decide arrangements for the custody of their children. In this new era of protection as a program of legal governance, the conditions of Indigenous life became considerably more constrained. Even so, Indigenous people in Victoria continued to adapt to the changing political landscape by petitioning for rights, developing new forms of economic and cultural sustainability in agricultural reserve communities, and arguing for state protections to expand their limited holdings in reserved land.[38]

In the mid-1880s, conditions in colonial Victoria transitioned again. At an immediate level, the expense of government-funded reserves prompted concerns about how to reduce costs; but, more broadly, settler-colonial theories of racial classification by bloodline were becoming consolidated in law in ways that supported a philosophy of assimilation for Indigenous people of mixed descent.[39] Known as the 'Half-Caste Act', the Aborigines Protection Act 1886 replaced Victoria's 1869 Act and forced people of mixed descent to find work outside the government stations, where Indigenous communities had rebuilt themselves, leaving so-called 'full blood' Indigenous people confined to reserves and, in the process, undermining family coherence.[40]

Beyond Victoria, however, neither a reserve-based model of segregation nor a legally monitored program of assimilation had yet emerged as viable policy. By the 1880s, Indigenous people everywhere were incorporated as workers into colonial industries, especially pastoralism. This encouraged the expansion of the privatised model of 'protection' grounded in employer paternalism, diminishing the pressure on governments to take greater responsibility for Indigenous welfare. South Australia and New South

[37] Jessie Mitchell and Ann Curthoys, 'How Different was Victoria? Aboriginal "Protection" in a Comparative Context', in L. Boucher and L. Russell (eds), *Settler Colonial Governance in Nineteenth-century Victoria* (Canberra: ANU Press/Aboriginal History, 2015), 183–201.

[38] Boucher and Russell (eds), *Settler Colonial Governance in Nineteenth-century Victoria*.

[39] Mark McMillan and Cosima McRae, 'Law, Identity and Dispossession: The Half-Caste Act of 1886 and Contemporary Legal Definitions of Indigeneity in Australia', in Z. Laidlaw and A. Lester (eds), *Indigenous Communities and Settler Colonialism* (London: Palgrave Macmillan, 2015), 233–44.

[40] Aborigines Protection Act Amendment (50 Vic. No. 912) 1886 (Victoria).

Wales had reintroduced a position of Protector of Aborigines in 1860 and 1880 respectively, and New South Wales established an Aborigines Protection Board in 1883, but these measures were not supported by any centralised policy or legislation. Also important in delaying a centralised policy in the mainland colonies outside Victoria was their sheer territorial scale. Western Australia alone was eleven times the size of Victoria. Its vast northern and interior hinterlands, and those of Queensland and the South Australian-administered Northern Territory, were still opening to new economic development, exposing more Indigenous populations to new waves of colonial occupation and the violence of dispossession. These combined factors did not encourage local governments to adopt Victoria's model of protection as a program of close legal management. Instead, the responsibility for ensuring that Indigenous people received the ordinary protections of the law remained nominally embodied in police and magistrates, the same legal officers who aggressively policed and prosecuted them.

Although protection legislation was slower to arrive in jurisdictions outside Victoria, Australian colonial governments nonetheless sought to limit Indigenous people's access to urban settler spaces while still facilitating their place as workers in colonial economies. Notions of protection played a role in this process. In South Australia, the protector worked through the 1880s and 1890s to regulate Indigenous mobility and employment by asking police to arrest the unemployed as vagrants if they lingered in town, while simultaneously using the rations scheme to encourage employment.[41] In Western Australia, police sometimes arrested unemployed Indigenous people as vagrants on grounds that this kept them away from pastoral runs and protected employed Indigenous workers from disruptive influences.[42] Victoria's Central Board for the Protection of Aborigines also considered the threat of arrest on vagrancy charges potentially useful in containing Indigenous people to the protective safety of government stations.[43]

Western Australia was the first colony to follow Victoria, with its Aborigines Protection Act 1886. The Act created an Aborigines Protection Board, although it was politically unpopular and carried little influence with

[41] Protector Edward Hamilton, January 1880–February 1908, Protector's Letterbook, GRG 52/7, State Records of South Australia.

[42] Constable Duffy to Sergeant Houlahan, 8 December 1899, Acc 430, File 1900/320, State Records Office of Western Australia (SROWA).

[43] *Report of the Commissioners Appointed to Inquire into the Present Condition of the Aborigines of this Colony, and to Advise as to the Best Means of Caring for and dealing with them in the Future* (Melbourne: Government Printer, 1877), 50–66.

the pastoralist-backed legislature.[44] The more notable feature of Western Australia's new protection legislation was its detailed focus on managing the conditions of Indigenous labour. This reflected the fact that, thanks to a slow-growing settler population and a thin supply of European labour, economic growth in Western Australia had relied heavily upon Indigenous labour from the colony's earliest years. The limited supply of free labour was temporarily boosted by the importation of convict labour through the 1850s and 1860s; but, with the cessation of penal transportation in the late 1860s, this unfree labour supply was relatively short-lived. Instead, settlers depended upon Indigenous workers to meet their labour needs, particularly from the 1860s, as the colony's northern frontiers expanded with investment in pastoralism, pearling and mining.

Western Australia's introduction of a Protection Act focused on regulating Indigenous labour followed years of reported and rumoured abuse against Indigenous workers in these northern economies. A well-known problem was the kidnapping and enforced indenture of Indigenous people to supply labour on lucrative pearling and pastoral frontiers. By 1886 when Western Australia's Protection Act came into effect, allegations of Aboriginal abduction and other widespread abuses had already generated several magisterial investigations and brought scandal on the colony in accusations that it tolerated a system of slavery.[45] The Aborigines Protection Act 1886 was supposed to end these practices of abuse by girding all labour arrangements with 'every possible precaution'.[46] It reinstated the position of Protectors of Aborigines – an office that had lapsed some three decades earlier – and focused their duties on managing Indigenous contracts with settler employers.

Yet, although the provisions of the Act were designed to ensure the consent and rights of Indigenous workers, they created much greater legal authority to determine the supply and conditions of Indigenous indenture. Protectors or their proxies (including honorary justices of the peace, who were usually local pastoralists and employers of Aboriginal workers) could now set the terms of Indigenous people's labour agreements with settlers. The Act required that employers supply payment in rations, clothing and blankets, although it did not mandate wages. It allowed local magistrates to

[44] 'The Aborigines Protection Board: Official Correspondence', *The West Australian*, 25 September 1893; 'Aborigines' Protection Board: Discussion in the Assembly', *The Inquirer and Commercial News*, 23 October 1896.

[45] *Legislative Council Papers Respecting the Treatment of Aboriginal Natives* (Perth: Government Printer, 1886); J. B. Gribble, *Dark Deeds in a Sunny Land, or Blacks and Whites in North-West Australia* (Perth: Stirling Bros, 1886).

[46] Governor Broome to the Secretary of State, 12 and 13 July 1886, CO 881/8/3, NA, 85, 91.

'bind by indenture' any Aboriginal or 'half-caste' child to the age of 21, and granted the government powers to requisition Aboriginal prisoners as unpaid labourers to work on public building projects. Finally, it carried over the provisions of master and servant legislation to punish breaches of contract.[47]

In theory, these provisions placed legal checks on abusive masters, but in practice, they proved most useful in punishing indentured Indigenous workers who absconded from their employment or refused to work.[48] A review of the labour protection system in 1900 indicated that pastoral employers valued its capacity to secure their Aboriginal labour force against labour poaching or desertion; only two dissenting voices suggested that the system supported 'a form of slavery'.[49] In many ways, then, Western Australia's system of Aboriginal labour protection mirrored the system of legal supervision over indentured workers that operated elsewhere around the British Empire more to manage labour supply than to protect labourers' rights.[50]

The legal powers of Australia's evolving protection regime expanded again at the end of the nineteenth century with the introduction of Queensland's Aboriginals Protection and Restriction of the Sale of Opium Act 1897. Queensland's Act established a much stronger legal framework for the management of Indigenous people than was available in Victoria's and Western Australia's existing protection legislation. It provided for the re-appointment of Protectors of Aborigines and reserve superintendents who held far-reaching powers to direct Indigenous people to live on or off reserves, to approve or to revoke their employment permits, to apportion the outcomes of their labour, to supervise the movements and personal relationships of 'half-caste' women, and to determine the custody and apprenticeship of Indigenous children.[51]

The provisions of Queensland's 1897 Act to govern Indigenous lives with near-comprehensive authority created the template for similarly comprehensive acts passed over the next decade or so in the other Australian colonies or states: Western Australia's Aborigines Act 1905, New South Wales's Aborigines Protection Act 1909, the Northern Territory Aboriginals Act 1910 and South Australia's Aborigines Act 1911. In Tasmania, Indigenous people were widely presumed to have 'died out'; but even so, the spread of protection legislation

[47] Aborigines Protection Act (50 Vic. No. 25) 1886 (WA).
[48] For instance, Resident Magistrate (Roebourne) to the Bishop of Perth, 27 May 1889, State Library of Western Australia, MN2216.
[49] William Harris to the Chief Protector, 20 April 1900, and Resident Magistrate (Roebourne) to the Chief Protector, 24 January 1901, Acc 255, 51/1900, SROWA.
[50] James McNeill and Chimman Lal, *Report on the Conditions of Indian Immigrants*, CO 323/717, fol. 219–342, NA.
[51] *Aboriginals Protection & Sale of Opium Act* (61 Vic. No. 17) 1897 (Qld).

influenced the introduction of Tasmania's Cape Barren Island Reserve Act 1912, which established specific conditions on which so-called 'half-caste' Aboriginal Tasmanians could continue to live on the island.[52] By the onset of World War I, a legal regime of protection grounded in principles of state surveillance and guardianship was in place across the country.

Protection policy had always been shaped at the level of local colonial or state governments, even though many of its features were shared or adapted across jurisdictions. In 1937, the Australian Commonwealth for the first time initiated a national debate on 'Aboriginal welfare'. Although protection policy would continue to be state directed, the 1937 conference – attended by Chief Protectors of Aborigines and other government representatives from most states – was significant in triggering a nation-wide review of Indigenous policy. Eased by decades of culturally assimilationist practices and persuaded by the theory of biological absorption championed by Western Australia's Chief Protector of Aborigines, A. O. Neville, the conference delegates endorsed a nation-wide plan to assimilate people of mixed descent into white Australian society. In contrast, so-called 'full blood' people would remain segregated on reserves.[53] This mixed vision of assimilation and segregation based on degrees of bloodline was supported by each state's existing legal powers of protection, which already authorised practices of child removal and reserve management. Queensland's long-standing Chief Protector of Aborigines, John Bleakley, identified the nature of protection in this interwar period when he emphasised to his fellow delegates the need to maintain 'benevolent supervision' over Indigenous people and the requisite government authority to exercise it.[54] Notably, the government officers tasked as protectors in this twentieth-century era were often local police officers.

Protection and Stolen Wages

A point raised by Chief Protector Bleakley at the 1937 conference was that Indigenous workers in Queensland were employed on a wage 'considerably

[52] The Cape Barren Island Reserve Act (3 Geo. V. No. 16) 1912 (Tas); Kristyn Harman, 'Protecting Tasmanian Aborigines: American and Queensland Influences on the Cape Barren Island Reserve Act, 1912' *Journal of Imperial and Commonwealth History* 41, no. 5 (2013):744–64.

[53] Commonwealth of Australia, *Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities* (Canberra: Commonwealth Government Printer, 1937), 3.

[54] Commonwealth of Australia, *Aboriginal Welfare*, 6; John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Melbourne: Cambridge University Press, 1997), 151–2.

lower' than that of white workers, and he suggested that the delegation consider an Aboriginal 'minimum living wage' for nation-wide application. Chief Protector Neville countered that in Western Australia 'we have no fixed wages or awards for the natives', and he argued that there was little point discussing 'a scheme which involves heavy expenditure'.[55] In its summary of advice on future policy, the delegation recommended that the Commonwealth provide the states with financial assistance to support 'the care, protection and education of the natives', but made no comment on wages.

As discussion at the national conference indicated, the sections of state protection statutes that related to labour were never concerned with establishing wage parity for Indigenous workers. In fact, the protection regime had itself helped to invest Indigenous labour into Australia's economic growth for virtually no financial reward to the workers themselves. Rather than being concerned with wage security, the legal provisions for protecting Indigenous workers conceived of labour as a vehicle for Indigenous training. These provisions included that employers be morally upright and be able to supply a sufficiency of rations, clothing and medical care. While superficially appearing to guarantee minimum entitlements for workers, then, protection provisions helped to prop up a labour system that functioned on a feudal model of indenture.[56]

At the same time as they placed contractual limits on the movement and freedoms of Indigenous workers, protection statutes also specified restrictions on women of mixed descent as part of wider government efforts to stamp out miscegenation or 'komboism'. The provisions of Queensland's 1897 Act, mirrored in other states and territories, established that the employment of every 'aboriginal or female half-caste' was conditional upon approval of a protector, Justice of the Peace or police officer; that every employed 'aboriginal or female half-caste' must remain under the supervision of a protection officer; and that it was an offence to accommodate or move any 'aboriginal or female half-caste' without permission.[57] Protection policy thereby enabled a particularly gendered form of state intervention into labour relations. As Victoria Haskins has argued, state policy directed Indigenous women into domestic work within white households and placed

[55] Commonwealth of Australia, *Aboriginal Welfare*, 12, 20.
[56] Thalia Anthony, 'Postcolonial Feudal Hauntings of Northern Australian Cattle Stations' *Law, Text, Culture* 7 (2003):277.
[57] Aboriginals Protection Act 1897 (Qld), ss 14–17.

white women employers in charge of them as representatives of its own 'civilising authority'.[58]

Queensland established a minimum Indigenous wage relatively early, but the bar was set low. A 1901 amendment to the 1897 Act specified a minimum Aboriginal wage of five shillings per month, or ten shillings per month for seamen, with wages to be held in trust by the protector or a police representative, who could expend it on behalf of the workers. Updated regulations over time reset Queensland's Indigenous minimum wage, but Rosalind Kidd notes that it only ever rose to two-thirds of the standard wage for non-Indigenous workers. Moreover, her research shows that misuse and poor book-keeping of Aboriginal trust accounts were widespread, that such accounting inadequacies were officially tolerated despite periodic scrutiny, and that workers had no rights of appeal about the questionable handling of their accounts.[59] The protection legislation of jurisdictions other than Queensland did not mandate a cash wage for Indigenous workers outside urban areas, but, where cash wages were provided, the law similarly allowed that they be paid into a trust account and acquitted under supervision of a protection officer. Withheld earnings were even used to pay for Indigenous 'welfare' services that were properly the responsibility of state governments.[60]

The building momentum of the Aboriginal rights movement through the 1930s and a series of Aboriginal strikes over the coming years brought a new degree of national attention to the inadequacy of Indigenous wages in the mid-twentieth century, and to the wider structures of racial inequality they reflected.[61] Nonetheless, pastoralists continued to exploit their Indigenous workers with little risk of prosecution, and where Indigenous workers were paid, their wages continued to be held in trust by state officers or Protection

[58] Victoria Haskins, '& So We are "Slave owners!": Employers and the NSW Aborigines Protection Board Trust Funds' *Labour History* 88 (2005):147–64; Victoria Haskins, 'Domesticating Colonizers: Domesticity, Indigenous Domestic Labor, and the Modern Settler Colonial Nation' *American Historical Review* 124, no. 4 (2019):1290–301.

[59] Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Canberra: Aboriginal Studies Press, 2006), 61–7.

[60] Rosalind Kidd, 'Taken on Trust', submission 49 to the Senate Legal and Constitutional References Committee Inquiry into Stolen Wages (July 2006), 3, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/stolen_wages/submissions/sublist, accessed 18 January 2020; Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Station Workers' *Australian Indigenous Law Review* 11, no. 1 (2007): 8.

[61] For instance, Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Sydney: Allen and Unwin, 1999); Anne Scrimgeour, '"We Only Want Our Rights and Freedom": The Pilbara Pastoral Workers Strike, 1946–1949' *History Australia* 11, no. 2 (2014):101–24.

Boards, leaving them powerless to invest or to spend their own earnings.[62] A critical change came in 1966, when the Northern Territory moved to include Indigenous workers within the pastoral award. However, while this appeared to promise the prospect of wage equality, it was highly qualified as a civil rights success. The provision of a 'slow worker' clause allowed pastoralists to pay less than the standard award, and the clarified award made Indigenous workers newly vulnerable to losing their long-standing place in the pastoral economy.[63]

In 2006, the federal government undertook a national inquiry into wages unpaid or withheld under the umbrella of past protection policies. The inquiry highlighted the entangled relationship between stolen wages and the Stolen Generations, whereby protection policies forced Indigenous workers into employment schemes that took them away from their families or took their children into state custody.[64] The report arising from the inquiry recommended that the Commonwealth and each state government provide Indigenous people with unhindered access to their records, undertake a process of Indigenous consultation to document experiences of stolen wages, and establish appropriate compensation schemes to redress unpaid entitlements.[65]

Commenting at the close of the national inquiry, Senator Andrew Bartlett emphasised the urgency of this process of redress. He noted that the 'exploitation of thousands of Indigenous people over decades was a building block of the prosperity which Australia as a nation enjoys today', a prosperity that has left 'many Indigenous people in poverty'.[66] Several years before the national inquiry, Queensland established a compensation scheme in restitution for stolen wages, followed by New South Wales and Western Australia. All these schemes, however, faced criticism that they were limited in their scope and inadequate in their restitution. In 2019, more than a decade after the national inquiry, a successful class action brought against the Queensland government signalled an advance in stolen wages reparation. Nonetheless, the issue of Indigenous stolen wages remains in many ways 'unfinished business' in Australia today.[67]

[62] Kidd, 'Taken on Trust', 33.

[63] *Re Cattle Station Industry* (Northern Territory) Award (1966) 113 Commonwealth Arbitration Reports 651; Thalia Anthony, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Case for Aboriginal Station Workers' *Labour History* 93 (2007):15–34.

[64] Senate Standing Committee on Legal and Constitutional Affairs, 'Unfinished Business: Indigenous Stolen Wages' (Canberra: Department of the Senate, December 2006),60–1.

[65] Ibid, 7, xiii–xiv.

[66] Ibid, 130. See Watson, Chapter 31 in this volume.

[67] Thalia Anthony, 'The New Mabo? $190 Million Stolen Wages Settlement is Unprecedented, but Still Limited', *The Conversation*, 10 July 2019.

Protection's Afterlives

Having been envisaged in the 1830s as a magisterial office that would build a place for Indigenous people within the growing settler world, protection by the late nineteenth century had become a policy tool that cemented their marginalisation from it. Rather than endowing Indigenous people with legal equality, originally conceived as the 'gift' of British subjecthood, protection finally subjected them to an ever more complex set of exceptional laws. This shift in the politics of protection was not a radical change, however, but a cumulative transition as early imperial faith in racial 'improvement' through legal entitlements and training became replaced with belief in a fixed racial hierarchy underpinned by legislation.[68]

But even in the mid-twentieth-century heyday of protection as a legal regime, state guardianship over Indigenous lives was neither complete nor unambiguous. Katharine Booth and Lisa Ford trace how the state's protective authority was challenged in the 1955 case of *Ross v Chambers*, a civil suit brought by the Northern Territory Administration on behalf of Indigenous pastoral workers against their abusive employers. In this case, the judge repudiated the assumed authority of the welfare agency to sue on behalf of its Aboriginal 'wards', determining – against long-standing practice – that Aboriginal adults held legal subjecthood to sue on their own behalf. The civil suit collapsed in face of this check on a government's power 'to protect as well as to infringe' the rights of Indigenous workers. But having brought the suit as a 'public performance of Aboriginal protection', the Northern Territory Administration then scrambled to limit Indigenous legal agency by amending the existing legislation to better secure the state's authority over its Aboriginal wards.[69] Regardless of the outcome, this case exposed the fragilities of protective governance and the ambiguity of the state's legal powers, in a decade when they appeared to be most comprehensive.

Over the 1960s and early 1970s, protection laws and welfare boards were gradually phased out around Australia as the civil rights era influenced a shift in policy away from a philosophy of state guardianship towards one of self-determination.[70] During their lifespan, protection's exceptional laws

[68] Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Carlton: Melbourne University Press, 1997).

[69] Katharine Booth and Lisa Ford, 'Ross v Chambers: Assimilation Law and Policy in the Northern Territory' *Aboriginal History* 40 (2016):13, 22.

[70] For a timeline of state protection laws and their repeal, see AIATSIS, 'To Remove and Protect', https://aiatsis.gov.au/collections/collections-online/digitised-collections/remove-and-protect, accessed 20 January 2020.

had worked to constrain almost every aspect of Indigenous independence, but they did not extinguish Indigenous cultural identity or silence Indigenous protest against the state's discriminatory powers. A 1923 petition by Ngarrindjeri people of South Australia's Point Macleay mission is notable for its moral authority in calling out the state's contradictory claims to protect Indigenous children by removing them from their own homes against their parents' wishes.[71] William Cooper's 1933–7 petition to the king, although not forwarded by the Australian government, is especially well known for its powerful reminder of the Crown's original promise of Indigenous rights and its demands for recognition of those rights in the form of political representation.[72]

The Indigenous legal scholar Irene Watson has argued that although Aboriginal protection policies and statutes have formally ended in Australia, their legacies continue to be felt in various forms of government paternalism and in assimilative vocabularies that echo with the foundational terms of colonialism. She makes the point that the ideological traces of protection – with its underpinnings in the assumption of settler jurisdiction and state guardianship – persist today in the continuing disinclination of Australian federal governments to acknowledge Aboriginal sovereignty.[73] Her comments serve as a reminder that protection regimes have a history that has not ended, but that has ongoing repercussions for Indigenous people's relationship to the Australian state.

[71] 'Give Us Our Children: The Aborigines' Plea', *The Observer*, 29 December 1923.
[72] 'Petition of the Aboriginal Inhabitants of Australia to His Majesty, King George V' in Attwood and Markus, *Thinking Black*, 35–6.
[73] Irene Watson, 'Aboriginality and the Violence of Colonialism' *Borderlands e-Journal* 8, no. 1 (2009): 1–8.