# *Indigenous Rights and Colonial Subjecthood: Protection and Reform in the Nineteenth-Century British Empire*

by Amanda Nettelbeck

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This is a study of the ideas and practices of British colonial administration – mostly in the six Australian colonies up to the early twentieth century. With due attention both to extensive scholarship and primary sources, Nettelbeck brings two valuable framings to this much studied topic: her comparisons within the six Australian colonies, and her interest in the connection between Aboriginal protection and British efforts in other parts of the Empire to regulate slavery, indentured labour conditions and the living conditions of certain ethnic communities. Her many comparative digressions touch on the West Indies, Mauritius, New Zealand, Canada, the Straits, Cape Colony and Natal. Her theme is that although the British conferred legal rights on the various kinds of non-white, non-settler, 'vulnerable subjects', the rule of law policed 'the terms of their own lawful conduct, the conditions of their employment and the scope of their movement' (p. 29). These 'subjects' were formally equal to all other subjects of the Empire, but practically marginal and subordinate.

Her story begins with the Imperial recognition that the unruliness of white settlers was a problem, as the 1837 *Report from the Select Committee on Aborigines (British Settlements)* (or 'Buxton Report') acknowledged. Postulating the natives' rights as British subjects was part of the corrective, but colonised people would have to change in order to live up to that status and to benefit from the law's protection. Thus, while protection was tutelary of both colonists and colonised, the cultural difference of colonised made it more practically difficult for protectors to bring them within effective jurisdiction. Previous experience in the protection of slaves and indentured labour made British officials such as Herman Merivale

(writing in 1841) confident that non-white peoples could be protected, if the right men were appointed as Protectors. Theorists of colonial rule such as Saxe Bannister (New South Wales Attorney-General 1824–26) envisaged an administration at whose local level 'colonial officials would work as regional "agents" together with indigenous counterparts to establish local terms of justice and good government' (p. 37); he even envisaged treaties. Buxton's outline of Protectors' duties towards Aboriginal people eschewed treaties and fell short of Bannister's vision.

In the Australasian colonies Protectors of Aborigines were appointed from the 1830s to devise context-sensitive practices of exposing Indigenous peoples to the rule of British law, and by 1840 there were four departments of Aboriginal protection in the Antipodean colonies. Indigenous people would be exempt from laws criminalising vagrancy. There was much debate about whether they should be allowed to swear the truth of their evidence in court, and some colonies made this possible earlier than others. Colonies differed also in the civilising role that they assigned to employment. Signing a treaty and purchasing land (the New Zealand experiment) left open the question 'of how much and how soon [Māori] should be considered amenable to British law' (p. 44). Land theft, martial law and removal (the Tasmanian experiment) left open the question of how to care for and 'improve' those removed. The most difficult 'protection' to practise was when Aboriginal Australians were killed or harmed by colonists or by other Aboriginal people; the colonists were politically effective in presenting themselves as defending person and property, while criminal acts *inter se* were arguably subject to an Aboriginal jurisdiction that, in principle, did not exist in Australian colonies.

Many officials who faced these problems as Protectors are mentioned by name, their practices and ideas briefly described, in Nettlebeck's deft, economical narrative. No previous monograph has covered so many Antipodean players and scenes in such detail as she provides. Her theme of local discretion is thus richly illustrated. The gross differences between colonies she summarises as 'dispute adjudication and land brokerage' in New Zealand, 'salvage' of the rapidly dispossessed in the Port Phillip District, 'impartial justice and labour management' in South Australia, and in Western Australia labour management and policing that resulted in much incarceration (p. 99).

Perhaps it is partly because protection turned out not to be 'a coherent or uniform policy' (p. 65) that it threw up certain intermediaries who could function without formal legal authority; these men are relevant to Nettelbeck's theme of law's effective limits. Some of them were Indigenous, others were colonists of atypical knowledge and interest, including missionaries and pastoralists; she acknowledges the inspiration of Richard White's study of the North American 'middle ground'. Formal legal authority wielded by Protectors employed by the Crown is nonetheless her main theme.

Protection was intended not only to defend the colonised from harms but also to educate them towards 'colonial citizenship' (p. 139). Nettelbeck argues that if Aboriginal people found that British law could be worked to defend their interest, Protectors' educative mission stood a better chance of success. She has much to say about strategic 'intimacies' between officials and Aboriginal people. Some Protectors rationed food; for people whose food-gathering was so disrupted this was a lasting and effective practice, but as Elkin was later to observe ('intelligent parasitism') this modus vivendi did not require much change in the outlook of the recipients. Protector patronage also took the form of creating a native police force; that strategy alienated some from the Crown even as it bound others to service. Some Protectors engaged with Aboriginal people when selecting lands that were reserved for their use. In South Australia and New Zealand cross-cultural marriages were encouraged. When Protectors were given magisterial powers they were both prosecutors and defenders of Aboriginal people.

Protectorates had been wound down in Australia and New Zealand by the 1850s (though what some esteemed the most successful innovation of the Port Phillip Protectorate – the Native Mounted Police – lasted (scandalously) for the rest of the nineteenth century in New South Wales, Queensland and episodically in South Australia). By 1860, Nettelbeck suggests, 'the promise of civil improvement [of Indigenous persons?] underpinned by law no longer held the same kind of political currency' (p. 164) and so in the Australian colonies protection was more and more realised through programs of 'welfare and labour management' (p. 165). She illustrates this thesis by describing the reserves established in Victoria, the Protectors' distribution of rations and blankets in South Australia, 'official neglect' in New South Wales (p. 167) until 1883, official neglect coupled with the recruitment and deployment of native police in Queensland, labour regulation in Western Australia and the declaration of Cape Barren Island as a reserve for Tasmanian Aboriginal people in 1881. Many Aboriginal people survived as labourers on pastoral leases and some took up farming (including under mission patronage at New Norcia and Poonindie).

What was lost from 'protection' in the second half of the nineteenth century, she suggests, was political support for 'compensatory Aboriginal justice' (p. 168) and 'the concept of indigenous justice embedded in equal rights' (p. 170). As the terms 'compensation', 'rights' and 'justice' are not indexed, it is not possible to check systematically how policy and practice embodied those ideals up to 1860. Nettelbeck's discussion of South Australia's approach to reserves (the strongest example of an official attempt at 'compensatory justice') suggests that no Australian colony had ever paid more than lip service to an idea worthy of the label 'compensatory justice'. South Australia increasingly rented its Aboriginal reserves to farmers, devoting the income to buying rations for private distribution. Perhaps the change in 'protection' that Nettelbeck is pointing to is better conveyed by saying that, after responsible

government, a colonial liberalism emerged that honoured the small landowner and the employee: to the extent that Indigenous subjects could present themselves (or be represented discursively) as people who worked the land and/or who were in 'employment' their interests could be 'protected' to some degree. One of the earlier contending theories of protection was that it would work best by attaching Aboriginal people productively to the economy. That vision increased in practical significance as the Australian colonies spread out and flourished economically. Nettelbeck's final chapter illustrates this amply, referring to the five mainland colonies, and this is where her knowledge of labour regulation elsewhere in the British Empire is most pertinent. The career of Governor Frederick Napier Broome (pp. 182–83) is a good illustration: he served in the administrations of Natal, Mauritius, Western Australia and Trinidad.

When Nettelbeck writes that 'the combination of race privilege and economic entitlement was strengthening everywhere in the late-nineteenth century British Empire' (p. 184), she is reminding us that this was a capitalist empire. Nettelbeck's book is much inspired by recent scholarly interest in the legal sinews of the British Empire, and her major thesis is that protection policy, inspired by certain ideas of justice, strove successfully for the Imperial state's 'governmental coherence within an increasingly mobile Empire' (p. 3). She does not say what was 'mobile', and I think she may be referring to people, which is certainly so. However, even more mobile than people was finance: the underlying point of Imperial governance was to secure land and labour in the territorial expansion of British capital. Protection secured capital (especially in the form of land purchased or stolen from indigenous people) and state authorities sought to manage the reproduction of labour, not all of which was sourced by migration.

The stories told by Nettelbeck are part of a wider trend in historical writing that reframes Australia's 'frontier wars' within themes of state formation and legal experimentation. This reframing highlights the tensions and contingencies of the triangular relationship between government, settler and colonised – requiring a more complicated cast of 'invaders' and giving rise, in this book, to many important stories about Australian Protectors' improvisations. This attention to law and administration also highlights Nettelbeck's question: how did their subjection to colonial law remake Indigenous persons as subjects? Referring, I think, to the late nineteenth century, Nettelbeck says that Indigenous Australians 'occupied a state closer to postponed than clarified British subjecthood' (p. 197). The word 'postponed' raises the question of when Nettelbeck should end her story. How should historians periodise 'protection'? Did subjection to protective law ever result in 'clarified' British subjecthood? If it did not, what aims and methods replaced 'protection', and did such 'post-protection' policies bring clarity to the subjecthood of Indigenous Australians?

Although Nettelbeck remarks that protection statutes and departments endured until the 1960s (p. 199), in the substance of her narrative she chooses to end her story in 1937, when two things relevant to her story happened. First, William Cooper organised a petition to the King to remind him that his Australian Indigenous subjects had suffered expropriation of their lands and denial of their legal status, and to ask for representation in parliament. Second, the first 'national' meeting of 'Protectors' declared 'absorption' as the goal of all governments that had control over Aboriginal people. The ensuing program of repealing all 'protective' abridgments of their civil and political rights took about 40 years of legislative reform to realise – assimilation in formal terms. While that was happening, the 'Aboriginal population' recovered and, in the late 1960s, became self-defining in Australia's census. Since then, much land has been returned, and the debate about political representation has recently entered a new phase ('the Voice'). If the avowed aim of protection was to 'produce [in indigenous peoples] a fuller kind of colonial citizenship' (p. 195) and 'to make indigenous people yield to the status of British subjects' (p. 196) then 'protection' has arguably succeeded (to the extent that when incidents of the partiality of justice demonstrate this project's incompleteness contemporary Australians are much scandalised and shamed). The Torres Strait Islanders' approach to the High Court of Australia in the 1980s and the effort put into seeking constitutional recognition since 2011 demonstrate that Indigenous Australians do find hope in the resources of the laws that the colonists imposed, just as the reformers of the 1830s hoped. Nettelbeck's retrospect on the vicissitudes of 'protection' could be extended in time in order to grasp how Indigenous rights (as we in Australia now understand them) have arisen from colonial subjecthood.

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