DENIAL AND LOSS: THE REMOVAL OF INDIGENOUS AUSTRALIAN CHILDREN FROM THEIR FAMILIES AND CULTURE

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Warning: the following material may contain reference to Indigenous persons who are deceased.

The 1997 *Bringing Them Home Report*[1] documented the systemic removal of Indigenous[2] Australian children from their families and culture, and the consequent and widespread devastation this has caused to the individuals concerned, their families and their communities, and also demonstrated how this suffering is continuing. Responses from the wider Australian community have been complex, ranging from sorrow and remorse to outright hostility. The official response has been disappointing and frustrating for many Indigenous Australians.

Since its release in April 1997, some, but not all, of the recommendations of the *Bringing Them Home Report* have been addressed. It is arguable, however, that the most important recommendations – the recognition and acknowledgement of the wrongs inflicted – have not been implemented. Attempts to seek legal redress through the courts for civil wrongs suffered have not been successful and may even have deepened the sense of disappointment and frustration.

In August 2004, another report was released: *Forgotten Australians: A Report on Australians who experienced institutional or out of home care as children* ("*Forgotten*

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1 *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families* Sydney, HREOC (April 1997) http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/.

2 In this paper, the terms 'Indigenous Australian people' or 'Indigenous Australians' will be used to refer to the Aboriginal peoples of Australia and the Torres Strait Islanders. Where appropriate, reference will be made to Aboriginal people only. It was often the case that laws applied only to Aboriginal peoples but that the term 'Aboriginal' in the relevant legislation inaccurately *included* Torres Strait Islanders.

Australians Report").[3] This report of the Australian Senate is the third national report into children in institutional care. The first was the *Bringing Them Home Report* which was produced by the Human Rights and Equal Opportunities Commission under the distinguished Chairmanship of former High Court judge, Sir Ronald Wilson. The second was a Senate report into the imposed migration of children from the United Kingdom and other English colonies to Australia in the post-war period (the "Child Migrants Report").[4] There have been other reports in Australia about children in institutional care, including one in Queensland.[5] Like the *Bringing Them Home Report*, widespread and systemic suffering was revealed.

Together, all the reports reveal the profound damage inflicted on the most vulnerable in our society by government, institutions and individuals. These reports inform us that policy, supported by the legal and social system, contributed to the appalling treatment of children – both Indigenous and non-Indigenous. Children, already defenceless, underprivileged or marginalised, were placed into situations of neglect, abuse and exploitation ostensibly for their benefit. Not all children suffered; and some had positive institutional or out of home care experiences. But the reports reveal the underlying misconception of the policy of removing children from their families and placing them in care. Children suffered greatly: loss of identity, loss of love and trust, harsh conditions, basic or no education, physical cruelty, sexual abuse and exploitation of their labour. Indigenous Australian children, who were further marginalised because of their race, suffered compounded hurt – the denial of their culture.

The tabling in the Australian Parliament of the *Forgotten Australians Report* in 2004 serves as a timely reminder of another opportunity that Australia, as a nation, has to consider: how to recognise and then attempt to repair the damage done to children who were harmed when under the care of the state.

This paper will examine the experience of removal and institutional and out-of-home care, with a particular focus on the removal of Indigenous Australian children. The legacy of the 'stolen generations' on individual Indigenous children cannot be understood without an awareness of the compounding and intersecting levels of discrimination. It is clear, from recent litigation, that there are many, and perhaps insurmountable, barriers to a successful outcome in the courts. The response to the issue of children in institutional care, especially Indigenous Australian children, must be a complex one because the issues themselves are complex. It is not necessarily a response that the legal system is well equipped to make on its own. It may well be the solution will instead be found in political, policy and administrative responses.

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3 The Senate Community Affairs References Committee, Commonwealth of Australia, Canberra, *Forgotten Australians: A Report on Australians who experienced institutional or out-of-home care as children* (2004) http://www.aph.gov.au/Senate/committee/ clac_ctte/inst_care/report/index.htm

4 The Senate Community Affairs Reference Committee, Commonwealth of Australia, Canberra, *Lost Innocents: Righting the Record Inquiry into Child Migration* (2001) http://www.aph.gov.au/Senate/committee/clac_ctte/completed_inquiries/1999-02/child_migrat/index.htm.

5 Forde, L *Commission of Inquiry into Child Abuse in Queensland Institutions* Brisbane, Queensland Government (1999) (the "Forde Inquiry Report") http://www.communities.qld.gov.au/department/forde/publications/documents/pdf/forde_comminquiry.pdf.

I THE REPORTS

In Australia, the various reports[6] have comprehensively documented the removal of children from their birth families and their placement in different forms of care throughout the twentieth century. The state-based forms of care included: Government and Church run institutions (which could include residential homes, that is, buildings where children are cared for by paid staff who may or may not reside on the same premises; or orphanages, being large residential housing areas in which children lived in a communal environment); foster care (care in a family based situation); and juvenile detention centres. This paper will refer to these forms of care generally as institutional and out-of-home care.

The *Bringing Them Home Report* documented the removal of Indigenous children from their families, concluding that there was an official policy of assimilation of Indigenous people that, at least after 1951, amounted to genocide.[7] The *Bringing Them Home Report* estimated that between one in three[8] and one in ten Indigenous Australian children had been forcibly removed from their families and communities in the period from 1910 to 1970.[9] The actual level of forced removal has been disputed, but it has not been disputed that, in a survey of Aboriginal and Torres Strait Islander people conducted by the Australian Bureau of Statistics in 1994, just over 10 per cent of persons over 25 years reported being taken away from their natural families.[10] The ABS found that of the 12,500 people they estimated had been taken away from their natural families, about one third were raised by non-Aboriginal or Torres Strait Islander adoptive or foster parents, almost one third by missions, and almost one third by orphanages or children's homes.

The *Bringing Them Home Report* also found that a significant proportion of those children who had been removed reported experiencing physical and sexual abuse and/or exploitation in the form of unpaid domestic and farm work. The *Bringing Them Home Report* made a number of recommendations, including: apologies from national and state governments and individual institutions; a memorial / history project; diverse programs, such as rehabilitation and counselling, to address the wide-ranging disadvantage experienced by Indigenous Australian people; and monetary compensation.

The *Child Migrants Report* was the result of an inquiry into the history and treatment of children who were sent to Australia from the United Kingdom, Ireland and Malta under

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6 As well as those already cited, there have been reports in:
- Tasmania: O'Grady J (Tasmanian Ombudsman) *Interim Report on Abuse of Children in State Care* http://www.justice.tas.gov.au/ombudsman/CART.html; and
- Victoria: Auditor-General *Protecting Victoria's Children* Melbourne, Victorian Government (1996) http://www.audit.vic.gov.au/old/sr43/sr43.pdf.

There has also been an Australian Law Reform Commission ("ALRC") Report into children and the legal process: ALRC *Seen and Heard: Priority for Children in the Legal Process*, AGPS (1997).

7 *Bringing Them Home Report*, above n 1, Community Guide – Conclusion.

8 Read, P, 'The Return of the Stolen Generation' (1998) 59, *Australia's Public Intellectual Forum* 8, 9.

9 *Bringing Them Home Report*, above n 1, Chapter 2 - National Overview – Estimating the numbers removed.

10 *Aboriginal and Torres Strait Islander Survey*, Australian Bureau of Statistics, 1994.

State (Australian and United Kingdom) approved child migrant schemes. The children were unaccompanied, generally under the age of 16 and many were sent without parental consent. In other cases, what parental consent was given was not necessarily given freely, or upon correct information. Many children were also told, incorrectly, that they were orphans. The *Child Migrants Report* revealed exploitation of the children as labour; physical, sexual and emotional abuse; and cruelty. Maltese children, in particular, further suffered the denial of the use of their own language and, consequently, the deprivation of their culture. The *Child Migrants Report* made a number of recommendations, including that Commonwealth and State Governments supplement the Child Migrant Support Travel Fund and assist former child migrants to access services, including access to their records.

The *Forde Inquiry Report* found that there was unsafe, improper and unlawful treatment of children in many of the institutions or detention centres in Queensland that were within the Inquiry's terms of reference.[11] Many forms of abuse were identified, including emotional, physical and sexual abuse. The report also found that there had been breaches of the relevant regulations in relation to food, clothing, education and corporal punishment and that such breaches were commonplace leaving children hungry, ill-clothed and poorly educated, with many illiterate. In addition, most were physically, and some were sexually, abused. A key conclusion of the report was that the Department of Families, Youth and Community Care (and hence the State Government) had failed to provide protection from abuse for children in institutional care, by ceding responsibility for the protection of children to the institutions and by failing to work in a systemic way to reduce the risk of abuse of children in institutions. The *Forde Inquiry Report* also found that current legislation and current practices were not adequately protecting children from abuse.

The most recent report, the 2004 report of the Australian Senate, the *Forgotten Australians Report* on Australians who experienced institutional or out-of-home care as children also found that there had been wide scale unsafe, improper and unlawful care of children, a failure of duty of care and serious and repeated breaches of statutory obligations. The *Forgotten Australians Report* recommended that research be undertaken into the role of institutional care in Australia's history and the relationship between child protection and welfare dependency. It reiterated the important link between how a child is raised and his or her experience of adult life.

These reports share many similarities and document many moving accounts of the experiences of children in institutional care. In particular, they uncover the systemic and widespread abuse of children in institutional or out-of-home care. The history of removal of children is complex and it is difficult, within the limitations of this paper, to accurately reflect its profoundly devastating effects. The reports cover almost a century of Australian history, throughout the States and Territories (all operating under different, but similar, legislation). During this time, social mores, governments and legislative regimes and policies changed. It must be stressed that, although most of the reports covered periods that ended about 30 years ago (excepting the *Forde Inquiry Report*, whose terms of reference included investigating into present day institutions), the consequences of abuse are ongoing.

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11 *Forde Inquiry Report*, above n 5, Findings and Recommendations.

After the care relationship ended, the suffering did not end. The consequences of long-time institutional care, the denial or loss of family, love or individual attention were all potential causes of later psychological damage, an inability to trust others or form relationships, or dependence on drugs and alcohol.[12] There was also significant intergenerational trauma caused[13] as the capacity to give love and nurture as a parent is related to the experience of receiving love and nurture as a child. Further, the capacity to bequeath culture was cut off because Elders and parents were unable to pass on cultural knowledge to the children in institutional or out-of-home care.

Litigation in relation to these harms have relied on two main areas: actions asserting the violation of constitutional rights and actions for damages based on civil actions of wrongful imprisonment, breach of statutory duty, negligence and breach of fiduciary duty.[14] This paper will analyse the problematic areas for litigants, by considering the time at which the harm may have occurred, that is at the point of removal, during care and in the period after release from care.

II AT THE POINT OF REMOVAL

Child welfare legislation created a legislative regime where children who were deemed neglected, destitute or criminal could be placed into institutional or out-of- home care, by first being declared a state ward or a state child.[15] The definition of 'neglected', although different in different states, included found begging, wandering, residing in a brothel, found associating with a person who has been convicted of vagrancy or who was known to the police as 'of bad repute' or a 'habitual drunkard' or the parent representing that they were unable to control the child.[16] In South Australia, 'neglected' was defined to include 'uncontrollable'.[17] Children convicted of offences, regardless of the type of offence, could be sent to industrial or reformatory schools. In Queensland, 'neglecting' children included allowing children to frequent establishments that sold alcohol.[18] In practice, these definitions of neglect meant that children could be institutionalised because their mothers were unmarried; one or both parents were imprisoned (regardless of the crime) or institutionalised as a result of mental illnesses; one or both parents had died; or their parents were separated or divorced.[19] Children could also have been abandoned or given up for social or economic reasons. A child under 14 years old, for example, who sold matches, newspapers, flowers or anything else between 7 pm and 6 am was deemed neglected.[20]

Indigenous Australian children were subject to child welfare legislation and legislation that controlled all aspects of Indigenous Australian life. In Queensland, during the

12 *Forde Inquiry Report*, above n 5, Executive Summary at xi.
13 See Read, above n 8, 8–17.
14 Cuneen, C and Grix, J *The Limitations of Litigation in Stolen Generations Cases* Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS): Research Discussion Paper No. 15, Canberra, AIATSIS (2004) 5.
15 *Forgotten Australians Report*, above n 3, 66 – 69.
16 Victorian Legislation: *Neglected and Children's Act 1864* in Forgotten Australians report, above n 3, 31; see also *State Children Act* 1907 (WA) in Berns, S 'Regulating the National Livestock: An Experiment in Human Husbandry', (2002) 4 *Univ of Notre Dame Australia Law Review* 1, 17.
17 *State Childrens Act 1911* (SA).
18 *State Children Act of 1911* (Qld) s 4.
19 *Forgotten Australians Report*, above n 3, 72 – 78.
20 *State Children Act of 1911* (Qld) s4.

nineteenth century, the mere fact of being a child under fifteen of an Indigenous Australian mother deemed a child legally 'neglected'.[21]

Even without this legislative presumption of neglect, cultural and class based assumptions meant that an Indigenous Australian child was perceived as neglected: there was little understanding of Aboriginal child rearing practices and "native camps", as they were referred to, were described in extremely derogatory terms and as places from which children needed to be rescued.[22] By the 1930s, the State had become the guardian of almost all Indigenous Australian children.

III DID A WRONG OCCUR AT THE TIME OF REMOVAL?

It is often argued that the legislation was meant for the benefit of the children removed – that is, that the State, who removed children, did so "in their best interests."[23] Although there may have been some beneficial intent initially, the continued implementation of the relevant policies and the refusal to acknowledge the serious harms caused by removal of children after much accumulation of material about the profound damage to children was, at best, misconceived and, at worst, inhumane.

The fact of removal and the consequent loss of self-identity, loss of family and culture can, without more, be devastating.[24] However, this form of loss is difficult for the law to recognise and therefore compensate. In the case of Valerie Linow, who made an

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21 *Industrial and Reformatory Schools Act 1865* (Qld) s 6(7); Forde Inquiry, above n 5, 49; see also Kidd, R *Black Lives Government Lies*, 9. Section 6 of the *Industrial and Reformatory Schools Act 1865 (Qld)* provided:

"6. Every child who answers to any of the descriptions hereinafter mentioned shall be deemed to be a "neglected child" within the meaning and for the purposes of this Act –

(1) Any child found begging or receiving alms or being in any street or public place for the purpose of begging or receiving alms;

(2) Any child who shall be found wandering about or frequenting any street thoroughfare tavern or place of public resort or sleeping in the open air and who shall not have any home or settled place of abode or any visible means of subsistence;

(3) Any child who shall reside in any brothel or associate or dwell with any person known or reputed to be a thief prostitute or drunkard or with any person convicted of vagrancy under any Act now or hereafter to be in force;

(4) Any child who having committed an offence punishable by imprisonment or some less punishment ought nevertheless in the opinion of the justices regard being had to his age and the circumstances of his case to be sent to an industrial school;

(5) Any child whose parent represents that he wishes him to be sent to an industrial school and gives security to the satisfaction of the justices before whom such child may be brought for payment of the maintenance of such child in such school;

(6) Any child who at the time of the passing of this Act or at any subsequent period may be or become an inmate of any benevolent asylum or who may be maintained either wholly or in part by public or private charity;

(7) Any child born of an aboriginal or half caste mother."

22 See eg *Cubillo v Commonwealth [No 2]* [2000] FCA 1084; (2000) 103 FCR 1, [172]-[189], [218].

23 See Batley, P 'State's Fiduciary Duty to Stolen Children' in Jones, M and Marks, L A B (eds) *Children on the Agenda: the Rights of Australia's Children* (2001) 107, 110 quoting Studdert J in *Williams v Minister Aboriginal Land Rights Act 1983*, unreported, Supreme Court of New South Wales, 25 August 1993, 29.

24 *Forgotten Australians Report*, above n 3, Executive Summary.

application for compensation to the NSW Victims Compensation Tribunal,[25] it was held by the Assessor at first instance that the detrimental effects of her removal from her family were so great as to overwhelm any harm caused by the subsequent assaults. Valerie Linow had been removed from her family at the age of two, placed with the Aboriginal Welfare Board (NSW). In 1958, when she was 16, the welfare board placed Valerie with a family as a domestic worker. During her time as a domestic worker, she experienced sexual assault by a man who was a member of the household. It was held by the Assessor that her psychiatric disorder may have been caused either by the sexual assaults, or by prior, or later, life events, and therefore she was denied compensation. An appeal from this decision to the tribunal in 2003 was successful. It was held that what was required to be proved was that a compensable injury is **a** direct result of a violent act, not **the** direct result of that act. Other stressors, in her case removal from her family, may also have contributed to her psychiatric injuries. She was able to claim compensation not because of any injury caused to her by her removal but because injury was also caused to her by the crime of sexual assault. As the removal itself was not considered a crime, it was not compensable under a crimes compensation scheme.

In *Cubillo & Anor v Commonwealth*,[26] O'Loughlin J held that the removal of Mrs Cubillo and of Mr Gunner from their families caused them to suffer considerable trauma and shock, and that harm to them continued throughout the period in which they were institutionalised. As a consequence, the plaintiffs suffered a psychiatric injury. His Honour held:

> "I think that it is important to stress at the outset that I am satisfied that each applicant suffered severely during the periods that they were institutionalised. However, it was the removal and the detention – more than the conditions of the detention – that were the cause of their sufferings. … I believe that Mrs Cubillo's sense of loss for her Aboriginal community and family would have been much the same irrespective of the physical conditions of the Retta Dixon Home. I do not think that overcrowding or unsatisfactory aspects of hygiene caused or contributed to her sense of loss. That loss came from the severing of her ties with her family and the loss of her language, culture and her relationship with the land."

The injury arose from removal rather than subsequent treatment, but there was insufficient evidence to find that the removal was unlawful.

There are other barriers to finding that removal was unlawful: the validity of the policy of removal itself and whether removal was consented to. In *Kruger v Commonwealth*[27] it was held that the Northern Territory *Aboriginals Ordinance 1918*, which had

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25 This case was unreported and the reasons remain confidential. The references to the facts and decision are derived from a number of articles about the case: Cuneen, C and Grix, J *The Limitations of Litigation in Stolen Generations Cases* Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS): Research Discussion Paper No. 15, Canberra, AIATSIS, 2004 10-11, 22; Forster, C 'Case Note: The Stolen Generation and the Victims Compensation Tribunal: The "writing in" of Aboriginality to "write out" a right to compensatory redress for sexual assault' in (2002) 25(1) *UNSW Law Journal* 185 – 193; Goodstone, A 'Stolen Generations Victory in the Victims Compensation Tribunal' (2003) 5 (22) *Indigenous Law Bulletin* 10 – 11.

26 *Cubillo v Commonwealth [No.1]* (1999) 89 FCR 528; *Cubillo v Commonwealth [No.2]* (2000) 103 FCR 1; *Cubillo v Commonwealth [No.3]* (2001) 112 FCR 455.

27 [1997] HCA 27; 190 CLR 1.

permitted the removal of Aboriginal children, was constitutionally valid. In *Cubillo*, O'Loughlin J also found that the powers of removal and detention were so broad that a decision to remove the plaintiffs could not be impeached. In the matters of *Cubillo* and *Williams v Minister, Aboriginal Land Rights Act 1983*,[28] it was held that the plaintiffs were removed by consent (Mr Gunner in *Cubillo*) or on application of the mother (*Williams*).

IV *KRUGER* CONSTITUTIONAL VALIDITY AND ATTEMPTING TO 'IMPEACH' REMOVAL

In *Kruger*, it was argued that the Northern Territory Ordinance, as amended from time to time, was constitutionally invalid for a number of reasons: it conferred a judicial power on a non-judicial body; it infringed the applicants' implied guarantee to due process of law; it infringed the applicants' implied constitutional right to legal equality; it infringed the applicants' constitutional right to freedom of movement; it infringed s 116 of the *Constitution*; and it infringed an implied right to freedom from genocide.

There were nine applicants in *Kruger*. Each had been removed from his or her mother or family between 1925 and 1944 and taken to institutions or reserves.

The Ordinance provided for a Chief Protector of Aborigines (and after 1953, a Director of Native Affairs) with extensive powers including the discretion to undertake the care, custody and control of any Aboriginal or part-Aboriginal person, the power to remove them to any reserve or Aboriginal institution, as defined in the Ordinance to include mission stations, schools, reformatories, orphanages and other institutions declared to be an Aboriginal institution.[29] The Ordinance provided that the Chief Protector, or Director, was the legal guardian of all Aboriginal persons.[30]

The applicants' claims in *Kruger* were not upheld by the High Court. It was held that the power to detain Indigenous Australian children in custody for the purpose of their welfare was not an exclusively judicial power and therefore it did not offend Chapter III of the *Constitution.* In relation to the implied guarantee of due process of law, it was held by Dawson J (with whom McHugh J agreed) that the *Constitution* contained no such implied guarantee. Gaudron J held that as the power to detain in custody was not exclusively a judicial power, it was not subject to a requirement of due process. All the judges, excepting Toohey J, held that there was no implied right to substantive legal equality.

There was disagreement about whether there was an implied freedom of movement. Toohey, Gaudron and McHugh JJ found that such a freedom did exist, but only Gaudron J found that some of the provisions of the Ordinance were invalid as a result. The majority of Brennan CJ and Dawson, McHugh and Gummow JJ held that any such implied constitutional right did not apply to the Ordinance.

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28 *Williams v Minister, Aboriginal Land Rights Act 1983* (Unreported, Supreme Court of NSW) 25 August 1993; *Williams v Minister, Aboriginal Land Rights Act 1983 [No 1]* (1994) 35 NSWLR 497; *Williams v Minister, Aboriginal Land Rights Act 1983 [No 2]* (1999) 25 Fam LR 86; *Williams v Minister, Aboriginal Land Rights Act 1983 [No 3]* (2000) Aust Torts Reports ¶ 81-78.

29 *Aboriginal Ordinance 1918* (NT) s 16.

30 *Aboriginal Ordinance 1918* (NT) s 7(1).

In relation to the claim that the applicants' implied right to freedom from genocide was infringed, the court held that there was no such right as the Genocide Convention, to which Australia was a party, had never formed part of Australian domestic law. Further, even if there were such a right, it nevertheless had not been infringed as there was no intent, as required by the Convention, to destroy the Aboriginal Australian people or their culture.

Although the High Court in *Kruger* held that the Ordinance was constitutionally valid, legal claims based on the misuse of the powers under the Ordinance, and therefore similar legislation in other states, were not foreclosed by the decision. As Brennan CJ held:[31]

> "… a power which is to be exercised in the interests of another may be misused. Revelation of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation, but the susceptibility of a power to its misuse is not an indicium of its invalidity. It may be that in the cases of the plaintiff children, the Chief Protector or the Director formed an opinion about their interests which would not be accepted today as a reasonable opinion having regard to contemporary community standards and the interests of those children in being kept together with their families. The practice of enforced separations is now seen to be unacceptable as a general policy." [footnotes omitted]

V ULTRA VIRES REMOVAL?

The plaintiffs argued in *Cubillo* that their removal was beyond the power conferred by the Aboriginal Ordinance. When she was a child, Mrs Cubillo was removed from her family along with 16 other Aboriginal children living at the Phillip Creek Native Settlement, which was operated by the Aborigines Inland Mission. From there, she was sent to the Retta Dixon Home in Darwin where she remained until she was 18. Mr Gunner was removed from his mother when he was seven years old. His mother apparently put a thumb print on a consent form, consenting to his removal for the purposes of education. He was placed in St Mary's Church of England Hostel in Alice Springs. When Mr Gunner was 14 years old, he left St Mary's to work at Angas Downs Station. Mrs Cubillo and Mr Gunner commenced separate proceedings that claimed damages for wrongful imprisonment and deprivation of liberty, negligence, breach of statutory duty and breach of fiduciary duty. Mrs Cubillo and Mr Gunner consented to orders that their matters be heard together.

Mrs Cubillo and Mr Gunner argued that their removal was beyond the power conferred by the Ordinance because the Director had not considered their individual best interests when removing them from their families and instead removed them as part of a state-sanctioned policy of removing part-Aboriginal children from their families. This argument was rejected. Justice O'Loughlin J held that a number of factors indicated that individual consideration was given:

- the expression of concern for part-Aboriginal children's welfare by some Administrators, patrol officers and staff of institutions;[32]

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31 *Kruger v Commonwealth* [1997] HCA 27, 36.

32 *Cubillo v Commonwealth [No. 2]* (2000) 103 FCR 1, [175], [201], [209], [301], [1561].

- the Commonwealth's lack of capacity to fully realise the policy;[33]
- the existence of cases where decisions had been taken not to remove part-Aboriginal children; and
- the existence of familial consent to or application for removal or where there was a clear situation of neglect or abuse.[34]

The plaintiffs argued that a policy existed because consent to removal was not required, even though it was sought, and that there was a presumption from the highest policy level of the Administrator down to the individual patrol officers that it was in the best interests of a part-Aboriginal child to be removed.[35]

Justice O'Loughlin found that there had not been "a policy of indiscriminate removal irrespective of the personal circumstances of the child".[36] He also stated that, even if such a policy did exist, it had not been implemented without regard to the individual circumstances of Mrs Cubillo and Mr Gunner.[37]

Mrs Cubillo faced the further hurdle that O'Loughlin J found that the Commonwealth was not the appropriate defendant to sue, as the Commonwealth did not have any vicarious liability for the actions of the Director. The appropriate defendant was therefore the former Director of Native Affairs and the particular patrol officer who had removed Mrs Cubillo, as well as the Superintendent of the Retta Dixon Home.

VI CONSENT

Mr Gunner faced the hurdle that O'Loughlin J found that his mother had consented to his removal by the evidence of a thumb print on the consent form. In regard to this finding, his Honour held:[38]

> "In coming to that conclusion, I am aware that there was no way of knowing whether the thumb mark on the "Form of Consent" was [Mr Gunner's mother's]; even on the assumption that it was, there was no way of knowing whether [she] understood the contents of the document. But it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as [Mr Gunner's mother] the meaning and effect of the document. I have no mandate to assume that [Mr Gunner's mother] did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document."

In the matter of *Williams*, it was found that, on her mother's application, Joy Williams became a ward of the Aborigines Welfare Board shortly after she was born. When she was 4½ years old, Joy Williams was transferred from a home for Indigenous Australian

33 *Cubillo v Commonwealth [No. 2]* (2000) 103 FCR 1, [1198].
34 *Cubillo v Commonwealth [No. 2]* (2000) 103 FCR 1, [28], [739].
35 Van Krieken, R 'The "Stolen Generations" and Cultural Genocide: The forced removal of Australian Indigenous Children from their Families and its Implications for the Sociology of Childhood' in (1999) 6(3) *Childhood* 297, 245; Cunneen & Grix, above n 25, 13.
36 *Cubillo v Commonwealth [No. 2]* (2000) 103 FCR 1, [300].
37 *Cubillo v Commonwealth [No. 2]* (2000) 103 FCR 1, [1160].
38 *Cubillo v Commonwealth [No. 2]* (2000) 103 FCR 1, [788].

children, Bomaderry, to one for "white" children, Lutanda. Joy Williams was the daughter of an Aboriginal woman who was herself removed and a ward of the Aborigines Welfare Board.[39] Ms Williams was diagnosed as having suffered from borderline personality disorder which she alleged was due to a fundamental failure in parenting.[40] Her causes of action were negligence, wrongful imprisonment and breach of fiduciary duties.

In relation to her claim for wrongful imprisonment, it was held that her removal and subsequent detention first at Bomaderry Children's Home and later Lutanda was with the consent of her mother. But does the finding of consent give adequate recognition to the social and historical context of removal? Legislation, like the Northern Territory Ordinance, made a Protector or Director of Native Affairs the legal guardian of all Aboriginal Australians, irrespective of age. In *Cubillo*, O'Loughlin J considered the context and preferred the presumption that the document expressed what it appeared to express. Where the plaintiff is unable to call evidence to refute it, such a presumption favours the defendant. In *Williams*, the finding that Ms Williams' removal was with the consent or on the application of her mother failed to take into consideration the fact that her mother, as a state ward, was deemed incompetent to handle her daily affairs. In each state, the relevant Acts created systems that controlled all aspects of Indigenous Australians' lives. There was a presumption therefore that Indigenous Australians were incompetent to make decisions about their lives. Yet it was held that an otherwise incompetent person could consent to the State having custody of his or her child. In relation to consent it is also relevant to consider the social context of an Indigenous Australian: there may have been an imbalance of power and knowledge or there may have been coercion, misinformation or misunderstanding of the effect of consent forms.

There has not yet been any case in Australia where an Indigenous Australian has been able to claim damages by successfully challenging the lawfulness of his or her removal from his or her family as a child.

VII ABUSE DURING CARE

Whatever the beneficial intent of removal may have been, the overwhelming evidence of the care experience is devastating. Children in institutional care experienced many forms of abuse: physical, sexual and emotional. The reports document widespread and systemic abuse of children. The reports, and other subsequent research, also document that there were concerned persons at the time representing to the government or responsible mission that the institutions were not appropriately staffed or funded and that children were, as a result, suffering. The many documented forms of abuse: physical, sexual, emotional and systems, each had consequences which may give rise to a civil cause of action.

It was found in the *Forde Inquiry Report* that "corporal punishment was common in institutions." [41] The *Forgotten Australians Report* found that there were "severe

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39 *Cunneen & Grix* (2004) 5; Williams v Minister, *Aboriginal Land Rights Act 1983 [No. 3]* (2000) Aust Torts Reports ¶81-78, [6].

40 Buti, T 'Removal of Indigenous Children from their Families: The National Inquiry and What Came Before – The Push for Reparation' (1998) 3 *AILR* 1.

41 *Forde Inquiry Report*, above n 5, 278.

beatings" which "often took the form of extremely severe physical violence – what can only be described as criminal assault."[42] In addition, there was "a culture of physical punishment and brutality engendered or tolerated by management" and that there were instances of "gross excesses in physical abuse in many institutions, beyond any acceptable boundary in any period."[43]

There have been complaints of sexual abuse committed by other residents, staff or visitors to the relevant institutions. [44] According to the *Forgotten Australians Report*, sexual abuse was perpetrated for the most part by staff members, but also by older children, with staff "turning a blind eye." [45] The *Forgotten Australians Report* found that "sexual abuse was widespread with reports covering all States and type of institution."[46] The *Forde Inquiry Report* found that almost all institutions were subject to complaints of sexual abuse. Some criminal charges have been laid and a small number dealt with.[47] Sexual abuse often involved the exploitation of a child's vulnerability by bribery with lollies, biscuits, cigarettes or alcohol, and by targeting those children who did not receive visitors.[48]

Emotional abuse – the neglect of a child's personal emotional needs – was common in institutions.[49] The *Forde Inquiry Report* found that "many institutions were austere places, staffed by people lacking the training, and in some instances the personal capacity, to provide the warmth and nurturing necessary for the healthy development of children." [50] There was strict discipline and little regard for the developmental and educational needs of children.

A child's individuality was not often considered and children were often treated impersonally.[51] The *Forde Inquiry Report* also found that cruelty was common, and demeaning and humiliating remarks were made to children almost daily. This in turn had a detrimental effect on a child's confidence and sense of self-worth which had profound effects on the child's life as an adult.

Systems abuse is the form of injury caused by the systems that were designed to care for and protect children. These include lack of sufficient funding and resources, including the lack of adequate accommodation, food, clothing,[52] and the perception that the children should be grateful for the 'care' that they were being given.[53] There was insufficient focus on the developmental and educational needs of a child; funding and resources were often so limited that children did not even receive a basic education.[54] Indeed, there was a perception that children from poor backgrounds and who were (part)

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42 *Forgotten Australians Report*, above n 3, 101, para [4.42].
43 *Forde Inquiry Report*, above n 5, 278; also *Forgotten Australians Report*, above n 3, 129, paras [5.08-5.12].
44 *Forde Inquiry Report*, above n 5, 278.
45 *Forgotten Australians Report*, above n 3, 103, para [4.46].
46 Ibid.
47 *Forde Inquiry Report*, above n 5, 278.
48 *Forgotten Australians Report*, above n 3, 104; See also *Lost Innocents Report*, above n 4, 76-80, paras [4.15]-[4.34].
49 *Forgotten Australians Report*, above n 3, 91 – 93.
50 *Forde Inquiry Report*, above n 5, 277.
51 *Forde Inquiry Report*, above n 5, 277; *Forgotten Australians Report*, above n 3, 93.
52 *Forgotten Australians Report*, above n 3, 88 – 90; 129 – 139.
53 Ibid 140 - 141.
54 *Forde Inquiry Report*, above n 5, 278 – 279.

Aboriginal were not destined for any greater vocation than domestic work if female and manual or farm labour if male. From an early stage, education was therefore geared towards this limited work, rather than allowing a child's goals and ambitions to flourish. Unlike the broader Australian community, education for these children was not a tool of social mobility.

In the 1930s, educational conditions for Aboriginal children on Palm Island were poor:[55]

> "The department acknowledged in 1931 its responsibility for the 'proper education' of its Aboriginal wards, but the government failed to allot necessary funds, causing teaching to be 'seriously hampered' through lack of facilities. This lack was condoned for Aboriginal children only. In the mid-1940s reports show the eight children of white officials on Palm Island were properly accommodated with their own teacher in a room described as being 'well ventilated and easily the best lighted classroom in the whole school building'. Meanwhile more than 180 Aboriginal schoolchildren were crammed into a small room and a further 60 took lessons underneath the school, described as so cold, draughty and dark that children suffered eyestrain trying to see their books and slates. When the white students' classroom was vacated it was allocated for the storage of old records.
>
> …
>
> It wasn't until 1952 that Aboriginal wards of state were given the opportunity to progress beyond grade 4."

It is undeniable that where abuse occurred during the care relationship, it is unacceptable by the moral and legal standards of the present and by standards operating at the time of care. For the beneficial intent of removal to be realised, removed children should have been placed in situations in which their lives would have been better than the situation from which they were removed.[56] Instead, they were often subject to the same neglect that "caused" them to be institutionalised in the first place.

VIII STATUTES OF LIMITATIONS

Where the causes of action are common law negligence, wrongful imprisonment or breach of statutory duty of care, the primary barrier facing the successful outcome of litigation based on causes of action relevant to harm arising from the care relationship are statutory limitations of actions.

The barrier of statutes of limitations may be surmountable. The policy underlying limitations is that a plaintiff should commence proceedings within a reasonable time. This is justified on the basis of fairness, certainty and public policy: that is, that it is unfair for a person to be subject to an indefinite threat of being sued; that a person should be able to arrange his or her affairs in the knowledge that a claim can no longer be brought against him or her; and that the public has an interest in the quick resolution

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55 Kidd, R *Black Lives, Government Lies* (2000) 20 – 21.

56 *Forde Inquiry Report*, above n 5, 107; *Forgotten Australians Report*, above n 3, 83 para 3.82; 93 sub 18; 141 para 5.52.

of disputes.[57] There is, however, a balancing of interests relevant to limitation periods: the interests of the potential claimants that their grievances be addressed, the interests of defendants as outlined above and the interests of society at large.[58] The justifications of unfairness and uncertainty in relation to the defendant may not be so persuasive when the defendant is the State. This is especially true in relation to the stolen generations and children who experienced abuse in institutional care where the imbalance of power is so striking.

The passage of time may disadvantage and prejudice the defence but it creates similar problems for the plaintiffs in making out their claims. In the matter of *Williams* Kirby P (as his Honour then was) stated that:[59]

> "The passage of time, and changing perceptions of right and wrong conduct present as great a problem for Ms Williams as they do for the respondents.
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> …
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> "It is not just and reasonable in this case to close the doors of the Court in Ms Williams' face. She should have her chance to prove her case. She might succeed. She might fail. But her cause will have been heard in full. It will then have been determined as our system of law provided to all Australians – Aboriginal and non-Aboriginal – according to law, in open court and on its merits."

In *Williams* and *Linow*, the limitation periods were extended. *Williams* was the first 'stolen generations case' in time. At first instance the extension of the limitation period was refused because it was held that it was "neither just nor reasonable" to extend the limitation period.[60] This decision was reversed on appeal.[61] This also occurred in the matter of *Johnson v Department of Community Services*.[62] Mr Johnson was four years old when he was removed from his family by an order of the Childrens Court, under the *Child Welfare Act* 1939 (NSW). He was placed in the care of the Minister for Community Services, as a ward. He was placed in three separate institutions during a period of ten months before he was placed in foster care where he remained until he was 13. He was again removed and placed into an institution – Weroona in the Blue Mountains, NSW. He left the institution when it closed, residing briefly with an officer of the Department of Community Services. Eventually he was "forced to fend for himself."[63] At first instance, an application for an extension of the limitation period was refused. Like *Williams*, this decision was reversed on appeal.

In *Cubillo*, although the question of extending the limitation period was put aside until after the substantive issues were heard, it was ultimately held that there would be

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57 Queensland Law Reform Commission ("QLRC") *Review of Limitations of Actions Act 1974* QLRC Report No 53 (September 1998) 6 – 8.

58 Ibid 8.

59 *Williams v Minister, Aboriginal Land Rights Act 1983 [No. 1]* (1994) 35 NSWLR 497, 514 – 515.

60 *Williams v Minister, Aboriginal Land Rights Act 1983* (unreported, Supreme Court of NSW) 25 August 1993, 36.

61 *Williams v Minister, Aboriginal Land Rights Act 1983 [No. 1]* (1997) 35 NSWLR 497, 514-515.

62 (2000) 5(4) AILR 49, [74] – [79], [139].

63 *Johnson v Department of Community Services* (2000) 5 [4] AILR 49, [4] – [5]; see also Cunneen & Grix (2004) 9 – 10.

"irremediable prejudice" to the defendant if the time limits were waived.[64] Justice O'Loughlin was particularly concerned about the passage of time in relation to the defendant's ability to prepare its defence due to a lack of documentary evidence and witness testimony.

Time limitations also apply to victims compensation schemes in all States. In certain circumstances, the court has a discretion to accept late applications.[65] In *Linow*, submissions to the court sought leave to apply out of time on the basis that she had been a vulnerable child at the time of the act of violence; in the intervening years, she suffered from psychiatric disorders; there was a significant power imbalance in the relationship between Ms Linow and the alleged perpetrator; and the fact that sexual assault crimes are the least likely to be reported due to victims' feelings of shame and disgust. Leave to apply out of time was granted.[66]

Although each case will turn on its facts, it is arguable that the position of vulnerability of a child, the particular types of harm caused and the delays an individual may experience before being able to deal with harm caused to them as a child are important factors to bear in mind in extending a limitation period.[67] This is, however, an area where reform to the law may be required. In a number of provinces in Canada, for example, time limits for actions for damages for sexual assault have been abolished.[68]

IX BREACH OF FIDUCIARY DUTY

Time limitations do not apply to claims for breach of fiduciary duty.[69] It remains possible that this may be an important cause of action for members of the stolen generations and other people who have experienced institutional or out of home care;[70] indeed there has been much written reposing hope in this cause of action as an opportunity to repair the damage done.[71] In relation to children in institutional care, it is often the case that a child was made a state ward. It has been held that the state vis-à-vis the child is in a guardian-ward relationship – one of the recognised fiduciary categories.[72] Many children who were placed in institutional care were made wards of

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64 Cunneen & Grix (2004) 34.

65 Cunneen & Grix (2004) 34.

66 Goodstone, A 'Stolen Generations Victory in the Victims Compensation Tribunal' (2003) 5 (22) *Indigenous Law Bulletin* 10 – 11.

67 *Carter v Corporation of Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335 per Atkinson J; *N v State of Queensland* [2004] QSC 290, [24]-[27] per McMurdo J; Mathews, B., 'Limitation periods and child sexual abuse cases: Law, psychology, time and justice', (2003) 11 *Torts Law Journal* 218; A Response by the Commission for Children and Young People (NSW) to the Senate Community Affairs References Committee Inquiry into Children in Institutional Care, July 2003 at http://www.kids.nsw.gov.au/files/submission_institcare.pdf at 3.3, 231.

68 *M(K) v M(H)* [1992] 3SCR 6, 49.

69 *Williams v Minister, Aboriginal Land Rights Act 1983 [No. 1]* (1994) 35 NSWLR 497, 509.

70 Batley, P 'State's Fiduciary Duty to Stolen Children' in Jones, M and Marks, L A B (eds) *Children on the Agenda: the Rights of Australia's Children* (2001) 107, 141.

71 See in particular Behrendt, L 'Responsibility in Governance: Implied Rights, Fiduciary Obligation and Indigenous Peoples' (2002) 61(2) *Australian Journal of Public Administration* 106 – 118.

72 *Williams v Minister, Aboriginal Land Rights Act 1983 [No. 1]* (1994) 35 NSWLR, 511 per Kirby P; also *Plowright v Lambert* (1885) 52 LT 646, 652; but note the decision of Blow J in *Tusyn v Tasmania* [2004] Tas SC 50 denying a cause of action for breach of fiduciary duties to a child who was sexually abused whilst a "child of the State".

the state. However, the situation with regard to Indigenous children was different. They were subject to regulation by virtue of their Indigeneity. Consequently, in the matter of *Williams [No 2]*, Abadee J held that no fiduciary relationship or duties arose. Nevertheless, the categories of fiduciary relationship are not closed.[73] The particular vulnerability of a child in institutional care, such vulnerability being exacerbated if the child is Indigenous, and the incidents of how the child was placed in care, may be a situation in which a fiduciary relationship could be argued. This has not yet been finally determined in Australia but it may be considered unduly optimistic to rely on it as providing a solution.

X EVIDENTIARY DIFFICULTIES

Evidentiary hurdles are also faced when claiming damages for injuries caused during the care relationship. These include the absence of key witnesses and the loss of records. As events may have occurred more than 50 years ago, witnesses may be difficult to locate, unwilling to give evidence or deceased.[74] In addition, there is the difference in culturally based concepts of authoritative evidence. This is particularly evident in the traditional Indigenous Australian culture's reliance on oral history. A further hurdle is the vulnerability of a child and the delay in making a connection between the injuries inflicted and any right of legal redress. Because it is the plaintiff who makes a claim, the burden of proof is on the plaintiff to establish his or her case.

Finally, the events may be so traumatic that it is difficult for a plaintiff to make a complaint. This is especially true of sexual abuse. It is even more difficult for someone who was a child at the time of the abuse to make any complaints, or to have their complaints listened to. There may never have been any record of complaints (and therefore potentially no record of the abuse); or the complaint is made many years after the abuse has ended.

It is no doubt because of the many difficulties in seeking redress through the courts which I have canvassed, that alternative solutions as to how to repair the damage done and compensate the victims must be sought.

XI ABUSE AFTER CARE

Many Indigenous Australian children were sent to work as domestic labour or as cheap farm labour. In such situations, their labour was exploited. They may not have been paid any wages. If they were paid wages, wages were pitifully low; or paid by the employer to be kept by government in trust funds which were not necessarily used or invested for the benefit of Aboriginal or Torres Strait Islander people.[75] Not uncommonly, Indigenous girls who worked in domestic labour were victims of sexual abuse.

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73 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 per Mason J.

74 Durbach, A 'Repairing the Damage: Achieving Reparations for the Stolen Generation' (2002) 27(6) *Alternative Law Journal* 262, 263.

75 R, Kidd, *Black Lives, Government Lies* (University of New South Wales Press 2000).

When children who were state wards left care at the age of 18 or 21, they were simply released. There were no support systems or counselling services to enable their integration into society.[76] After years in institutional care, usually isolated from the community, few of the removed children had any ability to cope with everyday life, including not knowing how to catch public transport or how to interact with people.[77] Rarely, did the children have some form of properly paid work to go to. This often meant that they drifted into a life of crime, and returned to institutions.

The fact that they lacked love often meant that they did not develop an ability to trust others or form and nurture successful relationships.[78] The compounding effects of the experience of care on the initial removal cannot be underestimated. Serious psychological trauma, which can affect all aspects of a child's adult life, could be caused throughout and after the care relationship. Suicide, depression and alcohol and drug dependence were common outcomes for care leavers and of course they are likely to appear before the courts as defendants. The *Royal Commission into Aboriginal Deaths in Custody* reported in 1991 that almost half of the persons whose deaths in custody were investigated had experienced childhood separation from their natural families through intervention by the Sate, mission organisations or other institutions.[79]

The full effects of harm caused by removal, placement in institutional or out of home care, abuse during that care and then effective abandonment when a child reaches the age of 18 or 21 may not be realised for many years.

XII CONCLUSION

That applicants' claims fail in court is not necessarily reflective of the veracity of their claims. It certainly does not mean that the events they recall did not occur. It may be the case that, for whatever reason, they are unable to satisfy the legal standards of proof. Many hurdles face stolen generations litigants and other victims of institutional or out-of-home care. Such hurdles include the cost of litigation and the difficulty of the trial process itself. Ultimately, there is no way to amend the loss of childhood, the loss of family connections and the loss of self identity.

At present, resort to litigation has not been fruitful for claimants. The courts played a major role in land rights with land mark decisions in *Mabo [No 2]*[80] and *Wik*.[81] However, as this paper has shown, reports by administrative and legislative bodies have to date played a more significant role than the courts in recognising the harms done to Indigenous children by their removal from their families, land, language and culture.

There must be an integrated approach to the consequences for the stolen generations, care leavers, their families and their communities. Monetary compensation can only ever be one aspect of the healing process. Some positive outcomes have been reached

76 *Forgotten Australians Report*, above n 3, 124 [4.101].
77 Ibid.
78 Ibid, Executive Summary; *Forde Inquiry Report*, above n 5, 284 – 286.
79 *Royal Commission into Aboriginal Deaths in Custody National Report* (1991) Vol 1 para 2.2.9; table 2.10.
80 *Mabo and others v Queensland [No. 2]* (1992) 175 CLR 1.
81 *Wik Peoples v Queensland* (1996) 187 CLR 1.

by organisations such as Link-Up, which run a variety of services to assist Indigenous Australians who were removed from their families to commence family research, to undertake counselling in relation to family reunion and family separation.[82] As a nation, Australia must be vigilant that the mistakes of the past are not repeated in the present or the future.

[82] 'Government Unlocks Stolen Generation Records in SA – the First State in Australia' (2003) 27(1) *Aboriginal and Islander Health Worker Journal* 29 – 31.