# THE BEST INTERESTS OF THE CHILD?
# The Stolen Generations in Canada and Australia

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The common policy of the Australian and Canadian governments of removing Aboriginal children from their families and placing them in institutions is now well documented. The key basis for such removals was a policy of assimilation. As a consequence of these revelations, litigation has been undertaken by members of the stolen generations in both Canada and Australia. This article considers the key cases in Canada and Australia in regard to three entwined strands of such claims: vicarious liability, non-delegable duties and duty of care. While the plaintiffs in the leading Canadian cases were ultimately successful under at least one of their heads of claim, the approaches in these cases in regard to the Crown's liability for breach of the duty of care and non-delegable duties is inconsistent. Thus, even in Canada, key legal issues pertaining to the Crown's liability for the Aboriginal residential school experience continues to be unresolved. Within this framework, the article also considers the key Australian decisions where the plaintiffs' claims against the Crown for vicarious liability and breaches of duty of care were rejected. The discussion in this article indicates that the doors for legal redress are not closed to members of the Australian stolen generation. This article also focuses on whether there was a breach of any such alleged duty of care arising out of the Canadian and Australian removal policies. This is potentially important in both jurisdictions, not just Australia, as the plaintiffs in the Canadian cases that have been determined to date were physically and/or sexually abused whilst detained in institutions pursuant to this removal policy. Thus the main focus in those cases has been on whether the assaults constituted actionable breaches.

## Introduction

The common policy of the Australian[1] and Canadian[2] governments of removing Aboriginal children from their families and placing them in

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1 See in particular HREOC (1997).

2 See in particular RCAP (1998). See also *Statement of Reconciliation: Learning from the Past*, 7 January 1998; Indian Residential Schools Resolution Department, 'Key Events' and 'The Residential school System Historical Overview', www.irsr-rqpi.gc.ca; Aboriginal Healing Foundation (2002); Cassidy (2003a).

institutions is now well documented. The key[3] basis for such removals was a policy of assimilation.[4] The underlying idea was that, by removing Aboriginal children from their families, the government could break the child's connection with their family, Aboriginal culture and traditional land, and ultimately they would be assimilated into white society.[5] While the removal of part-Aboriginal children from their families had been documented in Australia for many decades, it was not until the revelations of the Australian Human Rights and Equal Opportunity Commission (HREOC) report *Bringing Them Home*[6] that the general Australian public became truly aware of the removal policy. Similarly in Canada, it was not until the revelations of the *Royal Commission on Aboriginal Peoples Final Report* (1998) (*RCAP*)[7] that the Canadian general public became aware of the plight of the children, now adults, who had been removed under this policy and so often abused[8] while in the care of the relevant institution.

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3 It will be suggested that assimilation was not the sole impetus in Australia for the removal of Aboriginal children from their families. As noted below, two further matters that prompted this policy were pressure from pastoralists for the governments to provide them with cheap labour (particularly farmhands) and to dispossess Aboriginal communities to facilitate the expansion of European settlement in Australia.

4 With regard to Australia, see http://slq.qld.gov.au/ils/100years/assimilation.htm; *Cubillo & Gunner v The Commonwealth* [2000] FCA 1084 (*Cubillo 2*) at 1146. See also *Cubillo 2* [2000] FCA 1084 at [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams v The Minister No 2* [1999] NSWSC 843 at [88] ('*Williams 2*'). With regard to Canada, see RCAP (1998), p 335. See further RCAP (1998) and Aboriginal Healing Foundation (2002).

5 With regard to Australia, see *Cubillo 2* [2000] FCA 1084 at [172–79], [190] and [1146]; Attwood (1989), pp 16–17; HREOC (1997), p 9; Healey (1998), pp 17, 23 and 32. At the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra from 21–23 April 1937, it was resolved that such separation and absorption into white society was the answer to the 'Aboriginal problem': *National Report Volume 2 — The Assimilation Years* (www.austlii.edu.au/cgibin/dsip.pl/au/other/IndigLRes/rciadic/national/vol2/278.html). See also *Cubillo 2* [2000] FCA 1084 at [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams 2* [1999] NSWSC 843 at [88]. With regard to Canada, see RCAP (1998), p 335. See further Aboriginal Healing Foundation (2002).

6 HREOC (1997).

7 Chapter 10 of RCAP (1998) provides detailed information regarding the Aboriginal residential schools. The report recommended, *inter alia*, the establishment of a public inquiry into the Aboriginal residential schools. It also recommended the establishment of a National Repository of records and video collections related to Aboriginal residential schools.

8 Note, it has been suggested that in some schools all children were sexually abused: 'Reports of Sexual Abuse May be Low, Expert Says', *The Globe Mail*, 1 June 1990 at A3 reporting the comments of Rix Rogers, special adviser to the Minister of National Health and Welfare, cited by RCAP 1998 at 378. See further RCAP (1998) and Aboriginal Healing Foundation (2002), p 3.

As a consequence of these revelations, litigation has been undertaken by members of the stolen generations in both Canada and Australia. This article considers the key cases in Canada and Australia in regard to three entwined strands of such claims: vicarious liability; non-delegable duties; and duty of care. These aspects are entwined insofar as each provides a logically linked alternative basis for placing liability upon the Crown for the acknowledged damages that have flowed from this policy of assimilation. Thus Crown liability may be vicarious or primary. For example, in *Blackwater v Plint (No 1)*[9] and *Blackwater v Plint (No 4)*,[10] the courts found Canada and the United Church of Canada were vicariously liable for the sexual assaults by a dormitory supervisor. While in *Blackwater v Plint (No 2)*[11] the court held that the Crown had not breached the duty of care it owed to the children, the court went on to conclude that there had been breaches of its non-delegable duties. Thus vicarious liability and a breach of non-delegable duties were established, but no breach of the duty of care.

While the plaintiffs in the leading Canadian cases were ultimately successful under at least one of their heads of claim,[12] the approaches in these cases in regard to the Crown's liability for breach of the duty of care[13] and non-delegable duties[14] is inconsistent. Thus, even in Canada, key legal issues

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9 '*Blackwater 1*' (1998) 52 BCLR (3d) 18.

10 '*Blackwater 4*' (2005) 258 DLR (4th) 275 at [19–38[. The Supreme Court of Canada rejected the doctrine of charitable immunity that had been used by the court in *Blackwater v Plint (No 3)* ('*Blackwater 3*') (2003) 235 DLR (4th) 60 at [48–50] to relieve the church from liability: *Blackwater 4* (2005) 258 DLR (4th) 275 at [40–44].

11 '*Blackwater 2*' (2001) 93 BCLR (3d) 228. In *Blackwater 4* (2005) 258 DLR (4th) 275 at [16], the court agreed with the finding that there had been no breach of the duty of care, but concluded that the non-mandatory nature of the language in the *Indian Act* meant there was no non-delegable statutory duty: *Blackwater 4* (2005) 258 DLR (4th) 275 at [49–50] and [54–55].

12 Claims were brought for, *inter alia*, breaches of the duty of care, fiduciary duties and statutory duties. See further Cassidy (2003a).

13 As discussed below, in *Blackwater 2* (2001) 93 BCLR (3d) 228 and *Blackwater 4* (2005) 258 DLR (4th) 275 the courts rejected claims of direct liability against Canada and the United Church of Canada for breach of the duty of care. The courts held that the defendants neither knew, nor ought to have known, of the sexual assaults upon the students. By contrast, in *M(FS) v Clarke* [1999] 11 WWR 301 at 353 ('*Mowatt*'), the court found that Canada and the Anglican Church, as employers, were imputed with the school principal's knowledge of the sexual assaults and breached the duty of care by failing to take reasonable supervisory precautions against sexual abuse by dormitory supervisors. Both Canada and the church were held to have failed to protect the plaintiff from harm. See further Cassidy (2003a).

14 As discussed below, it will be seen that in *Blackwater 2* (2001) 93 BCLR (3d) 228 the court held that Canada had breached its non-delegable statutory duties owed to the children under the *Indian Act*. By contrast, in *Blackwater 4* (2005) 258 DLR (4th) 275 at [49–50] and [54–55] the court concluded that the non-mandatory

pertaining to the Crown's liability for the Aboriginal residential school experience continue to be unresolved.

Within this framework, the article also considers the key Australian decisions,[15] in particular *Cubillo & Gunner v the Commonwealth,* where the plaintiffs' claims against the Crown for vicarious liability and breaches of duty of care were rejected. [16] The issue of non-delegable duties was not, however, addressed in this case. The discussion in this article indicates that the doors for legal redress are not closed to members of the Australian stolen generation. Both O'Loughlin J and the Full Court of the Federal Court in *Cubillo* emphasised that they were only concerned with the particular circumstances of the two plaintiffs/appellants.[17] This is important in light of not only the court's conclusions regarding the circumstances of the plaintiffs' removals and the issue of parental/guardian consent,[18] but also the relevant legislative regimes authorising such removal and detention of the children. As discussed below, the legislative regimes differed from one state/territory to another as to who could exercise the removal power and who 'enjoyed' guardianship or custody, control and care of the removed child. While in *Cubillo* these powers and duties were specifically vested in the relevant directors, under other legislative regimes such was vested in the state, minister, governor or head of department. In such a case, key defences invoked by O'Loughlin J to reject the allegation of Commonwealth liability, such as the independent discretion rule, will not be available. Thus there is still an opening for these matters to be, in a sense, relitigated.

This article also focuses on whether there was a breach of any such alleged duty of care arising out of the Canadian and Australian removal policies. The article discusses whether the substandard conditions in the institutions in which the children were detained and/or removal *per se* of the Aboriginal children from their families was a breach of the Crown's duties.

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nature of the language in the *Indian Act* meant there was no non-delegable statutory duty.

15 The decision in *Kruger v Commonwealth* (1997) 190 CLR 1 is important in the broader context of the legal issues pertaining to the stolen generation in Australia. However, the focus of the claims in that case was the constitutionality of the legislation facilitating the removal and detention of the Aboriginal children and breaches of implied constitution protections, rather than common law and equitable claims and thus is only briefly referred to in this article.

16 *Cubillo 1* [1999] FCA 518; *Cubillo 2* [2000] FCA 1084; *Cubillo 3* [2001] FCA 1213. See further Cassidy (2003b). The article also refers to *Williams v The Minister (No 1)* (1994) 35 NSWLR 497 (*'Williams 1'*); *Williams 2* [1999] NSWSC 843; *Williams v The Minister (No 3)* [2000] Aust Torts Rep 64,136 (*'Williams 3'*).

17 *Cubillo 2* [2000] FCA 1084 at [3]; *Cubillo 3* [2001] FCA 1213 at 10.

18 O'Loughlin J held that Mrs Cubillo had 'failed to establish that she was, at that time, in the care of an adult Aboriginal person (such as Maisie) whose consent to her removal was not obtained': *Cubillo 2* [2000] FCA 1084 at [511]. Equally, with regard to Mr Gunner, the court accepted that Mr Gunner's mother had consented to his removal: *Cubillo 2* [2000] FCA 1084 at [787], [788], [790], [838] and [1133]. See further Cassidy (2003b).

This is potentially important in both jurisdictions, not just Australia, as the plaintiffs in the Canadian cases that have been determined to date were physically and/or sexually abused whilst detained in institutions pursuant to this removal policy.[19] Thus the main focus[20] in those cases has been on whether the assaults constituted actionable breaches.

## Evaluation of the Crown's Vicarious Liability

### *Government involvement in institutions*

While in the Australian case *Cubillo 2*[21] the Commonwealth government was held not to be vicariously liable for alleged breaches by the relevant directors and the staff at the institutions where the plaintiffs were detained, in the Canadian cases *Blackwater 1*[22] and *Mowatt*[23] the plaintiffs' claims for

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19 The importance of the point has diminished in the Canadian context as a consequence of a recently agreed compensation package for those persons who attended Aboriginal residential schools. On 20 November 2005, an 'Agreement in Principle' was entered into between the Canadian government, the Assembly of First Nations and various law firms representing clients through class actions. These class actions included plaintiffs who were not physically or sexually abused whilst detained and thus were claiming damages for the substandard conditions in the schools, loss of language and culture and maternal deprivation. See further Cassidy (2005). Under the terms of the agreement, compensation will be paid to all persons who attended Aboriginal residential schools, not only those who were physically or sexually abused. In turn, the agreement provides for the discontinuance of these class actions. Nevertheless, the agreement does not remove the right to litigate, and thus an individual may still bring a claim if they are unhappy with the extent of the compensation. On 25 April 2006, the Minister of Indian Affairs and Northern Development, Mr Jim Prentice, announced that a final agreement had been reached. Final approval was delayed to some extent by the change in the Canadian federal government.

20 Note in *Blackwater 2* (2001) 93 BCLR (3d) 228 at 273 there were claims of 'linguistic and cultural deprivation'; however, these were not pleaded as a separate cause of action, but rather a particular damage that flowed from the alleged breaches. See *Blackwater 3* (2003) 235 DLR (4th) 60 at [77]. In *Blackwater 3* (2003) 235 DLR (4th) 60 the plaintiffs sought to raise loss of native language and culture as an independent cause of action: *Blackwater 3* (2003) 235 DLR (4th) 60 at [77]. The court asserted that such claims were not connected to the sexual abuse (which was the only cause of action not barred by the statute of limitations) as thus were statute barred: *Blackwater 3* (2003) 235 DLR (4th) 60 at [79–80]. In addition, the court asserted it was too late in the proceedings to introduce a new cause of action: *Blackwater 3* (2003) 235 DLR (4th) 60 at [82].

21 [2000] FCA 1084 at [1122], [1123], [1133] and [1142].

22 (1998) 52 BCLR (3d) 18. This finding was upheld on appeal in *Blackwater 4* (2005) 258 DLR (4th) 275 at [34–38].

23 [1911] 11 WWR 301 at 346.

vicarious liability were upheld.[24] For the reasons outlined below, the preferable approach to the issue of vicarious liability was that adopted by the Canadian courts.

The Commonwealth/state governments were sufficiently involved in the removal of Aboriginal children in Australia and the conduct of the institutions where they were detained to be vicariously liable for the abuses that occurred. The Canadian courts have viewed the conduct of the aboriginal residential schools as a joint venture/partnership between the government and relevant church(es).[25] Such a description is equally apt to the Australian situation. The suggestion to the contrary — namely that the government(s) lacked sufficient involvement in the removal and detention of Aboriginal children — simply ignores the factual and legal reality of the situation. By 1911,[26] the federal government supported a policy of removing part-Aboriginal children from their mothers and placing such children in institutions. That the removal and detention of, in particular, part-Aboriginal children was declared to be a national policy at the first Conference of Commonwealth and State Aboriginal Authorities[27] in 1937 also highlights the role the state and federal governments played in the removal and detention of Aboriginal children. This policy was in turn put into effect through the various legislative Acts and regulations detailed below. This is the case whether the children were removed under race-specific legislation or general welfare legislation. As in Canada, the removal and detention of Aboriginal children could be seen as furthering the 'business' of both the churches and the governments.[28] It furthered the governments' policy of assimilation and the church's 'business' of ministering Aboriginal children to provide them with a Christian education.[29]

The degree of control the government(s) had over the lives of the removed Aboriginal children is also apparent from the fact that in many cases such legislation also extinguished the parents' guardianship of their children, even when such parents or other relatives were alive.[30] Guardianship was

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24 See also *A(TWN) v Canada* (2001) 92 BCLR (3d) 250 which was determined on the basis of the previous finding of liability in *Mowatt.* Thus in that case vicarious liability was admitted by Canada and the Anglican Church of Canada.

25 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [151]; *Blackwater 2* (2001) 93 BCLR (3d) 228 at 246; *Blackwater 4* (2005) 258 DLR (4th) 275 at [38]; *Mowatt* [1999] 11 WWR 301 at 346.

26 *Cubillo 2* [2000] FCA 1084 at [171–172].

27 Quoted in *Cubillo 2* [2000] FCA 1084 at [190]. At the third Conference of Commonwealth and State Aboriginal Authorities in 1951, the policy of assimilation was again affirmed: HREOC (1997), p 12.

28 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [119], [125], [138], [139] and [143]; *Blackwater 4* (2005) 258 DLR (4th) 275 at [34].

29 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [119], [125], [138], [139] and [143].

30 See, for example, *Northern Territory Aboriginals Act 1910* (SA), s 9; *Aborigines Act 1911* (SA), s 10; *Aboriginals Preservation and Protection Act 1939* (Qld), s 18; *Aborigines Act Amendment Act 1911* (WA); *Native Administration Act 1936* (WA).

placed with the government itself[31] or a government official — whether that be the governor, minister, board,[32] department head,[33] chief protector of Aborigines,[34] director[35] or commissioner[36] of natives.[37] Thus, unlike the position in Canada, it was government representatives, not missionaries or school principals, who were accorded the responsibilities and duties that flowed from the ward–guardian relationship. Through guardianship of the removed children, the government had legal power to effectively make any decisions as to the care and custody of the children and thus was responsible for their placement in the subject institutions and the care they should have received whilst detained.

As in the case of the institutions considered in *Cubillo*, the institutions in which the children were placed were often officially designated by the governments as 'Aboriginal institutions'.[38] In the course of his judgment, O'Loughlin J in *Cubillo 2*[39] quotes the then Minister, Sir Paul Hasluck, where he notes that, as a consequence of St Mary's Hostel being a declared Aboriginal institution, the government was responsible for its management. The minister also notes that the institutions operated under a licence issued by the Northern Territory administrator.[40] In turn, the government had supervisory powers over the Aboriginal institutions, requiring that certain standards be met.[41] The court in *Cubillo 2*[42] found that officers of the Native Affairs Branch

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31 See, for example, the *Aborigines Protection (Amendment) Act 1940* (NSW), s 11B. Under this legislation, all Aboriginal children were defined as wards of the state and could be 'placed in a home for the purpose of being maintained, educated and trained'. The relevant institutions were St Mary's Hostel (where the plaintiff Mr Gunner was detained) and the Retta Dixon Home (where the plaintiff Mrs Cubillo was detained).

32 See, for example, *Aborigines Protection (Amendment) Act 1940* (NSW).

33 Cf Buti (2004), pp 61–62 and 158.

34 See, for example, *Aboriginal Ordinance 1918* (Cth); *Aborigines Act 1905* (WA); *Aborigines Act Amendment Act 1911* (WA); *An Ordinance for the Protection, Maintenance and Upbringing of Orphans and other Destitute Children and Aborigines Act 1844* (SA); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA).

35 See, for example, *Aboriginals Preservation and Protection Act 1939* (Qld); *Aboriginals Ordinance 1953* (Cth).

36 See, for example, *Native Administration Act 1936* (WA).

37 Even where actual legal guardianship was not conferred under the terms of the legislation, legislation often nevertheless placed the custody, care and control of the removed child with the government or its instrumentalities See, for example, *Aborigines Act 1897* (WA), under which custody and control of the child were placed with the Aborigines Department.

38 See *Cubillo 1* [1999] FCA 518 at [25–28]; *Cubillo 2* [2000] FCA 1084 at [1], [10], [12], [514], [744] and [1156].

39 [2000] FCA 1084 at [757–58].

40 [2000] FCA 1084 at [758].

41 [2000] FCA 1084 at [330], [333–35], [340–41],[344], [670] and [755–59].

42 [2000] FCA 1084 at [343].

and later the Welfare Branch made periodic visits to both the Retta Dixon Home and St Mary's Hostel, reporting upon matters 'such as the conditions of the institutions, any staffing problems and the health and welfare of the children'. Thus, while the government did not directly employ the lower level staff at 'church' institutions,[43] such staff were supervised in this manner by the government. Moreover, as the court noted in *Cubillo 2*,[44] the government had the power to appoint the superintendent of Aboriginal institutions, such as the Retta Dixon Home or St Mary's Hostel. Institutions such as the Retta Dixon Home were often situated on Aboriginal reserves.[45] This not only indicates how integral the institutions were to government Aboriginal policy, but shows they also provided the government with legal control over who might be permitted to be on the reserve and thus in turn who could staff the institutions.[46]

The respective governments provided substantial funding to the churches for the management of 'church' institutions.[47] Whilst an official federal policy of funding the churches to run these institutions was not formalised until the 1940s,[48] well prior to this date government funding was paid to maintain 'church' schools. However, unlike the position in Canada, it seems that, prior to this shift in funding arrangements, the governments had greater — not lesser — control over the institutions where Aboriginal children were detained. Up to this point, the federal government was reluctant to pass on control of such institutions to the churches.[49] In this regard, it should also be noted that, unlike in Canada, in Australia the churches were not always involved in the conduct of the institutions where Aboriginal children were detained. Thus subject to the 'independent discretion rule' discussed below, when children were placed in state- or federally run 'welfare' or 'Aboriginal' institutions there can be no question that the respective governments were sufficiently involved in the

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43 Cf *Cubillo 2* [2000] FCA 1084 at [344] and [670]. In this regard it should also be noted that, unlike in Canada, in Australia the churches were not always involved in the conduct of the institutions where Aboriginal children were detained. Many institutions were government-run, and in such cases the staff were directly employed by the government.

44 [2000] FCA 1084 at [337] and [670]. This authority was conferred upon the administrator, but exercised through the director. Cf *Cubillo 2* [2000] FCA 1084 at [337] and [670].

45 [2000] FCA 1084 at [332] and [336].

46 Under *Aboriginal Ordinance 1918* (Cth), s 19, only those persons authorised by the director could enter and remain on a reserve. Cf *Cubillo 2* [2000] FCA 1084 at [332], [336], [339] and [344]. This power was exercised to remove a Mr Matthews from the Retta Dixon Home when the director found that he had inflicted excessive corporeal punishment on three boys: *Cubillo 2* [2000] FCA 1084 at [336], [339] and [344].

47 Cf *Cubillo 2* [2000] FCA 1084 at [333–34].

48 Essentially in response to the Chinery Report of 18 January 1940: *Cubillo 2* [2000] FCA 1084 at [196–97] and [202].

49 [2000] FCA 1084 at [181–82]. See also *Cubillo 2* [2000] FCA 1084 at [184].

institutions for the governments to be vicariously liable for the acts of those employed to care for the children.

Nevertheless, even when the institutions had church involvement in their management, as suggested above, the appropriate characterisation of the arrangement with the respective church(es) would be one of a joint venture.[50] Both the church and government were controlling entities.[51] Thus the Australian governments were sufficiently involved in the removal and placement of Aboriginal children in these institutions that they should be vicariously liable for the actions of those involved in the conduct of the institutions, whether or not they were purely government run or involved the churches.

### *Connection between Abuse and Employment*

To place these latter comments in their legal context, once it is concluded that a government(s) is sufficiently involved in the removal and detention of the Aboriginal children, it is also necessary to determine whether the abuse of the children was sufficiently connected with the abuser's employment that the government should be held liable.[52] At this point, focus is placed upon liability for the physical and sexual abuse of the children. The broader issues of liability for the conditions in the institutions and the consequences of removal *per se* are specifically considered below.

In the course of finding that Canada and the United Church were vicariously liable for the sexual assaults committed by the subject dormitory supervisor, Plint,[53] the court in *Blackwater 1*[54] applied two tests: the 'conferral of authority test' and the 'closeness of connection test'. Under the conferral of authority test, it had to be established that there was a sufficient nexus between

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50 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [151]; *Blackwater 2* (2001) 93 BCLR (3d) 228 at 246; *Blackwater 4* (2005) 258 DLR (4th) 275 at [38]; *Mowatt* [1999] 11 WWR 301 at 346.

51 Cf in the Canadian context: *Blackwater 1* (1998) 52 BCLR (3d) 18 at [10]; *Blackwater 4* (2005) 258 DLR (4th) 275 at [34] and [38].

52 Thus in *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia* [2003] BCCA 289 at [54] the court found that the employment duties of the perpetrator, Saxey, had not the 'remotest connection to dealing with the pupils at the school in any supervisory or parental fashion ... Although the present case involves a residential school setting that perhaps would tend to enhance some risk of improper contact between students and staff because everyone was there 24 hours every day, what occurred with respect to the plaintiff, EB, had absolutely no connection to any duty that Saxey was required or authorized to perform on behalf of his employer.' This finding was recently upheld by the Supreme Court of Canada: *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia* (2005) 258 DLR (4th) 385.

53 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [151]. See also *Blackwater 4* (2005) 258 DLR (4th) 275 at [19].

54 (1998) 52 BCLR (3d) 18 at [14] and [22–23], relying on *B(PA) v Curry* (1997) 146 DLR (4th) 72. See also *Blackwater 4* (2005) 258 DLR (4th) 275 at [20].

Plint's duties and his misconduct.[55] This was determined by examining the nature of the power conferred upon Plint and the likelihood that the conferral of power would make probable the very wrong that occurred.[56] Applying this test to the Australian and Canadian contexts, by so removing the children from their families and community and detaining them in institutions where they were often denied any contact with their families,[57] even siblings held at the same institutions,[58] the Australian and Canadian governments had placed the children in a very vulnerable position.[59] By law, the children could not leave the institutions. They were a considerable distance away from their families. It was unlikely that the children would complain to any person in authority about the assaults for a numbers of reasons. The intimacy of the sexual assaults dictated that the children were too ashamed to reveal what had happened to them.[60] There was also a great imbalance of power as the abusers and the rest of the staff at the institutions were white, while the children were not.[61] The institutions were run in such a militaristic manner that the children would be too frightened to complain about their dormitory supervisor(s) who had control over essentially every aspect of their lives.[62] To this end, it is pertinent to note a passage from *B(PA) v Curry*[63] where the court had observed that when 'the appellant conferred the authority of a parent' on a person, it had put that person 'in the place of the most powerful person a child can know — that of a parent upon whom the child is totally dependent'. The courts in *Blackwater 1*[64] and *Mowatt*[65] asserted that these sentiments were equally applicable to the position the dormitory supervisors occupied in the cases before them. It is just as pertinent in the Australian context regarding the staff at the Aboriginal institutions where the children were detained and so often abused.

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55 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [23]. See also *Blackwater 4* (2005) 258 DLR (4th) 275 at [20].

56 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [23]. See also *Blackwater 4* (2005) 258 DLR (4th) 275 at [20].

57 Thus, in both Canada and Australia, parents and relatives were often denied access to their removed children: RCAP 1998 p 365; *A(TWN) v Canada* (2001) 92 BCLR (3d) 250 at 301; Buti (2004), pp 168–70. It was felt that contact with the family would slow down or reverse the assimilation process.

58 *A(TWN) v Canada* (2001) 92 BCLR (3d) 250 at 301. In the Australian context, see the discussion in Buti (2004), p 168.

59 Cf in the Canadian context (*Mowatt* [1999] 11 WWR 301 at 339; *Blackwater 4* (2005) 258 DLR (4th) 275 at [21]) and the Australian context: *Cubillo 2* [2000] FCA 1084 at [1230].

60 *Mowatt* [1999] 11 WWR 301 at 339.

61 *Mowatt* [1999] 11 WWR 301 at 339.

62 *Mowatt* [1999] 11 WWR 301 at 339.

63 (1997) 146 DLR (4th) 72 at 100.

64 (1998) 52 BCLR (3d) 18 at [25].

65 [1999] 11 WWR 301 at 337 and 339.

It is in this factual context that the risk created by the government must be assessed. The court in *Blackwater 1*[66] concluded that the dormitory supervisors had been conferred the authority of a parent over the children, and this conferral of power was sufficiently connected to the wrong. Similarly, in *Mowatt,*[67] the court concluded there was 'a strong connection between the type of risk created by the employment' of Clarke as a dormitory supervisor and the sexual assault of the plaintiff. The religious, militaristic nature of the social structure of St George's, where the children were detained, meant that Clarke had been placed not only in the position of parent, but in a position of absolute control over the children's daily lives and this facilitated his crimes.[68]

As to the closeness of connection test, as virtually all of Plint's assaults occurred in his office or adjoining bedroom, the court in *Blackwater 1*[69] concluded there was a close connection, both temporally and spatially, with his duties as a dormitory supervisor and the acts of wrongdoing. Thus both tests were satisfied on the facts and the defendants were held to be vicariously liable for Plint's acts. Similarly in *Mowatt,*[70] the court found that Clarke had access to the children in the dormitory at all hours and he intimately inspected each boy for cleanliness every night before bedtime. The court consequently concluded that the 'employer could not possibly have given an employee a greater opportunity to abuse children'.[71] The church and Canada were consequently held liable for Clarke's acts.[72]

These conclusions are equally pertinent in the Australian context regarding the staff at the Aboriginal institutions where the children were detained and so often abused.[73] The courts in *Cubillo* accepted that Mr Gunner had been sexually assaulted by one of the missionaries, Constable, and that he had suffered cruel beatings by both Constable and another missionary, Bald.[74] Four other witnesses also gave evidence that, while they were resident at St Mary's Hostel, they were molested by Constable or Bald.[75] Both men were employed at St Mary's Hostel as dormitory supervisors.[76] Constable had

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66 *Blackwater 1* (1998) 52 BCLR (3d) 18 at [24] and [25].

67 [1999] 11 WWR 301 at 339.

68 [1999] 11 WWR 301 at 339.

69 (1998) 52 BCLR (3d) 18 at [26].

70 [1999] 11 WWR 301 at 339.

71 [1999] 11 WWR 301 at 339.

72 [1999] 11 WWR 301 at 340.

73 One in six of the witnesses before the *Bringing Them Home* Inquiry reported being physically assaulted while detained in Aboriginal institutions and one in 10 asserted that they had been sexually abused: Healey (1998), p 19.

74 *Cubillo 1* [1999] FCA 518 at [30]; *Cubillo 2* [2000] FCA 1084 at [14], [60], [348], [864], [879], [882–84], [899–905], [907–08], [941–46], [955], [960], [965], [974], [980], [985], [989–994], [1028], [1034], [1050], [1063], [1066] and [1073]. Note, Mr Constable was charged with, but acquitted of, a sexual assault on an inmate of St Mary's Hostel in August 1964: *Cubillo 2* [2000] FCA 1084 at [946].

75 *Cubillo 2* [2000] FCA 1084 at [14].

76 *Cubillo 2* [2000] FCA 1084 at [864].

access to the children in the dormitory at all hours and it was in their dormitory beds that Mr Gunner and the other boys were sexually assaulted.[77] Moreover, as in *Mowatt,*[78] Constable gave evidence that he too intimately inspected each boy for cleanliness every night before bedtime and washed their penises.[79] Once again, Constable had, through his role as dormitory supervisor at St Mary's Hostel, been placed in a position whereby he could not only physically assault the boys, but also was provided with the opportunity to sexually assault them. Through the removal of the children from their families and their detention in these Aboriginal institutions where their abusers had effectively unsupervised access to, and control over, the boys, the Commonwealth had placed the children at great risk from the abuse that occurred.

In regard to the other plaintiff, Mrs Cubillo, the abuser, Mr Walter, had been placed in a position at the Retta Dixon Home whereby he could physically assault the children. Mr Walter was placed in charge of the boys' dormitory.[80] Mrs Cubillo and other witnesses gave evidence as to the brutal beatings Mr Walter and other staff at the Retta Dixon Home had inflicted upon them.[81] Thus his inappropriate conduct towards Mrs Cubillo[82] and vicious assault of her[83] were again sufficiently connected with his position at the Aboriginal institution. It is perhaps relevant in identifying the connection between the assaults and Walter's position at the Retta Dixon Home that Walter and another staff member, Matthews, had a known propensity for beating the children. Incidents had been reported to the Native Affairs Branch,[84] yet no disciplinary measures were brought against Walter.[85] Thus he was not only provided an opportunity to assault the children through his position, but was allowed to continue in that position even when the assaults were revealed. The Commonwealth should have been held vicariously liable for its failure, through the Department of Native Affairs, to prevent such assaults occurring. This accords with the finding of the Human Rights and Equal Opportunity Commission that by allowing the Aboriginal children to be

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77 *Cubillo 2* [2000] FCA 1084 at [899–902], [944], [965–66], [974], [980] and [985].

78 [1999] 11 WWR 301 at [339].

79 *Cubillo 2* [2000] FCA 1084 at [907–08] and [989–94].

80 *Cubillo 2* [2000] FCA 1084 at [661].

81 *Cubillo 2* [2000] FCA 1084 at [10], [11], [30], [581]-[582], [677], [678], [682], [687], [705], [729] and [1156].

82 The court found that Mr Walter had acted improperly by placing his hand on the upper part of her leg when they were alone in a car, causing her to cry: *Cubillo 2* [2000] FCA 1084 at [677], [687] and [729].

83 *Cubillo 2* [2000] FCA 1084 at [10], [11], [30], [677], [678], [680–82], [687], [705], [729] and [1156].

84 *Cubillo 2* [2000] FCA 1084 at [664], [668], [669], [671], [672] and [674]; *Cubillo 3* [2001] FCA 1213 at [126–29], [333] and [382].

85 Unlike Mr Matthews, who was removed from the Retta Dixon Home by the Director of Native Affairs, Mr Walter was not disciplined, much less removed. Cf *Cubillo 2* [2000] FCA 1084 at [673].

so harmed and abused the relevant government institutions had breached their 'legal duty to look after [the children] properly'.[86]

The court in *Blackwater 4*[87] noted that such vicariously liability may extend to wrongful acts that are contrary to the employer's desires. 'Having created or enhanced the risk of the wrongful conduct' it is appropriate that the employer be liable as this promotes deterrence while providing the injured with an adequate remedy.[88]

The leading Australian authority on this point is the relatively recent High Court of Australia decision *New South Wales v Lepore.*[89] The High Court, Callinan J[90] dissenting, held that a defendant could be vicariously liable for such acts as long as there was a sufficiently close connection between the criminal act and what the person was employed to do. Kirby J adopted the approach in the Canadian decision *Bazley v Curry*,[91] asserting that vicarious liability should be imposed for even deliberate criminal acts where the defendant had materially increased the risk of such a deliberate criminal act. In the Aboriginal residential school cases, the governments placed the children in a very vulnerable position where there was a high risk of abuse. [92] Moreover, if the 'sufficiently connected' test was applied, the assaults on the children were sufficiently connected with the role of the dormitory supervisors.

Gummow and Hayne JJ in *New South Wales v Lepore,*[93] when applying the 'sufficiently connected' test, asserted that vicarious liability for intentional acts would only arise where the act was done in the intended or ostensible pursuit of a contract of employment.[94] On the facts of the case before them, they asserted that the sexual assault by a school teacher could not be viewed as an unintended by-product of the teacher's work or something they had ostensible authority to commit. Three points can be made in regard to this comment in the context of the Aboriginal residential school cases. First, factually *New South Wales v Lepore*[95] is distinguishable. In the Aboriginal residential school cases, the assaults were at times ostensibly in the course of the dormitory supervisors completing their employment duties. The abusers in both *Mowatt,*[96] and *Cubillo 2*[97] asserted that they were ensuring the personal

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86 HREOC (1997) p 28.

87 (2005) 258 DLR (4th) 275 at [20], following *Bazley v Curry* [1999] 2 SCR 534.

88 (2005) 258 DLR (4th) 275 at [20].

89 [2003] HCA 4. Factually the case involved the sexual assault of students by school teachers whilst at school.

90 Callinan J thought it would be unreasonable to impose liability in those circumstances.

91 [1999] 2 SCR 534.

92 Cf in the Canadian context (*Mowatt* [1999] 11 WWR 301 at 339; *Blackwater 4* (2005) 258 DLR (4th) 275 at [21]) and the Australian context: *Cubillo 2* [2000] FCA 1084 at [1230].

93 [2003] HCA 4.

94 Following *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

95 [2003] HCA 4.

96 [1999] 11 WWR 301 at [339].

hygiene of the boys in accordance with their employment responsibilities when they washed their penises. In regard to *Cubillo 2*,[98] there were other cases of sexual assault by Constable that he justified on the basis of a health problem the particular child was suffering.[99] Similarly, Walter's assaults of the children were purportedly disciplinary measures undertaken in the course of his responsibilities.[100] Walter asserted that he was requested by the female missionaries to inflict corporal punishment upon the female children at Retta Dixon Home.[101]

Second, as Gaudron J noted, ostensible authority is a species of estoppel and thus the defendant is estopped from denying vicarious liability where there is, as in the Aboriginal residential school cases, a close connection between the assaults and what the person was employed to do. Finally, it is contended that the preferable approach is that of Gleeson CJ. He asserted that there may be a sufficient connection between a sexual assault and employment when the nature of the employment created an intimacy that allowed for such abuse. As indicated above, the role of the dormitory supervisors created such an environment prone for abuse.[102] Thus Gleeson CJ appropriately concluded that a defendant could be vicariously liable for unauthorised acts as long as they were sufficiently connected with an authorised act.[103] For the reasons given, the assaults in the Aboriginal residential school cases had the requisite connection with an authorised act.

### *Independent Discretion Rule and Non-delegable Duties*

A key aspect of O'Loughlin J's denial of any vicarious liability on the part of the Commonwealth in *Cubillo 2* was the 'independent discretion rule'.[104] Under this rule, the Crown is not vicariously liable for the acts of its employees/officials where they have an independent discretion in the exercise of their duties.[105] Thus O'Loughlin J believed that the relevant statutory regimes granted the directors an independent discretion as to whether an Aboriginal child should be removed from his/her family and placed in care.[106]

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97 [2000] FCA 1084 at [907–08] and [991–94].

98 [2000] FCA 1084 at [988–90].

99 [2000] FCA 1084 at [988–90].

100 [2000] FCA 1084 at [662–63] and [683].

101 [2000] FCA 1084 at [662].

102 Cf *Mowatt* [1999] 11 WWR 301 at 339.

103 [2003] HCA 4 at [42], following *Lister v Hesley Hall Ltd* [2001] 2 WLR 1311.

104 [2000] FCA 1084 at [1122], [1123] and [1133].

105 See, for example, *Tobin v Queen* (1864) 143 ER 1148; *Stanbury v Exeter Corporation* [1905] 2 KB 838; *Enever v R* (1906) 3 CLR 969; *Fowles v Eastern & Australian Steamship Co Ltd* [1916] 2 AC 556; *Musgrave v The Commonwealth* (1937) 57 CLR 514; *Field v Nott* (1939) 62 CLR 660; *Little v Commonwealth* (1947) 75 CLR 94; *Oceania Crest Shipping Co v Pilar Harbour Services Pty Ltd* (1986) 160 CLR 626; *Jobling v Blacktown Municipal Council* [1969] 1 NSWLR 129; *Grimwade v Victoria* [1997] Aust Torts Reports 81-422.

106 [2000] FCA 1084 at, [1125–26], [1129–30] and [1132].

For example, under *Aboriginals Ordinance* 1918, s 6 the Director of Native Affairs was authorised to undertake the care, custody and control of a part-Aboriginal child if, in the Director's opinion, it was necessary or desirable in the interests of the child. It was O'Loughlin J's view that the Director(s) had an independent discretion to determine whether it was in the best interests of the child that they be removed from his/her family and detained in an Aboriginal institution. The court asserted that this power could be exercised 'almost without restraint.'[107] There was no need for a court order. O'Loughlin J also viewed the matter as not being subject to review by the administrator, relevant minister or the Commonwealth.[108] The 'independent discretion rule' consequently prevented the Commonwealth being vicariously liable for any breach of the duties by the directors within the statutory frameworks.[109]

There are a number of points than can be made in regard to O'Loughlin J's application of the 'independent discretion rule', and in particular its applicability to the broader factual circumstances of the stolen generation. First, the relevant legislation did not always authorise the removal of Aboriginal children by, or place the guardianship of the Aboriginal child with, a person who might exercise such an independent discretion. Authority to remove a child was often placed with the state itself, administrator,[110] governor[111] or relevant minister,[112] and thus the 'independent discretion rule' could not apply in such cases. Moreover, at times the removal was effected by a head of department. As that person would have been subject to the control and supervision of the relevant minister in such a case, the defence of the 'independent discretion rule' could not be invoked.

Second, it has also been suggested that the 'independent discretion rule' will not protect the Crown from liability where the director acted *ultra vires*.[113] Thus, where children should not have been removed from their families as such a removal was not in the child's best interests, the purported exercise of statutory removal powers would be *ultra vires*. It will be suggested below that the best interests of the child were not the primary concern underlying the removal of Aboriginal children from their families; rather, it was spurred by the furtherance of a government policy of assimilation. Moreover, even during the relevant period, there was significant understanding of the damage that would stem from maternal deprivation consequent to such removals. These matters are discussed in detail below.

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107 [2000] FCA 1084 at [144].

108 [2000] FCA 1084 at [1122].

109 [2000] FCA 1084 at [1123].

110 *Welfare Ordinance* 1953 (Cth).

111 *Aborigines Protection Act 1869* (Vic); *Aborigines Regulation 1899* (Vic).

112 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Protection of Aboriginals and Restriction of the Sale of Opium Amendment Act 1934* (Qld); *Aborigines Welfare Ordinance 1954* (Cth). See also, for example, the newspaper clipping reproduced in HREOC (1997), p 19.

113 Buti (2004), p 172.

Third, the 'independent discretion rule' is based on the notion that the subject official is not exercising delegated authority, but rather original authority.[114] The authority exercised by the directors in *Cubillo* was delegated in the sense that it flowed from a higher 'chain of command'. In fact, it is contended that the Crown's responsibilities to the removed children should be seen as non-delegable. Those overseeing the removal and detention of Aboriginal children should be seen as acting in the context of the highest non-delegable duties and thus the removal of the plaintiffs from their families should not have been characterised by the court in *Cubillo 2* as exercises of original authority.[115]

In *Blackwater 2,*[116] the court held that the statutory duties owed by the Crown to the removed children under the *Indian Act 1951* were non-delegable and thus no defence could be alleged on the Crown's part when the duties were not fulfilled. The court noted that, under the *Indian Act*, Canada had 'control over virtually every aspect of the lives of Indians', including schooling, and the pervasive nature of such control was not consistent with a delegable statutory duty.[117] As the court explained, this did not mean that the contracts between the churches and the government were contrary to statute, but rather that the Crown's duty had not been 'vacated' through such contracts.[118] The *Indian Act* imposed a 'very high standard of care' on Canada because, under the provisions of the *Indian Act*, the government had been given 'virtual absolute control over the lives of native peoples'.[119] The government had failed to discharge this duty of care.[120] The court also found that, as Canada was the

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114 *Cubillo 2* [2000] FCA 1084 at [1089].

115 In Australia, schools and like organisations have provided key examples of the factual scenarios where non-delegable duties have been held to arise. See *Commonwealth v Introvigne* (1982) 150 CLR 258; *New South Wales v Lepore* [2003] HCA 4. Thus in *New South Wales v Lepore* [2003] HCA 4 Gaudron J noted that such organisations have a non-delegable duty to take reasonable steps to ensure abuse of the children did not occur. The argument for the imposition of non-delegable duties is even stronger in the context of the Aboriginal residential schools where the children had also been removed from their families and detained in the organisations.

116 (2001) 93 BCLR (3d) 228 at 275.

117 (2001) 93 BCLR (3d) 228 at 275. See also the church's submissions in *Blackwater 4* (2005) 258 DLR (4th) 275 at [51].

118 (2001) 93 BCLR (3d) 228 at 275.

119 (2001) 93 BCLR (3d) 228 at 275. In *Blackwater 4* (2005) 258 DLR (4th) 275 at [51] the court was dismissive of this basis for finding a non-delegable duty, asserting in essence that regard could only be had to the 'strict language of the statute'. In that regard the court concluded that the use of the permissive term 'may', rather than 'shall', in the *Indian Act* indicated there was no non-delegable duty: *Blackwater 4* (2005) 258 DLR (4th) 275 at [49–50].

120 (2001) 93 BCLR (3d) 228 at 275.

plaintiffs' guardian, Canada owed a 'duty of special diligence' which had not been discharged.[121]

Once again, strong parallels can be drawn with the reasoning in *Blackwater 2*[122] and the factual/statutory basis of the Australian cases. As the plaintiffs submitted in *Cubillo 2*,[123] the 'vast powers' under the *Aboriginals Ordinance 1918* (Cth) and *Welfare Ordinance 1953* (Cth) allowed the government to control virtually all aspects of an Aboriginal person's life, and in particular specifically authorised the removal and detention of part-Aboriginal children. This is equally applicable to the legislative regime considered in the *Williams case,*[124] namely the *Aborigines Protection Act 1909* (NSW). As the plaintiffs submitted in *Cubillo 2*,[125] 'legislation restricted the rights of Aboriginal people in many fundamental areas such as their freedom of movement and association, their right to marry, to work and to deal with property'. Thus, as Clarke notes,[126] for the plaintiffs' families to have visited them whilst they were inmates at these religious institutions, they would have needed a permit to leave the reserve where they lived, another permit to enter the town where the children were held, and a further permit to enter the relevant institution.[127] Clarke also notes[128] that 'town districts' which included Darwin and, in time, Alice Springs, where the plaintiffs in *Cubillo* were held, were 'prohibited areas.'[129]

Such statutes also rigidly controlled the employment of Aboriginal adults and children. Aboriginal persons could be employed for less than the minimum wage — part of their wages being taken by, for example, the 'local guardian' or the protector of Aborigines to be held on trust.[130] In some cases — for example, under the *Aborigines Protection Act Regulation 1915* (NSW) — all Aboriginal persons were required to do a 'reasonable amount of work' or rations would be refused.

As Mr Gunner's circumstances evidence, wards[131] and other children[132] may be similarly placed 'in training'[133] or employment. Similarly, under the

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121 (2001) 93 BCLR (3d) 228 at 275. This point was not addressed by the court in *Blackwater 4* (2005) 258 DLR (4th) 275.

122 (2001) 93 BCLR (3d) 228 at 275.

123 [2000] FCA 1084 at [1298].

124 (1994) 35 NSWLR 497; [1999] NSWSC 843; [2000] Aust Torts Rep 64,136.

125 [2000] FCA 1084 at [1298].

126 [2000] FCA 1084 at 223 fn 24.

127 See *Aboriginals Ordinance* 1918 s 16 and *Welfare Ordinance*1953 ss 17, 20 and 47.

128 Clarke (2001), p 223.

129 See *Aboriginals Ordinance 1918*, s 11 and *Welfare Ordinance 1953*, ss 55–60.

130 See, for example, *Aborigines Protection Regulations 1871* (Vic).

131 See *Aboriginals Ordinance 1918* and *Wards Employment Ordinance 1953*, reg 11 and ss 15, 25–31 and 38.

132 See, for example, *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *An Ordinance for the Protection, Maintenance and Upbringing of Orphans and other Destitute Children and Aborigines Act 1844* (SA); *Northern Territory*

legislation considered in the *Williams case,*[134] the *Aborigines Protection Act 1909* (NSW), the Board for the Protection of Aborigines was authorised to apprentice 'the child of any Aborigine or the neglected child of any person apparently having an admixture of Aboriginal blood in his vein'. Typically, the child's wages were to be held by a government board[135] until the child reached the age of 21 years. In the cases of both Aboriginal adults and children in employment, often such funds were never paid and in certain cases were ultimately expropriated by the government.[136] These are but a few of the constraints that were imposed upon Aboriginal persons under the relevant legislative regimes.[137] Once again, the 'pervasive nature of such control was not consistent with a delegable statutory duty'.[138]

As to the second aspect of the reasoning in *Blackwater 2,*[139] namely that with guardianship came a 'duty of special diligence', under *Aboriginals Ordinance 1918*, s 7 and *Welfare Ordinance 1953,* s 24[140] the directors were the legal guardians of the plaintiffs in *Cubillo*. Similarly, in regard to the *Williams case,*[141] under the *Aborigines Protection Amending Act 1915* (NSW) the board was the legal guardian of the plaintiff. This again placed the children in a position of 'inequality' and 'vulnerability' with regard to the government, and thus the government was bound to 'act in their interests'.[142] By placing legal guardianship of the children with a government officer, it is contended that the Crown assumed a 'duty of special diligence' responsibility which could not be delegated away.

As indicated in *Blackwater 2,*[143] the non-delegable nature of the Crown's duties is important, as it cannot be 'vacated' by asserting that the responsibilities had been delegated to a third party. The non-delegable nature of the Crown's duties is also important in the context of vicarious liability, as Crown liability for breaches of non-delegable duties — while not quite absolute[144] — cannot be defeated by otherwise available defences[145] to

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*Aboriginals Act 1910* (SA); *Aboriginals Preservation and Protection Act 1939* (Qld).

133 See, for example, *Aboriginals Ordinance 1918* (Cth); *Aborigines (Training of Children) Act 1923* (SA); *Wards Employment Ordinance 1953* (Cth)

134 (1994) 35 NSWLR 497; [1999] NSWSC 843; [2000] Aust Torts Rep 64,136.

135 For example, the Aborigines Welfare Board: *Aborigines Protection (Amendment) Act 1940* (NSW).

136 See further Falk (2005).

137 See further Clarke (2001), pp 223 and 224.

138 *Blackwater 2* (2001) 93 BCLR (3d) 228 at 275.

139 (2001) 93 BCLR (3d) 228 at 275.

140 Cf *Cubillo 3* [2001] FCA 1213 at [452].

141 (1994) 35 NSWLR 497; [1999] NSWSC 843; [2000] Aust Torts Rep 64,136.

142 *Cubillo 2* [2000] FCA 1084 at [1287] and [1276].

143 (2001) 93 BCLR (3d) 228 at 275.

144 *New South Wales v Lepore* [2003] HCA 4.

145 Defences such as contributory negligence or voluntary assumption of risk.

vicarious liability.[146] Where the duty is non-delegable, the defendant must see that the duty is fulfilled. Thus the duty requires care be taken to ensure the child, in this context, is properly supervised.[147] As noted above, the Australian and Canadian courts have recognised the Crown's duty to supervise the conduct of the institutions in which the children were detained[148] and that they failed to properly undertake these supervisory duties.[149] The Canadian and Australian governments did not see that the removed children were properly cared for within their non-delegable duties.

While a majority of the Australian High Court has asserted in *New South Wales v Lepore*[150] that a non-delegable duty may not arise in the context of a deliberate act, McHugh J's contrary view[151] is to be preferred for a number of reasons. First, the existence of a duty cannot be determined by the nature of the breach. In the subject context, the Crown is either subject to a non-delegable duty or it is not — the nature of the breach by its agents cannot determine whether that duty existed. Such reasoning would involve the 'tail wagging the dog', as it would require analysis of the nature of the breach, before being able to determine if a duty exists. Second, the essence of the duty stemming from a non-delegable duty is the duty to supervise.[152] Obviously a failure to supervise may facilitate both negligent and deliberate acts.[153] Third, the majority justices in *New South Wales v Lepore*[154] seem to be erroneously placing deliberate acts outside the realm of the law of negligence.[155] As McHugh J in that case correctly notes, intentional acts may still be actionable torts under the law of negligence. As he explains, negligence is the minimum failure for the act to be actionable; it does not exclude worse conduct such as deliberate acts. Fourth, the rationale given by Gummow and Hayne JJ for the view that an intentional act could not breach a non-delegable duty was that a contrary view would

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146 See, for example, *Wilsons and Clyde Coal Co v English* [1938] AC 57 where the court held, in essence, that delegation of a duty was not an answer to claims of breach of that duty.

147 *New South Wales v Lepore* [2003] HCA 4 per McHugh J and per Gummow and Hayne JJ. Gaudron J talks in terms of a positive duty to take care to avoid a foreseeable risk of injury: *New South Wales v Lepore* [2003] HCA 4.

148 In the Australian context see *Cubillo 2* [2000] FCA 1084 at 330,333–35, 340–41, 344 and 670.

149 *Mowatt* [1999] 11 WWR 301 at 356.

150 [2003] HCA 4. Note, this issue was not considered in *Blackwater 4* (2005) 258 DLR (4th) 275.

151 McHugh J believed that a non-delegable duty could be breached through a deliberate act: *New South Wales v Lepore* [2003] HCA 4. Gaudron J also appears to suggest that an intentional breach may breach an non-delegable duty in certain circumstances.

152 See *Dalton v Angus* (1881) 6 App Cas 740.

153 Cf *New South Wales v Lepore* [2003] HCA 4 per McHugh J.

154 [2003] HCA 4.

155 See, in particular, the judgment of Gleeson CJ (with whom Callinan J agreed) in *New South Wales v Lepore* [2003] HCA 4 where the Chief Justice effectively tries to distinguish an intentional tort and an ordinary breach of the duty of care.

leave no room for the vicarious liability principles to operate. With respect, that is the whole point of the non-delegable duty notion — that it limits the ability of the defendant to invoke traditional legal defences to vicarious liability.

The 'independent discretion rule' has been appropriately criticised and consequently statutorily abrogated in certain jurisdictions.[156] The rule has been described as an antiquated principle,[157] inappropriately designed to simply protect the Crown from liability.[158] Such criticism has also been voiced by the judiciary.[159] In agreement with this criticism, it is contended that even the Crown's liability should be determined in accordance with vicarious liability principles, not selective protectionist legal notions.

Finally, and perhaps most importantly, legally and factually it is difficult to maintain that the directors did exercise such an independent discretion. From a legal standpoint, under *Aboriginal Ordinance* 1918 the Department of Native Affairs, and thus the director of native affairs, operated under the Northern Territory administrator. Similarly, under the *Welfare Ordinance 1953*, the Department of Welfare and Director of Welfare operated under the Northern Territory administrator. Moreover, the powers conferred on the directors under the Acts were exercised within the framework of government guidelines dictated by the Minister. O'Loughlin J in *Cubillo 2*[160] acknowledged this 'chain of command', but asserted that it was 'the Director who had to form the opinion that it was necessary or desirable, in the interests of the child, to undertake the care, custody or control of the child. Neither the Administrator, the Minister nor the Commonwealth could tell the Director what to do.'

Three points can be made in response. First, Mr Gunner's removal and detention were effected not only under the *Aboriginals Ordinance 1918* but also the *Welfare Ordinance 1953*.[161] Under the latter legislation, Mr Gunner was committed to the custody of St Mary's Hostel until his 18th birthday in 1966. Under the terms of the *Welfare Ordinance 1953*, such a removal of an Aboriginal child under 14 years from their family could not be effected without the authorisation of the administrator. To this end, it was the Northern Territory administrator, not the director of welfare, who declared Mr Gunner to

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156 This immunity has been completely removed in New South Wales: ALRC (2001) para 22.62. In South Australia (*Acts Interpretation Act 1915* (SA), s 20) and the Australian Capital Territory (*The Interpretation Act 1977* (ACT)) executive immunity from statute has been removed. With regard to Canada, the immunity has been removed in British Columbia (*Interpretation Act 1979*, s 14) and Prince Edward Island (*Interpretation Act 1981*, s 14).

157 Finn and Smith (1992), p 145.

158 Finn (1996), pp 36–37.

159 See *Konrad v Victoria Police* [1999] 91 FCR 95; *Middleton v Western Australia* (1992) 8 WAR 256.

160 [2000] FCA 1084 at [1122].

161 See *Cubillo 2* [2000] FCA 1084 at [155], [789] and [839].

be a ward pursuant to the *Welfare Ordinance 1953*, s 14.[162] Thus, contrary to O'Loughlin J's statement, in Mr Gunner's case it was ultimately the administrator, not the director of welfare, who declared him to be a ward and authorised his detention at St Mary's Hostel.

Second, O'Loughlin J's view belies the factual reality that the removal power was exercised in accordance with a government policy — there was no discretion. The directors were effecting what was at first an unofficial, but ultimately an official, national policy of removing part-Aboriginal children from their families. Documents dating from 1911[163] indicated support at the federal level for the removal of part-Aboriginal children from their families and placing such children in institutions. This policy was in turn formalised at the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra from 21–23 April 1937, where it was resolved in regard to the 'half-caste problem':[164]

> this conference believes that the destiny of the natives of Aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth and it therefore recommends that all efforts be directed to that end. That ... efforts of all State authorities should be directed towards the education of children of mixed Aboriginal blood at white standards, and their subsequent employment under the same conditions as whites with a view to their taking their place in the white community on an equal footing with the whites.

This policy of assimilation was reaffirmed as official policy in both the second and third Conferences of the Commonwealth and State Aboriginal Authorities.[165] A key aspect of this assimilation policy was the removal of Aboriginal children of mixed heritage from their parents and raising them in 'white ways' on missions, and government institutions and foster homes.[166] Thus, while the directors were conferred with wide statutory powers, they were exercised in accordance with government policy.[167] There was no discretion.

Third, and related to this point, O'Loughlin J essentially rejects this view on the basis of his conclusion that there was no policy of indiscriminate removal of part-Aboriginal children from their families.[168] He asserts that part-Aboriginal children were not taken from their families simply on the basis of race, but rather because under Eurocentric welfare notions it was believed to be in the best interests of the children. While *Aboriginal Ordinance 1918*, s 6

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162 See *Cubillo 2* [2000] FCA 1084 at [155], [789] and [839].

163 *Cubillo 2* [2000] FCA 1084 at [170], [171], [200] and [220].

164 Quoted in *Cubillo 2* [2000] FCA 1084 at [190].

165 HREOC (1997), p 12.

166 Buti (2004), p 67. See also HREOC (1997), p 12.

167 See the evidence provided by Milliken, Assistant Director, to this effect: *Cubillo 2* [2000] FCA 1084 at [342].

168 *Cubillo 2* [2000] FCA 1084 at [300]. See also *Cubillo 3* [2001] FCA 1213, Summary at 2.

states that the Director of Native Affairs may remove a part-Aboriginal child from their family if it is necessary or desirable in the interests of the child, it is apparent that race — in particular, mixed heritage — not neglect was the reason why the children were removed.[169] Thus again there was no exercise of discretion. This is clear from the governments' stated view at the first Conference of Commonwealth and State Aboriginal Authorities that part-Aboriginal children were to be removed from their families so they might be assimilated into 'white' society.[170] There was no qualification included in the government policy that the children be neglected.[171]

O'Loughlin J's statement also ignores the fact that the legislative support for the removal of Aboriginal children was race-specific. As in the case of the *Indian Act* in Canada, *Aboriginal Ordinance 1918*, s 6 was, for example, confined to Aboriginal children.[172] Even the *Welfare Ordinance 1953*, which was not expressly confined to persons of Aboriginal heritage, was also race-specific. The power to commit children as wards was confined to persons of Aboriginal heritage, as the legislation excepted from the Act's reach the class of persons entitled to vote.[173] Only Aboriginal persons fell into the class of persons who could be declared wards.[174] This accords with the findings of the HREOC that the reason for removal was Aboriginality.

Moreover, that removals were not based upon parental neglect is supported by the factual backgrounds of the removed children. In both the Canadian[175] and Australian[176] cases, the plaintiffs often described a happy childhood where they were cared for by their immediate or extended families prior to being removed and detained in the institutions. This is highlighted by the fact that, within the one family, lighter skinned children were removed from their families, leaving behind darker coloured siblings.[177] If removals were based on the notion that the children needed to be taken out of their family circumstances for their best interests, why were only some of the children — notably lighter skinned children — removed? It is because apparent mixed heritage was the criteria for removal. Finally, it will be suggested below that, even at the time of the removals, it was known to the governments that removing a child from their mother would cause irreparable damage and thus was not in the best interests of the child.

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169 Healey (1998), p 23.

170 See again the above passage quoted in *Cubillo 2* [2000] FCA 1084 at [190].

171 Healey (1998), p 23.

172 Equally in regard to the *Williams case* (1994) 35 NSWLR 497; [1999] NSWSC 843; [2000] Aust Torts Rep 64,136, the removal power under the *Aborigines Protection Act 1909* (NSW) was confined to Aboriginal children.

173 HREOC (1997), p 646.

174 HREOC (1997), p 646.

175 See, for example, the plaintiffs' evidence in *A(TWN) v Clarke* (2001) 92 BCLR (3d) 250.

176 See *Cubillo 2* [2000] FCA 1084 at [768–69] as to Mr Gunner's home life prior to removal.

177 Healey (1998), p 19.

## Evaluation of Crown's duty of care

There are two aspects to the discussion of the duty of care. First, did the Crown and/or its officers owe the removed and detained children a duty of care? Second, was there a breach of the duty of care? In regard to the first question, in *Cubillo 2* O'Loughlin J held that neither the directors, nor the Commonwealth Crown owed the plaintiffs a duty of care. O'Loughlin J's conclusion was partly[178] based on his assertion that there was no government policy of removing Aboriginal children from their families[179] and that the removal of children was effected by the directors, not the Commonwealth.[180] Effectively, O'Loughlin J said it would be 'unfair' to hold that the Commonwealth owed a duty of care to the children as it had no power of removal, that power being 'enjoyed' by the directors.[181] O'Loughlin J went further and asserted that no duty of care arises from the role of parent/carer.[182] Again, the preferable view is that adopted by the Canadian courts in *Mowatt,*[183] *A(TWN) v Canada*[184] and *Blackwater 2*[185] that there was sufficient proximity on the part of both Canada and the church to find they owed the plaintiffs a duty of care. In *Mowatt,*[186] the court held a duty of care also arose from the guardian–ward relationship and the role of *locus parentis*. Each of these points is discussed in more detail below in the context of O'Loughlin J's reasons.

### *Government Policy of Removing Aboriginal Children*

The issue of O'Loughlin J's statement that there was no government policy of removing Aboriginal children from their families being erroneous has already been dealt with above. It is clear from the above discussion of the history of

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178 O'Loughlin J also asserted that matters of government policy could only rarely be reviewed by the courts: *Cubillo 2* [2000] FCA 1084 at [1222] and [1230]. Note to the contrary that, in *Blackwater 2* (1998) 52 BCLR (3d) 18 at 248, the court held Canada was not immune from the claims of negligence under the doctrine that extends to the government immunity from claims that are based on flawed or inadequate policy. Canada's involvement in the Aboriginal residential schools was held to be operational, not merely a matter of policy. While the court held that Canada's decision to involve itself with the Aboriginal residential schools was clearly one of policy, many of the decisions made to effect that policy were operational: *Blackwater 2* (2001) 93 BCLR (3d) 228 at 247. In particular, the plaintiffs' allegations were held to pertain to decisions that were substantially operational in nature: *Blackwater 2* (2001) 93 BCLR (3d) 228 at 248.

179 [2000] FCA 1084 at [194].

180 [2000] FCA 1084 at [1197], [1198] and [1230].

181 [2000] FCA 1084 at [1197], [1198] and [1230].

182 [2000] FCA 1084 at [1256].

183 [1999] 11 WWR 301.

184 (2001) 92 BCLR (3d) 250 at 255. Note again that this case was determined on the basis of an admission of liability by both Canada and the Anglican Church of Canada on the basis of the findings in *Mowatt.*

185 (2001) 93 BCLR (3d) 228 at 246.

186 [1999] 11 WWR 301 at 347–51.

the stolen children that such a policy existed, first informally[187] and then officially,[188] from the 1937 conference of the Commonwealth and State Aboriginal Authorities.

### *Who Effected the Removals?*

As to the second aspect of O'Loughlin J's statement, that the directors, not the Commonwealth, were vested with the power of removal, this is also based on an erroneous assertion that the directors were acting independently, rather than in pursuance of a government policy. Again, this has been rejected above as the directors were public servants effecting the removals under legislative Acts and in accordance with government policy.

Again, it should also be noted that, under legislative regimes, the specific removal power was not always vested in the directors of native affairs or welfare but rather the government itself, the governor[189] or the relevant minister.[190] In such cases, O'Loughlin J's finding would therefore be distinguishable.

### *Duties of Guardian or Locus Parentis*

As to O'Loughlin J's third point,[191] to the contrary, a duty of care arises from the role of guardian and/or *locus parentis*.[192] In this regard, it should be noted that Abadee J in *Williams 2*[193] also expressed the view that the guardian–ward relationship is not an established fiduciary relationship.[194] Importantly, the Full

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187 As Marchant notes, while in the 1890s the policy may not have been officially stated, there was 'sufficient persistence' for it to be termed a policy: Marchant (1981), p 5.

188 Note again that in *Cubillo 2* [2000] FCA 1084 [170], [200] and [220] the court found that documents dating from 1911 indicated support at the federal level for the removal of part-Aboriginal children from their mothers and placing such children in institutions.

189 *Aborigines Protection Act 1869* (Vic); *Aborigines Regulation 1899* (Vic).

190 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Protection of Aboriginals and Restriction of the Sale of Opium Amendment Act 1934* (Qld); *Aborigines Welfare Ordinance 1954* (Cth). See also, for example, the newspaper clipping reproduced in HREOC (1997), p 19.

191 *Cubillo 2* [2000] FCA 1084 at [1256].

192 Moreover, O'Loughlin J denied that the guardian/ward relationship was an established fiduciary relationship. O'Loughlin J asserted only that it 'may' be a fiduciary relationship: *Cubillo 2* [2000] FCA 1084 at [1290].

193 [1999] NSWSC 843 especially at [721–22].

194 In essence, Abadee J reasoned that given Gibbs CJ and Mason J did not include the guardian–ward relationship in their lists of established fiduciary relationships in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 and 96, it could be concluded that the relationship was not fiduciary in nature *per se*. Neither Gibbs CJ nor Mason J purported that their lists of accepted fiduciary relationships were exhaustive. Each premised their list with the qualifying words 'eg' or 'viz': (1984) 156 CLR 41 at 68 and 96. Moreover, Abadee J makes no reference to the fact that, in the same case, Dawson J does

Court recognised in *Cubillo 3*[195] that, to the contrary, a wealth of authority provides that the guardian–ward relationship is an established fiduciary relationship.[196]

In *Mowatt,*[197] the court found that the government had assumed guardianship of the plaintiff and other Aboriginal children when it exercised its powers under the *Indian Act* to remove them from their homes, isolating them from 'parental input and responsibility' and placing them in Aboriginal residential schools. Canada had then delegated its parental role to the principal of the subject Aboriginal residential school and, in turn, the dormitory supervisors.[198] The court held that Canada was in a position of such proximity that it was reasonably foreseeable that actions of the plaintiff's guardian might likely cause damage to the plaintiff.[199] The size of the institution, in particular the number of children involved, did not serve to negate a relationship of sufficient proximity to create a duty of care.[200] The court also noted as relevant to the existence of this duty of care the magnitude of the risk that had been created by placing the children in the care of strangers, far away from their families and homes.[201]

This reasoning is equally applicable in the Australian context. As noted above, specifically in terms of the *Cubillo* case, under section 7 of the *Aboriginals Ordinance 1918*, the director of native affairs was the legal guardian of every Aboriginal person. Under the *Welfare Ordinance 1953*, the director of welfare was made the legal guardian of all wards. More generally, legislation in Northern Territory, Queensland, South Australia and Western Australia made the chief protector of Aborigines, director/commissioner of native affairs, head of department, minister or governor 'legal guardian of *every* Aboriginal and "half-caste" (narrowly or broadly defined) Aboriginal child'.[202] In other cases, such as legislation relevant to the *Williams case,*[203]

include the guardian–ward relationship in his list of well-established fiduciary relationships: (1984) 156 CLR 41 at 141.

195 [2001] FCA 1213 at [460].

196 *Countess of Bective v FCT* (1932) 47 CLR 417 at 131 at 420–21; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 141; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 411; *Williams 1* (1994) 35 NSWLR 497 at 511; *Paramasivam v Flynn (*1998) 160 ALR 203 at 218; *Clay v Clay* (1999) 20 WAR 427; (2001) 178 ALR 193 at 205; *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 at 555. See also HREOC (1997), pp 259–64.

197 [1999] 11 WWR 301 at 347–49.

198 [1999] 11 WWR 301 at 347.

199 [1999] 11 WWR 301 at 347. See also *Mowatt* [1999] 11 WWR 301 at 348, the court applying *A(C) v C(JW)* (198) 166 DLR (4th) 475 in regard to the duty of care.

200 [1999] 11 WWR 301 at 347–48.

201 [1999] 11 WWR 301 at 349–50.

202 Buti (2004), p 61, emphasis in original. See, for example, *Aborigines Act 1911* (SA), s 10(1).

203 (1994) 35 NSWLR 497; [1999] NSWSC 843; [2000] Aust Torts Rep 64,136.

namely the *Aborigines Protection Amending Act 1915* (NSW), the board was made the legal guardian of Aboriginal children when they were removed from their families for the 'best interests of the child'. Whatever the specifics of the legislative regime, contrary to O'Loughlin J's assertion, these Acts created a government guardianship relationship that gave rise to duties, most broadly a duty of care. In fact, this duty of care was normally explicitly stated in the legislative regime establishing the government guardianship.[204] In the case of Aboriginal children removed from their families, the legislation normally imposed on the government guardian a duty to provide for the 'custody, education and maintenance/care of Aboriginal children'.[205]

Buti, in his text *Separated: Australian Aboriginal Childhood Separations and Guardianship Law*, discusses in detail the duties that arise from guardianship. For our current purposes, it suffices to note that these duties include what Buti describes as the 'necessities of life' duty, 'protection and well-being' duty and 'education, family and cultural heritage' duty.[206] Overlaying these specific duties is the general duty of the guardian to always act in the best interests of the child.[207] That government guardianship gives rise to such duties is supported by a wealth of case law discussed by Buti in his text. These duties are discussed below in the context of whether such duties were breached by the Canadian and Australian governments in effecting their removal policies.

As noted above, the legislative regimes facilitating the removal of Aboriginal children from their families did not always confer full guardianship on government authorities. Instead of legal guardianship, at times custody, care and control of the children was conferred upon the government official.[208] It is in this regard that the court's conclusion in *Mowatt*[209] in regard to the Anglican Church is particularly pertinent. The court in *Mowatt*[210] found that, whilst the church was not the plaintiff's legal guardian, the church had assumed the role of 'moral counsellor and protector'. The church had adopted a role designed to influence the plaintiff's 'life fundamentally, with the expectation of his blind obedience enforced by discipline'.[211] In addition, the court found that by 'placing the dormitory supervisor in close proximity to the children in a closed Anglican environment with the expectation that he would control day-to-day

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204 See, for example, *Aborigines Protection Act 1896* (Vic); *Aborigines Act 1890* (Vic); *Aboriginals Protection and the Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA); *Aboriginals Preservation and Protection Act 1939* (Qld); *Native Welfare Act 1963* (WA).

205 Buti (2004), p 160.

206 Buti (2004), p 160.

207 Buti (2004), p 160.

208 See, for example, *Aborigines Act 1897* (WA) under which custody and control of the child was placed with the Aborigines Department.

209 [1999] 11 WWR 301.

210 [1999] 11 WWR 301 at 350.

211 [1999] 11 WWR 301 at 350. See also *Mowatt* [1999] 11 WWR 301 at 350–51.

moral and religious upbringing', the church 'assumed a duty to act reasonably in the best interest of [the plaintiff] to ensure a proper moral environment and to care for known moral harm that might befall him'.[212] Thus, even where government officials were not conferred full legal guardianship of the Aboriginal children, by taking the children into custody the governments had assumed the role of *in locus parentis*. This in turn imposes the obligations of a parent to ensure for the care and supervision of the child and provide for the necessities of life.[213]

Finally, that the recognition of a duty of care owed to institutionalised children may give rise to potential claims against the government is hardly a reasoned basis for rejecting the existence of a duty of care. Thus the courts' assertions in *Williams 2*[214] and *Williams 3*[215] that for policy reasons the existence of a duty of care owed to institutionalised Aboriginal children should be rejected was inappropriate. A duty of care clearly arises in law from the role of guardian and carer. The courts' concern for 'floodgates' politicises the court's treatment of Mrs Williams' case.

### *Placing the Children at Risk*

Another basis for O'Loughlin J denying the existence of a duty of care in *Cubillo 2* interrelates to the second question: was there was a breach of any such duty of care? O'Loughlin J in *Cubillo 2* acknowledged that the removed children were vulnerable,[216] but asserted that the Commonwealth was not aware of the risk of harm to the children and, absent any awareness of risk, no duty of care arose.[217] Again, this conclusion was based on the finding that the Commonwealth believed the removal of the children was in the best interests of the child.[218] Similarly, in *Blackwater 2*[219] and *Blackwater 4*,[220] the courts ultimately decided that the duty of care had not been breached as the Church and Canada had neither actual nor constructive knowledge of the sexual assaults.

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212 [1999] 11 WWR 301 at 350. Similarly, Kirby P in *Williams 1* (1994) 35 NSWLR 497 at 511 found that the Aboriginal Welfare Board was 'arguably, obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her "custody, maintenance and education"'.

213 Buti (2004), p 160.

214 [1999] NSWSC 843.

215 [2000] Aust Torts Rep 64,136 at 64,176–177. Note that on appeal the plaintiff had essentially abandoned the claim for breach of fiduciary duty: [2000] Aust Torts Rep 64,136 at 64,147.

216 [2000] FCA 1084 at [1230].

217 [2000] FCA 1084 at [1230].

218 [2000] FCA 1084 at [1230].

219 (2001) 93 BCLR (3d) 228 at 256 and 269. With regard to this point, the court held that neither the principal nor any other employee of the school had been told of the assaults prior to Plint being fired: *Blackwater 2* (2001) 93 BCLR (3d) 228 at 256.

220 (2005) 258 DLR (4th) 275 at [17].

Three points can be made in this regard. First, in regard to *Cubillo 2*, as noted above, government reports had detailed the appalling conditions at both the Retta Dixon Home and St Mary's Hostel and the propensity of Mr Walter to assaulting the children.[221] Thus the Full Court in *Cubillo 3*[222] acknowledged that it was difficult to agree with O'Loughlin J's conclusion that there was no evidence that neither the directors nor the Commonwealth knew, or ought to have known, of the assaults. The Full Court asserted that, in light of the relevant reports, 'there may be some difficulty with his finding that there was no evidence that the Commonwealth knew, or ought to have known, that Mr Walter was prone to violence towards children'.[223] The superintendent of the Retta Dixon Home was also aware of Mr Walter's and other missionaries' beatings of the children but refused to act to prevent them, even at times in breach of undertakings given to the Director of Native Affairs.[224]

Similarly, in regard to *Blackwater 2*[225] and *Blackwater 4*,[226] the finding that no employee of the subject Aboriginal residential school had knowledge of the sexual assaults is difficult to accept. Many of the plaintiffs gave evidence that they told the principal and/or other officials that they were being abused by Plint, but were only punished for so doing.[227] There was considerable evidence that persons — in particular, the principal, Andrews — had been told of the assaults, yet the court was either dismissive of the evidence or asserted that the plaintiffs bore the burden of proof and they had failed to prove that specific information about the assaults had been passed on to such persons.[228] Given that the court ultimately in *Blackwater 2*[229] accepted that the plaintiffs and others had tried to report the abuse to Andrews and others, it is difficult to agree with its conclusion that no student, or any other person, had ever reported to Andrews that Plint was abusing the students.[230] The statement in *Blackwater 4*[231] that there was 'no evidence that the possibility of sexual assault was actually brought to the attention of the people in charge of AIRS' is equally peculiar in light of this evidence.

Second, even if the governments in these cases did not have actual knowledge of the breaches of care, they had constructive knowledge (ie the defendants ought to have known) of the assaults and the appalling conditions

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221 See *Cubillo 2* [2000] FCA 1084 at [323], [324], [664], [668], [669], [671], [672] and [674]; *Cubillo 3* [2001] FCA 1213 at 126–29, 333 and 382.

222 [2001] FCA 1213 at 333.

223 [2001] FCA 1213 at 333.

224 See *Cubillo 2* [2000] FCA 1084 at [668].

225 See also the statement of facts and the discussion in *Blackwater 2* (2001) 93 BCLR (3d) 228 at 251–56.

226 (2005) 258 DLR (4th) 275 at [14].

227 (2001) 93 BCLR (3d) 228 at 238 and 251–53.

228 (2001) 93 BCLR (3d) 228 at 252–53 and 256.

229 (2001) 93 BCLR (3d) 228 at 255.

230 (2001) 93 BCLR (3d) 228 at 253 and 256.

231 (2005) 258 DLR (4th) 275 at [14].

in the institutions. In this regard, it is instructive to return to *Mowatt*.[232] The court noted that the church's and Canada's duty of care included ensuring adequate and reasonable supervision of the dormitory supervisors.[233] In determining what was reasonable, the court asserted that the knowledge of the defendants and their ability to act were relevant.[234] However, where the defendants had an ancillary duty to take precautions to protect against risks of which they would have been aware if their responsibilities had been properly performed, this knowledge might be deemed, not just actual.[235] The court therefore held that the principal's knowledge (whether that be actual or constructive) of Clarke's sexual abuses was imputed to Canada and the church.[236]

In turn, the court found that if the principal did not know of the assaults, he ought to have known.[237] The court held that knowledge of Clarke's sexual abuse would have been revealed 'through proper supervision of [Clarke], proper establishment and enforcement of rules disallowing students in staff quarters, and proper observation of general conduct of students at the residence by the administrator in the course of his regular duties ... Clarke's sexual activities continued for eight years with such frequency that it is unreasonable to expect that it would have gone unnoticed with reasonable supervision of his activities in the dormitory.'[238] This constructive knowledge was imputed to the church and Canada.[239]

The imputation of knowledge is equally applicable to the factual scenarios in both *Cubillo* and *Blackwater*. Given the frequency of the physical and sexual assaults[240] in both cases, proper supervision would have revealed the assaults. Thus, in regard to the latter case, even if it is accepted that the principal did not become aware of Plint's sexual misconduct until the time Plint was fired, he ought to have known. In turn, such constructive knowledge should have been imputed to Canada and the church. While the courts in *Blackwater 2*[241] and *Blackwater 4*[242] asserted that the defendants ought not to have known of the sexual assaults as at the time paedophilia was not a matter of which the community was aware, paedophilia is an insidious form of child abuse and child abuse was a matter known to the community at the relevant time.

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232 [1999] 11 WWR 301.

233 [1999] 11 WWR 301 at 350.

234 [1999] 11 WWR 301 at 351. See also *Mowatt* [1999] 11 WWR 301at 351–52.

235 [1999] 11 WWR 301 at 352.

236 [1999] 11 WWR 301 at 353.

237 [1999] 11 WWR 301 at 352.

238 [1999] 11 WWR 301 at 352–53.

239 [1999] 11 WWR 301 at 352–53.

240 There were a number of boys being sexually assaulted by Plint and one plaintiff testified that he was being abused up to three times a week: *Blackwater 2* (2001) 93 BCLR (3d) 228 at 243–44.

241 (2001) 93 BCLR (3d) 228 at 256.

242 (2005) 258 DLR (4th) 275 at [15].

Returning to O'Loughlin J's comment that the Commonwealth was not aware of the risk of harm to the children,[243] it is pertinent to reiterate the comments made above in regard to the risk the government had created.[244] In light of the vulnerability of the removed children[245] and the control exercised by the personnel over every aspect of their lives in the institutions,[246] the government had placed the children in a factually risky environment for abuse. The governments 'could not possibly have given an [abuser] a greater opportunity to abuse children'.[247]

Finally, even at the time of the removals, the risk of harm to children stemming from maternal deprivation was well understood and the courts had long believed that removing children from their families was a matter of last resort.[248] Thus the governments were aware, or ought to have known, that they were placing the children at risk simply by taking them away from their families. This matter is discussed in more detail below.

### *Did the Assaults Constitute a Breach of Duty?*

In regard to the physical and sexual assaults of the removed Aboriginal children,[249] as noted above one of the categories of duties Buti identifies is 'protection and well-being'.[250] Describing such in the context of guardianship, the court in *Weld v Weld*[251] asserts that this 'denotes duties concerning the child *ab extra*; that is, a warding off; the defence, protection and guarding of the child, or his property, from danger, harm or loss that may enure from without'.[252] The guardian is bound to 'protect the child against abuse of any type and to ensure they are not placed in danger'.[253] Thus the failure to prevent the children being physically and sexually abused was a breach of one of the most fundamental duties — 'the duty to protect from harm'.[254] This necessarily

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243 *Cubillo 2* [2000] FCA 1084 at 1230.

244 *Mowatt* [1999] 11 WWR 301 at 339.

245 As found by O'Loughlin J in *Cubillo 2* [2000] FCA 1084 at 1230.

246 Cf *Mowatt* [1999] 11 WWR 301 at 339.

247 *Mowatt* [1999] 11 WWR 301 at 339.

248 *Re Gyngall* [1893] 2 QB 232 at 243; *In re O'Hara* [1900] 2 IR 232 at 239–40; *Mace v Murray* (1955) 92 CLR 370 at 385.

249 Note, of course, that it includes not only the plaintiffs in the cases particularly under discussion, but the many more Aboriginal children who were physically and sexually abused when removed from their families. In this regard, see the evidence before the HREOC (1997) indicating the endemic nature of the abuse of the Aboriginal children.

250 Buti (2004), p 160. Again, overlaying such is the general duty of the guardian to always act in the best interests of the child: Buti (2004), p 160.

251 *Weld v Weld* [1948] SASR 104 at 106–07.

252 Quoted by Buti (2004), p 160.

253 Buti (2004), p 29.

254 Buti (2004), p 162, citing *Weld v Weld* [1948] SASR 104 at 106–07.

involved adequate and reasonable supervision of the dormitory supervisors.[255] Both the governments and the churches breached the duty of care by failing to take reasonable supervisory precautions against physical/sexual abuse by staff[256] at the institutions where the children were detained.[257] Again, this was acknowledged by the HREOC.[258]

Again in the context of guardianship, the courts have recognised that this duty also includes a need for positive action in the sense of assisting in litigation being brought against third parties for breaches of the child's rights.[259] The guardian is duty bound to obtain independent legal advice and instigate litigation on the abused child's behalf.[260] Contrary to this obligation, in *Mowatt*[261] and *A(TWN) v Canada*[262] the courts found the church breached its duties by failing to investigate properly and report Clarke's sexual abuse after it became aware of the abuse and the failed to provide counselling and care to the plaintiffs after the disclosure.

### *Were the conditions at the institutions a breach of duty?*

Two categories of duties that Buti identifies — namely the 'necessities of life' duty and 'protection and well-being' duty — are particularly relevant as to whether the conditions in the institutions where the children were detained constituted a breach.[263] At common law, a guardian has a duty to properly maintain the child.[264] This duty to maintain was in turn entrenched in the government guardianship regimes discussed above.[265] The duty to maintain is,

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255 *Mowatt* [1999] 11 WWR 301 at 350.

256 In the case in *Mowatt*, that is abuse by dormitory supervisors: [1999] 11 WWR 301 at 353.

257 *Mowatt* [1999] 11 WWR 301 at 353.

258 HREOC (1997).

259 *In the Marriage of Newberry* (1977) 27 FLR 246 at 249; *Bennett v Minister of Community Welfare* (1990) Aust Torts Rep 80-210 at 68,090; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 427, cited by Buti (2004), pp 29 and 161.

260 *In the Marriage of Newberry* (1977) 27 FLR 246 at 249; *Bennett v Minister of Community Welfare* (1990) Aust Torts Rep 80-210 at 68,090; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 427, cited by Buti (2004), pp 29 and 161.

261 [1999] 11 WWR 301 at 353.

262 (2001) 92 BCLR (3d) 250 at 280.

263 Buti (2004), p 160. Again overlaying these specific duties is the general duty of the guardian to always act in the best interests of the child: Buti (2004), p 160.

264 *Mathew v Brise* (1887) 51 ER 317 at 318, cited by Buti (2004), p 28.

265 See, for example, *Aborigines (Protection) Act 1869* (Vic); *Aborigines Act 1890* (Vic); *Aboriginals Protection and the Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA); *Aboriginals Preservation and Protection Act 1939* (Qld); *Native Welfare Act 1963* (WA).

of course, interlinked with the duty to protect.[266] Thus the custodian must ensure the 'preservation and care of the child's person, physically, mentally and morally' through the provision of the necessities of life, including accommodation, food and medical treatment.[267] This duty of maintenance was breached given the inadequate living conditions in the institutions.

In the Australian[268] and Canadian[269] stolen generation cases, the courts invoked the principle that the standard of conduct required of the churches and governments must be assessed according to the standard of care prevailing at the time of the offences. Applying this principle, the courts in *Blackwater 2*[270] and *Blackwater 4*[271] rejected the plaintiffs' claims that the Aboriginal residential schools were unreasonably unsafe, asserting they were reasonable in light of the standards of the day and budgetary restraints and the personnel and equipment available. In particular, the court in *Blackwater 2*[272] pointed to glowing reports from the government's inspectors and the district superintendent that asserted the subject school was a 'safe, secure place to work and play and to mature'. In regard to this basis for the court's finding, it is particularly pertinent to note that the RCAP found that such inspection reports were rarely reliable as they often simply duplicated statements provided by school officials.[273]

The finding of fact in *Blackwater 2*[274] simply belies the truth of the standards in the institutions where the children were held, even when compared with acceptable standards of the time. The *RCAP* found the Aboriginal residential schools were based upon 'chronic neglect' that 'forced children to live in conditions and endure levels of care that fell short of acceptable standards'.[275] The buildings were lacking in heating and plumbing and in dire need of maintenance.[276] They were described as 'totally unsuitable and a disgrace to Indian affairs'.[277] The *RCAP* found that, throughout the history of the Aboriginal residential schools, many children were 'ill-fed and

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266 *Weld v Weld* [1948] SASR 104 at 107; *Hewer v Bryant* [1970] 1 QB 357 at 373, cited by Buti (2004), p 28.

267 Buti (2004), p 28.

268 *Cubillo 2* [2000] FCA 1084 at [85] and [109]. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36–37, 53–54, 97 and 158; *Williams 1* (1994) 35 NSWLR 497 at 514, 519 and 520; *Williams 2* [1999] NSWSC 843 at [88] and [92–94].

269 *Blackwater 2* (2001) 93 BCLR (3d) 228 at 249-250.; *Blackwater 4* (2005) 258 DLR (4th) 275 at [13] and [15].

270 (2001) 93 BCLR (3d) 228 at 248.

271 (2005) 258 DLR (4th) 275 at [15].

272 (2001) 93 BCLR (3d) 228 at 269.

273 *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia* (2005) 258 DLR (4th) 385 at [93].

274 (2001) 93 BCLR (3d) 228 at 269.

275 RCAP (1998), p 353.

276 RCAP (1998), p 362.

277 RCAP (1998), p 362.

ill-clothed and turned out into the cold to work', trapped and 'unhappy with a feeling of slavery existing in their minds' and with no escape but in 'thought'.[278] Hunger was 'a permanent reality'.[279] The food was not appropriate in terms of either quantity or quality.[280] The *RCAP* found that these 'conditions constituted the context for the neglect, abuse and death of an incalculable number of children'.[281]

Equally, in Australia, the HREOC found that the conditions in the institutions where the children were placed were often appalling.[282] There were often insufficient resources to properly shelter, clothe and feed the children.[283] Evidence has been provided by removed Aboriginal children of insufficient warm clothing and footwear, and inadequate — including maggot-infested — food.[284] The 1948 *Bateman Report* into Aboriginal affairs in Western Australia noted the general problem of malnutrition and in certain cases unacceptable sanitation and hygiene.[285] Lavatories, bathrooms and laundries were described as 'not only primitive but in some cases disgraceful' and the 'bedding in the children's dormitories was filthy'.[286]

Specifically in the context of the *Cubillo* case, the court found that by 1956 the director of welfare, the Northern Territory administrator and the minister were expressing concerns about the staff and management of St Mary's Hostel.[287] The hostel was found to be inadequately staffed, and the facilities were inadequate and unhygienic. Complaints had been made about the lack of food and clothes provided to the children.[288] Mr Gunner and another witness gave evidence that the children went to the rubbish dump looking for food.[289] As O'Loughlin J noted, the 'amenities and staffing at St Mary's Hostel were considered to be so bad that, at one stage, Mrs Ballagh recommended that the Branch not place any more children in the Hostel'.[290] In regard to the Retta Dixon Home, the court found that in 1956 the director of welfare and the administrator were similarly expressing concerns about the staff and management of this institution.[291] Conditions were 'inadequate and

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278 RCAP (1998), p 358. See also RCAP (1998), p 359.

279 RCAP (1998), p 359.

280 RCAP (1998), p 359.

281 RCAP (1998), p 353.

282 HREOC (1997), p 264. See also HREOC (1997), p 15.

283 HREOC (1997), pp 262–65. See also HREOC (1997), p 15; Healey (1998), p 19.

284 Buti (2004), p 161.

285 *Report on Survey of Native Affairs* (1948), pp 5 and 13, cited by Buti (2004), p 161.

286 *Report on Survey of Native Affairs* (1948), p 13, cited by Buti (2004) p 131.

287 See, for example, *Cubillo 2* [2000] FCA 1084 at [756–59].

288 [2000] FCA 1084 at [796].

289 [2000] FCA 1084 at [878].

290 [2000] FCA 1084 at [343].

291 [2000] FCA 1084 at [556].

unsatisfactory'.[292] Witnesses spoke of always being hungry.[293] The court found that the conditions at the Retta Dixon Home were regarded by both the Department of Native Affairs and the Welfare Department as being unsatisfactory, even according to the standards of the time.[294] This evidences a failure on the part of the governments and the churches to satisfy their duty to properly maintain the children and provide them with the necessities of life so they could live with 'some acceptable level of dignity'.[295]

### *Was Removal of the Children per se a Breach of Duty?*

The final context for this discussion is whether the removal of the Aboriginal children from their families *per se* was a breach of the duty of care. It will be apparent from the above discussion of the *Cubillo* case that a continual thread through O'Loughlin J's judgment is the notion that the removal of the Aboriginal children from their families was not an actionable breach because the government believed they were acting in the best interests of the child.[296] Specifically, in the context of alleged breaches of duty of care, O'Loughlin J in *Cubillo 2* asserted that the Commonwealth was not aware that they were placing the children at risk because the Commonwealth believed that the removal was in the best interests of the child.[297] O'Loughlin J asserted that the mere fact of a part-Aboriginal child being placed in an institution did not mean that child had been wronged because the policy was based on the 'best interests of the child'.[298] Even when the act of removal is adjudged according to the standards of the time,[299] the removal of Aboriginal children from their families was not in the best interests of the children.

As O'Loughlin J acknowledges,[300] the view that the removal of the Aboriginal children from their family was in the child's best interests was not shared by all. As early as the 1940s, 'the importance of affection in a child's normal development and the role played by parental affection in behaviour disorder' had been recognised.[301] In 1951 the *Bowlby Report*[302] to the World

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292 [2000] FCA 1084 at [557].

293 [2000] FCA 1084 at [547].

294 [2000] FCA 1084 at [343].

295 Buti (2004), p 160.

296 See, for example, *Cubillo 2* [2000] FCA 1084 at [503], [511], [1146], [1167], [1264], [1305] and [1538–39].

297 [2000] FCA 1084 at [1230].

298 [2000] FCA 1084 at [5].

299 The relevant period is essentially 1943–70. In the Australian context of the *Cubillo* case, the relevant dates are 1947 (when Mrs Cubillo was removed) and 1956 (when Mr Gunner was removed). In the Canadian context, the plaintiffs were placed in the Aboriginal residential schools during the period 1943–70.

300 *Cubillo 2* [2000] FCA 1084 at [1230].

301 [2000] FCA 1084 at [1455]. See also HREOC (1997) pp 263–65.

302 *Maternal Care and Mental Health* (1951). See also United Nations Department of Social Affairs *Children Deprived of Normal Home Lives* (1952). See further the discussion in Buti (2004), pp 68–69.

Health Organisation, drawing on earlier research,[303] detailed the damaging consequences of maternal deprivation through the placement of children in institutions.[304] The report stresses that a continuous relationship with the child's mother is 'essential for the [child's] mental health'.[305]

Similarly, the courts have long recognised the importance of the family unit to the upbringing and development of the child.[306] Whilst this notion is subject to the overriding principle of the best interests of the child, removing children from their families was considered by the courts as a matter of last resort.[307] Thus the High Court in *Mace v Murray*[308] declared that, just because persons other than the mother believed the child would benefit from being removed from the mother, that did not suffice to justify a separation. Only 'weighty and convincing reasons' would justify an involuntary breaking of that tie.[309]

The view that an Aboriginal child would be better off being raised in 'white' society, no matter how well intentioned, could hardly fall within the 'weighty and convincing reasons' test that could justify forcible separations. As the courts have recognised: 'In retrospect, many would say that the risk of a child suffering mental harm by being kept away from its mother and family was too great to permit even a well-intentioned policy of separation to be implemented.'[310] Hence Dawson J in *Kruger v The Commonwealth*[311] acknowledged that the subject policy of assimilation 'did not promote the welfare of Aboriginals'.

At the relevant times, there was considerable opposition to the policy of removing Aboriginal children from their families, there being an appreciation of the consequent risk of damage to the child. Thus O'Loughlin J in *Cubillo 2* found from his review of the documentary evidence that, even as early as 1911, it was recognised that there 'would probably be an outcry from well

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303 HREOC found that infant anxiety on separation from his/her mother had been scientifically observed as early as 1905: HREOC (1997), p 263

304 *Maternal Care and Mental Health* (1951), p 12. Such placements were considered most likely to effect a complete deprivation because of the way they were conducted so that the child felt that no one cared for him/her in a 'personal way and with whom he may feel secure': *Maternal Care and Mental Health* (1951), p 12.

305 *Maternal Care and Mental Health* (1951), p 11. See further the discussion in HREOC (1997), pp 263–64.

306 *Re Gyngall* [1893] 2 QB 232 at 243; *In re O'Hara* [1900] 2 IR 232 at 239–40; *Mace v Murray* (1955) 92 CLR 370 at 385.

307 *Re Gyngall* [1893] 2 QB 232 at 243; *In re O'Hara* [1900] 2 IR 232 at 239–40.

308 (1955) 92 CLR 370 at 385.

309 (1955) 92 CLR 370 at 385. Such a 'weighty and convincing reason' was the mother's total rejection of the child from the moment of birth: *Mace v Murray* (1955) 92 CLR 370 at 385.

310 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36.

311 (1997) 190 CLR 1.

meaning people about depriving the mother of her child'.[312] O'Loughlin J also documented claims of violations of human rights in the case of certain incidents where part-Aboriginal children were removed from their families in 1949 from Wave Hill[313] and Mulgoa. O'Loughlin J noted that. in the early 1950s. 'growing public opinion ... did not approve of any policy of removing part-Aboriginal children from their families'.[314] In this regard, O'Loughlin J accepted the evidence of Dr McGrath, an historian who noted in regard to 'contemporary attitudes to the policy and practice of removal of part-Aboriginal children in the Northern Territory between 1947 and 1963 ... that there was disquiet and sometimes deep concern about the general policy and practice of removal of Aboriginal children from their families'.[315] Even one of the Commonwealth's witnesses accepted that such forcible removals of part-Aboriginal children 'would have been completely unacceptable to the general community of the Northern Territory at the time'.[316] Thus even contemporaneous thought was not supportive of the removal of Aboriginal children from their families.

As to the claim that part-Aboriginal children were removed from their families for their best interests, as noted above, if that was the impetus for removal, why were darker skinned siblings 'left behind' in their care of their families?[317] Why were only some of the children — notably lighter skinned children — removed?

Moreover, leaving aside the churches' missionary intentions, two alternative reasons for removing part-Aboriginal children from their families and generally regulating the lives of Aboriginal may suggest an even darker side to the Australian governments' removal policy. In enacting the race-specific legislation discussed above, parliamentarians were subjected to pressures from pastoralists and churches for the government to provide a cheap labour source through Aboriginal — in particular, part-Aboriginal — workers. This was facilitated through the subject legislation in three ways.

Removed children were forced to work for the institutions in which they were detained for either no monetary compensation or amounts less than the minimum wage.[318] In the latter case, such funds were supposed to be held on trust for the children until they reached adulthood,[319] but were not ultimately

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312 [2000] FCA 1084 at [267].

313 [2000] FCA 1084 at [228].

314 [2000] FCA 1084 at [220]. See also *Cubillo 2* [2000] FCA 1084 at [212].

315 [2000] FCA 1084 at [232].

316 [2000] FCA 1084 at [213].

317 Healey (1998), p 19.

318 See, for example, *Aborigines Act 1886* (WA); *Apprentices Act 1901* (NSW); *Aborigines Act 1905* (WA); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Protection Act Regulation 1915* (NSW); *Aborigines Protection Amending Act 1915* (NSW); *Aboriginals Ordinance 1918* (Cth); *Aborigines (Training of Children) Act 1923* (SA); *Wards Employment Ordinance 1953* (Cth).

319 For example, the Aborigines Welfare Board: *Aborigines Protection (Amendment) Act 1940* (NSW).

paid to them as required by law. Second, children were not always detained in Aboriginal institutions, but rather were often placed with families to work as unpaid nannies, domestics or farm labourers.[320] This was far from uncommon.[321] The HREOC report, *Bringing Them Home*,[322] includes contemporaneous pictures evidencing the practice of placing children with families as free labour. The report contains a picture of 'Biddy', who in 1887 was a young Aboriginal child of perhaps nine or ten years of age who was nursemaid to the Gordons of Brewon Station, Walgett NSW.[323] The report also includes a newspaper clipping where the then minister for the interior seeks the placements of 'half-caste' and 'quadroon' children into homes.[324] That the children were intended to be unpaid employees, not family members, is apparent from the handwritten comments on the clipping stating that, while the 'scribe' had preference for one particular child, 'as long as they are strong' any child would do.[325] Again the children were not paid for such work — or if they were paid, the amounts were withheld by either the pastoralist employer or a government agency and, again, never paid to the child.[326]

Third, the movement of Aboriginal persons — whether adults or children — on and off reserves and their employment was regulated by the government. This in turn enabled the government[327] to ensure pastoralists and church institutions had a workforce that was paid either no wage[328] or less than the minimum wage.[329] Again, if any such payments were made, they were often not passed on to the Aboriginal employees. For example, in Queensland the wages of Aboriginal workers that were initially held on trust in the Aboriginal Welfare Fund were eventually transferred to the state treasury fund and spent

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320 Healey (1998), p 19. Note in this regard that under the *Aborigines Regulation 1908* (Vic) an orphan 'half-caste' child could only be transferred to an orphanage if they were not required by the station manager where the child lived.

321 See, for example, *Aborigines Protection Act 1886* (Vic); *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *An Ordinance for the Protection, Maintenance and Upbringing of Orphans and other Destitute Children and Aborigines Act 1844* (SA); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Protection Act Regulation 1915* (NSW); *Aborigines Protection (Amendment) Act 1943* (NSW); *Aboriginals Preservation and Protection Act 1939* (Qld).

322 HREOC (1997).

323 HREOC (1997), p 35.

324 HREOC (1997), p 19.

325 HREOC (1997), p 19.

326 Healey (1998), p 19.

327 Note that the author has found no evidence of such concerns promulgating the Canadian removal policy.

328 Thus, under the *Aborigines Protection Act Regulation 1915* (Vic), every 'able bodied' Aboriginal person was required to do a reasonable amount of work as was directed by the manager of the Board for the Protection of Aborigines. The only payment was in the form of rations that would be withheld in the case of a refusal to work: *Aborigines Protection Act Regulation 1915* (Vic).

329 Falk (2005).

by the Queensland government as part of consolidated revenue.[330] The funds were not returned to the Aboriginal employees, even after the revelation of such facts.[331] From the brief discussion of this injustice, it will be apparent that the removal of Aboriginal children from their families and the regulation of their 'training' and employment under the subject race specific legislation may partly be explained by reasons other than best interests of the child.

Another — and equally insidious — impetus for the removal of the children lies with the concerns expressed by pastoralists, who were eager to break the connection Aboriginal peoples had with traditional lands so that pastoral activities might expand into Aboriginal lands and thus promote the economy. Again, this was facilitated through the subject legislation in three ways. First, by removing the Aboriginal children from their family and community, the child's connection with their traditional land could be broken. To this end, it is pertinent to note that today a recognised consequence of the stolen generations is that it has prevented such persons making land rights claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Native Title Act 1993* (Cth).[332]

Second, this was also facilitated through sections of the removal legislation defining, *inter alia,* a 'native' or an 'Aboriginal' person. Legislation at times effectively categorised Aboriginal persons as (i) 'full bloods', (ii) 'half-castes' (iii) 'quadroons' or (iv) 'octoroons'. In turn, the legislation prohibited persons so defined as 'quadroons', 'octoroons' and/or 'half-castes' from residing on Aboriginal reserves.[333] Such legislation effectively dispossessed Aboriginal persons of mixed heritage of their traditional lands.[334]

Finally, specific to the Tasmanian circumstances, the *Cape Barren Island Reserve* legislation[335] was expressly designed to encourage 'half-caste' Aboriginal persons who had been transported to the island to relocate to other parts of Tasmania. In particular, it required occupants to develop and cultivate their lands under the threat of removal from the island.

Thus the displacement of Aboriginal children was not necessarily for their best interests, but rather to break the connection with traditional lands so as to facilitate pastoralist expansion.

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330 See further, Falk (2005).

331 See further, Falk (2005).

332 HREOC (1997), pp 20–21; Healey (1998), pp 12–13 and 34.

333 See *Aborigines Regulation 1916* (Vic); *Aborigines Protection (Amendment) Act 1918* (NSW); *Native Welfare Act Amendment Act 1960* (WA). See also *Cape Barren Island Reserve Act 1912* (Tas).

334 See the discussion in NSW Parliamentary Debates, 9 October 1917, p 1561 regarding the *Aborigines Protection (Amendment) Act 1918* (NSW). As stated in the debates, the amendment was designed to ensure only 'full-blood' Aboriginal persons could remain on aboriginal reserves. The idea behind the amendment was that, through this legislative dispossession of Aboriginal people, in time government expenditure on Aboriginal matters would 'reach vanishing point': quoted by Buti (2004), p 63.

335 See *Cape Barren Island Reserve Act 1912* (Tas); *Cape Barren Island Reserve Act 1945* (Tas).

## Conclusion

The discussion in this article indicates that the doors for legal redress are not closed to members of the Australian stolen generation. Both O'Loughlin J and the Full Court of the Federal Court in the *Cubillo* case emphasised that they were only concerned with the particular circumstances of the two plaintiffs.[336] This is important in light of not only the court's conclusion regarding the circumstances of the plaintiffs' removal and the issue of parental/guardian consent,[337] but also the relevant legislative regimes authorising such removal and detention of the children. As discussed above, the legislative regimes differed from one state/territory to another as to who could exercise the removal power and who 'enjoyed' guardianship or custody, control and care of the removed child. While in *Cubillo* these powers and duties were specifically vested in the relevant directors, under other legislative regimes they were vested in the state, minister, governor or head of department. In such a case, key 'defences' invoked by O'Loughlin J to reject the allegation of Commonwealth liability, such as the 'independent discretion rule', will not be available. Thus there is still an opening for these matters to be, in a sense, relitigated. It must also be reiterated in this regard that the plaintiffs did not include in their actions claims against the directors, the relevant churches/missionary societies or the perpetuators of the abuse inflicted upon them.

The above discussion is equally pertinent in the Canadian jurisdiction for two reasons. First, while the Canadian line of authority discussed above is instructional for the Australian courts, the discussion has revealed some inconsistencies in the Canadian courts' approaches to, *inter alia,* vicarious liability and the duty of care. Thus certain key issues remain unresolved even in Canada. Second, the issues tested in the Canadian courts have largely been confined to whether the failure to protect the children from physical, and in particular sexual, assault was an actionable breach. Judicial comment on whether removal *per se* was a breach of the duty to act in the best interests of the child, discussed above, will have to await further litigation.

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336 *Cubillo 2* [2000] FCA 1084 at [3]; *Cubillo 3* [2001] FCA 1213 at [10].

337 As noted above, O'Loughlin J held that Mrs Cubillo had 'failed to establish that she was, at that time, in the care of an adult Aboriginal person (such as Maisie) whose consent to her removal was not obtained': *Cubillo 2* [2000] FCA 1084 at [511]. Equally, in regard to Mr Gunner, the court accepted that Mr Gunner's mother had consented to his removal: *Cubillo 2* [2000] FCA 1084 at [787], [788], [790], [838] and [1133].

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