
WESTERN AUSTRALIAN FORUM

Removal of Indigenous Children from their Families: The Litigation Path



TONY BUTT[†]

Sir Ronald Wilson's report on the Stolen Generation has drawn attention to the mistreatment of Aboriginal and half-caste children by government authorities from the turn of the century to the mid-1960s. This article considers what legal redress the children – now adults – may have against the State governments and other authorities who forcibly removed them from their families.

FROM the turn of the century until at least the mid to late 1960s, large numbers of Aboriginal children in all States and Territories of Australia were removed from their families to be raised in institutions and by foster parents. The justifications and policy motives behind the practice varied, but 'at its most pernicious the practice was a result of theories such as eugenics and assimilation'.¹ The systematic removal of Aboriginal children from their families received nationwide attention with the tabling in Commonwealth Parliament on 25 May 1997 of the Human Rights and Equal Opportunity Commission ('HREOC') report of the *National Inquiry*

[†] Lecturer in Law, Murdoch University, Western Australia.

1. S Beckett (ed) *The Stolen Generation: A Legal Issues Paper for Lawyers and Other Advisers* (Sydney: Public Interest Advocacy Centre, 1997) 5-6.

into the Separation of Aboriginal Children from their Families (the 'National Inquiry'), entitled *Bringing Them Home*.² In discussing grounds for reparation, *Bringing Them Home* examined issues such as infringement of parental rights, deprivation of liberty, abuse of power and breach of guardianship duties (within which fiduciary duties were considered).³ However, these issues were only canvassed in a general and superficial manner. There was no in-depth analysis of common law actions, and no discussion of possible defences and obstacles to successful litigation.⁴

This paper seeks to redress that deficiency.⁵ The focus of the paper is on breach of fiduciary duty,⁶ the policy/operational distinction under the negligence heading, factual defences, damages, limitation periods and statutory immunity provisions. Only a brief reference will be made to breach of statutory duty, wrongful imprisonment and misfeasance in public office.⁷ But before exploring the common law actions, the author will provide some background information on the history and effects of the policies and practices of forced removal.⁸

BACKGROUND

The practice of removing indigenous children from their families and culture

-
2. HREOC *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: HREOC, 1997).
 3. Ibid, 249-265.
 4. Sir Ronald Wilson, one of the two main Commissioners on the National Inquiry (the other being Mr Mick Dodson), has stated that *Bringing Them Home* is a report looking at moral responsibility, not just strict legal questions: see interviews of R Wilson *PM Programme* (ABC Radio, 1 Aug 1997) and in the *7:30 Report* (ABC Television, 2 Aug 1997).
 5. It should be noted that *Bringing Them Home* supra n 2, 266-313 looks at relevant human rights standards decisions in recommending 'reparations'. Reparations include not only compensation but also restitution, rehabilitation, satisfaction and guarantees of non-repetition.
 6. This cause of action is perceived as the one most likely to succeed in respect to establishing a cause of action and overcoming limitation problems: see P Bately 'The State's Fiduciary Duty to the Stolen Children' (1996) 2 AJHR 177; '*Williams v Minister, Aboriginal Land Rights Act 1983*' (1994) 35 NSWLR 459; S Brewer '*Williams v Minister, Aboriginal Land Rights Act 1983* — A Case Note' in Beckett supra n 1, 36.
 7. The possibility of seeking compensation by arguing that the enabling legislation which allowed for the removal was unconstitutional has been made more remote by the decision in *Kruger v Cth; Bray v Cth* (1997) 146 ALR 126. Thus causes of action based on constitutional grounds will not be discussed here. See T Buti '*Kruger and Bray and the Common Law*' (1977) 4(3) UNSWLJ Forum 15; M Schaefer '*The Stolen Generation: In the Aftermath of Kruger, Bray v The Commonwealth*' (1977) 4(3) UNSWLJ Forum 22.
 8. Whilst this paper has general application throughout Australia, emphasis is placed on the situation in Western Australia.

can be described under the headings of segregation,⁹ biological absorption¹⁰ and assimilation.¹¹ Even though there are differences between these categories the aim was basically the same — to remove ‘half-caste’ children from their families so that they could be taught the ways of white Australia.¹² The ultimate goal was to absorb the half-castes into the white community with the hope that full-blooded Aboriginal people would ‘die out as quickly as possible’.¹³

There was a perception that the ‘pure’ indigenous population was declining and that in time there would be no pure indigenous people left. Indigenous people of mixed descent were, however, throughout most of this period, seen as requiring assimilation into the non-indigenous community. It was thought that the earlier a child was removed from indigenous society, and the more completely the child was isolated from it, the more likely successful assimilation would be.¹⁴

Mr AO Neville, the second Chief Protector of Aborigines in Western Australia, clearly expounded the aim behind the practice of removing indigenous children from their families. In a speech to the first conference of Commonwealth and State Aboriginal Authorities, held in April 1937 at Parliament House, he stated:

The native population is increasing. What is to be the limit? Are we going to have a population of 1 000 000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any Aborigines in Australia...?

[W]e must have charge of the children at the age of six years; it is useless to wait until they are 12 or 13 years of age. *In Western Australia we have power under*

-
9. Segregation, the dominant policy in the early 1900s, sought to separate the Aboriginal population from the non-Aboriginal population. This was often accomplished by placing Aboriginal people in reserves or missions. However, the half-caste children (the fairer skinned children) were considered ‘savable’ and were removed from their Aboriginal families and absorbed into non-Aboriginal culture.
 10. The policy of biological absorption, developed during the 1930s, sought the ‘complete merger of the Aboriginal mixed race population with white Australia’. Haebich writes: ‘Strict State regulations of Aboriginal reproduction to produce progeny with progressively less Aboriginal features, together with social engineering programs involving the wholesale removal of mixed race children, would ensure the breeding out of Aboriginal physical characteristics and cultural practices’: see A Haebich *Submission to the HREOC Inquiry into the Removal of Aboriginal Children* (unpublished: Murdoch Uni, 1996) 4.
 11. In contrast to biological absorption, the policy of assimilation sought a social rather than a racial explanation for indigenous disadvantage. The focus shifted from biological racial explanations to social factors.
 12. Although the focus was on the ‘light skinned’ so-called half-castes, indigenous children of ‘darker complexion’ were also removed.
 13. A Haebich *For Their Own Good* (Perth: UWA Press, 1988) 150.
 14. Aboriginal Legal Service of WA (Inc) *Telling Our Story: A Report on the Removal of Aboriginal Children from their Families in WA* (Perth: ALS (WA), 1995).

*the Act to take any child from its mother at any stage of its life, no matter whether the mother be legally married or not.*¹⁵

All States and the Northern Territory (excepting Tasmania) had passed legislation which allowed the removal of Aboriginal children 'by the order of a public servant alone'. In Tasmania, Aboriginal children were removed under general child welfare legislation.¹⁶ All States and Territories, including Tasmania, had enacted legislation aimed at the management and control of Aboriginal people, especially so in the area of Aboriginal child welfare. Typical of such legislation was the Aborigines Act 1905 (WA).

Section 12 of that Act empowered the Chief Protector of Aborigines to order that any Aborigine be moved from a reserve or district to another reserve or district and be kept there. Many summary offences were created for contravention of the various provisions of the Act and extensive regulation-making powers were conferred on the Governor of Western Australia.

The Parliamentary debates on the Aborigines Bill 1905 (WA) illuminate the intentions and attitudes underlying the prospective Act. The member for Mount Magnet, Mr F Troy, in support of the Bill stated that 'half-castes, if bred with white people, become in some respects almost as expert as the whites' — hence the need for segregation of Aborigines and half-castes from white society.¹⁷

In 1909, police, protectors and justices of the peace were given the power to remove any half-caste child to a mission without the authorisation of the Chief Protector.¹⁸ The guardianship powers created by the 1905 Act were extended by the 1911 amendments so that the Chief Protector had the power of removal 'to the exclusion of the rights of the mother of an illegitimate or half-caste child'.¹⁹

There have been many reports documenting the harms suffered by the children who were removed from their families.²⁰ Professor Raphael²¹ has stated that many

15. AO Neville *Report of the Initial Conference of Commonwealth and State Aboriginal Authorities* (Canberra, April 1937) (emphasis added).

16. HREOC supra n 2, 253-254. For a summary of the relevant removal legislation for all States and Territories: see HREOC supra n 2, 600-648.

17. *Hansard* (Leg Assembly) 13 Dec 1905 (Vol 28) 432.

18. *WA Govt Gazette* 19 Feb 1909, 588.

19. Aborigines Act Amendment Act 1911 (WA) s 3.

20. HREOC supra n 2, 177; E Johnston *Royal Commission into Aboriginal Deaths in Custody: National Report* Vol 2 (Canberra: AGPS, 1991) 111-123, 131-138; HREOC *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (Canberra: AGPS, 1993) 692-704; T Buti *After the Removal: A Submission by the ALS (WA) (Inc) to the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families* (Perth: ALS (WA), 1996) 57-65.

21. At the time, Head of the Psychiatry Dept, University of Queensland and also co-author of a report on Aboriginal mental health: see P Swan & B Raphael *Ways Forward: National*

Aboriginal children who were removed to missions and other institutional and foster care environments have since displayed symptoms and behaviour similar to holocaust victims.²²

In the case of *In the Marriage of B and R*,²³ the Full Court of the Family Court of Australia recognised the devastating effects of placing Aboriginal children in non-Aboriginal environments. Fogarty, Kay and O'Ryan JJ stated that it is now beyond controversy that there has been a

devastating long-term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment.²⁴

The remainder of this article considers what legal redress these Aboriginal and half-caste children may have.

COMMON LAW ACTIONS

1. Levels of decision-making

There are a number of different decisions made in relation to the removal of Aboriginal children from their families which may give rise to a cause of action. These are outlined below.

(i) First level of decision-making

The first level of decision which may be actionable is the decision to remove a child from its family. In circumstances where the removal was without the consent of the family or the child, and against a background where the intention was that the child should be brought up in such a way as to be deprived of what would otherwise be its culture and heritage, a variety of actions are potentially available. In decreasing order of legal plausibility, they include: breach of fiduciary duty; wrongful imprisonment; negligence; breach of constitutional rights; genocide; breach of statutory duty and misfeasance in public office. The decision to remove a child would obviously have been made at the government level, thus these actions would be available only against the State or its officers.

Consultancy Report on Aboriginal and Torres Strait Islander Mental Health Parts 1 & 2 (Canberra: AGPS, 1995).

22. B Raphael 'The Ways Forward' *WA State Mental Health Conference* (Perth, 20 Nov 1995).

23. (1995) 19 Fam LR 594.

24. *Ibid*, 602.

(ii) Second level of decision-making

The next level of decision-making, once a child has been removed from its family, is the decision to deprive the child of access to its family and to deny it Aboriginal identity. With the exception of wrongful imprisonment, each of the causes of action adverted to above in relation to the decision to remove the child would appear to be available. The decisions would generally have been made at a government level. Institutions with a substantial degree of autonomy, such as church missions, would also have made or participated in decisions to deny a particular child's parents access to the child, or attempted to disguise from a particular child its Aboriginal origins. These actions may be available against private institutions as well as against governments.

(iii) Third level of decision-making

The third level of decision-making involves the extent of departmental supervision of the particular institution or particular person with which or with whom a child was placed. Where the institution was a government institution, the relevant government department was clearly responsible for managing the institution. Where the institution was a private one, the power to decide to place the child with a particular person or institution, and the decision to allow the child to continue there, rested with the relevant official or department. To the extent that the treatment of a child, by an institution or person into whose care the child was committed, involved neglect or cruelty,²⁵ the relevant causes of action would be breach of fiduciary duty, breach of statutory duty, negligence and misfeasance in public office. An action of this type would be maintainable only against the State or its officers.²⁶

Broadly speaking, of the different levels of decision-making resulting in the causes of action briefly described above, it is submitted that the first mentioned²⁷ will be hardest to prove as a matter of fact, and hardest to maintain as a matter of

25. Which could include inappropriate separation from parents, excessive and inappropriate discipline, failure to educate and physical and/or sexual and emotional abuse.

26. To the extent that the running of any particular private institution involved neglect or cruelty causing harm to a child, a cause of action in breach of fiduciary duty or negligence would lie against the institution. Other torts, such as assault, may also have been committed. However, as these have excessively short limitation periods and can generally been driven home only to particular individuals against whom redress would often be not worth seeking, they will not be discussed further here.

27. *Supra* p 207: see 1(i).

law, with the difficulty of litigation decreasing as one moves down through the different levels of cause of action. However, a favourable outcome in litigation in relation to one of the earlier mentioned levels will be most useful for the removal class of plaintiff as a whole, as a successful outcome will give rise to a decision with a broader precedent value and a greater possibility of ready application to other potential plaintiffs. In relation to the first and second levels of decision-making, both parents and children may have a cause of action.

BREACH OF STATUTORY DUTY

The breadth of the duty imposed by the various statutes dealing with Aborigines tells most strongly against the existence of a private right of action. For example, section 6 of the Aborigines Act 1905 (WA) and the general duty in section 6(6) to protect against 'injustice, imposition and fraud' is a duty of such breadth that there must inevitably be a failure to perform it from time to time. Such a failure could have resulted either from mere lack of knowledge of any possible injustice or from a mistaken assessment of circumstances. It was in part the breadth of the duty in *X (Minors) v Bedfordshire County Council*²⁸ which led the House of Lords to hold that there was no action for breach of statutory duty available to the plaintiffs.²⁹

The breadth of the duty imposed in relation to Aborigines suggests that it is unlikely that a private right of action was contemplated. Further, the paternalistic nature of the statute makes it more difficult to argue that actions consistent with that paternalistic ethos may give rise to an action for breach of statutory duty.

WRONGFUL IMPRISONMENT

As previously mentioned, the removal of children and their detention in institutions was carried out pursuant to legislation including the Aborigines Act 1905 (WA) and the Native Administration Act 1936 (WA). It is therefore highly unlikely that a successful action for wrongful imprisonment could be pursued.

28. [1995] 3 WLR 152.

29. Generally, in breach of statutory duty, see: *Solomons v R Gertzenstein Ltd* [1954] 2 All ER 625; *Cutler v Wandsworth Stadium Ltd* [1949] 1 All ER 544; *Rodgers v National Coal Board* [1966] 3 All ER 144; *Potts or Riddell v Reid* [1942] 2 All ER 161.

BREACH OF FIDUCIARY DUTY

A fiduciary duty arises where a person or representative ‘undertakes or agrees to act for, or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other in a legal or practical sense’.³⁰ The fact that a beneficiary is vulnerable can be considered to be an element of the fiduciary duty. The relationship is ‘one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary by virtue of his position’.³¹

1. The removal

Looking first at breach of fiduciary duty in relation to the decision to remove as a matter of policy (Level 1(i) above), it is settled law in the United States and Canada that the Crown can owe a fiduciary obligation to indigenous people. However, the fiduciary relationship in these cases appears to arise only in relation to a dealing with property interests.³² The lone exception is *White v Califano*,³³ in which an appellate court found that the United States government had a duty to provide emergency health care for a Sioux woman suffering severe mental illness. In this case the federal government was held liable because it had a general responsibility for the health of Indian people and the power to commit Indians to mental hospitals involuntarily. *White v Califano* has important implications regarding the fiduciary relationship between the Crown and the Aboriginal people of Australia. In Western Australia the Crown had the power to remove Aborigines from a reserve district, and also to remove Aboriginal children from their homes under provisions in the Aborigines Act 1905 (WA). The Crown could therefore be held to be responsible for the health and welfare of Aboriginal people on the principle in *White v Califano*.

In *Frame v Smith*,³⁴ a Canadian case, Wilson J stated that ‘to deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests, would, it seems to me, be arbitrary in the

30. *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, Mason J 96-97.

31. *Ibid*, 97.

32. See particularly *R v Guerin* (1985) 13 DLR (4th) 321; *Cherokee Nation v State of Georgia* 30 US 1.

33. (1978) 581 F (2nd) 697.

34. (1987) 42 DLR (4th) 81.

extreme'.³⁵ He also noted that:

Relationships in which a fiduciary obligation has been imposed seem to possess three characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power;
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.³⁶

Dicta in some isolated cases might be thought to point to a fiduciary duty to preserve the culture and autonomy of indigenous people, but no court in Canada, the United States or Australia has yet found to this effect.³⁷

In *Mabo (No 2)*,³⁸ Brennan J, with whom Mason CJ and McHugh J agreed, briefly mentioned the fiduciary obligation in these terms:

If native title were surrendered to the Crown in expectation of a grant of tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case.³⁹

Deane and Gaudron JJ mentioned the possibility of equitable relief in relation to the denial of common law native title or threats of infringement of that title by an inconsistent grant.⁴⁰ Dawson J found that there was no possibility of any fiduciary obligation, but his view must be read in the light of his dissent in *Mabo (No 2)*⁴¹ coupled with his recognition in the later case of *Western Australia v The Commonwealth*⁴² that the majority result in *Mabo (No 2)* was now the law.

Toohy J undertook a broader analysis of the doctrine of fiduciary obligation. He came to the conclusion that the right of the Crown in Queensland to alienate land the subject of traditional interests, and the corresponding vulnerability of the Meriam people, could give rise to a fiduciary obligation on the part of the Crown.⁴³

35. Ibid, 104.

36. Ibid, 97, quoted in S Dorsett 'Apsassin v The Queen in Right of Canada: Re-examining the Source of the Crown's Fiduciary Obligation to Indigenous Peoples' (1996) 3 ALB 7-8.

37. See: B Slattery 'First Nations and the Constitution' (1992) 71 Can Bar Rev 261.

38. (1992) 175 CLR 1.

39. Ibid, 60.

40. Ibid, 113.

41. Supra n 38.

42. *WA v Cth; Wororra Peoples v WA; Biljabu v WA* (1995) 183 CLR 373.

43. Supra n 36, 203.

He held that if the relationship between the Crown and the Meriam people with respect to traditional title was insufficient to give rise to a fiduciary obligation, such an obligation could arise both from 'the course of dealings by the Queensland government with respect to the islands since annexation ... and the exercise of control over or regulation of the Islanders themselves by *welfare legislation*'.⁴⁴ His Honour's reference to 'welfare legislation' is consistent with the recognition by Mason CJ in *Coe v The Commonwealth*⁴⁵ that in some circumstances a fiduciary relationship may arise out of a representation or an undertaking.

The issue of a fiduciary duty was most recently raised in the case of *Wik Peoples v State of Queensland*.⁴⁶ The argument in this case was that there was a fiduciary duty owed by the Crown to indigenous inhabitants of leased areas. This fiduciary duty was said to arise as a result of the vulnerability of native title, the Crown's power to extinguish it and the position of the indigenous people in relation to the State government. In his judgment, Brennan CJ concluded that these factors alone did not create a 'free-standing fiduciary duty'. He held that for such a duty to arise, an action or function is required the performance of which is capable of affecting the interests of the beneficiary.⁴⁷ Further, it is necessary that the fiduciary act in such a manner as to make it reasonable for the beneficiary to conclude that the fiduciary will act in his or her interests, to the exclusion of any other interests.⁴⁸

In *Wik*, Brennan CJ felt that the sole power exercised by the Crown in regard to the native title interests was the statutory power of alienation. He considered the exercise of the statutory power to be discretionary and therefore it could affect individuals positively or negatively. It follows that it is impossible for a beneficiary to expect that a particular power will necessarily be used in his or her favour. However, Brennan CJ did state that 'a discretionary power — whether statutory or not — conferred on a repository for exercise on behalf of, or for the benefit of, another or others might well have to be exercised by the repository in the manner expected of a fiduciary'.⁴⁹ Although the existence of a fiduciary relationship was ruled out in *Wik*, this does not mean that it cannot be established in the Stolen Generation cases.

Specific statutory provisions such as section 6(3) of the Aborigines Protection Act 1886 (WA) and section 6(3) of the Aborigines Act 1905 (WA) were created

44. Ibid (emphasis added).

45. (1994) 68 ALJR 110, 116.

46. (1996) 141 ALR 129.

47. Ibid, 160. Brennan CJ referred to the case of *Breen v Williams* (1996) 70 ALJR 772, 776.

48. Ibid.

49. Ibid, 161.

'to provide for the custody, maintenance and education of the children of Aborigines'. Under sections 7 and 8 of the Aborigines Act 1905 (WA), a Chief Protector of Aborigines was appointed as the legal guardian of Aboriginal children until they reached the age of 16. Pursuant to section 8 of the Native Administration Act 1936 (WA) the guardianship was extended to the age of 21. In the light of *Wik*,⁵⁰ these provisions fit within the idea that discretionary statutory powers were conferred on a repository for exercise on behalf of, or for the benefit of, Aboriginal children. A fiduciary relationship would arise since the function the Crown was performing involved complete control of the welfare of all Aboriginal children. This clearly affected their interests, and might well have led them to believe that the Crown was acting in their best interests.

One can see an argument that in its assumption and exercise of power with respect to Aboriginal land and Aboriginal people in Western Australia, the Imperial Crown created a relationship of trust and vulnerability between itself and the Aboriginal inhabitants. Section 70 of the Constitution Act 1889 (WA) *might* be regarded as an acknowledgment by the successor to the Imperial Crown in Western Australia of that relationship. This is supported by *Coe*⁵¹ as a representation that the Crown would take care of the welfare of Aboriginal inhabitants. The Aborigines Act 1905 (WA) which repealed, or on one view *purported* to repeal, section 70⁵² might likewise be seen as a representation or acknowledgment of a fiduciary duty. Consistent with section 4 of the Act, the duty can be seen to require the 'preservation and well-being' of Aborigines. The essentially paternalistic nature of the restrictions and conditions governing Aboriginal people under the 1905 Act, and its successors, could be seen in that context as an assumption by the State of the role of guardian in respect of the *whole* of the Aboriginal people, not just the infant members of that group.

In the event that such a duty is held to exist, the decision to remove children from their families — at least in those cases where there is no evidence of any threat to the well-being of the children in their family homes — might well be thought to be contrary to the fiduciary duty to ensure the 'preservation' of the Aboriginal race as a whole. If evidence can be produced to demonstrate the profound distress such action would cause to the parents, the wider family and the children themselves, that action would be demonstrated to be the very opposite of the duty assumed. Further, to the extent that the policy of enforced assimilation was aimed at the disappearance of a distinctive Aboriginal race and culture, one could argue that it was a policy in direct conflict with the duty owed.

50. Supra n 46.

51. Supra n 45.

Potential defences would revolve around the state of knowledge that existed at the time of the particular removal. Such defences would be directed at showing that the removals were not unreasonable in the light of the then state of knowledge. A possible argument might be that the prevailing orthodoxy was that the welfare of both individual Aboriginals and of the Aboriginal people as a whole would best be served by their absorption into white society. These issues may well be resolved differently in different cases depending on the 'contemporary standards' of the period and place in question.

2. After the removal

With respect to the children concerned, once they were removed the relationship between them and the State fell within the classic fiduciary category of guardian and ward.⁵³ That duty, arguably, is imposed on the State. At common law the Crown has jurisdiction, *parens patriae*, over those who are unable to care for themselves.⁵⁴ It would be appropriate to characterise the statutory provisions as providing a bureaucratic framework for the discharge of those responsibilities rather than as creating an independent discretion in the various Protectors. The preambles to the various statutes and the provisions for Ministerial control support this view. In any event, this is the correct view to avoid the immunity provisions in the various statutes which, as discussed below, exempt the officers referred to from personal liability but do not necessarily avoid any liability of the Crown itself.

Institutions or foster parents may also owe a fiduciary duty to children who were placed in their care. This duty may arise under some of the child welfare legislation by which institutions or foster parents were made guardians of the children due to their day-to-day control and responsibility.

Characterisation of the content of the fiduciary duty in these cases is not easy. It has most often been considered in the context of contractual relations between parent and child or guardian and ward. In *Bennett*,⁵⁵ the fiduciary duty apparently would have extended to require the provision of legal advice. In a Canadian case, *M(K) v M(H)*,⁵⁶ La Forest J noted that the 'inherent purpose of the family relationship

52. See *Snowy Judamia v WA* (unreported) WA Sup Ct 23 Jan 1995.

53. *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, McHugh J 426 et seq; *M(K) v M(H)* (1993) 96 DLR (4th) 289, 323-328 (fiduciary duty of parent).

54. *Marion's Case* (1992) 175 CLR 218, 258-259.

55. *Supra* n 53.

56. *Supra* n 53.

imposes certain obligations to act in the child's best interests'.⁵⁷ This view echoes the observation of McTiernan J that the court's *parens patriae* jurisdiction over infants is essentially parental and therefore 'the main consideration to be acted upon in its exercise is the benefit or welfare of the child'.⁵⁸

It may well be that the content of the obligation coincides largely with the duty of care under the 'negligence' heading discussed below. There may also be a positive duty to promote the child's welfare.⁵⁹ However, given the difficulty of deciding what type of discipline, education, etc, is in the best interests of an individual child, public policy considerations are likely to limit the scope of the obligation. Even if the content is co-extensive with the law of negligence, establishing a breach of fiduciary duty may be advantageous when considering questions of limitation.⁶⁰

MISFEASANCE IN PUBLIC OFFICE

Misfeasance is a special public tort whereby public officials may, in certain circumstances, be held liable in damages for abuse of power. This right of action exists independently of torts such as negligence and breach of statutory duty.⁶¹ Both the action said to exist in *Beautesert Shire Council v Smith*⁶² and the tort of misfeasance in public office⁶³ have been effectively ruled out by the decision in *Northern Territory v Mengel*,⁶⁴ in which the High Court overruled *Beautesert*. The Court also considered the limits of the tort of misfeasance in public office and took the view (correctly, it is submitted) that the weight of authority was to the effect that no liability arose unless there was an intention to cause harm or there was an act done deliberately in excess of a statutory power.

57. *M(K) v M(H)* supra n 53, 326.

58. *Carseldine v Dept of Children's Services* (1974) 133 CLR 345, 351 quoting *R v Gyngall* [1893] 2 QB 232, 248.

59. As suggested by Kirby J in *Williams v The Minister, Aboriginal Land Rights Act 1983* supra n 6.

60. See discussion infra p 219-224.

61. SD Hotop *The Principles of Australian Administrative Law* (Sydney: Law Book Co, 1985) 485.

62. (1969) 120 CLR 145. Under the *Beautesert* principle a person can be awarded damages if he or she has suffered harm or loss from the unlawful, intentional and positive acts of another, such as the Chief Protector of Aborigines.

63. Eg *Dunlop v Woollahara MC* [1982] AC 158, 172.

64. (1995) 129 ALR 1.

NEGLIGENCE

When bringing an action in negligence relating to forcible removal, the ordinary principles apply. It must first be determined whether there is a common law duty of care. A duty of care will arise when there is foreseeability of harm and sufficient proximity between the parties to the dispute.⁶⁵ It seems that one must also look to see whether it is just and reasonable to impose a duty of care.⁶⁶ One must then determine whether damage was suffered and whether the damage was itself reasonably foreseeable.

1. Policy/operational distinction

A hurdle which will probably need to be surmounted in establishing a claim in negligence is the so-called policy/operational distinction. This distinction was first recognised in the United Kingdom in *Dorset Yacht v The Home Office*,⁶⁷ and it was subsequently developed through a line of authority discussed in *X (Minors) v Bedfordshire County Council*.⁶⁸

The status of the policy/operational distinction in Australia is not clear.⁶⁹ In *Sutherland Shire Council v Heyman*,⁷⁰ a majority of the High Court referred to and apparently accepted the distinction, although it did not feature in Brennan J's analysis. However, the approaches taken differed substantially. Gibbs CJ took an uncomplicated view:

There [is] no novelty in holding that the ordinary principles of negligence apply to public authorities exercising statutory functions — powers as well as duties. The distinction between the area of policy and the operational area is a logical and convenient one. There is no doubt that a public authority may be liable for the negligent acts of its servants or agents in carrying out their duties, or exercising their powers, within the operational area, although if the performance of their duties or the exercise of their powers involves the exercise of a discretion, an act will not be negligent [if it] was done in good faith in the exercise of, and within the limits of, the discretion.⁷¹

65. See *Anns v Merton London BC* [1978] AC 728; *Sutherland SC v Heyman* (1985) 157 CLR 424; *Murphy v Brentwood DC* [1991] 1 AC 398; *Ramsay v Larsen* (1964) 111 CLR 16; *Jaensch v Coffey* (1984) 155 CLR 549; *Wyong SC v Shirt* (1980) 146 CLR 40; *Bennett v Minister of Community Welfare* supra n 53.

66. See *Sutherland SC v Heyman* *ibid*; *X (Minors) v Bedfordshire CC* supra n 28.

67. [1970] AC 1004.

68. Supra n 28.

69. In the recent decision of *Eskimo Amber Pty Ltd v Pyrenees SC* (unreported) High Ct 23 Jan 1998, the usefulness of this distinction was questioned: see Gaudron J ¶¶ 181-182, Brennan J ¶ 22, Toohey J ¶ 80, McHugh J ¶¶ 107-109, Kirby J ¶¶ 249-254.

70. Supra n 65.

71. *Ibid*, 442.

Mason J seems to have taken a fairly narrow view of policy immunity, suggesting that there could be a sphere of discretion which was not within the concept of 'policy' and which was therefore subject to a duty of care:

This distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.⁷²

Deane J⁷³ thought that liability would 'commonly' be precluded in cases of policy-making power, founding this principle on a presumed legislative intent.⁷⁴

In the case of actions resulting from forcible removal, there are two alternative views based on the English approach in *Dorset Yacht*. First, the plaintiff could argue, at least after the statutory provisions which conferred guardianship on the Commissioner, that there was no discretion simply to do nothing. There was a power to make decisions of a kind which a guardian is able to make. The only choice was between exercising that power by giving positive directions as to what the child should do or exercising the power by refraining from giving directions and, in effect, delegating the decision-making power to the child's parents or to whoever else was in fact exercising those functions. In a sense, the only policy decision had been made by Parliament and all decisions thereafter were operational.⁷⁵

Such an analysis is, however, somewhat artificial. It ignores the practical reality that a 'decision' not to give any specific directions with respect to a particular child could just as easily be caused by ignorance of the child's existence or by inadvertence as by a conscious decision. It also ignores the fact that the mere conferment of powers of guardianship does not require that any particular power be exercised.

It would have been open to the relevant officers merely to leave the children with their parents who were exercising day-to-day de facto control over them.

72. Ibid, 469.

73. Ibid, 500.

74. Presumably subject to being displaced in a particular statutory context.

75. At least until 1963 in Western Australia (eg, when the statutory guardianship was removed and action with respect to individual children again became a matter of discretion. This was amended by the Native Welfare Act 1963 (WA)).

On that view, the decision to remove Aboriginal children generally, or even particular Aboriginal children, from their parents would be an example of a 'pure policy' decision which is outside the realm of tort law. In contrast, decisions as to the child's subsequent placement, and the supervision of those into whose care the child was entrusted, may well be operational decisions and actionable even in this context.

There is more scope for argument, on the analysis of Mason or DeaneJJ, that the decision to remove a particular child was based on some administrative or expert decision and was therefore operational. In the end, much may turn on the evidence.

A further argument which may suggest that the relevant decisions are not to be regarded as policy decisions lies in the reservation which Lord Reid expressed in the *Dorset Yacht*⁷⁶ case about discretions exercised 'so carelessly or unreasonably' that there has been no true exercise of the discretion at all. In the light of knowledge at the particular time, and in the absence of compelling circumstances, it may be argued that the policy decision to remove children from their parents and their culture was highly unreasonable.⁷⁷

DEFENCES

1. The factual defences

A difficulty arises in proving claims of this kind. The ages and details of most children removed, and the placement history of those children, will be available from official records. In other cases, it will be necessary to rely upon childhood memories of circumstances which were no doubt alien and confusing for the children involved, or the memories of adults about the removal of their children in stressful circumstances. In such cases, there is a real risk of insufficiency of evidence, conflicting evidence and of inconsistencies with established facts.

76. Supra n 67.

77. The *Bringing Them Home* report argues that 'the policy of forcible removal of children from indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled "genocidal" in breach of binding international law from at least 11 December 1949': see HREOC supra n 2, 275. Cf *Kruger* and *Bray* supra n 7, Brennan CJ 137, Dawson J 161-162, Toohey J 175, Gaudron J 190, McHugh J 220, Gummow J 230-232. Article II of the *Convention on the Prevention and Punishment of the Crimes of Genocide* defines 'genocide', inter alia, to mean 'any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group, as such ... (e) forcible transferring of children of the group to another group'. See also M Storey '*Kruger v Cth: Does Genocide Require Malice?*' (1997) 4(3) UNSWLJ Forum 11.

Proving harm beyond the actual fact of removal will also be difficult. In many cases it will be difficult to establish the type or extent of the harm suffered or the identity of those who perpetrated it. So far as the decision to remove is concerned, unless there are adequate official records, there may be difficulty in establishing that the reason for removal was something other than a genuine fear for the child's well-being.

As well as simply putting the plaintiffs to proof of all allegations, one can expect defences based on contemporary standards. Arguments will be made based on the then state of knowledge and opinion concerning child-rearing practices, and particularly on any cultural distinctions in child-rearing practices, at the relevant time. It will also be argued that the removal of the children, the degree of supervision given to their subsequent placements, and (at least in some cases) the way in which they were actually treated, was consistent with what was believed on reasonable grounds to be the most appropriate child welfare practices of the time.

2. Limitation periods

(i) Crown Suits Act 1947 (WA)

In *Snowy Judamia v Western Australia*,⁷⁸ Owen J took the view that the provisions of section 6 of the Crown Suits Act 1947 (WA) were a statutory precondition to the right to sue conferred by the Act and that unless notice in accordance with section 6 was given no action of any kind could be brought against the Crown. There are dicta of the Full Court of the Supreme Court in *Western Australia v Watson*⁷⁹ which support that view. However, it should be noted that *Judamia* was appealed to the High Court,⁸⁰ which has now referred the matter back to the Supreme Court of Western Australia for trial. No written decision is available, but the transcript of the High Court proceedings give some indication that a claim for declaratory relief may not be caught by the Crown Suits Act 1947.

One odd feature of this Act is the difference in wording between section 5, on the one hand, and sections 4 and 6, on the other. It may be open to argue that section 5 confers a general right to sue, and to be sued, in any type of action. However, because of the use of the expression 'cause of action' in sub-paragraphs (a) and (b) of section 6(1), the conditions precedent to the bringing of the action

78. Supra n 52.

79. [1990] WAR 248, 316-317.

80. (Unreported) High Ct 1996 no P40.

are intended to govern only those actions in which a 'cause of action', as traditionally understood, arises. If 'cause of action' is understood as the fact, or combination of facts, giving rise to the right to sue,⁸¹ then the argument does not take the interpretation any further. However, it might be worth arguing that section 6 is referring back to the traditional action at common law and not to any suit in equity. Such an interpretation would leave actions based on breach of fiduciary duty untouched. It could be argued that this interpretation makes sense of the different wording in sections 5 and 6. If, however, the Crown Suits Act 1947 applies to *any* action, there are three lines of argument which may assist Stolen Generation litigants to overcome the hurdle of statutory time limits. These are discussed below.

(a) Continuing duty

The first possibility is based on the provisions of section 6 of the Crown Suits Act 1947 (WA) which relate to a continuing act, neglect or default. The characterisation of the fiduciary duty owed to the children has been dealt with earlier. It is not self-evident that a duty of this kind will terminate when the child attains majority. One could argue that the duty, being a fiduciary one, continues until it is discharged.

Based particularly on the Canadian cases, which are extensively summarised in *M (K) v M (H)*,⁸² one could mount this argument in either of two ways. The first is that although the Crown Suits Act 1947 refers to the time when a cause of action accrues, a cause of action in equity does not 'accrue' at the same time as a cause of action at common law. A common law cause of action accrues when all the facts giving rise to it have come into existence, regardless of the state of the potential plaintiff's knowledge. In equity it appears that a fraudulent concealment of the cause of action would prevent the action from accruing until the time of discovery. The reason seems to be that the fiduciary relationship itself carries with it a duty of disclosure.

An alternative argument might be founded on the nature of the fiduciary relationship itself. The inequality of power, and the position of dependence in which the children were placed, did not terminate upon their attaining majority. Although the various native welfare statutes terminated the Commissioner's guardianship when the children reached a particular age, it may be argued that isolating a child from any other appropriate sources of knowledge and support had

81. Eg *DoCarmo v Ford Excavations* (1984) 154 CLR 234.

82. *Supra* n 53.

the effect of prolonging both the child's vulnerability and its dependence upon the power of the relevant welfare officers. It could be argued that this relationship continued *beyond* the statutory guardianship age. The vulnerability would continue until the child, in its later adult life, was able to view its childhood, and the treatment meted out to it by the authorities, in a realistic and objective light. It might be asserted that if equity imposes a fiduciary obligation on a person who undertakes the care and upbringing of a child, then the adoption by the fiduciary of a method of upbringing which prolongs the child's insecurity and dependence, and delays the development of the skills required to function in society,⁸³ may have the effect of prolonging the fiduciary obligation. Some support for this view, albeit in a different context, may be found in the judgment of Deane J in *Hawkins v Clayton*,⁸⁴ where his Honour observed that notions of 'unconscionable reliance' upon the statute of limitations could be called into play where the wrongful act not only caused injury but effectively precluded the bringing of proceedings.

A similar approach, admittedly not as a matter of fiduciary obligation but as a matter of the common law duty of care, seems to have been taken by the High Court in *Bennett v Minister of Community Welfare*.⁸⁵ In that case, a child was injured whilst a ward of State in circumstances where he was entitled to recover damages from the Minister. It was accepted by the Court that the Director of Community Welfare was under a duty to obtain independent legal advice for the ward regarding his right to recover damages. The Director failed to do this and later the action became statute barred. The child then sought damages in relation to the loss caused by the Director's failure to obtain independent legal advice. Mason CJ and Deane and Toohey JJ found that after the injury the Director became subject to a duty of care. This duty was owed to the appellant to avoid his suffering loss and damage arising from the possibility that he might not exercise his entitlement to bring an action for damages in respect of the injury before the action became statute barred. The breach of that duty was itself actionable.⁸⁶ Because of the dates in question, the Court did not need to consider the further question of whether the wardship ended some years prior to the cause of action becoming statute barred. The duty appeared to continue into the child's adult life.

In relation to the Director's duty, McHugh J noted that the distinction between a duty which is broken once and for all on a particular day and a duty which is a

83. Including the ability to make informed decisions about the adult's past upbringing.

84. (1988) 164 CLR 539, 590.

85. *Supra* n 53.

86. This action also became statute barred.

continuing one despite its breach is never easy to draw. However, he found that the duty in this case arose out of the Director's general duty to care for the welfare of the child. This duty was a product of circumstances which occurred during the course of the guardianship. His Honour said:

The better view is that it was a continuing duty to avoid economic loss to the appellant as a result of his injury occurring during the guardianship.... Once the Director became charged with the duty, it continued to bind him until it was performed or discharged. It did not end on the day when the appellant was discharged from the Director's custody and care.⁸⁷

This reasoning would appear to be applicable by analogy to a substantial breach of a fiduciary duty. Such a breach would be characterised as a complete failure to discharge the responsibilities of a guardian thereby rendering the child less capable of becoming an independent, educated and well adjusted adult. That duty, not discharged during the minority of the child, could have been discharged by appropriate remedial steps taken at any time during his or her adult life. Counselling, social support, remedial education and similar measures could have discharged the duty.

(b) Failure to advise of the right to bring an action

It could be argued that the damage, having occurred during the child's minority, created a duty to ensure that the child suffered no further loss from a failure to be made aware of the right to bring an action. This duty to advise of the right to bring an action is a *continuing* duty. However, this argument raises difficult questions of remoteness. Theoretically, if a cause of action becomes statute barred after six years, then the cause of action for 'loss of an action' arises at the end of the six year term. What is not clear is whether the duty to advise as to a possible cause of action becomes on the statute barred date a new duty to advise as to the availability of an action for loss of a cause of action. With respect to removal, the loss was caused by the failure of the relevant welfare authorities to give the appropriate advice on the right to bring an action for damage while the claimant was a minor. However, it becomes a somewhat artificial and remote exercise to then contemplate the possibility, six years later, of a further action for loss of the right to bring that subsequent potential action, and so on. The concept of a continuing fiduciary duty to discharge the protective obligations voluntarily assumed is much more coherent.

87. *Bennett v Minister of Community Welfare* supra n 53, 431.

(c) Discoverability rule

Another approach is to argue that in relation to a limited category of actions, there is a 'discoverability' rule for the accrual of a cause of action. Such an approach, although not precluded by any definitive High Court decision, is inconsistent with the leading English cases and inconsistent with a number of observations of the High Court in *Hawkins v Clayton*.⁸⁸ It would, of course, be of use only to some potential plaintiffs. Others no doubt will have known of the damage caused by their removal from their families for a considerable time. A 'discoverability' rule would mean that a cause of action arises at the time when, viewed objectively, a potential plaintiff *ought* to have become aware, both of the fact that he or she had suffered physical or emotional damage, and of the casual connection between that damage and his or her upbringing. By analogy with the Canadian sexual abuse cases, it is one thing for a child to know what is happening to it, but it is quite another for the child to know that it is the victim of wrongdoing. Indeed, it may be some time before any connection is made between psychological and emotional difficulties or depression and the childhood abuse.

In such cases, one might attempt to argue for a discoverability rule. The most substantial obstacle to this rule is the general acceptance in Australia, particularly in dicta in *Hawkins*, of the 'ordinary rule' that was enunciated by the House of Lords in *Cartledge v E Jopling & Sons*.⁸⁹ This rule states that a cause of action accrues when damage is suffered, irrespective of knowledge. In *Cartledge*, the House of Lords held that plaintiffs who had contracted pneumoconiosis, but who were not aware of it and could not have known it until more than six years had elapsed, had their causes of action statute barred.

Nevertheless, the ruling in *Cartledge* may be distinguishable. In that case the House of Lords seems to have been compelled to reach its conclusion primarily because of the wording of the relevant United Kingdom Act. This Act allowed for an extension of the limitation period in cases of mistake or fraud. Their Lordships thought that the specific provision for mistake or fraud was inconsistent with accrual, as understood in that Act, being equivalent to discoverability. It is interesting to note that the Crown Suits Act 1947 (WA) presently contains no such extension provision and there is nothing in the terms of the Act itself which appears to be inconsistent with discoverability.

In the light of the very statute-specific reasoning in *Cartledge*, and the recent adoption of a discoverability rule in New Zealand in *G v GD Searle*,⁹⁰ it may be

88. Supra n 84.

89. [1963] AC 758.

90. [1995] 1 NZLR 341.

open to argue that a similar rule could be adopted in Australian law. An argument for a discoverability rule would, however, be very much an argument of last resort. It would involve persuading the High Court to take a different approach from that taken hitherto and it would benefit only some of the class of potential plaintiffs.

(ii) Limitation Act 1935 (WA)

Section 47A of the Limitation Act 1935 (WA) is generally similar to the provisions of the Crown Suits Act 1947 (WA). Like the Crown Suits Act, section 47A of the Limitation Act probably applies to all 'actions', including equitable actions, as section 3 defines 'actions' very broadly. In contrast, section 38(3) of the Limitation Act 1935 appears expressly to recognise the distinction between common law actions and other actions, and it significantly restricts the meaning of 'action' for the limited purposes of section 38 only.

There are two distinctions between section 47A of the Limitation Act 1935 and the Crown Suits Act 1947. First, the cases to date suggest that the Crown Suits Act provisions cannot be waived; in contrast, section 47A is probably an ordinary limitation period which can be relied on only if pleaded. Secondly, section 47A, by reason of the definition in section 3 of the Limitation Act, could not be relied upon in any action which is brought in the High Court.

Section 38 of the Limitation Act applies only to defined common law categories of action and not to equitable causes of action. It will be effective only when pleaded. It is in some ways an unfortunate barrier to redress against non-government organisations, but it is of much less significance than the Crown Suits Act 1947 or section 47A of the Limitation Act 1935.

3. Statutory immunity provisions

By and large it suffices for the purpose of any provision which confers immunity that the defendant genuinely believes that he or she is acting within the limits of authority conferred by the statutory scheme. This is likely to be the construction given to section 16 of the Native Welfare Act 1963 (WA), which specifically refers both to the 'exercise' and the 'purported exercise' of powers or functions under the Act. The protective provisions are generally fairly broad in this area.

A difficulty which departments and Ministers may have in relation to such provisions is that, as was held in *Webster v Lampard*,⁹¹ it is for the defendant to establish a connection between the acts performed and the actual or intended

91. (1993) 177 CLR 598.

course of official duty. Because of the lapse of time and the paucity of evidence there may well be difficulty in establishing this in particular cases. However, one may assume that the courts will be alive to the difficulties of reconstructing events which happened a considerable time ago and will be prepared to draw inferences in such circumstances even from relatively scanty documentation or other materials.

It was noted in *Webster v Lampard*⁹² that the defendant will be precluded from relying upon a defence conferring statutory immunity if it appears that the defendant was actuated predominantly by a wrongful motive (eg, actual malice or the obtaining of an unlawful benefit). It may be possible to establish this in some cases. In relation to this particular rule, the onus of establishing the wrongful motive will rest upon the plaintiff. Once again there may be difficulty in drawing any conclusion from the relatively scarce material. The categories of 'wrongful motive' are apparently not closed and it would surely be possible to argue that the pursuit of genocide, which is recognised in international law as a crime, must necessarily be such a motive.⁹³

Most importantly, the various statutory provisions confer an immunity from *personal* liability on the part of the various officers, ministers and so on. The effect of this immunity from 'personal liability' on the liability of the Crown as employer is not entirely clear. It may be possible to argue that any defence available to the servant will shield the master from liability and that, unless an immunity clause expressly preserves the vicarious liability of the Crown, the clause will also protect the Crown from liability.

However, there is a line of authority which appears to establish that an immunity provision of this kind will not exclude the vicarious liability of the Crown unless the Crown itself is expressly mentioned. This is the case where the employer is liable not for the torts of the servant but rather for his or her acts. It is not really the liability which is vicarious,⁹⁴ but the fact that an immunity expressly conferred on one person is not capable of shielding another from liability.⁹⁵ Precisely this view was expressed, obiter, by Windeyer J in *Parker v The Commonwealth*⁹⁶ and also by Lord Pearce, again obiter, in *Imperial Chemical Industries Ltd v Shatwell*.⁹⁷ In that case his Lordship said: 'Unless the servant is liable, the master is not liable for his acts; subject only to this, *that the Master cannot take advantage of an immunity*

92. Ibid.

93. On genocide, see *supra* n 77.

94. *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36, Kitto J 61, Taylor J 68-70.

95. *Broom v Morgan* [1953] 1 QB 597, particularly Denning LJ 609-610.

96. (1965) 112 CLR 295, 301, 303.

97. [1965] AC 656.

from suit conferred on the servant'.⁹⁸ Although the reasoning is not easy to understand it appears to be a case based upon a similar principle. If the immunity provisions only protect public servants and ministers, and do not affect the vicarious liability of the Crown, the plaintiffs will still be able to take action against the Government of Western Australia.

The particular statutes may confer a personal duty only upon the Minister or upon some other officer. If that duty is breached or negligently discharged the breach of duty, or negligence in the discharge of it, will not be something for which the Crown is vicariously liable. This is because, properly construed, the Crown will have no duty — this seems to have been the basis of the decision in *Darling Island Stevedoring*.⁹⁹ However, it is unlikely that the duties created by the relevant statutes will be seen as personal to the named officers thus excluding the liability of the Crown. Indeed, they would be more likely to be characterised as a scheme for the selection and regulation of persons charged with the function of carrying out those *parens patriae* duties which are peculiarly those of the Crown.

CONCLUSION

No doubt there will be proponents and opponents of the litigation path. Some will argue that it is counter-productive to instigate legal actions in a very complex and difficult area. The potential plaintiffs have suffered enough — they should not be put through the difficulties, stresses and anxieties associated with court action. Indeed many indigenous people who were removed will not want to instigate litigation. However, others will demand legal action.¹⁰⁰ Those from the Stolen Generations who choose the litigation path,¹⁰¹ and more importantly their legal representatives, will have to examine closely a number of causes of action and possible defences to them. Litigation by the Stolen Generations will once again draw attention to a part of Australian history that we all should know about, and of which none of us can be proud.

98. Ibid, 686 (emphasis added).

99. Supra n 94.

100. The writer practised as a solicitor at the Aboriginal Legal Service of WA (Inc) and has advised many 'removal clients' who are demanding that their cases be heard in court.

101. The Commonwealth and State governments' negative response to the issue of monetary compensation can only increase the likelihood of litigation. With respect to the Commonwealth government's position on monetary compensation: see Cth Govt *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Canberra: AGPS, 1996) 26-32. See also Editorial 'Long Delay Awaits Victims of Forced Removal' *The Australian* 27 May 1997. The Commonwealth government released its formal response to the National Inquiry report on 16 December 1997. It did not mention monetary compensation.