AUSTRALIAN ABORIGINAL CHILD SEPARATIONS AND GUARDIANSHIP

Antonio De Paulo Buti

A thesis submitted for the degree of

Doctor of Philosophy

Wolfson College, University of Oxford

Michaelmas Term, 2002 [i.e. 2003]

ABSTRACT

This thesis explores and examines the history of Aboriginal child welfare policy in Western Australia. This historical scheme allowed thousands of Aboriginal children to be separated from their families. The policy of separating Aboriginal children from their families to be raised in the 'white way' was underpinned by an intrusive legislative scheme that made the Chief Protector of Aborigines or the Commissioner of Native Affairs the legal guardian of all Aboriginal children whether they had living parents or not. However, the statutes, Aboriginal specific or mainstream, remained relatively silent on the content of the guardianship duties, thus the need to turn to the common law to identify these duties. Overlaying these duties is the best interest of the child principle. Unfortunately, according to testimonies and some corroborating official documents, it appears that in many instances the State guardians failed to comply with their guardianship duties. This raises issues of State accountability and responsibility and legal liability. However the court system has failed to provide redress for the separated Aborigines. It is argued that the courts could provide redress by holding the guardianship relationship as a sub-category of the fiduciary relationship requiring protection of the non-economic personal interests of the separated Aboriginal children. It is acknowledged though, that the protection of non-economic interest is foreign to Australian fiduciary jurisprudence. It is furthered acknowledged that the separated Aboriginal children face other legal hurdles. The lack of judicial redress means a political solution is required in response to the demands for justice by the separated Aboriginal children. It is argued that the examination of the guardianship relationship and breaches of guardianship duties provides added political force to the case for awarding reparations to the separated Aboriginal children.

STATEMENT

No part of this thesis has been accepted or is being concurrently submitted for a qualification of this University or elsewhere.

I have followed the OSCOLA 2000 (the year I undertook the Legal Research Methodology course) method of citation, with the following exception. In relation to citation of parliamentary debates and Hansard reports from Australian Parliaments, I have followed the current local convention, which differs slightly from the OSCOLA recommended method.

I have attempted to keep cross-citation and cross-referencing to a minimum. Cross-citation has not been applied to cases, legislation or parliamentary debates. Further, cross-citation has been confined to intra-chapter usage.

I declare that this thesis is my own account of my research and runs to 96,000 words.

ACKNOWLEDGEMENTS

My first debt of gratitude is to Mr Bill Johnson, JLV Industries and the Louis St John Johnson Memorial Trust for awarding me the JLV/Louis Johnson Memorial Trust Fellowship in Aboriginal Legal Issues and Public Policy, which provided me with the financial support to undertake my doctorate at Oxford University. Without their support none of this would be possible.

I also received financial assistance from the Government of Western Australia. This support came about through the interest displayed in my work by the Premier, the Hon Dr Geoff Gallop. I thank him.

I will always remain indebted to my doctoral supervisor, Dr Joshua Getzler of St Hugh's, Oxford University. It was he who planted the 'guardianship' seed into my conscious, which became the cornerstone of the thesis. Dr Getzler challenged and encouraged me to strive for that little bit more but also provided a reassuring voice, when one was needed. This work would, without doubt, have been a significantly poorer one but for the benefit of his guidance, comments and critique.

This thesis has also been enhanced by the comments of my QT examiners. They reminded me that this work required more than just a narrow legal analysis. Discussion and analysis of history and politics was needed. I am so glad they wrote those comments for this work is much better for it.

For challenging, stimulating or encouraging the development of my ideas, in different ways and at different times, I wish to thank teachers, colleagues and friends such as Dr Jeremy Kirk, Saul Fridman, Dr Anna Haebich, Gavin Loughton, John McMillan, Dr Colin James, Gary Meyers, Weeliem Seah, Debra Osborn, David Markovich, Lorraine Madden, Michael Berkeley-Hill, Sarah Meddin, Andrew McRobert, Andrew Bastow, Lisa Young, Naomi Sidebotham, Dr Thomas Crofts, Andrew Fuller, Max Beckerling, Gehann Perera, Rebecca Poole and Elouise Dellitt.

There are many others I feel indebted to. The law librarians at Murdoch University and Sue Beverly, librarian at Department of Indigenous Affairs, who all gave of their time and bent the 'borrowing rules' for my sanity. To Professor Ralph Simmonds, Dean of School of Law, Murdoch University, a most supportive 'boss'. To the administrative staff of the School of Law, who provided support in many ways. To Gordon Hill who has always been encouraging and who looked after 'business' in my absence from Perth. To Julia Windsor for her great computer skills.

A special thank you to two of my colleagues. To Dr John Mugambwa who first sowed the idea of me pursuing a doctorate at Oxford University. This project would not have been started if not for his 'crazy' idea. This project's completion owes much to the support of Dr Chris Kendall. Dr Kendall rendered invaluable service as a proofreader and a rock of emotional support. His assistance and encouragement has been unfaltering throughout the doctorate journey.

I have been blessed to enjoy the friendship and support of a most special Australian, Sir Ronald Wilson. His interest and encouragement and companionship and many 'coffee chats' have been more uplifting than I can adequately describe in words. Thank you Sir Ronald.

For friendship and support while in Oxford, I wish to thank my dearest Oxford friends, who provided extra-ordinary friendship and enjoyable companionship. My very special friend, Yoav Mazeh, is indeed special. His friendship and generosity knows no limit. The same is true of his beautiful wife, Shevy. I thank you both and your gorgeous children, Natan and Haley, for making your home so welcoming for me. To my other special friend at Oxford, Sarita Cargas, thank you for being you.

In addition to Bill Johnson, my greatest due is to my family. My parents, Andrea and Mimma Buti for being the parents everyone would hope for. To Ted and Joyce Wilkins, for being the in-laws from heaven. Without their babysitting and 'taxi service', this project would have been rendered nearly impossible. And it would have been impossible without the love, support, encouragement and loyalty of the most special person, my wife Mandy. Thanks darling. And thanks to my beautiful children, Alkira, Paris and Tennessee for being my children and given me so much happiness. I hope I can repay you all one day.

ABBREVIATIONS

AD	Aborigines Department
AGPS	Australian Government Publishing Service
ALSWA	Aboriginal Legal Service of Western Australia (Inc)
Cth	Commonwealth
CUP	Cambridge University Press
CSO	Colonial Secretary's Office
HC	House of Commons
HREOC	Human Rights and Equal Opportunity Commission
NSW	New South Wales
NT	Northern Territory
OUP	Oxford University Press
Qld	Queensland
SA	South Australia
UBC	University of British Columbia
WA	Western Australia

TABLE OF CASES

TABLE OF LEGISLATION

TABLE OF INTERNATIONAL LAW INSTRUMENTS AND COVENANTS

ROMAN LAW INSTRUMENTS

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

THE THESIS PARADIGM

When launching the Year of the Indigenous Peoples at Redfern Park in Sydney in 1992, the then Prime Minister of Australia, the Hon Mr Paul Keating, declared: 'We took the children from their mothers.'[1] This marked the first time that a senior executive government officer had publicly acknowledged the government's responsibility or participation in the practice of separating Aboriginal children from their families. Less than three years later, on 11 May 1995, the Commonwealth Labor Government announced that the Human Rights and Equal Opportunity Commission (hereafter HREOC)[2] would conduct a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (hereafter the National Inquiry). The National Inquiry was officially launched in Adelaide on 10 August 1995.

On 25 May 1997,[3] after eighteen months of public and private hearings and submissions from Commonwealth, State and Territorial governments, churches, Aboriginal organisations, Aborigines who were separated from family and other interested parties, the National Inquiry report, *Bringing them home*,[4] was tabled in the Commonwealth Parliament of Australia. This report, which has generated significant

---

1 The Honourable Prime Minister Paul Keating MP 'Speech by the Honourable Prime Minister, PJ Keating MP Australian Launch of the International Year for the World's Indigenous People: Redfern 10 December 1992' (1993) 3 Aboriginal L Bulletin 4, 4.

2 HEROC is a Commonwealth statutory body (established pursuant to the Human Rights and Equal Opportunity Act 1986 (Cth)) charged with advocating, mediating and adjudicating on matters of discrimination and human rights.

3 This was a day prior to the thirtieth anniversary of the 1967 referendum, which granted the Commonwealth Parliament power to legislate for Aborigines and count the Aborigines in the census.

4 HREOC *Bringing them home* (AGPS Canberra 1997).

public, media and academic debate and criticism,[5] documents widespread and systematic racial discrimination and gross ill-treatment of Australian Aborigines[6] resulting from the perception of lawmakers and administrators that there was a need to resolve 'the Aboriginal problem.'

The National Inquiry report states that from at least the mid or late nineteenth century, there was a policy of forcible separation adversely affecting Aborigines across Australia in all States and Territories. It argues that in many cases, forcible separation resulted in deprivation of liberty, violation of parental rights, abuses of legislative and administrative powers, breaches of guardianship obligations and breaches of human rights.[7] The report goes further to argue that the history of separation equalled genocide. Specifically, the laws and policies promoting the separation of Aboriginal children aimed to destroy, or had the effect of destroying the Aborigines as a racial group and their 'Indigenous culture'.[8] The report recommends that the Commonwealth, State and Territorial governments and relevant churches, provide a reparation package to those separated and their families and communities.[9]

Although the National Inquiry report has generated much debate and imprinted itself in the national consciousness,[10] it is not a document of rigorous legal historical investigation or for that matter a rigorous doctrinal examination of the legal issues emanating from the separation policies and practices. One of the principal authors of the report, former Justice of the High Court of Australia and then President of HEROC, Sir Ronald Wilson, argues that the report focuses more on moral rather than legal

5 For example, refer to 'Stolen Children "must be paid"' The Australian (21 May 1997); 'How do we reconcile the stolen children?' The Australian (21 May 1997); 'Long delay awaits victims of forced removal' The Australian (27 May 1997); 'Acts of genocide persist, Dodson says' The Australian (5 June 1997); R Brunton 'Betraying the Victims: The "Stolen Generations" Report' (1998) 10 IPA Backgrounder 1; H Wooten 'Ron Bruton & Bringing then Home' (1998) 4 Indigenous L Bulletin 4; P Howson 'Rescued from the Rabbit Burrow' (1999) June Quadrant 10; R Marsh ' "Lost", "Stolen" or "Rescued"?' (1999) Quadrant 15; B Lane 'Rights body a "bad influence' on policy' The Australian (11 September 2000) 26; S Powell 'Sloppy study makes falsehoods fact' The Australian (11 September 2000) 26; R Manne 'In Denial: The Stolen Generations and the Right' (2001) 1 Australian Quarterly Essay 3; P Carlyon 'Stolen Children: On the Words that Matter' The Bulletin (12 June 2001) 26

6 HREOC (1997) 277-78.

7 HREOC (1997) 253-60, 269, 282.

8 HREOC (1997) 270-75.

9 HREOC (1997) 247-597, 651-665.

10 One literary critic described it as the best book released in the winter of 1997, see D Modjeska 'A Bitter Wind Beyond the Tree Line' Sydney Morning Herald (18 September 1997) 19.

responsibilities.[11] Others have written on the history of the Aboriginal child separations[12] and the legal issues and findings of facts and law in the relevant decided cases.[13] However, apart from the judicial scrutiny of legislation specifically pertaining to the factual scenarios of the limited cases in the area, there is a paucity of historical legal analysis on the legislative and policy regimes that governed the separation of Aboriginal children from their families. Likewise, there is lack of historical legal analysis of government responsibility and accountability.

Just as deficient is the lack of detailed examination of guardianship law. This has been and is a major deficiency in the whole debate on the Aboriginal child separation issue.[14] In most jurisdictions, the historical scheme in existence had as its cornerstone the transfer of guardianship from Aboriginal parents to the State – usually to the most senior public servant in Aboriginal affairs in the relevant State.

This thesis seeks to rectify, at least in part, these deficiencies. In particular, this thesis is devoted to an examination of the separation of Aboriginal children from their families within the context of the duties and responsibilities inherent in guardianship law. The analysis will focus on Western Australia, with little law being described outside this jurisdiction. The Western Australian legislative scheme provided the model for most of the rest of Australia[15] and, as will be seen from the historical study presented herein,

---

11 Sir Ronald Wilson (Interview) ABC Radio Programme (1 August 1997) and ABC Television 7.30 Report (2 August 1997).

12 For example, P Read *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (NSW Ministry of Aboriginal Affairs Sydney 1981) Occasional Paper No 1; T Austin *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911 –1939* (Northern Territory University Press Darwin 1997); Q Beresford and P Omaji *Our State of Mind* (Fremantle Arts Centre Press Fremantle 1998); A Haebich *Broken Circles* (Fremantle Arts Centre Press Fremantle 2000).

13 For example, P Batley 'The State's Fiduciary Duty to the Stolen Generations' (1996) 2 Australian J of Human Rights 177; B Cummings J Blokland and R La Forgia 'Lessons from the Stolen Generations Litigation' (1997) 19 Adelaide L Rev 25; M Flynn and S Stanton 'Trial by Ordeal: The Stolen Generation in Court' (2000) 25 Alternative L J 75; J Clarke 'Commonwealth Not Liable: Cubillo and Gunner v Commonwealth' (2000) 5 Indigenous L Bulletin 11; J Clarke 'Cubillo v Commonwealth' (2001) 1 U of Melbourne L Rev 218; P O'Connor 'History on Trial: Cubillo and Gunner v The Commonwealth of Australia' (2001) 26 Alternative L J 27; R van Krieken 'Is assimilation justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' (2001) 23 Sydney L Rev 239.

14 The plaintiffs' statement of claim in *Cubillo and Anor v Commonwealth* (2000) 103 FCR 1, 334 (hereafter *Cubillo Trial*), pleaded breach of guardianship duties by the Commonwealth but did not argue it at trial – it was 'subsumed' into the actions for breaches of statutory duty, fiduciary duty and general duty of care.

15 Although the seminal Western Australian statute, the Aborigines Act 1905 (WA) was based on the Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld).

Western Australia was at the forefront of the policy debate on Aboriginal affairs nationally. Additionally, the separation of Aboriginal children from their families was probably most pervasive in Western Australia and the Northern Territory. During the National Inquiry hearings in Perth on 17 May 1996, the Western Australian government verbally acknowledged that to some degree all Aborigines in Western Australia have been touched and affected by successive government policies of separating Aboriginal children from their families.

This thesis aims to investigate the legislative regime and policies of successive Western Australian governments, from 1905 until the 1960s, of separating Aboriginal children from their families to be raised in church missions and government institutions (and in some cases with foster parents). Because the separation policy was part of the greater colonization process, the period from British–European settlement in Western Australia in 1829 until the end of the nineteenth century is also investigated. The historical period under investigation ends in 1972, where there was a substantial shift in government policy towards granting Aborigines greater participation in Aboriginal affairs.

This thesis also seeks to examine whether the State guardian, that is, the Chief Protector of Aborigines or Commissioner of Native Affairs, complied with his guardianship duties and whether the State complied with its responsibilities and accountability obligations, looking at legal duties as postulated by the law of the time. This thesis explores the State guardian's compliance with the duties and standards implied by his guardianship office and whether the State guardian, the relevant department and ultimately the State complied with its supervisory duties. This is critical in any examination of the historical scheme of separating Aboriginal children from their families.[16] The State now argues that the motivating force (at least in part) for this historical scheme was to act in the best interest of Aboriginal children. If that was so, there was an obligation and responsibility to ensure the separated children were properly cared for and developed to their maximal potential – nothing less can be expected of a guardian who removes a child because it is in their 'best interests'.

16 The relationship between the 'State guardian' and the separated Aboriginal children is referred to as 'State guardianship'.

This thesis examines the common law jurisprudence of guardianship – which at its core has the overlying principal of acting in the best interests of the child; but it also looks beyond legal issues and attempts to deepen our historical understanding of the family separation policies and practices. This demands exploration of social and political factors in addition to legal analysis – a narrow legal investigation would be insufficient. The narrow legalistic or litigious approaches to seeking redress, as evidenced in the trial and appellate cases in the area in the last ten years, have failed the Aboriginal plaintiffs.[17] This thesis does not seek to provide a quarry of legal opinion for potential plaintiffs – some use may come the plaintiffs' way from this material but that is not its focus.

The debate about the responsibilities of the State in relation to the separation of Aboriginal children from their families continues. This thesis seeks to have a significant import into this debate by addressing the neglected issue of State guardianship. The importance of guardianship cannot be stressed enough – the legislative and policy system developed in Western Australia and some of the other jurisdiction made a State official the legal guardian of Aboriginal children. Many of these children were removed because it was considered 'to be in their best interest'. Thus, the State guardian had a duty to ensure they were properly treated and provided with an environment that maximised the separated children's physical, intellectual, psychological and emotional development. The State guardian and ultimately the State had the responsibility to ensure that the scheme was accountable to the require standards of guardianship. To appraise these issues we must not be constrained by a narrow legal approach but be aware also of the political, social and ideological aspects of the subject.

---

[17] *Kruger and Anor v Commonwealth* (1997) 190 CLR 1; *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (SCNSW 25 August 1993) (hereafter *Williams (No 1) Unreported); Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (1994) 35 NSWLR 497 (hereafter *Williams [No 1]*); *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (1999) 25 Fam L R 86 (hereafter *Williams [No2] Trial*); *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* [2000] Aust Torts Reports 81-578, 64,136 (hereafter *Williams [No2] Appeal)*); *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (HCA s246/2000 22 June 2001); *Cubillo and Anor v Commonwealth* (1999) 89 FCR 528 (hereafter *Cubillo Strike-out Application*); *Cubillo and Anor v Commonwealth* (2000) 103 FCR 1 (hereafter *Cubillo Trial*); *Cubillo and Anor v Commonwealth* (2001) 112 FCR 455 (hereafter *Cubillo Appeal*); *Cubillo and Anor v Commonwealth* (HCA D10 and 11/2001 3 May 2002). There have been two other 'least significant' Aboriginal child separation cases – one that was poorly pleaded and rejected by a single justice of the High Court of Australia (*Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767),and the other that has not yet reached the trial stage (*Johnson v Department of Community Services and Anor* [2000] Aust Torts Reports 81-540, 63,472). None of these cases involved the jurisdiction of Western Australia, the focus of this thesis.

THESIS PLAN

The first part of the thesis examines the law of guardianship. Chapter Two provides an historical overview of the law of guardianship and shows how the 'best child interest' principle attained paramountcy. Chapter Three examines the evolution and content of guardianship duties.

The second part investigates in some detail the legislation and policies of Aboriginal affairs, particularly in relation to child welfare, in Western Australia from 1829 until 1972. The emphasis is placed on looking at issues of legislative guardianship provisions and the policies that drove the legislation that implemented the Aboriginal child separation scheme. This necessitates some comparative analysis between the Aboriginal child welfare system and the mainstream child welfare system. Chapter Four deals with the period from colonial settlement of Western Australia in 1829 until the end of the nineteenth century. Chapter Five looks at the period from the beginning of the twentieth century and the seminal Aborigines Act 1905 (WA) to the end of the Second World War. The final chapter of Part II investigates the period from post Second World War until 1972, where the historical scheme under examination ended.[18]

Part III seeks to bring together the discussion of the previous chapters and focuses on the thesis paradigm presented above. In this part, the thesis seeks to give factual content to the guardianship law and duties examined and identified in Part II. Testimonial and documentary evidence and allegations of ill treatment and breaches of guardianship duties are presented. This part also looks at the crucial issue of government responsibility and accountability and examines the legal arguments that have been raised in courts in an attempt to attach legal liability on the State for alleged wrongs committed. Of particular focus here is the unsuccessful arguments that have been mounted based on the fiduciary doctrine that most closely fits the guardianship relationship.

This thesis argues that the guardianship relationship should be seen as a sub-category of fiduciary law and should allow the protection of the non-economic personal interests of Aborigines, who as children, were separated from their families. Moreover, it

[18] Although there still were some missions and other institutions operating during the 1970s.

is argued that fiduciary law is better suited than tort law to recognising alleged breaches of trust by the State to the separated Aboriginal children under its care. However, it is acknowledged that success through the litigation process is unlikely and that a political solution needs to be found to the demands of 'the separated' Aboriginal class or group. It is argued in Part III that the guardianship analysis may act as a catalyst for that political solution. The guardianship analysis may provide the impetus for renewed political advocacy by highlighting the severity of the wrongs committed by the State and State guardians in relation to guardianship duties and inadequate supervision of the separated children.

TERMINOLOGY

The term 'stolen generation' or 'stolen generations' has become common usage when describing the separation of Aboriginal children from their families. Australian historian Peter Read in relation to his study of the New South Wales situation coined the term.[19] This thesis avoids its usage, as too much energy is wasted debating the veracity and accuracy of the term and its connotations.[20] More importantly, the term creates problems about which Aborigines can be members of the 'stolen generation' or 'stolen generations'. Does it only mean those that were literally stolen from their parents' arms or does it also include historical circumstances where a parent was cajoled, tricked or pressured into allowing their child to be separated from them? Does it exclude parents that sent their children to mission schools because they thought they would receive a superior education but were not allowed to take their children back home?

In describing the group of Aborigines who as children were separated from their families, this thesis prefers the term 'the separated'. This thesis is focused on the treatment of these children once they were separated from their families, irrespective of whether the separation took place by way of forceful removal, fraud or with the genuine consent of the parents.

19 P Read (1981).
20 A Bolt 'Stolen Generation Myth Sells Us All Short' The Daily Telegraph (24 February 2001) 19; S Rintoul 'Going Home' The Australian Magazine (21-22 April 2001) 12;

PART I

CHAPTER TWO

HISTORY OF GUARDIANSHIP AND THE CHILD'S BEST INTEREST PRINCIPLE

INTRODUCTION

The major movement in the history of guardianship and child's best interest principle is that from a pre-nineteenth century emphasis on the usefulness of children to their guardians to a welfarist model where the guardian was to act in the interest of the child as defined by the guardian; and from this welfarist or paternalist position to a rights-based relationship where the child's rights as determined by the 'actual or perceived viewpoint' of the child prevailed.[21] This later/third rights-based model gained currency from the 1970s – after the period of this study. The period of Aboriginal child removals from their families under Aboriginal specific legislation ceased in the 1960s.

This chapter examines the evolution of guardianship law and the movement from the near absolute dominance of the father's wishes in the raising of the child to the equalizing of gender parental status and the child's best interest being the 'first and paramount consideration'. The following chapter will examine the content of guardianship rights and duties.

THE ROMAN LAW OF GUARDIANSHIP

The 449 BC Roman Twelve Tables, the first expressed legislation on Roman private law,[22] made reference to guardianship by providing that a family or paternal relative should protect a person and his goods if that person was unable to take care of himself.[23] Of course, children came within this guardianship protection or control, his *potestas* or power. In contrast to early English medieval feudal law, where guardianship applied only

21 J Eekelaar 'Families and Children: From Welfarism to Rights' in C McCrudden and G Chambers (eds) *Individual Rights and the Law in Britain* (Clarendon Press Oxford 1994) 301.
22 WW Buckland *A Textbook of Roman Law from Augustus to Justinian* (2nd ed CUP Cambridge 1933) 1-2.

to infants of property, the *potestas* concept in Roman times applied to all minors *sui juris*, whether they had property or not.[24]

When a father, who had *patria potestas* or absolute control over his children's person, their property and their labour,[25] died leaving minor children, Roman law provided the children with two types of guardians; the tutor (*tutela*) and the curator. A tutor was appointed to a child in *pupillari aetate*, that is below puberty[26] after which a curator was appointed to represent the child until the age of 25.[27] The tutor was appointed to protect both the child's person and property,[28] while the curator was responsible only for the child's property.

Unlike English guardians of later centuries, guardianship in Rome was a public office and was compulsory for those qualified and without legal excuse. Only a free person with the rights of citizenship was qualified to become a tutor or curator.[29] Like current law, certain prescribed 'classes' or 'types' of people were prohibited from being appointed as tutors. Those prohibited included slaves, intermediate citizens and hostile aliens. A female could only be appointed tutor if the father died without appointing a tutor, she promised not to remarry and a magistrate agreed to appoint her.[30] In relation to appointment of tutors, there were three different methods of appointment, depending on what type of tutor was being appointed - *testamentaria, legitima* and *dativa*. The tutor *testamentaria* was the guardian named in a father's will and unless he was legally disqualified, he took precedence over the others. If no tutor *testamentaria* had been named, the law looked to the tutor *legitima* or next of kin. Originally, appointment of this tutor was limited to the father's relations but was later extended by the Emperor

23 F Johns and V Joiner Bowers 'Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century – A March of Folly? Or Just a Mask of Virtual Reality?' (1997) 27 Stetson L Rev 1,10.

24 R Storry Deans *The Law of Parent and Child, Guardian and Ward* (Reeves and Turner London 1895) 49.

25 Although a daughter ceased to be under the father's *potestas* if upon her marriage she came under her husband's *manus*, a corresponding power of husband over wife.

26 *Institutes* 1.22.pr in JB Moyle (tr) *The Institutes of Justinian* (4th ed Clarendon Press Oxford 1906) 27.

27 *Institutes* 1.23.pr in JB Moyle (1906) 28.

28 *Institutes* 1.14.4.pr in JB Moyle (1906) 22-23.

29 *Institutes* 1.25.pr in JB Moyle (1906) 30-33.

30 WW Buckland (1933) 150-151; F Johns and V Joiner Bowers (1997)12.

Justinian to include cognates.[31] The third type of tutor, the tutor *dativa*, was appointed by the Magistrate only in the absence of the other two.[32] By contrast, the curator's appointment rested with the minor.[33] Only when the minor had no nominee of his own did the court find and appoint a curator.[34] It appears it was not necessary for a minor between 14 and 25 years to have a curator, unless the minor wished to contract or engage in a suit as plaintiff or defendant.[35]

A Roman tutor was not entitled to custody of the minor as this usually belonged to the mother but he was required to discharge three main duties: maintain the child;[36] represent the child in litigation;[37] and administer the child's property.[38] In discharging these duties he was not required to use his own private resources. If the tutor did incur personal expenses in carrying out his guardianship duties, he was entitled to reimbursement from the minor's property. The curator's duties were restricted to properly administering the child's property. Legal historian R H Helmholz writes that the Act books,which record cases from the English church courts during the middle ages, include references to the Roman guardians' duties of caring for the physical and educational needs of the infants under their charge.[39] Helmholz adds that most court records did not specify the duties required of a guardian regarding the child's person. This lack of detail in recording may have meant that on some occasions, a child's physical needs were left up to the tutor to determine.[40]

Emperor Antoninus Philosophus delegated guardianship jurisdiction to the *Praetor* at Rome and the *Praeses* in the provinces. The *Praetor* and *Praeses* exercise a general control over all guardians. This included a 'superintending power over the persons and property of minors.'[41] They also gave directions concerning the maintenance

31 See generally, R H Helmholz 'The Roman Law of Guardianship in England, 1300-1600' (1978) 52 Tulane L Rev 223, 235.
32 *Institutes* 1.20 pr in JB Moyle (1906) 25-25.
33 *Institutes* 1.23 pr in JB Moyle (1906) 28.
34 R H Helmholz (1978) 241.
35 G Spence *The Equitable Jurisdiction of The Court of Chancery* (Lea & Blanchard Philadelphia 1846) Vol I 610.
36 *Digest* 26.10.3.14, 27.2.3 in CH Monro (tr) *The Digest of Justinian* (CUP Cambridge 1904) Vol.
37 *Digest* 26.7.1.2, 26.7.30 in CH Monro (tr) (1904) Vol I.
38 *Digest* 26.7 in CH Monro (tr) (1904) Vol I.
39 RH Helmholz (1978) 245.
40 RH Helmholz (1978) 245-246.
41 G Spence (1846) 609.

and education of minors including modifying the testamentary directions of the father if they thought to do so was in the interests of the minor.[42] Their jurisdiction was not unlike the jurisdiction later exercised in England by the Court of Chancery leading Spence to claim that it is in fact the model upon which the Court of Chancery was framed.[43] Similarly, the Hon Justice Story in his *Commentaries on Equity Jurisprudence* claims, '[i]n many respects, indeed, the Court of Chancery, in the exercise of its authority over infants, implicitly follows the very dictates of the Roman code.'[44]

A tutor was also required to administer the minor's property and was under a legal duty to act in the minor's interests. If during the course of the *tutela* the tutor was guilty of misconduct towards either the minor or his property, he could be removed from his position by an action called an *accusatio suspecti*, which is also mentioned in the Twelve Tables. Even suspicion of wrongdoing could lead to removal.[45] As Roman guardianship was purely an office of trust, having to administer the minor's assets for the benefit of the minor.[46] A tutor was required to give a general account or *actio tutelae directa* of the minor's property at the end of the *tutela*, at which time he would be held liable for any loss sustained by the minor's estate due to his fraudulent or negligent acts. An exemption clause in a will would not protect a tutor from liability for a breach of trust amounting to fraud. His heir was liable to provide reparation, such as restoring property to the condition it was prior to the breach.[47]

English law may have looked to Rome when, in later centuries, it too transformed what in feudal times had been an opportunity to profit, into a trust by requiring the guardian to account for his management of a ward's property at the end of his or her minority.[48] However, Roman law went further again in that a tutor found guilty of misconduct was also subject to a type of civil penalty called an *infamia*, which involved a loss of certain political and civil rights. Breach of guardianship under Roman law therefore had both private and public consequences. It should also be added that a

42 G Spence (1846) 610.
43 G Spence (1846) 608.
44 Hon Mr Justice Story *Commentaries on Equity Jurisprudence* (11th ed Stevens and Haynes London 1873) 935.
45 R Storry Deans (1895) 49.
46 G Spence (1846) 608.
47 *Digest* 27.7.8.1 in CH Monro (tr) *The Digest of Justinian* (CUP Cambridge 1904) Vol I.
48 Prov of Westminster 1259, c 17; Statute of Marlborough 1267, c 17.

curator who did not discharge the office in a proper manner could be proceeded against and removed; such a removal carrying great disgrace.[49]

Although the Roman guardian was subjected to a strict code of conduct and compliance with prescribed duties, the tutors and curators had great power. The Roman guardian did not act for his charge but supplied the *aucutoritas* to fill up the deficiency in the minor's own legal authority. Together they formed one complete person with the legal capacity to act.[50] Without the tutor or curator's *auctoritas* or 'added authority' the minor's acts were not legally binding.

Although it may be difficult to accurately pinpoint the degree to which Roman law of guardianship influenced the common law, it is clear that there are similarities between the two systems. Examples include the rendering of accounts by the guardian at the end of the minority to reflect the trust relationship between the parties and the general supervisory jurisdiction of the Court of Chancery modelled on that of the Roman *Praetor* and *Praeses*. Helmholz also claims that the influence of Rome is particularly evident in the principles developed by the English church courts when exercising their significant guardianship jurisdiction. While not strictly applying Roman law, he claims they applied a simplified form, 'having an eye to the habits and the needs of contemporary practice while dispensing with the purely formal, archaic elements of the Roman law of guardianship'.[51] Whether Helmholz's estimate of the influence of Rome on the common law through ecclesiastical practices in its guardianship jurisdiction is sustainable, to a greater or lesser extent, the common law of guardianship does bear the imprint of Rome. In many respects the equity jurisprudence of England borrowed from the doctrines of Roman law[52] and the rights, duties and liabilities attached to the Roman guardians are similar to those of guardians in the common law system.[53]

---

49 R Storry Deans (1895) 49.

50 George Long 'Curators' in William Smith (ed) *A Dictionary of Greek and Roman Antiquities* (John Murray London 1875) 374-376.

51 RH Helmholz (1978) 255.

52 Hon Mr Justice Story (1873) 934.

53 R Storry Deans (1895) 49-50.

PRE MEDIEVAL LAW

Under Anglo-Saxon customary law fathers did not have absolute power over their children in the manner of Roman fathers, but they did enjoy many of the same rights through the concept of 'mund'. A 'mund' was a state of protection out of which arose a number of rights and duties.[54] However, under customary law the mother acquired rights and duties of personal control, education and maintenance of the child following the death of the father, while vesting control over the child's property in its paternal relatives.[55] It also granted her limited rights to custody of her children in the event of a separation.[56] Anglo-Saxon customary law lacks a concept of guardianship allowing a third person or substitute to take over the guardianship rights and duties vested in the father.[57] These rights and duties involved personal control, maintenance and education. Custom dictated that on the death of the father the mother cared for the child's person and a paternal kin would assume responsibility for the child's property.[58] With the arrival of the Normans in 1066, these maternal rights to guardianship survived by custom in the manorial courts and in the form of socage guardianship in the royal courts.[59]

The Norman invaders brought with them the customary laws of Normandy which, when combined with certain pre-existing Saxon customary laws, developed into a new body of law based upon local conditions.[60] The division between Anglo-Saxon law and the law under the Normans is most evident in the area of land ownership. When William conquered England, he destroyed the ruling Saxon class, dispossessed them of their land and parcelled it out among the barons who had allied themselves to him. These barons made oaths of personal loyalty or fealty to him and agreed to hold the land as his vassals promising future military service in exchange for his protection and the right to derive income from the land by carving out of it tenures to lesser lords and commoners. Thus in Norman England, all the land remained the King's by right and the barons held

54 DC Wright 'De Manneville v De Manneville: Rethinking the Birth of Custody Law under Patriarchy' (1999) 17 Law and History Rev 247, 263.
55 W Holdsworth *History of English Law* (4th ed (6th Impression) Metheun Sweet & Maxwell London 1982) Vol II 99.
56 S Berns 'Women in English Legal History: Subject (almost), Object (irrevocably), Person (not quite)' (1993) 12 U of Toronto L Rev 26, 28-29.
57 DC Wright (1999) 264.
58 DC Wright (1999) 264.
59 DC Wright (1999) 252.
60 W Holdsworth (1982) Vol II 166, 168.

their land of him as their supreme lord by knight's service. This system of land titles or holdings gave rise to two different types of tenure, military tenures and socage tenure. The former was tenure in exchange for knight services or grand serjeantry and was non-fiduciary in nature. The latter was a type of tenure that was fiduciary in nature and, although difficult to define, bore some resemblance to the old customary guardianship of Anglo-Saxon times.

GUARDIANSHIP UNDER MEDIEVAL FEUDAL LAW

According to Sir Edward Coke at common law during medieval England there were four types of guardianship; guardian in chivalry, guardian by nature, guardian in socage and guardian in nurture.[61] Only guardian by nurture was unrelated to child property ownership and in feudal times the most important was guardian in chivalry. There were also several more obscure forms of guardianship in use in historical England: guardianship by election; guardianship by custom; and guardian *ad litem*.

1 Guardianship in Chivalry

Guardianship in chivalry arose when a tenant of land held under knight service died leaving an infant heir. The feudal overlord automatically assumed guardianship of both the person and property of the heir. It was purely a creation of the royal courts and lasted until a male heir was twenty one and a female heir was sixteen, or fourteen if she married.[62] It was the most important guardianship in feudal times.[63]

Guardianship in chivalry did not concern itself with the welfare of vulnerable heirs. Rather, it treated them as an adjunct to their land, seeing in them not a child to be protected, but a valuable proprietary right to be exploited. A guardian in chivalry of the ward's estate was entitled to rent and profits from the estate and was under no liability to account for his use of the land. His sole duties to the heir were to allow him a bare

---

61 F Hargrave and C Butler (eds) *E Coke The First Part of the Institutes of the Laws of England: A Commentary upon Littleton* (15th ed W Clarke London 1817) 88b. See also C Viner *General Abridgement of Law and Equity* (GGJ & J Robinson London 1793) Vol 14 160-172.

62 J Seymour 'Parens Patriae and Wardship Powers: Their Nature and Origin' (1994) 14 OJLS 159, 163.

63 R Storry Deans (1895) 50.

maintenance[64] and to refrain from committing waste of his estate.[65] However, when a guardian also held guardianship of the person of the heir, he had the right to determine the heir's marriage. This was a lucrative right in the hands of the guardian who frequently auctioned off the ward's marriage to the highest bidder.

The notion of guardianship in chivalry is not dissimilar to the *paterfamilias* of Roman law. In both doctrines, the guardian or *paterfamilias* had near absolute power over both the persons and the property of the minors under their control, yet owed them few duties in return. However, as mentioned above, the Roman tutor did have duties towards the minor in relation to maintenance, education, litigation and the child's property.

Guardianship in chivalry reached its zenith during the reign of Henry VIII who regarded wardship as a largely untapped source of Crown revenue. In 1540 he passed a statute establishing the Court of Wards,[66] which as a result of the 1541 statute of 33 Hen VIII c22 became the Court of Wards and Liveries. The court's special mandate was to enforce the Crown's revived feudal prerogatives.[67] The Court was abolished in 1646 in the first Parliament of the Protectorate. In 1660 Parliament passed a bill confirming the 1646 Act and making it retrospective to 1645.[68] The Tenures Abolition Act 1660 put an end to military tenures and so ended the reign of guardians in chivalry.

2 Guardianship in Socage

When a deceased tenant held no land by military tenure, a socage guardian was appointed to a child under the age of fourteen. While socage guardianship, like guardianship in chivalry, arose from tenure, unlike the latter it was fiduciary in nature[69] and was to be undertaken for the benefit of the ward, not the profit of the guardian. Under the Statute of Marlborough 1267, c 17, the guardian in socage had to hold an heir's land 'to the use of the said heir.' In fact, its obligations were so daunting, that a

64 R Storry Deans (1895) 51.
65 J Seymour (1994) 163.
66 (1540) 32 Hen VIII c46.
67 J Seymour (1994)164.
68 DC Wright (1999) 270.
69 The fiduciary concept is a later characterisation.

scholar undertaking a study of pleas of wardship in the thirteenth and fourteenth centuries could find only one case involving competing claims to socage guardianship.[70] This common law guardianship was also a clear departure from Roman law in that it allowed mothers to be appointed guardians of their children, a practice that had its roots in Anglo-Saxon customary law and was based upon the rationale that stability was best achieved when community and family stayed together.[71]

Common law dictated that guardianship in socage went to the child's nearest relative who could not inherit, which was usually the mother. If the mother could inherit, guardianship was then placed with a paternal relative who could not, thus avoiding potential conflicts between the personal interests of the guardian and the child. This was again a departure from Rome where an heir was placed under the strict control of tutors and curators who were next in succession to the heir.[72] In each of the royal courts, the manor courts and the ecclesiastical courts, when military tenure was not involved, the mother was usually the guardian of choice unless she could not ensure the productivity of the estate.[73] If this was the case, or if the mother was deceased or able to inherit, the court would usually consult with the community and place the child with either the next of kin, or if this was not possible, a willing neighbour. If none of these options were available, guardianship would often be given to a member of the clergy.[74]

Courts exercised a supervisory role over guardians, and commonly required them to guarantee their performance through personal pledges.[75] The court warned guardians about disparaging their children by arranging unsuitable marriages and abusing their guardianship by allowing rents to fall into arrears or lands to lie waste or dwellings in a state of disrepair.[76]

70 S S Walker 'Wrongdoing and Compensation: The Pleas of Wardship in Thirteenth and Fourteenth Century England' (1988) 9 J of Legal History 267, 275.
71 DC Wright (1999) 275. Also see E Clark 'The Custody of Children in English Manor Courts' (1985) 3 Law and History Rev 333, 343.
72 R Storry Deans (1895) 54.
73 However, even if a mother lost guardianship of the estate of her child, she rarely lost physical custody.
74 E Clark (1985) 337-338, 340.
75 E Clark (1985) 338.
76 G Spence (1846) 610-611.

In addition, the guardian was under a duty to instruct the ward in the art of agriculture and to ensure the safety of both his person and land.[77] This built on the notion of a fiduciary relation and trusteeship.[78] The Statute of Marlborough 1267, c17, which declared it to be so, put this trust categorisation of the socage guardianship beyond doubt. This development of the socage guardianship into a trusteeship, claims Holdsworth, 'became the model to which all forms of guardianship ultimately conformed.'[79]

Unlike guardianship in chivalry, socage guardianship was strictly personal and could not be disposed of by alienation, succession or devise.[80] When the ward reached the age of fourteen, he could enter upon the estate and demand that the guardian deliver up the estate and account to him for all the rents and profits received during the wardship,[81] including the price of any marriage entered into before his majority.[82] In this, the socage guardian was under a duty similar to that of the curator in Roman law. However, a breach of the duty to preserve a ward's estate in medieval English law did not attract the same kind of censure as it did in Roman law, where as we have seen, guardians often suffered public and well as private consequences for breach.

3 Guardianship by Nature

The third type of common law guardianship found in historical English law was that of guardianship by nature. This guardianship was originally an incident of tenure in chivalry and extended only to the person of a child under twenty-one years.[83] At common law, the father was the natural guardian of his child[84] and his right, except as limited by statute or by the courts was absolute,[85] even against the mother, despite the

77 F Hargrave and C Butler (1817) 87b, 88a, 89, 123.
78 J Seymour (1994) 165.
79 W Holdsworth *History of English Law* (4th ed (3rd reprint) Metheun Sweet & Maxwell London 1983) Vol III 66.
80 R Storry Deans (1895) 54.
81 Statute of Marlborough 1267, c 17.
82 R Storry Deans (1895) 55.
83 WP Eversley *The Law of the Domestic Relations* (3rd ed Stevens and Haynes London 1906) 610, fn 2.
84 F Hargrave and C Butler (1817) 84 a.
85 Where the father or mother held guardianship by both nature and in socage, the socage guardianship (as to the custody of the child) prevailed until the child turned 14 after which the parent's natural guardianship took over until the child is 21. F Hargrave and C Butler (1817) 84.

child being an infant at her breast.[86] Coke believes that guardianship by nature at common law extended only to the father in respect of the heir apparent[87] and was the only type of guardianship, which took precedence over guardianship in chivalry.[88] While the father was alive he retained custody of the heir despite holding his tenure by knight's service, but upon his death, the lord took precedence over the mother or other relative.[89]

Guardianship by nature also existed in equity, which deemed both parents the natural guardians of all of their children, both legitimate and illegitimate.[90] However, while the father was alive his right took precedence over the mother's right if the father died before the child reached the age of majority, however, the mother became the natural guardian.[91]

There is uncertainty as to whether guardianship by nature formally disappeared with the abolition of military tenures in 1660[92] or whether it survived only to be subsumed by the natural law concepts of parental duties and rights arising out of the biological tie.[93] This term of nature was liable to create confusion between the parental duties of support, maintenance and education deriving from the 'natural' biological tie between parents and biological child and the more legalistic guardianship by nature of the father to his heir.[94]

4 Guardianship by Nuture

The fourth of the common law forms of guardianship is perhaps the oldest English form of guardianship.[95] It occurred only when there was no other guardian and belonged to both parents, one taking over when the other died. If both died, the guardianship ceased

86 *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639, 39 ER 538.
87 F Hargrave and C Butler (1817) 88.
88 R Storry Deans (1895) 53-54.
89 *Ratcliff's Case* (1592) 3 Co Rep 38b, 76 ER 713.
90 F Hargrave and C Butler (1817) n 12.
91 F Hargrave and C Butler (1817) n 12.
92 WP Eversley (1906) 610, fn 2.
93 DC Wright (1999) 271.
94 F Hargrave and C Butler (1817) 88 b; W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769)Vol 1 449 (Special edition LB Adams Jr The Legal Classics Library Birmingham Alabama 1983); DC Wright (1999) 247, fn 79.
95 R Storry Deans (1895) 54.

entirely.[96] Only natural parents could be guardians by nuture and their guardianship extended to all of their children, not simply the heir. Guardianship by nuture involved only the care of the child's person and education[97] not being concerned with the child's property. It ceased when the child reached fourteen years of age. [98] Of all the common law guardianships, it is guardianship by nuture that most resembles modern guardianships of children.[99]

5 Other Guardianships

There were also several more obscure forms of guardianship in use in historical England. The first of these was guardianship by election of the infant. Infant tenants who had no socage lands or whose socage interests were purely equitable and who had no testamentary guardians were permitted to elect their own guardians at any time during their minority after the age of seven. [100] Infant tenants of socage lands who had no testamentary guardians were also permitted to choose their own guardians but only for the rest of their minority upon their socage guardianship expiring at age fourteen.[101] The infant made his or her election before the judges on assize[102] or by deed[103] or even parol,[104] although the appointment was not binding on the infant and the Court of Chancery was empowered to set the appointment aside and appoint another.[105] It was, however, the usual practice of the Court of Chancery to allow an infant to choose his or her own guardian, provided the deceased father had not appointed a testamentary guardian.[106]

Three types of customary guardianship also existed under the common law. The first was guardianship by the custom of the City of London,[107] which gave guardianship

96 DC Wright (1999) 272.
97 F Hargrave and C Butler (1817) 88 a.
98 C Viner (1793) Vol 14 171.
99 DC Wright (1999) 272.
100 F Hargrave and C Butler (1817) 87 b, 88 a; G W Knowles *Simpson on the Law of Infants* (4th ed Sweet and Maxwell London 1926) 150.
101 F Hargrave and C Butler (1817) 78 b; *Mendes v Mendes* (1747-1748) 1 Ves Sen 89, 27 ER 910.
102 F Hargrave and C Butler (1817) 87 b.
103 F Hargrave and C Butler 88 b, fn 15; *Pen v Lord Baltimore* (1745) Ridg t H 332, 27 ER 847.
104 F Hargrave and C Butler (1817) 88 b, fn 15; *Pen v Lord Baltimore* (1745) Ridg t H 332, 27 ER 847.
105 *Curtis v Rippon* (1819) 4 Madd 462, 56 ER 775.
106 R Storry Deans (1895) 55.
107 F Hargrave and C Butler (1817) 88 b. Note Coke says that 'other places' also followed this custom.

of orphans to the Mayor and Aldermen of that city exercising jurisdiction under their Court of Orphans.[108] The court was permitted to exercise the guardianship itself, or commit it to any other person.[109] It included both guardianship of the person and the estate.[110] In Kent too there existed a custom where guardianship of an heir under the age of fifteen was committed to the heir's next of kin who could not inherit.[111] This took place in a court of justice at the instigation of the lord.[112] This guardianship resembled socage guardianship except that it extended to the age of fifteen and included the personal estate of the heir, which was most likely not so for socage guardianship.[113] The other difference between this customary guardianship and that of socage is that the former required that the lord make up any deficiency in the accounts rendered by the guardian.[114] The third type of customary guardianship granted the lords of certain manors the right to appoint a guardian to infants of deceased tenants by virtue of some special custom peculiar to that particular manor.[115]

However, the custom had to be proved by the lord,[116] failing which the next of kin who could not inherit took guardianship. This was usually the same person who was entitled to guardianship in socage.[117] If both a special custom and socage guardianship applied, the socage guardian had custody of the heir's person, while the lord had the right to have someone perform the services in respect of the land.[118] However, guardianship by special custom took precedence over a father's appointment of a testamentary guardian under the Tenures Abolition Act 1660.

---

[108] LI Stranger-Jones *Eversley's Law of Domestic Relations* (6th ed Sweet and Maxwell London 1951) 441. See generally E Clark 'City Orphans and Custody Laws in Medieval England' (1990) 34 American J of Legal History 168.
[109] *Wilkinson v Bolton Miles* (1804) 1 Sid 250, 82 ER 1087.
[110] WP Eversley (1906) 615.
[111] G W Knowles (1926) 162.
[112] WP Eversley (1906) 615-16.
[113] R Storry Deans (1895) 55.
[114] WP Eversley (1906) 616.
[115] G W Knowles (1926) 162. See generally, E Clark (1985).
[116] *Drury v Fitch* (1682) Hutt 16, 123 ER 1068.
[117] WP Eversley (1906) 616.
[118] WP Eversley (1909) 616.

Guardianship by election of an infant and the customary guardianship continue to exist in England, but have fallen into disuse.[119] The powers of a guardian elected by an infant never seem to have been defined.

Medieval courts had the power to appoint a guardian *ad litem*, that is a guardian appointed for the purpose of acting legally on behalf of an infant without a guardian, if the infant wished to sue or is being sued and needs surrogate representation in court. All courts still retain the power to appoint guardianship ad litem.[120] The reason for the appointment is that an infant has no capacity and cannot appoint an attorney and so would be without assistance if the court were not empowered to provide him with a guardian ad litem. The power and duties of such a guardian are limited to the conduct or defence of the suit.[121]

GUARDIANSHIP AFTER 1660

1 Tenures Abolition Act 1660

1660 marked the year of the enactment by the English Parliament of the Tenures Abolition Act 1660, which provided a revolution in the law of guardianship.[122] The Act converted military tenures to socage tenures and modified the medieval guardianships. It abolished the property-based guardianship in chivalry and the Court of Wards and Liveries jurisdiction over the medieval guardianships of chivalry, nature, nuture and socage. More importantly, s 8 of the 1660 Act allowed the father of a child under twenty-one and not married at the time of his death to appoint by will or deed a guardian for his child in the event of the father's death. The guardianship of a male child continued to the age of twenty-one even if the child subsequently married.[123] However, whether this also applied to the female child is unclear.[124] This power of appointment was exclusive to the

119 G W Knowles (1926) 150; LI Stranger-Jones (1951) 441.
120 G W Knowles (1926) 149.
121 F Hargrave and C Butler (1817) 88 b, n 16, 135 b, n 1.
122 S Abramowicz 'English Child Custody, 1660-1839: The Origin of Judicial Intervention in Paternal Custody' (1999) 99 Columbia L Rev 1344, 1370.
123 *Eyre v Countess of Shaftesbury* (1722) 2 P Wms 103, 24 ER 659.
124 Compare *Mendes v Mendes* (1747-1748) 1 Ves Sen 89, 27 ER 910; *Roach v Garvan* (1748) 1 Ves Sen 157, 27 ER 954.

father; it did not extend to the mother. Any appointment made by a mother was void,[125] even if made for illegitimate children,[126] although the mother's wishes could be taken into account by the Court of Chancery in exercising its guardianship jurisdiction.[127]

The Tenures Abolition Act 1660 gave testamentary guardians precedence over all other guardians[128] (with the rare exception of special customary guardians) and granted them the same rights and duties regarding the ward's person and estate as those of socage guardians.[129] Even though subsequent statutes altered the relative status of father, mother and child, the 1660 Act has endured over time. The sections dealing with the appointment of testamentary guardians and authority of guardians had not been repealed or substantially amended either in the United Kingdom or in Western Australia during the period under study in this thesis (up to 1972).[130]

The enduring effect of ss 8 and 9 of the Tenures Abolition Act 1660 reinforces the significance of the 1660 Act in the history of guardianship law. Under s 8, the father of a child may by executing a valid will, dispose of the custody and the tuition of any of his children under twenty-one and until twenty-one. This disposition may be made to any person 'other than Popish recusants' and the disponee 'may maintain an action of ravishment of ward or trespass against any person or person which shall wrongfully take away or detain such child or children for the recovery of such child or children; and shall and may recover damages for the same in the said action for the use and benefit of such child or children.' Pursuant to s 9 the disponee may take into his possession all real and personal property of the child or children to be used for the child or children until they reach twenty-one years (or a lesser time if so devised) and 'may bring such action or actions in relation thereto as by law a guardian in common socage might do.'

At one level the Tenures Abolition Act 1660 made the father all-powerful, returning guardianship back to the position of Roman times. The Act increased the

125 *Villareal v Mellish* (1737) 2 Sw 533, 36 ER 719.
126 *Ord v Blackett* (1724) 9 Mod 116, 88 ER 351.
127 G W Knowles (1926) 151.
128 *In re Louisa Morris* (1862) 2 Sw & Tr 360, 164 ER 1035.
129 R Storry Deans (1895) 61.
130 Law Reform Commission of Western Australia *Report on United Kingdom Statutes in Force in Western Australia* (Law Reform Commission of Western Australia Perth Project No 75 1994) Appendix 1.

father's power to dispose of his children's custody upon his death.[131] Even though some suggest this removed guardianship decisions from the judiciary and placed them back in the hands of the fathers[132] legal academic Sarah Abramowicz argues otherwise.[133] Abramowicz argues that the 1660 Act and not the Infants' Custody Act 1839 is the origin of the Court of Chancery's incursion in to the so-called 'empire of the father.' Abromowicz writes that 'the Court of Chancery employed an analogy between testamentary guardians and fathers to extend its jurisdiction to include the supervision of fathers themselves.'[134]

Abromowicz's position is given credence by the 1721 case of *Duke of Beaufort v Berty*,[135] where Lord Macclesfield LC accepted that a testamentary guardian was subject to the jurisdiction of the Court of Chancery.[136] There was a developing or evolving jurisdiction in the Court of Chancery that allowed the Lord Chancellor, representing the Crown, to intervene in matters of guardianship and protection of children.[137] It should be noted that Abromowicz concerned herself solely with jurisdiction in relation to legitimate children and the 1660 Act excluded the possibility of appointing a testamentary guardian for illegitimate children. However, the mother of an illegitimate child could still request and obtain from the Court of Chancery an order for the appointment of a testamentary guardian. Unlike the Common Law Courts, where the doctrine that an illegitimate child was *filius nullius* prevailed, illegitimate children were always subject to the jurisdiction of the Court of Chancery and the mother's status reign supreme over the fathers.[138] This is confirmed by a number of twentieth century English and Australian cases[139] and, as stated by Street CJ in the 1981 New South Wales' case of *Youngman v Lawson*:

---

131 DC Wright (1999) 273.

132 M Grossberg *Governing the Hearth* (Studies in Legal History University of North Carolina Press Chapel Hill 1985); M Mason *From Father's Property to Children's Rights* (Columbia University Press New York 1994).

133 S Abramowicz (1999).

134 S Abramowicz (1999) 1345.

135 (1721) 1 P Wms 703, 24 ER 579.

136 See also *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 21; 38 ER 236, 243.

137 O M Stone 'Jurisdictions Over the Custody and Upbringing of Children in Canada and their Judicial Exercise' (1979) 2 Canadian J Family L 364, 382.

138 *R v Nash, Re Carey* (1883) 10 QBD 453; *Barnardo v McHugh* [1891] AC 388.

139 For example *Re Aster (An Infant)* [1955] 1 WLR 465, 468-469; *Ex parte Vorhauer: Re Steep* (1968) 88 WN (Pt 1) (NSW) 135; *Re an Infant, K, and the adoption of Children Act* [1973] 1 NSWLR 311.

> It appears to be established by the authorities that, in the case of an illegitimate child, all of the rights that are customarily incidents of technical legal guardianship in the case of a legitimate child, inhere in the mother. These rights are shared by the putative father, but, the child being illegitimate, the mother is usually the only parent known or on the scene and hence usually has been recognized as having, in her sole capacity, the status to enforce such rights as customarily inhere in guardianship as, for example, the right to bring habeas corpus in her own name in aid of the obtaining of custody or determination of religion of the child.[140]

Returning to Abromowicz's arguments, the core of her thesis is that '[t]he substantive basis for Chancery's authority over testamentary guardianships was that guardianship was a trust, and as such subject to the Court of Chancery's power to oversee all trusts.'[141] This trust argument is briefly touched on below but receives further examination in the following chapter. We now look further at the origin of the guardianship power or jurisdiction of the Court of Chancery.

2 Court of Chancery and Legislation

(a) Origins of the Guardianship Powers of the Court of Chancery

Dating back to Anglo-Saxon times, the King was seen as the protector of his subjects. By the fourteenth century, the concept had developed into the doctrine of *parens patriae* whereby the King had a royal prerogative to act as guardian to persons with legal disabilities. The King was to care for the persons and property of infants where they had no other guardian.[142] Subsequently, the King delegated this jurisdiction to the Lord Chancellor and finally to what became the Court of Chancery, which as early as the fifteenth century was exercising jurisdiction over infant heirs.[143] It should be noted that the Courts of Common Law also had jurisdiction over guardians. Over time however, and no later than 1660, the Court of Chancery absorbed all or almost the entire jurisdiction of guardianship.[144] The Courts of Common Law restricted themselves to

140 [1981] 1 NSWLR 439, 443.
141 S Abramowicz (1999) 1371.
142 *Eyre v Countess of Shaftesbury* (1722) 2 P Wms 103, 118-119; 24 ER 659, 664.
143 J Seymour (1994) 166.
144 R Storry Deans (1895) 58; S Abramowicz (1999) 1371.

questions of who had custody of the infant and their rights against third parties.[145] The Court of Chancery, being a court of equity, had great discretion to consider the interest of the infant and not just the rights of the guardian. And, as mentioned above, the Court of Chancery, unlike the Common Law Courts, also considered the interests of illegitimate children.

Despite this apparently seamless delegation of guardianship jurisdiction, which began with the King and ended with the Court of Chancery, there is disagreement among scholars over the nature and extent of that jurisdiction; or even whether delegation actually took place.[146] Disagreement seems to centre on the specific origin and antiquity of the Court of Chancery's broad parental jurisdiction in matters involving the guardianship of children.[147] This is not easy to resolve because as Storry Deans writes the ' the origin of the Chancellor's jurisdiction is obscure.'[148]

One theory is that the jurisdiction arose from matters of trust law, which itself was a natural development of its fifteenth century jurisdiction over uses.[149] The concept that guardianship is a trust is given support by a number of eighteenth and nineteenth century cases.[150] However Francis Hargrave in his annotations to Coke's Commentary upon Littleton rejects the trust theory. Hargrave writes that the trust theory is 'an overstrained refinement' of the term trust as used in the technical sense by lawyers and trust law was only ever concerned with the property not the persons of the legally vulnerable.[151] The Hon Justice Story in his *Commentaries on Equity Jurisprudence* supports this view adding 'that guardianship, considered as a trust, would equally be within the jurisdiction of all the courts of equity; whereas it is limited to the chancellor, siting in chancery.'[152] The trust argument is briefly examined in the next chapter.

---

145 *Rex v Smith* (1734) 2 Strange 282, 93 ER 983; *Rex v deManneville* (1804) 5 East 221,102 ER 1054; R Storry Deans (1895) 57.
146 F Hargrave and C Butler (1817) 88b, n 16; cf: G Spence (1846) 611.
147 J Seymour (1994) 166.
148 R Storry Deans (1895) 12.
149 J Seymour (1994) 166-167.
150 *Duke of Beaufort v Berty* (1721) 1 P Wms 703, 24 ER 579, 580; *Mathew v Brise* (1851) 14 Beav 341, 51 ER 317; *Plowright v Lambert* (1885) 52 LT 646.
151 F Hargrave and C Butler (1817) 88b, n 16.
152 Hon Mr Justice Story *Commentaries on Equity Jurisprudence* (15th ed Stevens and Haynes London 1884) 920.

The Court of Chancery in the 1696 case of *Falkland v Bertie*[153] espoused another theory or school of thought on where the Court of Chancery developed its guardianship jurisdiction over children. The Lord Chancellor, Lord Somers, in obiter dicta, stated the parens patriae doctrine or as the Court called it, the pater patriae doctrine, extended to cover not only lunatics and idiots but also infants. The Court added that the parens patriae protective jurisdiction in relation to infants was transferred in 1540 to the Court of Wards but on the abolition of that Court by the Tenures Abolition Act 1660, the jurisdiction reverted to the Court of Chancery.[154] Support for this view can be found in the early nineteenth century House of Lords' decision in *Wellesley v Wellesley* where Lord Redesdale referred to Lord Somers statement with approval.[155] Likewise Professor Holdsworth writes in his *History of English Law* that the Lord Somers' 'view has generally been accepted as the origin of this jurisdiction of the court.'[156]

However, Lord Somers' view or theory has not escaped criticism. Hargrave rejects such a theory on a number of grounds. First, in contrast to the situation with lunatics and idiots, no delegation from the King to the Court of Chancery of the parens patriae authority over infants existed. Second, there was a lack of authority to support the thesis that the Court of Chancery had parens patriae jurisdiction over infants prior to the establishment of the Court of Wards. Indeed, British barrister and legal academic Olive Stone believes that the guardianship jurisdiction was conferred on the Court of Chancery only after the abolition of Court of Wards in 1660.[157] Third, Hargrave cites *Ex parte* Whitfield[158] to support his argument that the Court of Chancery had rejected the notion that its parens patriae guardianship jurisdiction over infants was part of its power over lunatics and idiots.[159]

Other commentators provide some support for Hargrave. As noted by Lawrence Custer, the Court of Chancery in *Falkland v Bertie*[160] failed to provide case law authority

153 (1696) 2 Vern 333, 23 ER 814. cf: jurisdiction not suspended during the time of the Court of Wards, Hon Mr Justice Story (1884) 922.
154 *Falkland v Bertie* (1696) 2 Vern 333, 342; 23 ER 814, 818.
155 (1828) Bli NS 124, 131; 4 ER 1078, 1081.
156 W Holdsworth *History of English Law* (2nd ed (4th reprint) Methuen Sweet & Maxwell London 1987)Vol VI 648.
157 O M Stone (1979) 382.
158 (1742) 2 Atk 315, 26 ER 529.
159 F Hargrave and C Butler (1817) 88b, n 16.
160 (1696) 2 Vern 333, 23 ER 814.

to the statements about the Courts parens patriae jurisdiction over infants.[161] The Hon Justice Story comments that the 'lunatic, idiot and infants' continuum theory does not fit with the 'marked distinction between the jurisdiction in cases of infancy, and in cases of lunacy and idiocy.'[162] He writes that the infancy jurisdiction was exercised by a general delegation of authority of the crown to the Lord Chancellor in the Court of Chancery. No special warrant was required, the authority being exercised virtue officii. In contrast, the Lord Chancellor exercised the jurisdiction over lunacy and idiocy 'by a separate commission under the sign-manual of the king, and not otherwise.'[163]

In 1793 John Fonblanque offered a rebuttal to Hargraves' attack on the guardianship jurisdiction of the Court of Chancery. Flonblanque said the court's jurisdiction over children had always existed because to live in a civilised society it was necessary for the court to exercise that power.[164]

Whatever the exact origin of the Court of Chancery's jurisdiction to interfere in the guardianship of children, there is no doubt it has that jurisdiction and has exercised it. Spence noted that from the year 1796 the Court of Chancery has interfered or exercised jurisdiction over the guardianship of children.[165] However, the Court of Chancery's general supervisory jurisdiction over guardians was exercised prior to then. Indeed, Lord Esher in *R v Gyngall* said the jurisdiction 'has been exercised by the Court of Chancery from time immemorial.'[166] Despite this, the passing of the Tenures Abolition Act 1660 was a catalyst for a more active supervisory role, particularly in relation to legitimate children with living parents. The supervision extended to all types of guardians. In relation to the guardianship of illegitimate children or children with deceased parents the Court of Chancery had always been willing to interfere. As Blackstone says: 'For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of such persons as have not discretion enough to manage their own concerns.'[167]

161 L Custer 'The Origins of the Doctrine of Parens Patriae' (1978) 27 Emory L J 195, 202. Also refer to S Abramowicz (1999) 1352, fn 36.
162 Hon Mr Justice Story (1884) 919.
163 Hon Mr Justice Story (1884) 919.
164 J Fonblanque *A Treatise of Equity* (J and W T Clarke London 1820) 228-229.
165 G Spence (1846) Vol 1 612.
166 [1893] QB 232, 239.
167 W Blackstone (1765-1769) Vol 1 451.

(b) Guardianship in The Courts of Chancery and other Equitable Jurisdictions and via Legislation during the Modern Period

(i) Introduction

In exercising its guardianship powers, the Court of Chancery was not confined to determining questions of guardianship and custody in accordance with strict rights as was required of the Common Law Courts. Rather, it enjoyed a discretionary jurisdiction under which the welfare of the infant had priority.[168] The Court of Chancery afforded greater protection to children and had the power to refer preliminary questions relating to the guardian's fitness and willingness to act to the masters. It could also make flexible orders regarding the child's maintenance and education, while punishing those who sought to interfere with the powers of its appointed guardians.[169] The Court of Chancery often issued contempt of court orders against guardians and third parties who disobeyed its orders and sometimes imprisoned offending guardians and third parties until they payed for any damage done.[170] Also sometimes guardians would be subjected to criminal prosecutions[171] or be removed as guardians.[172] The discretionary jurisdiction of the Court of Chancery meant that it absorbed almost the whole of the guardianship jurisdiction.

With the passing of the Judicature Act 1873, the jurisdiction vested in the High Court of Chancery could be exercised by the Courts of Common Law. Courts of Equity and Courts of Common Law fused into one. However, this occurred only at an administrative level. The rules and principles of equity and common law remained separate and the supremacy of equity over the common law, established in 1615, in the *Earl of Oxford's Case*,[173] remains to this day.[174] The rules of equity prevail in questions relating to the custody and education of children but in *Re Goldsworthy*[175] the court held that there was still a concurrent common law jurisdiction. The rules of common law and equity were imported to Australia with colonial settlement in 1776 in New South

---

168 R Storry Deans (1895) 56-57.
169 R Storry Deans (1895) 56-57.
170 *Eyre v Shaftesbury* (1722) 2 P Wms 103, 24 ER 659.
171 *Goodall v Harris* (1729) 2 P Wms 561, 562; 24 ER 862, 863.
172 *Goodall v Harris* (1729) 24 ER 862, 862; *Morgan v Dillon* (1724) 9 Mod 134, 88 ER 361.
173 (1615) 1 Ch Rep 1, 21 ER 485.
174 Although, note the existence of the unitary view, that is, the fusion of the common law and equity, which has much support in the United Kingdom but little in Australia. Refer to P Birks *An Introduction to the Law of Restitution* (revd edn Clarendon Press Oxford 1989) 33.

Wales[176] and 1829 in Western Australia.[177] In 1935, the Western Australian Parliament passed its own version of the Judicature Act 1873,[178] vesting the Supreme Court of Western Australia with both common law and equitable jurisdictions.

Although the United Kingdom statutes discussed below in this chapter did not become part of the law of Western Australia, they are reflective of the statutory law history in Western Australia. Some of the Western Australian statutes are mentioned in this chapter but they are examined in greater depth in Part II. The case law examined in this section is predominately from the United Kingdom and Ireland. At least up to the end of the relevant period under examination (1972) a long line of Australian authorities have referred to the English cases for guidance and accepted the English Courts' position on the common law of guardianship.[179] Is should also be remembered that until the passing of the Australian Act 1986, English law had binding force in Western Australia. Generally, the Australian authorities add little to the discussion here. Where relevant however, they are referred to.

(ii) More than just Property

Initially the Court of Chancery's jurisdiction over guardianship matters was concerned with the proper management and preservation of the property of the child.[180] In *Wellesley v Beaufort*, Lord Eldon LC in discussing the parental and guardianship jurisdiction of the Court of Chancery says, 'it belongs to the King as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.'[181] However he qualified this jurisdiction or placed a precondition for its

175 [1876] 2 QB 75.
176 The first colony of Australia.
177 Refer further to 81-84 of thesis.
178 Supreme Court Act 1935 (WA), ss 24-25.
179 *Neale v Colquhoun* [1944] SASR 119, 122, 126, 129-130; *Capodici v Capodici* (1967) 12 FLR 129, 131-135;*Carseldine v The Director of the Department of Children's Services* (1974-1975) 133 CLR 345, 350-351, 366-367; *Glynn v Harries* (1980) 6 Fam LR 892, 894-895; *Youngman v Lawson* [1981] NSWLR 439, 442-443; *Fountain v Alexander* (1982) 150 CLR 615, 627, 633, 641, 645; *Bennett v Minister for Community Welfare* (1988) Aust Torts Reports 80-210, 68,089; *Secretary, Department of Health and Community Services v JMB and SMB* (1991-1992) 175 CLR 218, 279-281, 291-293.
180 J Seymour (1994) 175.
181 (1827) 2 Russ 1, 20; 38 ER 236, 243.

exercise: 'If any one will turn his mind attentively to the subject, he must see that this Court has not the means of acting, except where it has property to act upon.'[182] This property connection was not abandoned until 1847 where Lord Cottenham ruled:

> The cases in which this Court interferes on behalf of infants, are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of the person of *any* body who is suggested to be improperly detained. This Court interferes for the protection of infants, *qua* infants by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal.[183]

Again, in 1851 in, *Anonymous*, Lord Cranworth VC commenced his judgement as follows: 'The ground for granting the writ of habeas corpus by the Court is not the same as for the grant of it by a Court of Law. At law the issue of the writ is *ex debito justitiae* and in a sense it is so here; but the Court of Chancery has a jurisdiction respecting it infinitely beyond that of a Court of Law.' [184] In another 1851 case, the Master of the Rolls, Sir John Romilly stated: '[a] guardian is not only a trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant with many duties to perform, such as to see to his education and maintenance.'[185] Thus the property connection had been abandoned as a pre-condition for the Court of Chancery to impose its jurisdiction over matters of guardianship.

(iii) The Best Interest of the Child and Equalising of Parental Status

As the eighteenth century progressed, the Court of Chancery became more willing to intervene in the parents' upbringing of their children. Lord Macclesfield LC in *Duke of Beaufort v Berty*[186] commented that the Court had interfered in guardianship of the child even if it overrode the father[187] or mother's wishes.[188] On some occasions, the public interest was influential in the Court's decision.[189] This was so when the child was

---

182 (1827) 2 Russ 1, 21; 38 ER 236, 243.
183 *In re Spence* (1847) 2 Ph 247, 252; 41 ER 937, 938.
184 (1851) 2 Sim (NS) 54, 68; 61 ER 260, 266.
185 *Mathew v Brise* (1851) 14 Beav 341,345; 51 ER 317, 319.
186 (1721) 1 P Wms 703, 705; 24 ER 579, 579-580.
187 See also *Creuze v Hunter* (1790) 2 Cox 242, 30 ER 113; *Powel v Cleaver* (1789) 2 Bro C C 500, 29 ER 274; *Ex parte Warner* (1792) 4 Bro C C 101, 29 ER 799; *Skinner v Warner* (1792) Dick 779, 21 ER 473. Also refer to J Seymour (1994) 175.
188 *Tenham v Lennard* (1724) 4 Bro P C 302, 2 ER 204.
189 S Abramowicz (1999) 1389-1390.

destined to become a member of the House of Lords.[190] However, whether it was the infant interest or public interest test, the court found that it would be best if the child were brought up in the 'proper' manner, that is, with the customs and religion of England.[191]

American legal scholar Danya Wright notes that in the eighteenth century the Court of Chancery regularly placed the interests of children higher than those of parents or guardians.[192] Wright comments that the eighteenth century, 'was a period of rights, of legal rhetoric, and juridic symbols, and the growth and changes in eighteenth century English law brought attention onto rights which underscored the incongruities in the law of parents and children that preferred the heir over his other siblings and over the non-propertied minor child.'[193] The nineteenth and twentieth centuries witnessed a continuation of the developments that earmarked the eighteenth century as a century of change in relation to guardianship law. Even though the courts of the eighteenth and nineteenth centuries were in their decisions preferring the interests of the child to other competing interests and also bringing the rights of the father and mother on a more even keel, this did not always happen.[194] As Lord MacDermott remarked in *J v C* in 1970: 'The authorities are not consistent and the way along which they have moved towards a broad discretion, under the impact of changing social conditions and the weight of opinion, has many twists and turns.'[195] But a trend did develop towards equalising the gender parental rights and elevating the child's best interest above all other interests. The changing social condition and norms also affected the legislature leading to the enactment of legislation reflecting the trend just described.

Back in the early eighteenth century (1722) in *Eyre v Countess of Shaftesbury*, Lord Commissioner Jekyll comments: 'The law is particularly favourable to and careful of an infant's interest.'[196] However, some 82 years later, in the case of *De Manneville v*

---

190 *Duke of Beaufort v Berty* (1721) 1 P Wms 703, 24 ER 579.
191 *Eyre v Countess of Shaftesbury* (1722) 2 P Wms 103, 113; 24 ER 659, 662; S Abramowicz (1999) 1380.
192 DC Wright (1999) 281.
193 DC Wright (1999) 256.
194 H A Finlay and R J Bailey-Harris *Family Law in Australia* (4th ed Butterworths Sydney 1989) 220.
195 [1970] AC 668, 703.
196 (1722) 2 P Wms 103, 24 ER 659. See also *Roach v Garvan* (1748) 1 Ves Sen 157, 27 ER 954; *Shipbrook v Lord Hinchinbrook* (1778) 2 Dick 547, 21 ER 383.

De Manneville,[197] Lord Eldon LC placed the unlawful separation of the parties ahead of consideration of the child's best interest. Mrs De Manneville came to the marriage with Mr De Manneville, a French alien, with considerable property ownership. By contrast Mr De Manneville had a government annuity of 60 pounds as a French alien. In 1803, three years into the marriage a child was born. Soon after due to incompatible personalities, Mrs De Manneville left her husband's home and returned with her child to her mother's place of residence. While a nurse was attending to the child due to a short illness of the mother, Mr De Manneville took custody of the child. However, soon after the father was taken into custody pursuant to the Alien Act 1793 and the child was returned to the mother. Upon his release, Mr De Manneville illegally entered the child's grandmother's house and once again snatched the child away. After refusing to return the child to his estranged wife, Mrs De Manneville instigated habeas corpus proceedings in the Court of King's Bench.[198] She was unsuccessful there, the Court holding that a father had the right to seize and reclaim custody of a 'child then at the breast.'[199] Unsuccessful at the King's Bench Mrs De Manneville turned to the Court of Chancery, seeking an order of custody or in the alternative, an order prohibiting her husband from removing the child from England.[200] Mrs De Manneville argued that her husband was guilty of ill-usage, had threatened to remove her and the child to France, had pressed her to make a will in his favour, held Jacobin views and was irreligious. It was also argued by her counsel that the child's tender age necessitated he remains with his mother and further, the father was incapable of providing appropriate maintenance.

Even though the father had limited means to support the child in contrast to the mother who had property and family support in England, Lord Eldon LC denied the mother's claim for custody because she was living in an unauthorised separation.[201] She had not obtained a legal separation from the ecclesiastical court. Thus on the basis of the law of coverture, she could not bring a suit against her husband. However, the Court did agree to an order from the mother preventing the father from removing the child from England.

[197] (1804) 10 Ves 52, 32 ER 762.
[198] *R v De Manneville* (1804) 5 East 221, 102 ER 1054.
[199] (1804) 5 East 221, 221; 102 ER 1054, 1054.
[200] *De Manneville v De Manneville* (1804) 10 Ves 52, 32 ER 762.

In his judgment, Lord Eldon LC did not refer to the father's inadequate means to support the child or the superior familial and financial support the mother possessed. Although he made reference to the husband's 'cruelty' to his wife, there was no mention as to whether the child had been treated likewise. Lord Eldon LC's decision seems to ignore the interest of the child. He was concerned to protect the existing social order so it was not the child's interests or even the father's rights that dominated his decision but the sanctity of marriage. In later decisions Lord Eldon LC did override paternal rights when separation was not an issue,[202] very clearly pronouncing that the Court of Chancery must protect the child: 'It has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done.'[203]

Lord Eldon LC was very protective of the existing social order.[204] While not opposed to all change he was guarded against radical change that would lead to, 'the shattering of a whole social order, and its appropriate values and modes of behaviour.'[205] Lord Eldon LC was a great defender of the sanctity of the family and family stability but he adhered to a patriarchal centric view of the family where the wife had a special duty to the children and was expected to be more self-sacrificing than the husband.[206] However, as academic Martha Bailey points out Lord Eldon LC 'saw husbands, too, as bound by a code of duty. The family, held together by the various duties of its members, was as dear to Eldon as his beloved Constitution, and he was as resistant to change in one as in the other.'[207] Lord Eldon LC viewed that the best interests of the child were served by maintaining the stability of the family.

The decision by Lord Eldon in *De Manneville v De Manneville* was followed in subsequent cases in the Common Law Courts[208] and the Court of Chancery,[209] which

201 *De Manneville v De Manneville* (1804) 10 Ves 52, 60; 32 ER 762, 766.
202 For example, *Shelley v Westbrooke* (1817) Jacob 266, 37 ER 850; *Wellesley v The Duke of Beaufort* (1827) 2 Russ 1, 38 ER 236.
203 *Wellesley v The Duke of Beaufort* (1827) 2 Russ 1, 17; 38 ER 236, 242.
204 M Bailey 'England's First Custody of Infants Act' (1995) 20 Queen's L J 391, 398.
205 J C D Clark *English Society 1688-1832* (CUP Cambridge 1985) 409; M Bailey (1995) 398.
206 M Bailey (1995) 398-399.
207 M Bailey (1995) 399.
208 *Reg v Greenhill* (1836) 4 AD & E 624, 111 ER 922.
209 *Ball v Ball* (1827) 2 Sim 35, 57 ER 703.

were cited in support for the need for legislative reform.[210] Initial legislative reform came in the form of the Custody of Infants Act 1839. This Act is sometimes referred to as the Talfourd's Act, named after House of Commons member Serjeant Talfourd. Talfourd received assistance outside of Parliament from the campaign of Caroline Norton. Norton, a well-known society hostess of the time had an unsuccessful marriage, leaving her husband and taking their three children with her. In her absence her husband seized the children and denied her access to them. She then realised her parlous position in the eyes of the law, leading her to campaign for law reform to improve the rights of mothers of legitimate children. She wrote and published a number of pamphlets.[211]

The 1839 Act was not passed without a vigorous debate in Parliament where many believed the father's absolute rights should prevailed as this was in the best interest of the child and the institution of marriage. To a large extent, those in favour of the 1839 Act argued that it was a grave injustice that under existing laws, a mother of an illegitimate child retained custody of her child but a mother of a legitimate child was denied this same right. The 1839 Act permitted the Court of Chancery to award custody of a child to the mother up to the age of seven, with access after that until majority. However, unlike the mother of an illegitimate child, a mother of a legitimate child who committed adultery forfeited her right of custody or access to the children.[212]

The 1848 case of *In re Flynn* reinforced the guardianship and custody rights of the father, which rights should only be interfered with if the father has conducted himself or shown himself to be a person who has placed at risk 'in some serious and important respect' the safety and welfare of his children.[213] The interest of the child is the principle that invites the jurisdiction of the Court of Chancery. As Lord Cranworth LC in *Hope v Hope* stated:

---

210 M Bailey (1995) 396, 399.

211 For example, C Norton *Separation of the Mother and Child by the Law of Custody of Infants Considered* (Roake & Varty London 1838). Also refer to I Pinchbeck and M Hewitt *Children in English Society* (Routledge and Kegan Paul London 1973) Vol II 371-373.

212 *Seddon v Doyle* (1862) 2 Sw & Tr 640, 164 ER 1146.

213 (1848) 2 De G & Sm 457, 474-475;64 ER 205, 212.

> The jurisdiction of this court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects.[214]

The Matrimonial Causes Act 1857 furthered eroded the father's rights by given the Divorce Court large discretion in relation to custody, maintenance and education of children of divorcing or separating parents. Less than twenty years later, the father's rights were further eroded via the Custody of Infants Act 1873. This Act allowed the Court of Chancery to grant access, custody and control to the mother for a child up to sixteen (compared to the previous age of seven) and did not automatically bar the mother from seeking access, custody and control because she was an adulterer.[215] Further, the 1873 Act legalised agreements between parents that gave the mother the custody of the child 'except where the Court might deem it contrary to the benefit of the child to enforce it.'[216]

Even though in 1865, Sir John Romilly expressed support for maternal preference in relation to 'a child of tender years',[217] in equity as with common law, the rights of the father continue to dominate with the welfare of the child being subsidiary. Indeed, the 'father's empire' or 'sacred rights' of a father to the custody and control of the child was confirmed in *Re Agar-Ellis; Agar-Ellis v Lascelles*,[218] although in relation to illegitimate children the mother's wishes dominated, as can be seen in the 1891 case of *Barnardo v McHugh*.[219] For legitimate children the Court of Chancery was of the opinion that only gross misconduct on the part of the father would justify interference with paternal rights and the natural authority of the father. Lord Justice Cotton commented:

214 (1854) 4 De GM & G 328, 344-345; 43 ER 534, 540-541.
215 *Stark v Stark & Hutchins* (1910) 26 TLR 194.
216 Refer to I Pinchbeck and M Hewitt (1973) Vol II 377.
217 *Austin v Austin* (1865) 55 ER 634, 636-637.
218 (1883) 24 Ch D 317.
219 [1891] AC 388.

> It has been said that we ought to consider the interest of the ward. Undoubtedly but this court holds the principle that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of a particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father, but leave him the responsibility of exercising that power which has given him by birth of the child.[220]

In the same case Bowen LJ considered the family and the rights of the family as sacred.[221] In relation to the child's interest he added:

> Then we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense it would be a fallacious test to apply to the way the court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can.[222]

The sacred rights of the family as espoused in *Re Ellis; Agar-Ellis v Lascelles* had received prior judicial acceptance in *In re Curtis*[223] and *In re Plomley*.[224] However, the 1843 case of *Johnstone v Beattie*[225] and the 1861 case of *Stuart v Marquis of Bute* [226] determined that the child's interest was the determinative factor. Although in these later two cases the parents of the children concerned were deceased. Hence, the family unit with the father figure being the centre of focus was not a consideration for the Court in these two cases.

At the time of the enactment of the Guardianship of Infants Act 1886 father's rights still seemed to be the predominant consideration. The 1886 Act did make some inroads into this position, with mothers, for the first time, standing in the same position as testamentary guardians appointed by the fathers. At common law the father retained guardianship supremacy but on his death, the mother became guardian. She did, however

220 *Re Agar-Ellis v Lascelles* (1883) 24 Ch D 317, 334.
221 (1883) 24 Ch D 317, 337.
222 (1883) 24 Ch D 317, 337.
223 (1859) 28 LJ Ch 458, 459-460.
224 (1882) 47 LT 284.
225 (1843) 10 CL & Fin 42, 122; 8 ER 657, 688.
226 (1861) 9 HLC 440, 469; 11 ER 799, 811.

share this guardianship status with any testamentary guardian appointed by the father.[227] No wonder Lindley LJ in the 1897 case of *In re A and B* described the 1886 Act as 'essentially a mother's Act.'[228] Under s 5 the Court could make those orders in relation to custody and access that it thought were appropriate having regard to the welfare of the child and the conduct and wishes of both parents. In relation to s 5 Rigby LJ wrote: 'The court is not to forget the rights of the father; but throughout the Act an intention is shown to modify those rights and cut them down and make them totally different from what they had been at common law or under the previous Acts.'[229] His Lordship continued: 'The section goes on to indicate the considerations that must be taken into account by the Court. First comes the welfare of the infant'[230]

Lord Justice Rigby added that regard was to be had to the conduct of the parents equally and their wishes equally.[231] One must be careful though not to be mistaken in assuming that the father's rights were now of inferior priority. They were not but they were diminished to the extent that the rights of the mother had to be equally considered and the welfare of the child was becoming as significant as those of the parents.[232]

Three years prior to the decision in *In re A and B* Lord Justice Lindley in *In re McGrath (Infants)* recognised the growing importance to be given to the welfare of the child when he commented:

> The duty of the court is, in our judgment, to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.[233]

227 Guardianship of Infants Act 1886, s 2.
228 [1897] 1 Ch 786, 790.
229 *Re A & B* [1897] 1 Ch 786, 793. Also refer to H A Finlay and R J Bailey-Harris (1989) 219.
230 [1897] 1 Ch 786, 793.
231 [1897] 1 Ch 786, 794-795.
232 [1897] 1 Ch 786, 790, 792.
233 [1893] 1 Ch 143, 148.

This decision makes it clear that the welfare of the child is to be at the forefront of the courts' decisions. Also it is interesting to note that the welfare of the child means more than just physical welfare or the pre-eighteenth century focus on property or economic factors. Wider social or cultural considerations such as morality and religion are important considerations in determining what is best for the child.

The erosion of parental rights, irrespective whether paternal or maternal, if considered in the best welfare of the child, was given strong statutory support by a number of other statutes during the second half of the nineteenth century. The Poor Law Act 1834, Poor Law Amendment Act 1850, Poor Law Adoption Act 1889 and the Prevention of Cruelty Act 1889 deprived neglected parents and other custodians from custody of their children and prevented their economic exploitation. These Acts were part of the so-called 'Poor Laws' and originated from statute from the Tudor times; the principal being the untitled (1535) 27 Hen VIII c 25, which continued and was amended by later statutes.[234] In addition to the English Poor Law legislation, there were a number of reports on English Poor Law policy; such as the report of 1834. [235]

The Poor Laws required local administrators to provide shelter to the children of the destitute and to make the parents and the children work.[236] Another Act, the Custody of Children Act 1891, also prevented unfit parents from having custody of their children and provided for custody to pass to a stranger.[237] Under s 3, if the parent had abandoned or deserted the child or otherwise raised the child in a manner unbecoming of a 'proper' parent, the Court 'shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.' Furthermore, there were many other statutes passed throughout the nineteenth century that sought to provide protection to children and prevent their economic abuse and in some cases to provide educational measures.[238]

---

234 Refer to EM Leonard *Early History of English Poor Relief* (Frank Cass & Co London 1965); OM Stone (1979) 383.

235 *Report from His Majesty's Commission for Inquiring into the Administration and Practical Operation of the Poor Laws* (British Parliamentary Papers (1834) vol 27 no 44).

236 OM Stone (1979) 383.

237 Custody of Children Act 1891, ss 1 and 3.

238 For example, Peel's Act 1816; Cotton Factories Act 1816; Custody of Infants Act 1839; Infants Felons Act 1840; Poor Laws Amendment Act 1844; Industrial Schools Act 1857; Infants Life

This legislative activity in Britain also had its parallel in Australia. In the 1860s and 1870s all Australian States enacted legislation modelled on the British Industrial Schools Act 1857.[239] In Western Australia the relevant statute was the Industrial Schools Act 1874 (WA). The 1874 Act was repealed and replaced in 1907 by the State Children Act 1907 (WA), which was the blueprint for mainstream child welfare in that state for at least the first half of the twentieth century.[240]

Even though the legislative scheme developed in the nineteenth century contemplated and made it more permissible to remove a child from a 'dangerous' or 'harmful' or 'neglected' situation, including a family situation, it was still considered preferable that a child should be in the custody of the parents. It was thought that the parents' rights and wishes in relation to the bringing up of their children should not be displaced just because the courts thought there was a 'better way'; but it must be a 'very serious and important' matter for the court to disregard or intervened in the parents parental rights.[241] This 'very serious and important' matter would often be misconduct on the part of the parent but not always. Lord Esher in *R v Gyngall* stated that although there may be no misconduct on the part of a parent, the Court 'will not permit that to be done with the child which a wise, affectionate, and careful parent would not do.'[242] However, '[t]he Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right'[243] because generally it is in the child's best interest to stay with the natural parents as others will not have that natural relationship with the child.[244] Lord Esher also made it clear that the parents' natural rights and feelings towards the child and the feelings and views that may have been introduced into the 'heart and mind of the child' need to be considered and the child should not be removed from its natural parent, 'merely because its pecuniary position

Protection Act 1872; Dangerous Performance Act 1879; Factories Act 1891. See also R Storry Deans (1895) 106-118.

239 Refer to 91-101 of this thesis.

240 Refer to 128-136 of this thesis. It should also be noted that in 1896 the Western Australian Parliament enacted the Adoption of Children Act 1896 (WA), which provided for the adoption of 'deserted children'.

241 *R v Gyngall* [1893] 2 QB 232, 242.

242 [1893] 2 QB 239, 242.

243 [1893] 2 QB 239, 242.

244 [1893] 2 QB 239, 243.

will be thereby bettered.'[245] Thus the sanctity of the family and the bonding of a child with his or her parents remained important.

The position that the Courts should be cautious in intervening in matters of parental rights over their children was well stated in the turn of century Irish case of *In re O'Hara*.[246] Lord Justice FitzGibbon very aptly described the law on the matter as follows:

> The following principles appear to be settled: -1, At common law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct; 2, Chancery, when a separate tribunal, possessed a jurisdiction different from that of the Queen's Bench, and essentially parental, in exercise of which the main consideration was the welfare of the child, and the court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the common law right to do otherwise, and had not been guilty of misconduct; 3. The Judicature Act has made it the duty of every division of the High Court to exercise the Chancery jurisdiction; 4, In exercising the jurisdiction to control or to ignore the parental right with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded.[247]

The social upheaval of the First World War and changing public opinion on the rights of women in society and the welfare of children influenced the enactment of the British Guardianship of Infants Act 1925[248] and the Western Australian Guardianship of Infants Act 1920 and Guardianship of Infants Act 1926 (WA). The preamble to the British 1925 Act stated: 'Whereas Parliament, by the Sex Disqualification (Removal) Act 1919, and various enactments has sought to establish equality in law between the sexes, it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby.' Pursuant to s 1 of the 1925 Act, in court proceedings in relation to custody and upbringing of the child, the courts were to abide by the principle of the child's welfare being the 'first and paramount consideration.' Section 2 provided for gender equality: 'The mother of an infant shall

245 [1893] 2 QB 239, 243.
246 [1900] 2 IR 232.
247 [1900] 2 IR 232, 239-240.

have the powers to apply to the court in respect of any matter affecting the infant as are possessed by the father.' While there was some debate whether the application of the Guardianship of Infants Act 1886 was restricted to disagreement between parental spouses[249] the Guardianship of Infants Act 1925 applied 'to disputes not only between parents, but between parents and strangers and strangers and strangers.'[250]

The Guardianship of Infants Act 1920 (WA) gave mothers special rights in applying to courts for custody. Much of the 1920 Act was amended by the Guardianship of Infants Act 1926 (WA), which like the British 1925 Act expressly legislated for the child's welfare being 'the first and paramount consideration' in the custody and upbringing of the child.[251] The British 1925 Act s 2 'parental equality' provision was reproduced in s 3 of the Western Australian 1926 Act.

Even before the enactment of the Guardianship of Infants Act 1925, it is arguable that the welfare of the child had long been of dominant consideration. This is the view held by Lord Guest in *J v C* [252] and was the position of the Irish case heard in the House of Lords of *Ward v Laverty*.[253] In this case, heard a year prior to the passing of the Guardianship of Infants Act 1925, Viscount Cave summarised the law as it then stood:

248 I Pinchbeck and M Hewitt (1973) Vol II 383.
249 *In re A and B (Infants)* [1897] 1 Ch 786.
250 *J v C* [1970] AC 669, 697-698, 715, 724-725.
251 Guardianship of Infant Act 1926 (WA), s 2.
252 [1970] AC 669, 697.
253 [1925] AC 101.

> The law in these cases is well settled, and, indeed, is not contested by the learned counsel who argued the case before this House. On the question of religion in which a young child is to be brought up, the wishes of the father of the child are to be considered; and if there is no other matter to be taken into account, then, according to the practice of our courts, the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children, which, according to rules which are now well accepted, forms the paramount considerations in these cases. Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now; but in the more recent decisions, and especially since the passing of the Guardianship of Infants Act, 1886, section 5 of which Act shows the modern feeling in these matters, the greater stress is laid upon the welfare and happiness of the children. It is, of course, still true, as the learned counsel who argued the case quite properly said, that a sufficient case must be made for going contrary to the father's wishes; but, if such a case is made, then the courts have no hesitation in deciding upon the whole facts of the case.[254]

Hence even prior to the Guardianship of Infants Act 1925, the child's interest was of paramount consideration with the father's interest being one factor to consider. As Mason J said in the High Court of Australian case of *Fountain v Alexander*: 'It has always been recognized that the dominant matter for the consideration of the court is the welfare of the child.'[255] It just happens that often it was concluded that the father knew best and thus the father's rights and authority held sway. However, even if the child's welfare was the predominating consideration, there was the occasional exception[256] and there must have been 'some lingering uncertainty' as to what extent the welfare principle had encroached on parental rights. Otherwise, as Lord Donovan said in *J v C* why was there the need to enact s 1 of the Guardianship of Infants Act 1925?[257] Whether there was doubt or not, the Guardianship of Infants Act 1925 and the Guardianship of Infants Act 1926 (WA) expressly and clearly made the welfare of the child the first and paramount consideration and equalised the rights or weighting to be given between the parents.

---

254 [1925] AC 101, 108.

255 (1982) 150 CLR 615, 633. Mason J refers to *In re McGrath (Infants)* [1893] 1 Ch 143, 148.

256 For example, refer to *Re Agar-Ellis; Agar-Ellis v Lascelles* (1883) 24 Ch D 317; *R v New* (1904) 20 TLR 583.

257 *J v C* [1970] AC 688, 727. Also refer to JC Hall 'The Waning of Parental Rights' (1972) 31 CLJ 248, 252.

Although the cited legislation clearly espoused the 'first and paramount' principle, in 1931 the Court of Appeal in *Re Carroll* fought a successful defence and counter-attack in favour of parental rights. [258] However, Dankwerts LJ in the 1963 case of *In re Adoption Application 41/61*[259] and finally the 1970 case of *J v C* [260] settled the law as expressed in s 1 of the Guardianship of Infants Act 1925. That is, the child's welfare considerations must predominate over parental rights and this goes for whether one is looking at disputes between parents, parents and non-parental guardian or custodian, or two non-parental guardians or custodians. However, parental rights have not been abrogated completely. They have just been relegated behind the interests of the child. As Lord MacDermont said in *J v C*, the words first and paramount consideration refers to:

> a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.[261]

As mentioned above, a number of English statutes were enacted in the second half of the nineteenth century, which provided legislative protection and care for children made destitute, neglected or abused and to prevent such harmful conduct towards children. The British legislatures of the twentieth century likewise enacted a series of statutes to protect children and make it an offence to mistreat or cause suffering and injury to them and provided processes for removing children from the care of neglectful or abusive parents.[262] This history of legislation over the last one hundred years or so traverses a similar path to the case law developed by the Courts of England. That is an increasing recognition of the rights of the child and placing the best interest of the child ahead of all other considerations. As also mentioned above, this development of the law

---

258 [1931] 1 KB 317.
259 [1963] Ch 315, 328-329.
260 *J v C* [1970] AC 669.
261 [1970] AC 669, 710-711.
262 Children Act 1908; Children and Young Persons Act 1932; Children and Young Persons Act 1933; Children and Young Persons Act 1938; Children Act 1948; Children and Young Persons Act 1956; Children Act 1958; Children and Young Persons Act 1963; Children and Young Persons Act 1969. See also JC Hall (1972) 256-258.

giving primacy to the interests of the child has been mirrored in Australia. The similarity of development between Britain and Australia has been acknowledged by the High Court of Australia where McHugh J remarked: '... the father's near absolute right of control over the person, education and conduct of his children has been taken away by a series of enactments in England and Australia in the last hundred and fifty years and by the social and judicial recognition of children as persons with independent rights.'[263]

CONCLUSION

This examination of the history of guardianship presents a picture of how from Roman times to modern times, the status of the father in matters of guardianship have dominated but how over time this has been eroded, particularly over the last two hundred years, to a stage where now the principle of the child's best interest is the 'first and paramount consideration' There has also been an equalising of the status of fathers and mothers. English statute law over the last two centuries and Western Australian legislation in the twentieth century has also pushed along the best interest of the child consideration and the equalising of the status of the father and mother. In relation to illegitimate children, the Court of Chancery and equity, unlike the Common Law Courts, have been prepared to recognise the need to protect the child and have given preference to the views of the mother over the father.

Even though the rights of the parents have been relegated behind the best interest or welfare of the child, the general wisdom has been that in most circumstances it is best for a child to stay with the parents or a parent. The need to preserve the sanctity of the family and keep the children with their parents has been a significant consideration in the exercise of the parental and guardianship jurisdiction by the Court of Chancery and since the Judicature Act 1873, the Common Law Courts exercising equitable jurisdiction. However, even though there have been some hiccups, the clear trend in the last two centuries from the Court of Chancery and other court's exercising equitable jurisdiction, is that the child's best interest must prevail and if this requires a child to be removed from a parent and placed in the guardianship or custody of a third person so be it. But

[263] *Secretary, Department of Health and Community Services v JMB and SMB* (1991 – 1992) 175 CLR 218, 314.

there had to be strong and good reason for such action. The Australian judiciary has accepted this English case law on guardianship and parental status and rights. This has also been reflected in the mainstream child welfare legislation enacted in the various State Parliaments, including Western Australia. The legislation pertaining to Western Australia will be examined in Part II, as will Aboriginal specific legislation.

We now turn to look at the detail of the guardianship concept and the rights and duties of guardians. The guardianship paradigm was the cornerstone of the relationship between the separated Aboriginal children and the State Chief Protector of Aborigines or Commissioner of Native Affairs.

CHAPTER THREE

CONCEPT, RIGHTS AND DUTIES OF GUARDIANSHIP

INTRODUCTION

Under the legislative and policy scheme examined in the next part of this thesis, the Chief Protector of Aborigines or the Commissioner of Native Affairs and the Department they administered, were given responsibility over the upbringing of Aboriginal children. The parents' natural guardianship was superseded by guardianship legislatively granted to the Chief Protector of Aborigines or the Commissioner of Native Affairs or other prescribed or designated officials. Simultaneously, the parental rights of many Aborigines were interfered with and thus where relevant are touched on in this chapter.

This chapter examines these guardianship rights and duties, with the emphasis being on the duties or obligations. In tackling this task one must turn to the common law of guardianship as the statutes relevant to the Aboriginal child separation history are relatively silent on the content of guardianship duties. The same is true of the mainstream child welfare legislation operating in Western Australia. Further the focus is not on the guardianship of all Aboriginal children in Western Australia during the relevant period, but rather the State guardianship of those Aboriginal children who were separated from their parents or other family guardians.

The following examination is made somewhat difficult by confusion over what is meant by the term guardianship. Is the concept of guardianship different to custody? Is custodial duties part of the duties a guardian has to comply with? This chapter commences with a discussion of the concept of guardianship, followed by an examination of guardianship rights and duties. The chapter concludes with an examination on the concept of guardianship as a trust. If a guardianship is categorised as a trust it adds a further overlaying trusteeship obligation or duty over the guardianship duties.

CONCEPT OF GUARDIANSHIP

Any confusion that exists in relationship to terminology surrounding the concept of guardianship centres on the distinction between the terms guardianship and custody. The later term 'is of fairly modern vintage in respect to children.' [264] It does not appear in Blackstone's commentaries on child law.[265] However, the term has existed for some time and was mentioned in some of the leading cases of the nineteenth century[266] where custody was often referred to as being the 'physical possession and control of a child.'[267] Legislatures have often distinguished between guardianship and custody while the courts have often treated guardianship and custody as the same. This has lead to confusion.[268] In responding to the way statutes have used the term custody, courts have often broadened the scope of custody.[269] The confusion that legislatures have generated was recognised by Sachs LJ in the English Court of Appeal case of *Hewer v Bryant*:

> In their efforts to assist the court counsel referred to the series of words and phrases appearing in that cascade of legislation which during the past half century has touched upon the welfare and protection of children from many angles. In those statutes one finds scattered, sometimes with and sometimes without definitions, words and phrases such as "care, control, custody, actual custody, legal custody, guardian, legal guardian and possession." In the end, so far as comprehensibility on these matters is concerned, one finds that this voluminous and well intentioned legislation has created a bureaucrat's paradise and a citizen's nightmare. Each statute was passed with its eyes focused on its own particular set of objects, and for my part I have found but little assistance from their detailed terminology.[270]

The confusion in categorisation or definition was recognised by Demack SJ in *In the Marriage of Newbery* where he observed that statutes often treat guardianship and custody as distinct concepts, even though they are 'terms of art of invariable content.'[271] And as mentioned here, the confusion between the terms guardianship and custody has

---

264 WGW White 'A Comparison of Some Parental and Guardian Rights' (1980) 3 Canadian J Family L 219, 224.

265 W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) Vol I 434-454 (Special edition LB Adams Jr The Legal Classics Library Birmingham Alabama 1983).

266 See for example *In re Agar; Agar-Ellis v Lascelles* (1883) 24 Ch D 317.

267 A Dickey *Family Law* (3rd ed Law Book Company North Ryde 1997) 323.

268 *Hewer v Bryant* [1970] 1 QB 357, 373.

269 A Dickey *Family Law* (1997) 323.

270 [1970] 1 QB 357, 371.

271 (1977) 27 FLR 246, 248.

mainly come about due to the legislature distinguishing between the terms and the courts giving custody an enlarged meaning.

Whether and how guardianship differs from custody depends to a large degree on whether one is referring to the terms in their broad or narrow sense. Australian family law expert Anthony Dickey QC asserts that guardianship in its broad common law sense encompasses 'the full range of rights and powers that can be exercised by an adult in respect of the welfare and upbringing of a child.'[272] For example, in *Neale v Coloquhoun*, the Supreme Court of South Australia explained that guardianship 'must be regarded as including the education in the wide sense of the upbringing and all round development of the child.'[273] In *Youngman v Lawson* Street CJ noted that, 'guardianship is a relationship which, so long as it subsists, is recognized as conferring rights in the guardian in respect of the custody and upbringing (educational as well as religious) of the child.'[274] His Honour added that guardianship 'rights may be exercised by the guardian himself or herself actually having physical custody; or it may be exercised by the physical custody being placed with others.'[275]

The 'narrow sense' definition of guardianship, Dickey writes, includes few rights. It is the contradistinction to custody, restricted to protecting the person and property of the child against third parties and undertaking legal action on behalf of the child.[276] In *Wedd v Wedd* Mayo J stated: 'It may be "guardianship" and "custody", when used in contrast, are several aspects of the same relationship. The former can very well be employed in a special context to denote 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.'[277] Justice Mayo goes on to say that custody 'concerns control, and the preservation and care of the child's person, physically, mentally and morally: responsibility for a child in regard to his needs, food, clothing instructions and the like.'[278] Likewise, in *Hewer v Bryant* Sachs LJ stated that 'among the various meanings of the word "custody" there are two in common use in

272 A Dickey *Family Law* (1997) 323.
273 [1944] SASR 119, 129.
274 [1981] NSWLR 439, 445.
275 [1981] NSWLR 439, 445-446.
276 A Dickey *Family Law* (1997) 324.
277 [1948] SASR 104, 106-107.

relation to infants which are relevant and need to be carefully distinguished. One is wide – the word being used in practice as almost the equivalent of guardianship: the other is limited and refers to the power physically to control the infant's movements.'[279] His Honour added:

> In its wider meaning, the word "custody" is used as if it were almost the equivalent of "guardianship" in the fullest sense – whether the guardianship is by nature, by nurture, by testamentary disposition or by order of the Court. (I use the words "fullest sense" because guardianship may be limited to give control only over the person or only over the administration of the assets of an infant.) Adapting the convenient phraseology of counsel, such guardianship embraces a "bundle of rights" or to be more exact, a "bundle of powers," which continue until the male infant attains 21, or a female infant marries. These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of the passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the Courts to exercise the powers of the Crown as parens patriae.[280]

Thus in the narrow sense custody seems limited to actual possession of the child and the rights that attach to that physical possession. It is the narrow sense of the word that most equates with its original meaning to the custody or actual custody of the infant's body.[281] In many respects the narrow meaning of custody is similar to the 'care and control' of the child. Although there has been judicial acknowledgement of the difficulties in determining what care and control entails[282] and how it differs from custody,[283] a number of Australian cases post 1960 have done so.[284] Dickey succinctly states that these cases conclude that 'at common law, care and control concerns the right to take care of a child and to make day-to-day, short-term decisions concerning the

278 [1948] SASR 104, 107.

279 [1970] 1 QB 357, 372. Also refer to *Allen v Allen* [1948] 2 All ER 413.

280 [1970] 1 QB 357, 373.

281 *R v Thorp* [1697] Carth 394, 90 ER 825; *Ex parte Hopkins* (1732) 3 P Wms 152, 24 ER 1009; *Lyons v Blenkin* [1821] Tac 245, 23 ER 38. Also refer to the modern New Zealand case that reached the House of Lords, *Todd v Davison* [1974] 2 WLR 898.

282 *Semple v Semple* (1964) FLR 114.

283 *Marks v Marks* [1965] ALR 241, 247.

284 *Capodici v Capodici* (1967) 12 FLR 129, 135-136; *In the Marriage of McEnearney* [1980] FLC 90-866, 75,501; *In the Marriage of Chandler* [1981] FLC 91-008, 76,112-76, 113; and *Fountain v Alexander* (1982) 150 CLR 615, 626-627.

child's upbringing and welfare.'[285] In contrast, '[c]ustody without care and control (that is, custody in its narrow sense) concerns the right to make the more important, longer-term decisions concerning the upbringing and welfare of a child.'[286]

We commenced this particular discussion by looking at possible confusion or difficulties in distinguishing guardianship from custody. To this can be added the distinction between custody and care and control. When custody came to be given a broader meaning than just care and control, the distinction between custody and guardianship became blurred. As Eekelaar writes when commenting on the previously referred remarks by Sachs LJ in *Hewer v Bryant*[287]:

> This expansion of the concept of custody is a relatively recent phenomenon. The "right to custody" protected by the common law was the right to physical possession and, while terminology may not have always been exact, it was used this way also by the Chancery Courts. The right was often expressed as the right to "custody and care and control." The confusion between custody and guardianship began when courts began to treat care and control as separable from custody.[288]

Irrespective of any confusion in distinguishing between the concepts of guardianship and custody and even custody and care and control, what we do know is that collectively, guardianship, custody and care and control encompass the total sphere of child welfare and upbringing. In referring just to guardianship and custody the Full Court of the Family Court of Australian has remarked: 'It is unnecessary to draw a precise distinction between these concepts. There seems no room for doubt that together they encompass virtually every aspect of a child's welfare, advancement or education.'[289] Although it must be acknowledged that the need to distinguish between the terms, especially in relation to guardianship and custody does become particularly important in marriage separations where both parents have guardianship but one parent has exclusive custody. However, in the historical situation being examined here, guardianship and custody were removed from the parents. Pursuant to legislation, the Chief Protector of Aborigines or the Commissioner of Native Affairs was given

285 A Dickey (1997) 324.
286 A Dickey (1997) 324.
287 [1970] 1 QB 357, 373.
288 JM Eekelaar 'What are Parental Rights?' (1973) 89 LQR 210, 230. Footnote omitted
289 *In the Marriage of Chapman and Palmer* [1978] FLC 90-510, 76, 672.

guardianship and custody of the separated children. The 'administrators' of the missions/ state institutions or foster parents that 'housed' the children generally had actual custody. The parents' rights to guardianship, custody and care and control were removed or cut back by legislation, policy and practice.

Interestingly, amendments in 1995 to the Family Law Act 1975 (Cth) have done away with notions of guardianship and custody and replaced them with 'a single, all-embracing notion of parental responsibility' that includes the bundle of rights and duties associated with raising a child.'[290] Likewise s 3(1) of the Children Act 1989 states that 'parental responsibility' means 'all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property.' However as this thesis is dealing with guardianship law pre-1972, terms of guardianship and custody are relevant. But I have adopted the all-embracing notion of a bundle of rights and responsibilities attached to raising a child, whether as a parent or non-parental guardian.

The way guardianship is categorised here, means that custody is an incident of guardianship and care and control is an incident of custody and a sub incident of guardianship. Another way of seeing it is to imagine a large box; the large box is guardianship. Custody is a smaller box within the large box and care and control is an even smaller box within the custody box. The space between the smallest box and second smallest box represent the residual custody rights and duties; the gap between the second largest box and the largest box represents the residual guardianship rights and duties.

This thesis is concerned in the widest possible sense with the upbringing of the Aboriginal children separated from their families. That is the rights and duties of care and control, custody and guardianship; all making up the full all-embracing ('bundle of rights and duties') guardianship paradigm. I am not concerned with fine distinctions between guardianship and custody or custody and care and control or legal and actual custody. Here, unless otherwise stated, guardianship is given its full meaning. This thesis is concerned with the responsibilities and duties the State's chief Aboriginal affairs

[290] Refer to A Dickey (1997) 309, 330-332.

public servant acquired as a result of becoming the guardian of Aboriginal children and particularly those children separated from their parents and families.

It was via legislation that the State, through its senior Aboriginal affairs public servant, assumed guardianship of all Aboriginal children in Western Australia. It was via removal or separation policies and practices that the State public servant and the relevant Department assumed custody and care and control over some Aboriginal children. Although most often the actual physical custody and care and control was discharged by church based missions. Thus this thesis is primarily concerned with the rights and duties of the non-parental guardian. Of course, the curtailment/defeasibility of the rights of the parents who had their children removed from them is also of interest.

GUARDIANSHIP RIGHTS AND DUTIES

1 Introduction

The British Family Law expert John Eekelaar writes, '[t]he relationship of the guardian to the child is very close to that of a parent to a child.'[291] He equates parentage with natural guardianship.[292] This concurs with the earlier opinion of Lindley LJ in the 1894 case of *Thomasset v Thomasset* where he equated the father's rights with those of a guardian,[293] which was cited with approval by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB*.[294] Hence, discussion on guardianship rights and duties will at the very least touch on parents' rights and duties. A non-parental guardian stands *in loco parentis* to the child and thus has parental responsibilities.[295] And if guardianship is removed from a parent it impacts on their parental rights, as was the case for many Aboriginal parents in Western Australia during the first six decades of the twentieth century.

Writing in the second half of the eighteenth century, Blackstone indicates that by that stage English law recognised not only that parents had rights but also correlating

291 J Eekelaar (1973) 229.
292 J Eekelaar (1973) 232.
293 [1894] P 295, 297-299.
294 (1991-1992) 175 CLR 218, 292.

duties. There has been some debate about whether these duties are legal or merely moral duties[296] but statute law such as the Poor Laws enforced these rights and before that the Ecclesiastical Courts enforced them.[297] Justice McHugh was in no doubt of the legality of parents to protect and maintain their children when he wrote: 'The combination of the common law and the Poor Relief Act 1601 (43 Eliz. c. 2) imposed a duty on a father to protect his children and to maintain them until they reached an age where they could lawfully and physically support themselves. But a father was not obliged to provide more than the necessaries of life.'[298] Blackstone identifies three parental duties:

> And, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.
>
> The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents.[299]

Blackstone also argues the guardian ward relationship resembles that of parent child. He wrote that the guardian is a temporary parent for the duration that the child is a ward or under age.[300] Blackstone adds that the guardian performs the Roman law office of both tutor and curator and under the law of the Court of Chancery; the tutor being responsible for the person of the child and the curator the estate of the child.[301]

The following passage from Blackstone reinforces the similarities of parents and guardians: 'The power and reciprocal duty of a guardian and ward are the same, *pro*

---

295 PM Bromley *Family Law* (3rd ed London Butterworths 1962) 369.
296 LI Stranger-Jones *Eversley's Law of Domestic Relations* (6th ed Sweet and Maxwell London 1951) 361; PM Bromley *Family Law* (1962) 300; OM Stone 'Jurisdiction over the Custody and Upbringing of Children in Canada and their Judicial Exercise' (1979) 2 Canadian J Family L 365, 388.
297 *Thomasset v Thomasset* [1894] P 295, 297, 299; OM Stone (1979) 388.
298 *Secretary, Department of Health and Community Services v JMB and SMB* (1991-1992) 175 CLR 218, 313.
299 W Blackstone (1765-1769) Vol I 434-435.
300 W Blackstone (1765-1769) Vol I 448.
301 W Blackstone (1765-1769) Vol I 448.

tempore, as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence.'[302] However, care must be taken not to take this to far by saying that parental and guardian rights are identical. Lord Macclesfield LC in *The Duke of Beaufort v Berty* stated that there is some diversity between a natural parent and the non-parental guardian.[303] Lord Eldon in *Re Agar-Ellis; Agar Ellis v Lascelles* said the father has greater rights than any other guardian.[304] A parent, but not a guardian, may consent to marriage of the child and a parent, but not a guardian, may delegate parental authority.[305]

A parent or non-parent, as mentioned above, can exercise guardianship. The non-parent guardian may be a relative or friend of the family, or it could be a charitable body or it could be the State or one of its servants or officers. The States involvement in guardianship law became more significant from the time of the enactment of the English Poor Laws and child protection legislation.[306] The State or its servants and instrumentalities assumed guardianship when parents or other guardians failed or neglected to comply with minimum standards of childcare prescribed by legislation and/or policy. However, in relation to Aboriginal children, the relevant 'Aborigines or Native Acts' automatically granted guardianship to the Chief Protector of Aborigines or the Commissioner of Native Affairs; there was no need to satisfy a pre-condition of neglect or abuse on the part of the parents or guardians. Though the relevant legislation failed to give content to the guardianship duties the Chief Protector of Aborigines or the Commissioner of Native Affairs had to comply with – one must turn to the common law for this. It can be said, that although there may be some variations, in general, a public servant, as guardian, must comply with the same standard as a parent or private guardian.[307]

302 W Blackstone (1765-1769) Vol 1 451.
303 (1721) 1 P Wms 703, 705; 24 ER 579, 579.
304 (1883) 24 Ch D 317, 327.
305 W Blackstone (1765-1769) Vol 1 451; WGW White (1980) 234.
306 OM Stone (1979) 383-384; WGW White (1980) 229.
307 ML McCall 'An Analysis of Responsibilities in Child Welfare Systems' (1990) 8 Canadian J Family L 345, 351.

2 Rights and Correlative Duties

Much of the writings on parental child and guardian ward relationships focus on the rights of the parents and/or guardians over the child. However, duties of parents and guardians have also been recognised. A right can be seen as a claim to something or an entitlement to be treated a certain way. A duty can be seen as a legal obligation someone has to another.[308]

A right often has a corresponding duty attached to it and similarly for a duty to be complied with a right often needs to be conferred on the obligator.[309] Rights can have different meanings or aspects to it. Under the Hohfeldian nomenclature of legal relations and concepts, rights can be seen as: a claim; a liberty; a power to alter another's status with respect to that other's rights or duties; and an immunity from an exercise of a power.[310] According to Hohfeld, rights carry legal duties to ensure the right can be carried out and there is a right or power available to ensure the duty is carried out.[311] Hohfeldian discourse finds jurisprudential expression in the following utterances from Schwartz J of the Middlesex Country Court of New Jersey: 'While parents have undoubted rights to their children, a correlative duty obtains to prevent a situation arising which could alter the strict right or result in harm to the child.[312]

Raz believes that rights ground duties but argues there 'is no conceptual reason for upholding' a view that all rights emanate from duties.[313] He states that not all rights give rise to a duty and that some competing consideration may supersede that right and thus the duty that emanates from the right. [314]However, Raz does go onto to say that the 'special feature of rights are their source in individual interest and their peremptory force, expressed in the fact that they are sufficient to hold people to be bound by duties.'[315]

308 J Raz *The Morality of Freedom* (Clarendon Press Oxford 1989) 166, 183.
309 *Barnardo v McHugh* [1891] AC 388, 395.
310 W Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 32 Yale L J 16.
311 W Hohfeld (1913) 16.
312 *A v M and C* (1962) 74 NJ Super 104, 180 A 2d 541.
313 J Raz (1989) 170-172.
314 J Raz (1989) 171.

Although not all rights emanate from duties, it has long been recognised that parents and guardians have rights and power over the children in their care and also have duties to these same children. Blackstone comments, the source of parental rights or power is parental duties, as is the case for guardians.[316] The rights are derived from the duties because in order to perform the duty the parent or guardian needs a prescribed power or right.[317] Also, the right is a partial 'recompense' for the parents' care and trouble in discharging the parental duty.[318] In *Humphreys v Polak* Stirling LJ explained:

> It is I think clear, from *Barnardo v McHugh* that the mother of an illegitimate child has by law imposed upon her obligations in respect of the child, and by reason of such obligations is vested by law with responding rights, one of which is the right prima facie to the custody and possession of the person of the child. That right is given to the mother, not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes on her in respect of the infant, and for its benefit.[319]

Thus, it is clear that parents and guardians have duties as well as rights. Moreover, in order to comply with duties it is necessary to have certain rights and powers. The need to have the power to perform a duty was recognised by McHugh J in *Secretary, Department of Health and Community Services v JMB and SMB*: 'Whenever the law imposes a duty, it will imply, if necessary, the power to carry out that duty to the extent required by the need.'[320]

In the end, what is of most concerned here are the duties that a guardian must comply with. That is the duties a guardian has to the children they are guardian to. In this case that is the duties the State guardian had to the separated Aboriginal children.

---

315 J Raz (1989) 192.
316 W Blackstone (1765-1769) Vol 1 440; 450.
317 For a brief discussion on the issue of rights and duties in this context, refer to J Eekelaar (1973) 229.
318 W Blackstone (1765-1769) Vol 440, 450-451.
319 [1901] 2 KB 385, 389-390.
320 (1991-1992) 175 CLR 218, 312.

3 The Rights and Duties

(a) Introduction

The English Law Commission has suggested that rather than talk about parental (and guardianship) rights, it is more appropriate to talk of parental (and guardianship) powers, authority or responsibilities as these words more closely match with the need to act in the child's best interest.[321] That is, as referred above, the parent and guardian has the right (power) to act in a certain way because they have a duty (responsibility) to do what is best for the child. However this thesis, in general, adheres to the more traditional and common usage of the terms rights and duties but if appropriate, reference is made to powers, authority and responsibilities. Probably of particular relevance here is the term responsibilities, as the Chief Protector of Aborigines or Commissioner of Native Affairs had responsibility for Aboriginal children. Although the named public office holder had guardianship of all Aboriginal children, this thesis, as previously mentioned, is particularly interested in the guardianship of the Aboriginal children separated from their families.

Before moving on to looking at the specific rights and duties, note should be made on the 'dwindling rights' of parents (and guardians) in opposition to the 'rights' or wishes of the child. On this issue, reference is often made to Lord Denning MR in *Hewer v Bryant*:

321 Law Commission *Family Law: Review of Child Law: Guardianship* (Law Commission Working Papers No 91 1985-1986) paras 1.11, 3.66.

> I would get rid of the rule in *In re Agar-Ellis* and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of his house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent Report of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.[322]

However, like Lord Denning in *Hewer v Bryant*[323] I will not pursue this further here. Although to repeat what I said in the previous chapter that the concept of children's 'rights' did not come to dominate child welfare policy until the 1970s – the so-called rights-based model. A particular notable achievement of this child rights-based model is the 1990 United Nations Convention on the Rights of the Child. Prior to the rights-based model, the Welfarist model dominated – where the child's interests were the first and paramount consideration – but from the viewpoint of what others (adults, governments, public servants and the courts) thought was in the child's best interests.[324] Also in relation to the legislative and factual history being dealt with here, the Chief Protector's or Commissioner's legal grip on the Aboriginal children did not 'dwindle' as the child reached majority; it just expired on the child reaching the legislative prescribed age of either 18 or 21 years.[325]

(b) Maintenance

Historically, a father was only under a moral obligation to maintain the child.[326] Even though the obligation was recognised by the common law and equity courts, it was an

322 [1970] 1 QB 357, 369.
323 [1970] 1 QB 357, 369.
324 J Eekelaar 'Families and Children: From Welfarism to Rights' in C McCrudden and G Chambers (eds) *Individual Rights and the Law in Britain* (Clarendon Press Oxford 1994) 301, 301-302, 326-327.
325 Cf: In *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 431, McHugh J talks about a duty continuing until discharge. This view has not received judicial support.
326 WGW White (1980) 231.

'imperfect obligation' lacking direct enforcement.[327] As mentioned above it was the so-called Poor Laws that widened the ecclesiastical law financial support obligation to other courts.[328] The Poor Laws of Elizabeth I legally obligated the parents and grandparents to maintain their children.[329] This statute was never enacted in Australia.[330] However, twentieth century Australian family and child welfare legislation leaves no doubt that both parents must provide for the maintenance of the child.

Under common law the guardian, like the parent, is duty bound to properly maintain the child.[331] This has historically meant that a guardian has to do what is necessary to keep the child at a level equal to his or her station and expectation.[332] However, a guardian did not have to maintain the child at its own expense; the cost of maintenance was to be from income derived from the child's estate.[333] In the absence of legislation a maintenance order against the guardian could only be made if the child has property.

Under State guardianship, the State also must comply with the common law obligation to properly maintain their wards. The legislation pertaining to Aboriginal children, to be discussed in Part II, provided that the Chief Protector of Aborigines or the Commissioner of Native Affairs or the Department they administered was to provide for the maintenance of the child. Under the mainstream child welfare system, the relevant Minister for Child Welfare and the relevant Department had the same maintenance obligations in relation to children made wards of the State. Sometimes, there were legislative provisions to allow the State to seek a contribution from the ward's parents for maintenance. However the parents often lacked the necessary resources and the State had larger resources available for maintenance. With the Aborigines or Native Acts, the opportunity for maintenance contribution from the parents was absent.

---

327 GW Knowles *A Treatise on the Law and Practice Relating to Infants* (4th ed Sweet & Maxwell London 1926) 121.

328 WGW White (1980) 232.

329 (1601) 43 Eliz c 2, s 7.

330 H Gamble *Law for Parents and Children* (2nd ed The Law Book Company Sydney 1986) 17, n 44.

331 *Mathew v Brise* (1887) 14 Beav 341, 343; 51 ER 317, 318.

332 GW Knowles (1926) 189.

333 WGW White (1980) 233-234.

(c) Protection

If one is to distinguish guardianship from custody (in other words what residual duties attached to guardianship), the issue of protection looms large. The above noted quote of Mayo J in *Wedd v Wedd* is worth repeating here. Justice Mayo said that in contrast to custody, guardianship '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.'[334] Arguably, duties that essentially attach to the custody incident of the guardianship paradigm also involve or overlap with protection. Duties identified with custody, such as 'the preservation and care of the child's person, physically, mentally and morally' and provision of accommodation, food, medical treatment and other life necessities[335] can be seen to include elements of protection and maintenance.[336] Thus, the guardian is duty bound to protect the child against abuse of any type and ensure they are not placed in danger. The need to provide for the necessities of life is required to protect the child against physical and mental harm and possibly even moral damage.

The warding off from danger, part of protection, has been held to include the need for positive action by the guardian in asserting the rights of a child. This includes 'the power to assert the rights of a child against some third party, e.g., to undertake litigation on behalf of a child,'[337] and providing independent legal advice to the ward.[338] It should be noted that from earliest times any court has had jurisdiction to appoint a guardian ad litem to instigate legal proceeding on behalf of a child or to defend a suit against the child.[339] Further, it is not always necessary to obtain a court order; the child can consent to a guardian acting for them.

334 [1948] SASR 104, 106-107. Also see *In the Marriage of Newberry* (1997) 27 FLR 246, 249.

335 *Wedd v Wedd* [1948] SASR 104, 107; and *Hewer v Bryant* [1970] 1 QB 357, 373

336 WGW White (1980) 234.

337 *In the Marriage of Newberry* (1977) 27 FLR 246, 249; *Bennet v Minister of Community Welfare* [1990] Aust Torts Reports 80-210, 68,090.

338 *Bennet v Minister of Community Welfare* (1990) Aust Torts Reports 80-210, 68,090; and *Bennet v Minister of Community Welfare* (1992) 176 CLR 408, 427.

339 R Storry Deans (1895) 56.

(d) Education

Blackstone identifies education as one of the principal duties parents and guardians owed to children.[340] Likewise, Sir John Romilly MR said in *Mathew v Brise* that the guardian had many duties to perform including educating the child.[341] Often the education duty is attached to the custody incident of guardianship.[342] However what does educating the child mean?

Historically, the duty to educate meant providing instructions and learning in a manner suitable to the child's rank and expectation in life.[343] However, in twentieth century Australia with its universal education system one can strongly argue that the guardian had to ensure the child was educated to at least the standard provided for by the State public education system. Also the rigid class system present in the England of earlier centuries has never existed to the same extent in Australia further reducing the significance of the 'rank in life' standard.

In *Neale v Colquhoun* the court said that the word guardianship, 'must be regarded as including the education, in the wide sense of the upbringing and all round development of the child.'[344] Part of this education and development of the child includes religious and moral education, which has long been recognised by the courts as a guardianship duty.[345] In examining the duty of guardians Lord Eldon stated in *Wellesley v Beaufort* that: 'Looking to a moral and religious education as the foundation of all that is valuable here, or to be hoped for hereafter, I cannot put pecuniary considerations in the balance with the imperious duty of taking care that the children shall have a moral and religious education.'[346]

In relation to the form of religious education, historically the guardian was duty bound to raise a legitimate child in the faith of the father or according to the wishes or

340 W Blackstone (1765-1769) Vol I 434, 450.
341 (1851) 14 Beav 341, 345; 51 ER 317.
342 *Wedd v Wedd* [1948] SASR 104, 107; and *Hewer v Bryant* [1970] 1 QB 357, 373.
343 *Powell v Cleaver* (1789) 2 Bro C C 500, 29 ER 274; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 36; 38 ER 236.
344 [1944] SASR 119, 129.
345 *Re Nevin* [1891] 2 Ch 299; *Re McGrath* [1893] 1 Ch 143.
346 (1827) 2 Russ 1, 29; 38 ER 236, 247.

directions of the father.[347] If the father died without leaving directions as to the religious upbringing of the child, the court normally presumed the father wanted the child to be educated in the faith of the father.[348] In *Hawksworth v Hawksworth*, for example, James LJ stated: 'The rule of the Court is, that the Court, or any persons who have guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been.'[349]

However, at least from the enactment of the English Guardianship of Infants Act 1925 [350] the wishes of both parents were to be considered.[351] The equality provision of s 3 of the Guardianship of Infants Act 1926 (WA) also provided the mother with right to have her views on the religious upbringing of her child considered by the courts. The mother's wishes reign supreme in relation to the parental and non-parental guardianship of an illegitimate child.[352]

The courts showed a propensity for preferring the child to be brought up in the religion of its parents, as illustrated by the following quote: 'This court is not concerned with the respective merits of religions when considering the welfare of the child, but is concerned with the possible invasion of natural law (unless expressly authorised by statute) involved in bringing up a child in a religion different from that of its parent.'[353] It should be noted however that it is firmly established that the parental wishes of either or both parents regarding religious upbringing will not be enforced by the courts if it would be detrimental to the child; the paramount consideration being the welfare of the child.[354] If it would be detrimental to the child to follow the parents' wishes, those wishes will be disregarded. As was discussed in the previous chapter, the best interest of the child is the 'first and paramount' consideration in judicial decision making on questions of the

347 *Talbot v Earl of Shrewsbury* (1840) 4 My & Cr 672. 41 ER 259.
348 *Hawksworth v Hawksworth* (1871) 6 LR Ch App 539.
349 (1871) 6 LR Ch App 539, 542.
350 Guardianship of Infants Act 1925 s 45.
351 *Re Collins* [1950] 1 All ER 1057.
352 *R v Nash, Re Carey* (1883) 10 QBD 453; *Barnardo v McHugh* [1891] AC 388; *R v New* (1904) 20 TLR 583; *Re Carroll (No 2)* [1930] All ER 192.
353 *Re Carroll (No 2)* [1930] All ER 192, 210.
354 *Ward v Laverty* [1925] AC 101, 108-111.

upbringing of children. This of course includes decisions on what religion the child should be brought up with.

If any confirmation was required of the best interest principle, the 1970 case of *J v C* [355] provided this. Although, as discussed in the previous chapter, the child best interest principle has been around long before this case and although there had been occasional judicial retraction from the principle, the principle had been prevalent during the preceding seven decades to the decision in *J v C*.[356] The case confirmed that the child best interest or welfare principle[357] as provided for in s1 of the Guardianship of Infants Act 1925[358] takes precedence over any parental right whether there is a dispute between parents or parent(s) and a third party such as a non-parental guardian.[359] However the parental wishes are still very important and as stated by Lord MacDermott: 'While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases.'[360] This is probably even more so in relation to religious upbringing.

The case of *J v C* concerned custody in general and not religious education. Arguably then, something must be detrimental to the child before the parents' wishes in relation to religious education are disregarded. Bad character of a parent for example may lead the court to disregard the wishes of the parent.[361] Similarly, if the child has formed a firm conviction of a religion different from the parents the courts would not disturb that.[362] In contrast, if the child has not formed beliefs of his or her own, 'the parental wishes will usually govern the matter because the welfare test cannot determine

355 [1970] AC 668.
356 Examples of earlier Australian cases that held to this principle, include *Goldsmith v Sands* (1907) 4 CLR 1648, 1653; *Moule v Moule* (1911) 13 CLR 267, 269.
357 Although cases and legislation used slightly different terminology such as 'best interest', 'welfare of child', 'paramount' and 'first and paramount', the 'distinction is without difference.' H Finlay ' "First" or "Paramount"? The Interests of the Child in Matrimonial Proceedings' (1968) Australian L J 96, 103. Also refer to *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 293.
358 Similarly, under the Guardianship of Infants Act 1926 (WA), s 2.
359 [1970] AC 668, 726, 727.
360 *J v C* [1970] AC 668, 715.
361 *Re Carroll (No 2)* [1930] All ER 192, 201.

which is the better creed for the child.'[363] Then again, if there is a possibility the child is to be indoctrinated into a creed with beliefs that may be harmful, the best interest of the child principle demands that the court intervene to prevent harm taking place.[364]

The courts' tendency to defer to the religion of the parents has found support in legislation. This is further explored in Part II but it is enough to say here that under the English Poor Laws the child was to be educated in the creed of the parents'. Likewise, the Industrial Schools Act 1874 (WA) and the State Children Act 1907 (WA) provided for a child removed from its parents to be educated in the religion of the parents'. However, no such provision was included in the Aboriginal specific statutes such as the Aborigines Act 1905 (WA).

Contrary to what has just been said, Eekelaar argues that apart from a testamentary guardian, a guardian appointed 'to supersede the parent's guardianship' is at liberty to disregard the parents' wishes in education and religious matters.[365] In support of this proposition, Eekelaar cites the case of *Thomas v Roberts*[366] where a father lost his guardianship because of the unorthodox nature of his religious views. There is no question that a parent's wishes in regards to education in general and religion in particular may be disregarded if it is not in the best interest of the child. However, that is not the same as saying that once a guardian is appointed to supersede the natural guardianship of a parent, the parents wishes in relation to education and religion no longer hold any currency. Arguably, even when the parents' guardianship has been usurped by the appointing of another guardian, the parents retain a 'voice' in matters of education and religious upbringing unless denied by the conduct of the parent,[367] by statute[368] or by the child's best interest principle.[369] Of course, the 'voice' of the parent may need to compete with the 'voice' of the superseding guardian and in the end, the child's best interest principle is the crucial factor in matters of religious education. But particularly in relation to religion, one should be cautious before determining that the

362 *Stourton v Stourton* (1857) 8 De G M & G 760, 44 ER 583; *Hawksworth v Hawskworth* (1871) 6 LR Ch App 539, 542-543; *Re W* [1907] 2 Ch 557; *Ward v Laverty* [1925] AC 101, 109.

363 JM Eekelaar (1973) 222.

364 *Mauger v Mauger* (1967) Qd R 62; JM Eekelaar (1973) 222, fn 87.

365 JM Eekelaar (1973) 233-234.

366 (1850) 3 De G & Sm 758; 64 ER 693.

367 *Re Carroll (No 2)* [1930] All ER 192, 201.

368 *R v Gyngall* [1893] QB 232, 239; *Re Carroll (No 2)* [1930] All ER 192, 210.

parents have no role to play. For as Mellish J concludes in *Hawksworth v Hawksworth*: 'I fear that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in that religion instead of the religion of the father.' [370]

The judicial support for the child to be educated in the religion of the parents is consistent with the view that family life is sacred and the parents, historically the father, 'knows far better as a rule what is good for his children than a court of justice can.'[371] The strong view that parents should decide on the religious education of their child is seen as particularly important because 'the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful ...'[372] Of course, some, as Eekelaar does, may argue that if a guardian has been appointed to supersede the parent's guardianship they stand in *loco parentis* and therefore they have total control to determine matters of education and religious upbringing. However, there is sufficient judicial and legislative authority to hold to the contrary view. Arguably, unless it is not in the best interest of a child, a child removed from parental guardianship should be educated in the religion of the parents. This is because to hold otherwise may severely prejudice the chances of the child being able to smoothly reunite with their family. The cases do not contradict the proposition that all things being equal, a child's interest are generally best serve by being with their parents or at least having a good relationship with their parents. Being of the same religious persuasion of the parents would more than not, assist this goal.

In relation to State guardianship there may be little opportunity for parents to 'influence' the ward's secular education. The State is required to provide a secular education in the State public school system that in theory should be universally uniform. This would seem to remove parental choice. However, in matters of religious education, the parent's preference should be preserved[373] unless ousted by parental conduct, statute or the best interest of the child principle. As intimated above, religion can have a

---

369 *Ward v Laverty* [1925] AC 101, 108-111.
370 (1871) 6 LR Ch App 539, 545.
371 *Re Agar-Ellis; Agar-Ellis v Lascelles* (1883) 24 Ch D 317, 337.
372 *Allcard v Skinner* (1887) 36 Ch D 145, 183.

powerful influence on a child's overall development and state of mind. If a child is brought up in a religion different from the parents it may hamper family reunion or harmony after the guardianship expires. Surely this is not good public policy and contrary to the 'sanctity of family life'. As a matter of policy, in the normal course of events it is difficult to see how the State would want to do anything that inhibits family harmony or family reunions. The family unit, for at least the duration of the twentieth century, has been the fundamental unit of society, recognised both by the judiciary[374] and the State.[375] Besides moral and philosophical arguments, there are also economic reasons for preserving the family unit. Family disharmony may consequentially increase demands for social services such as health, legal aid and financial support; increasing the resource demands placed on the State and society. Finally, and most importantly, it is difficult to see how inhibiting or potentially making it more difficult for family reunions to take place can be in the best interest of the child. Of course different consideration are present when dealing with a consensual adoption situation – however the historical examination under consideration in this thesis is not such a situation.

(e) Discipline and Punishment

Under ancient Roman law the father had strong power over the child. In particular, he had the 'power of life and death over his child.'[376] The power under the English common law was and is not so powerful. As Blackstone comments: 'the power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education.'[377] The parental right to discipline is a corollary right to the duty to provide instruction and education. In order to instruct and educate, one sometimes needs the power of discipline and punishment. This is no more

373 WGW White (1980) 237.

374 For example, *Re Ellis; Agar-Ellis v Lascelles* (1883) 24 Ch D 317; *Secretary, Department of health and Community Services v JWB and SMB* (1991-1992) 175 CLR 218, 316. Also refer to M Bailey 'England's First Custody of Infants Act' (1995) 20 Queen's L J 391, 398-399, for an interesting discussion on Lord Eldon's view about the sanctity of the family in society.

375 United Nations Universal Declaration of Human Rights 1948, arts 12, 16(3). Also refer to A Haebich *The Noongar Stolen Generations* (Unpublised Paper Seminar 'Albany's History and Heritage' Albany 24 April 1997).

376 W Blackstone (1765-1769) Vol I 440.

377 W Blackstone (1765-1769) Vol I 440.

so than in the case of a recalcitrant child.[378] Of course, the discipline and punishment must be reasonable. If not reasonable, the child may be taken away from the parent.

The disciplinary power or rights of the parent also attach to a non-parental guardian. Such was held by Sachs LJ: 'It would follow that such guardianship includes the necessary power of physical control over the liberty of the persons concerned – for all infants under the age of 14 are subject to that personal power of the father.' [379] There is no reason why the State or a State official as guardian will not also have rights or powers in relation to discipline and punishment. However, use of physical force by the State against a child will no doubt be somewhat controversial and thus the State may have less recourse to such action than a parent or private guardian.

(f) Domicile, Access and Visitation

The issues of domicile, access and visitation come into play when a child is removed from either parents or one of its parents. Historically, it is the domicile of the father that determines the domicile of the child and a legitimate child's domicile of origin is determined by its father's domicile at time of birth. For illegitimate children the domicile of origin will be the mother's domicile at the time of birth. Even though the father or sometimes the mother, whether of origin or dependency, determines domicile, this is not strictly a parental right.[380] However, while the matter has not been conclusively determined, it seems that a guardian cannot change the domicile of the child.[381] It is unlikely without agreement of the parent(s) or by court order or by statute that a guardian has the authority to determine the domicile of a child.

It has been said that the origin of access in the law of guardianship stems from the prerogative powers of the Lord High Chancellor in his equitable jurisdiction.[382] This is highly unlikely as, under feudal concepts of guardianship, the guardian had authority to prevent assess or visitation by a parent or other party. The origins of access more than likely derived from the movement to curb the father's absolute power and improve the

378 WGW White (1980) 238.
379 *Hewer v Bryant* [1970] 1 QB 357, 374.
380 JM Eekelaar (1973) 228.
381 LI Stranger-Jones *Eversley Law of Domestic Relations* (1951) 472.

rights of the mother - something that received a significant impetus with the Custody of Infants Act 1839.[383] It has been held that 'traditionally, powers of custody and guardianship included a power to determine who should not have social interaction or social intercourse with a child.'[384] Access is a part of modern guardianship law and has been defined as being 'the contact of a child with a person having custody whether by way of a visit by or to that person including attendance for a period of time at a place other the child's habitual residence or by way of communication, by way of letter, telephone or other means with that person.'[385]

Eekelaar argues that the right of a parent to visit a child separated from them demands special treatment as it often is the only way for the parent to maintain contact with the child.[386] In support of his arguments Eekelaar cites the powerful statement from Willmer LJ in *S v S*: 'Here the wife is asking for no more than periodical access to her children. In the ordinary way that would be no more than the basic right of any parent.'[387] While the non-parental guardian may determine who can have access or visitation rights, the parental right to visit one's child should not be taken away unless contact with the parents is detrimental to the child. At all times, unless abrogated by statute, the best interest of the child principle must prevail. Eekelaar writes that visitation rights should be given 'even greater independent weight than the right to possess the child' because of the child's best interest principle.[388] So even if one is to ignore the parents' rights to make contact with the children they are separated from, the best interest of the child principle, dictates that unless there would be a clear prejudice to the child or there is statutory directive to do so, a parent should be able to visit their child.[389]

Eekelaar argues the parents right to visit the child should not be affected by the child's unwillingness to be in contact with their parents,[390] unless of course if it would

[382] *Tedesco v Tedesco* [1972] VR 491, 492.
[383] WGW White (1980) 227.
[384] *Le Gallienne v Director General, Department of Community Sevices, Victoria and Others* (1987) 11 Fam LR 484, 488.
[385] Family Law Council *Watson Committee Report (Wardship, Guardianship, Custody, Access, Change of Name)* (AGPS Canberra 1982) 7.
[386] JM Eekelaar (1973) 218.
[387] [1962] 2 All ER 1,3.
[388] JM Eekelaar (1973) 219.
[389] JM Eekelaar (1973) 219.
[390] JM Eekelaar (1973), 219.

not be in the best interest of the child to be visited by the parents. Arguably, on principles of family unity and the natural bond between parents and their children, there would need to be exceptional circumstances for holding that the best interests of the child are best served from denying the parent contact with the child. The need to ensure the maintenance of family ties and an environment that maximises the possibility of family re-unification is most important because a non-parental guardianship will in most circumstances terminate on the child reaching the age of majority. Without family ties and support, the child turned young adult who has been cared for by the State may suffer from isolation and loneliness. [391]

(g) Affection and Emotional Support

The Honourable Justice Story wrote that there is a natural presumption that 'children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion and that they will be treated with kindness and affection.'[392] Kindness and affection denotes terms or concepts of love, guidance and emotional support. The Hon Justice Story made his comments in relation to a parent as natural guardian. He did not say whether a non-parental guardian has a duty of 'kindness and affection' to the child. Speaking in 1883, Lord Eldon said a non-parental guardian such as a 'testamentary guardian is not called on to feel affection for his ward; he is not called upon to forgive the ward; he is not called upon to treat the ward with tenderness'[393] However, there appears no reason why a non-parental guardian should not be obligated to show tenderness towards the child.

The guardian may not need to feel affection for the child, but he should be affectionate to the child as twentieth century child welfare legislation contemplates. The State often intervenes in the upbringing of a child who is being neglected by the parents - this includes emotional neglect where a parent or parents are not providing adequate affection and emotional support. As children are necessarily dependant on adults, the parental or non-parental guardian as the case may be, must fulfil their emotional

[391] ALSWA *Telling Our Story* (ALSWA Perth 1995) 2-3.
[392] Hon Justice Story *Commentaries on Equity Jurisprudence* (Stevens & Maxwell London 1884) 929. Noted with approval in *In Re Goldsworthy* (1876) 2 QB 75, 80.
[393] *Re Agar-Ellis; Agar Ellis v Lascelles* (1883) 24 Ch D 317, 327.

needs.[394] Arguably even the State as guardian has an obligation to provide affection and emotional support - albeit it would be unrealistic to expect that a State guardian can offer the kindness and affection that can be offered by a parental or non-parental individual guardian in a stable home.[395] The State guardian must however display some attempt at kindness and affection, otherwise it places in doubt the best interest of the child justification for removing or separating many children from their parents.

The issue of kindness and affection also imposes a duty on the guardian to ensure the child has kind feelings towards its parents. Francis Vesey Jnr in a headnote to the case of *Ex parte Earl of Ilchester* where Lord Eldon was the Justice, wrote: 'This court looks with great anxiety to the execution of the duty belonging to a guardian, and the attention expected to be paid to the reasonable wishes of the parent. Implanting in the hearts of the children filial and dutiful feelings towards the parent is the most important duty imposed on the guardian by the deceased parent.' [396] Compare this note by Vesey Jnr to Lord Eldon's view in the earlier case of *Re Agar-Ellis; Agar Ellis v Lascelles* wherein he wrote that a non-parental guardian does not need to display tenderness to the child. [397] Arguably, a guardian will have difficult passing onto the child a 'filial and dutiful feeling towards the parent' if the guardian doesn't display tenderness him or herself towards the child.

The *Earl of Ilchester* case concerned a testamentary guardianship. Thus it will be expected that the guardian should ensure the children of the deceased father are given a positive picture of their deceased father. However there is no reason why this should not also be so in the case of a guardian responsible for children who still have living parents. Of course, in some instances it may not be possible to 'bring the children up with feelings of affection and dutiful obedience to their parents'[398] if the reason for the child being removed from the guardianship of the parent is because of neglect or even worse abuse. However, neglect may not always mean that the parent(s) were not kind to the child; neglect may be the result of educational or economic deprivation. Thus, neglect

394 Alberta Law Reform Institute *Family Law Project: Child Guardianship, Custody and Access* (Alberta Law Reform Institute Edmonton 1998) 81.

395 WGW White (1980) 227.

396 (1803) 7 Ves Jun 348, 32 ER 142. Also refer to *Wellesley v Duke of Beaufort* (1827) 2 Russ 1,43; 38 ER 236, 252.

397 (1883) 24 Ch D 317, 327

per se should not automatically relieve the non-parental guardian from imparting feelings of affection and dutiful obedience to the parents. Incidences of abuse are a different story but here again care must be taken in relation to what picture of the parents the guardian should be allowed to present to the child under its responsibility. It is unlikely to be in the child's psychological or emotional best interest to be told negative stories about the child's parents.

Except in the case of parental abuse (and even then one must look at the particular situation in question), the guardian should raise the child with positive feelings towards their parents. Negative stories or descriptions of the parents may have the consequence of reducing the chances of successful reunification between the child and parents and psychologically damaging the child. Either consequence cannot be in the best interest of the child - the first and paramount consideration in guardianship law.[399] The best interest of the child is the guiding principle in making decisions in relation to parental and guardianship rights and duties.

GUARDIANSHIP AS A TRUST

American legal academic Sarah Abromowicz states that 'guardianship is a trust'[400] and 'a guardian was but a trustee.'[401] A number of eighteenth and nineteenth century cases give support to this position.

Lord Macclesfield LC in *The Duke of Beaufort v Berty* was of the opinion that guardianship in socage and under the Tenures Abolition Act 1660 both amounted to a trust.[402] In particular, the Lord Chancellor said 'that guardians were but trustees'[403] and the jurisdiction of the Court of Chancery 'was grounded upon the general power and jurisdiction which it has over all trusts, and a guardianship was most plainly a trust.'[404]

398 GW Knowles (1926) 176.

399 *J v C* [1970] AC 668; Law Reform Commission of The Australian Capital Territory *Report on the Law of Guardianship and Custody of Infants* (AGPS Canberra 1974) 11.

400 S Abramowicz 'English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody' (1999) 99 Columbia L Rev 1344, 1345.

401 S Abramowicz (1999) 1355.

402 (1721) 1 P Wms 703, 24 ER 579.

403 (1721) 1 P Wms 703, 704; 24 ER 579, 579.

404 (1721) 1 P Wms 703, 705; 24 ER 580.

His Honour repeated this belief four years later in the 1725 case of *Eyre v Countess of Shaftesbury*.[405]

This position of a guardian being a trustee was carried into the nineteenth century. For example, in the 1851 case of *Mathew v Brise*, Sir John Romilly MR also held that the jurisdiction of the Court of Chancery is attracted to situations of guardians and the infant ward because of the trusteeship relationship.[406] He added that the guardian is not only a trustee of the infant's property but 'he is a trustee for the benefit of the infant ward', required to see to the infant's education and maintenance.[407] In 1885, Field J continued this line of reasoning in *Plowright v Lambert*: 'I need not say it is familiar to everybody who practices in this division that the fiduciary relation, as it is called, does not depend upon any particular circumstances. It exists in almost every shape. It exists, of course, notoriously in the case of trustee and *cestui que trust*; it exists in the case of guardian and ward, of parent and child, of solicitor and client.'[408]

More recently, the trial judge in the Western Australian Supreme Court case of *Bennett v Minister of Community Welfare* without further analysis seems to have accepted the line of pre-twentieth century English cases that held guardianship to be an office of trust.[409] However, that is not the law of Australia. Rather, the High Court of Australia in the more recent case of *Clay v Clay*, rejected the notion that guardianship is an office of trust and that the relationship between guardian and child is that of a trust and beneficiary.[410] The guardian unlike the trustee administers a child's property but does not have the legal title on trust for the child beneficiary[411] and in relation to the person of the child there is no trust property; there can be no trust without the three certainties of intention (words), subject matter (trust property) and object (beneficiary).[412]

405 (1725) 2 P Wms 102, 24 ER 659.
406 (1851) 14 Beav 341, 346; 51 ER 317, 319.
407 (1851) 14 Beav 341, 345; 51 ER 317, 319.
408 (1885) 52 LT 646, 652.
409 [1988] Aust Torts Reports 80-210, 68,089.
410 (2001) 202 CLR 410, 428-432.
411 *Clay v Clay* (2001) 202 CLR 410, 428-429.
412 *Knight v Knight* (1840) 3 Beav 148, 172-173; 49 ER 58, 67-68.

It should be noted that although there are a number of eighteenth and nineteenth century cases that prescribe to the trust notion of guardianship, this was not universally agreed to by the judiciary[413] and treatise writers[414] of the time. In *Clay v Clay* the court cited with approval the following quote from the Hon Justice Story: '[A]lthough guardianship may properly be denominated a trust, in the common acceptation of the term, yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery. In the latter, trusts are invariably applied to property (and especially to real property) and not to persons.'[415]

Even though guardianship is not an office of trust, a guardian stands in a fiduciary relationship with the child being 'guarded'. *Clay v Clay*[416] and cases before[417] confirms as much. Fiduciary relationships are relationships of trust between the parties but not necessarily a trust in the technical sense recognised by equity. A fiduciary must comply with high standards of honesty and propriety, always act in the best interest of the principal or the person owed the duty,[418] not allow their self interest and the interests of the principal to conflict and not make an unauthorised profit from their position as a fiduciary.[419] Thus, apart from the guardianship duties discussed above, the guardian to a child has a strict duty of loyalty to the child to always act in their best interest. The welfare of the child must always be placed ahead of any other consideration. This is consistent with the overarching guiding principle of the guardianship duties. The child's welfare is the first and paramount consideration, although the duties a guardian owes to the child stand on there own. These are duties that developed over time to 'protect, educate and maintain' the child. Moreover, the relationship of a guardian to a child is also a fiduciary one attracting further requirements or obligations.

---

413 *De Manneville v De Manneville* (1804) 10 Ves Jun 52, 63, 32 ER 762, 767.

414 F Hargrave and C Butler (eds) E Coke The First Part of the Institutes of the Laws of England: A Commentary upon Littleton (15th ed W Clarke London 1817) 88b, n 16; Hon Mr Justice Story Commentaries on Equity Jurisprudence (15th ed Stevens and Haynes London 1884) 920.

415 (2001) 202 CLR 410, 429 citing Hon Mr Justice Story (1884) 920.

416 (2001) 202 CLR 410.

417 See for example, *Plowright v Lambert* (1885) 52 LT 646, 652; *Bennet v Minister of Community Welfare* (1992) 176 CLR 408, 426-427.

418 *Pilmer v Duke Group Ltd* (2001) 180 ALR 249, 293; P Finn 'The Fiduciary Principle' in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell Toronto 1989) 27.

419 *Chan v Zacharia* (1984) 154 CLR 178, 198-199.

It should be remembered that although the child's best interest are the first and paramount consideration, parents' rights are of some currency and consideration. This does not necessarily violate the guardian's fiduciary duties. As long as the child's interests are placed first and consideration of the parents rights are not prejudicial to the interests of the child there is no conflict. In fact, considering the parents' rights may be crucial in acting in the child's best interest. Substantial evidence needs to be presented before one can convincingly argue that it is in the best interests of the child that the natural bond between child and parent should be denied or that action or decisions should be allowed that may reduce possible family reunions or the child being comfortable with the culture of his or her parent.

CONCLUSION

Even though some confusion in relation to the guardianship concept and how it differs from custody has developed and more attention has probably centred on the powers or rights of guardians than their duties or obligations, there is little doubt that guardians do have duties to comply with. These duties are in the main the same as parental duties but there are some differences, as there are in relation to the rights of parents and non-parental guardians. In fact, in some instances the guardian, in complying with his or her duties must allow for the exercise of certain parental rights. Often the need to respect the rights of the parents is necessary to guarantee the welfare of the child. Historically it was the rights of the fathers of legitimate children and to a lesser extent, the rights of the mother of an illegitimate child that received preference. Hence, over time the child's welfare has become the first and paramount consideration in matters of guardianship law. Under the common law, unless abrogated or modified by statute law, guardians must comply with a number of duties and ensure they act in the best interest of the child. Whether we are concerned with testamentary guardianship, other private guardianships or State guardianship, 'the rights and obligations associated with it exist for the benefit of the child, not the parent'[420] or the State. However, one hopes the State sees that acting in the best interest of the child is also in the best interest of the State and society. The

[420] Alberta Law Reform Institute (1998) 82.

State looms large in the next part of this thesis – the history of Aboriginal child separations and child welfare.

PART II

CHAPTER FOUR

FIRST CONTACT, CIVILISING, CHRISTIANISING AND PROTECTING: 1829-1899

INTRODUCTION

On 1 June 1829, after a four month journey from England on the ship Parmelia, Captain James Stirling grounded on a bank between Carnac Island and the mainland of western New Holland, near what is now Fremantle. By 16 June he and his soldiers were able to land at Arthur's Head Fremantle. Two days later he read troops the letter appointing him as Lieutenant-Governor of the new Swan River settlement.[421] More importantly, he made his first executive action; a Proclamation setting out, inter alia, his powers, how the settlers were to behave towards the Aborigines and the application of British law in the new settlement. He proclaimed that on 'His Majesty's Authority he had the power to make 'Legal Commands and Regulations' that must be obeyed by 'all His Majesty's Subjects found or residing' in the territory of Western Australia. The 'Laws of the United Kingdom as far as they are applicable to the Circumstances of the Case' were to prevail and 'Offences against the King's Peace or the Laws of the Realm' would be prosecuted 'and punished in the same manner and to all Intents and Purposes as is usual in similar offences committed in any other Part or Parts of His Majesty's Dominions subject to British Law.' Further on in the Proclamation, Captain Stirling pronounces:

> And whereas the Protection of Law doth of Right belong to all people whatsoever who may come or be found within the Territory aforesaid, I do hereby give Notice that if any Person or Persons shall be convicted of behaving in a fraudulent, cruel, or felonious Manner towards the Aborigines of the Country, such Person or Persons will be liable to be prosecuted and tried for the Offence, as if the same had been committed against any other of His Majesty's subjects.[422]

The Swan River settlement was the first British colony in Australia to be

[421] Sir George Murray Secretary of State for the Colonies *Instruction to Captain Stirling* (Downing Street 30 December 1829).
[422] Lieutenant-Governor James Stirling *Proclamation* (Swan River 18 June 1829).

established exclusively for private settlement. By 1850, however, convicts from the United Kingdom were arriving. It should be noted that in December 1826, a convict outpost had been established at King George Sound at what is now Albany, about 600 hundred kilometres south from the Swan River. The King George convict outpost had been established by the New South Wales administration partly in response to fears that France might seek to acquire the then unclaimed western New Holland. However, there had been no particular enthusiasm in the United Kingdom for the establishment of the Swan River colony. With some reluctance the Government of the United Kingdom agreed to the settlement and on 14 May 1829 an Act was passed to make provisions for the establishment of the Swan River settlement.[423] The Government of the United Kingdom was however slow to implement the Act and, when Captain Stirling sailed from England on 8 February 1829, he had no formal Commission. Rather, what he relied on were instructions from Sir George Murray, Secretary of State for the Colonies, issued at Downing Street on 30 December 1829. Murray appointed Stirling Lieutenant-Governor and acknowledged that because the proposed Swan River settlement was not part of any existing colony, 'difficulties may easily be anticipated in the course of' establishing the settlement.' Despite this, Murray hoped that any difficulties could be overcome by 'firmness and discretion ' by Stirling.[424]

THE ORIGINAL INHABITANTS

It is a mistake to think that European contact with the Aborigines of Western Australia commenced with the arrival of the Parmelia in 1829. The first recorded contact was some two hundred years earlier in June 1629 when the Dutch ship Batavia grounded at the Abrolhos islands of the Western Australia coast near what is today the coastal city of Geraldton. It is not proposed here to provide a detailed history of European-Aboriginal contact prior to Captain Stirling's arrival or of the Aborigines in Western Australia or Australia pre-colonial settlement.[425] However, a full appreciation of the history and

423 (1829) 10 Geo IV c 22. The Act continued in force from year to year by the force of a number of Imperial Acts: (1835) 5 & 6 Wm IV c 14; (1836) 6 & 7 Wm IV c 68; (1838) 1 & 2 Vic c 46; (1841) 4 & 5 Vic c 43; 5 & 6 Vic c 88 (1842); (1844) 7 & 8 Vic c 57; (1846) 9 & 10 Vic c 35.

424 Sir George Murray Secretary of State for the Colonies *Instruction to Captain Stirling* (Downing Street 30 December 1829). (1829).

425 For further information refer to N Green 'Aborigines and White Settlers in Nineteenth Century' in C T Stannage (ed) *A New History of Western Australia* (University of Western Australia Press Nedlands 1981) 72-79.

consequences to the Aboriginal community of the child separation policies and practices is difficult without some knowledge of traditional Aboriginal society; particularly in relation to child rearing and family. A brief commentary is thus offered.

Aborigines inhabited the State of Western Australia for well in excess of the 30,000 years prior to European settlement and for at least 31,000 years in the south west of Western Australia prior to Captain Stirling's arrival.[426] Under traditional Aboriginal society in existence prior to European settlement and continuing for some Aboriginal families today, children had a special place in the extended family network developed on kinship lines.[427] This was unlike European-British society where under guardianship law, as discussed in Part I, the father generally had the main guardianship responsibility. However in most cases the mother actually undertook the nurturing and caring of the child. In traditional Aboriginal society, child rearing is the responsibility of the extended family or other members of the tribe. Further, Aboriginal children traditionally are allowed greater freedom of movement and less attention is placed on material comfort, discipline and training.[428] However, the fact that, at some particular stage, someone other than the biological parents may be caring for the child does not mean that the parental ties are severed or that the parents have relinquished their parental rights or their love for the child. On the contrary, the child at all times is made aware of their parents and the special significance of his/her relationship with them.

The relative freedom that the child in a traditional Aboriginal society is granted and the lack of emphasis on 'western style' training have lead to perceptions that Aboriginal children are often neglected. This perception has been a contentious issue in Australia. Sadly, European Australia has often failed to understand the kinship family arrangements, child rearing traditions and learning methods of traditional Aboriginal society. This has lead to a history of intense State intervention in the welfare of Aboriginal children that forms the focus of this thesis.

---

426 MC Howard *Aboriginal Politics in South-Western Australia* (University of Western Australia Press Nedlands 1981).

427 Australian Law Reform Commission *Reference on Aboriginal Customary Law-Aboriginal Customary Law: Child Custody, Fostering and Adoption* (Australian Law Commission Sydney Research Paper No 4 1985) 1.

428 E Sommerlad 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 Australian Journal of Social Issues 167; Australian Law Reform Commission

Traditionally, Aboriginal children are not educated in a structured school situation, but rather by observing adults and elders and participating in certain activities. Also, the passing of knowledge from adults to children in traditional Aboriginal society is governed by strict tribal rules as to who is to do the passing and who is to receive the knowledge. Depending on factors such as clan, sex and age some children receive more or different information or knowledge than other children. The knowledge that is past to the child in relation to beliefs, language, culture and law is crucial for the survival of the Aboriginal culture as children are the key ingredient in maintaining and preserving cultural integrity and identity.[429] It is also the right of parents and families wherever to pass this knowledge onto the children, the next generation of any particular racial or ethnic group. This right is violated when another group or institution interferes with the traditional process of transferring the societal or group norms, knowledge and culture to the next generation.[430]

Traditional Aboriginal society was foreign/deeply alien to the British settlers that established the Swan River colony. This lead to much misunderstanding that in varying degrees has continued ever since, no more so than in the area of child welfare and child rearing. Because the original inhabitants of Western Australia were different from the European settlers, the latter's dominate political and economic power meant that the Aboriginal was most vulnerable to interference in his/her way of life. This was achieved through the legislation, policies and practices of successive governments from the time the Swan River was settled by the British in 1829. The intervention and interference into the traditional Aboriginal society by the State and other European institutions such as the Christian churches varied in intensity over time.

Part II of thesis, chronicles that intervention and interference, particularly in regards to the parental and familial-child relationship and Aboriginal child rearing and child welfare. No other area is more important to the preservation of Aboriginal culture and identity.

The Recognition of Aboriginal Customary Laws (Australian Law Commission Sydney No 31 1986) Vol 1 para 344; Australian Law Reform Commission (1985) 1-2.

429 Australian Law Reform Commission (1985) 1.

Before continuing I offer a qualification of what has been said above. The above discussion described child rearing in traditional Aboriginal society and how European colonialists failed adequately to understand such practices and traditions. However, it is stating the obvious in adding that in traditional Aboriginal society or even non-traditional Aboriginal society, not all behave in an acceptable manner and not all parents are fit and able to properly rear their children. Unfortunately, neglect and abuse of children has and continues to take place in all societies. This may require intervention from the State and the removal or separation of the child from the parents and family. But that is the point of the argument here. For non-Aboriginal Australians, children were only removed from families in cases of neglect or abuse. In contrast, Aboriginal children were removed from families as part of wider Aboriginal policy without the need to prove neglect and abuse. I do not argue that Aboriginal children should not have been separated from their families if they were subjected to danger and harm – but this danger and harm had to be real and not based on notion of racial superiority or misunderstanding of different ways of bringing up children. As long as these differences did not amount to neglect or abuse, it should have been legally and morally clear that children should not have been separated. Furthermore, once separated, the State as guardian had to ensure that the children were properly taken care of according to extant legal and moral requirements. Sadly this was not always the case.

THE APPLICABLE LAW

In Part I it was seen that the English law on guardianship was imported into Western Australia at settlement. Also in the main, the decisions of the English Courts on guardianship during the period under examination in this study continue to have force in Western Australia. Before exploring chronologically the law as it affected Aborigines, a few comments are necessary on the law that applied in Western Australia on settlement and after.

When Western Australia was settled in 1829 there was no law-making body in the Colony. Or more correctly there was no British law-making body; the Aborigines had

[430] M Brandl 'The Aboriginal Children and Families Heritage Project' (1980) 5 Australian Child and Family Welfare 20, 20.

their own complex system of rules and laws governing behaviour and relationships.[431] However, it was not difficult to determine what constituted the law of Western Australia. As previously noted, Captain Stirling answered this question in his Proclamation of 18 June 1829, where he proclaimed that '[t]he Laws of the United Kingdom as far as they are applicable to the Circumstances of the case' immediately prevail on 'all His Majesty's Subjects' within the territory.[432] Captain Stirling was applying the English law as understood by Blackstone and a number of English cases.[433] Blackstone for example, explains:

> [I]f an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them (2 P.Wms 75). But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.[434]

The judiciary in *Cooper v Stuart* agreed with Blackstone's position saying that when Englishmen settled on land which

> consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominions ... the law of England must (subject to well established exceptions) become from the outset the law of the Colony and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute.[435]

The High Court of Australia in the landmark decision *Mabo v Queensland (No.2)*[436] set aside the legal fiction that Australia was uninhabited prior to British settlement. This raises the point of whether Australia was conquered rather than settled

431 RM & CH Berndt *The World of the First Australians* (Angus and Robertson London 1964) ch X; KJ Maddock 'Aboriginal Customary Law' in P Hanks and B Keon-Cohen (eds) *Aborigines and the Law* (Allen & Unwin Sydney 1984) 224-225.

432 Lieutenant-Governor James Stirling *Proclamation* (Swan River 18 June 1829).

433 For example, *Blankard v Galdy* (1693) Holt KB 341, 90 ER 1089; *Case15-Anonymous* (1722) 2 P Wms 75; 24 ER 646; *Cooper v Stuart* (1889) 14 App Cas 286.

434 W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) Vol 1 104-105 (Special edition LB Adams Jr The Legal Classics Library Birmingham Alabama 1983).

435 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

436 (1992) 175 CLR 1.

and whether Aboriginal law remained in force when the British arrived. These questions are for another study and whatever the position should be it is clear that the legal jurisprudence of Western Australia has proceeded from colonial settlement on the assumption that the law of England came to Western Australia with Captain Stirling. [437]

The law of England took effect in Western Australia from June 1 1829. This later became known as Foundation Day and it coincides with the day Captain Stirling's ship Parmelia sailed into Cockburn Sound south of Fremantle. In relation to the words 'reasonably applicable,' this refers to whether the English law is to have a local or general application; if the later, it became part of the law of Western Australia.[438]

Legislation of general application thus passed by the Parliament of the United Kingdom and came into force on 1 June 1829.[439] English statutes passed after 1 June 1829 has no effect in Western Australia unless those acts expressly applied to Western Australia[440] or the Western Australian Parliament expressly adopted or applied a United Kingdom statute by referring to it.[441] Also it should be added that even legislation not expressly applying to Western Australia could still have a guiding effect in the enacting of similar legislation in Western Australia.[442]

In relation to common law, the law decided by the Courts of England in its common law and equitable jurisdictions as of 1 June 1829 became the law of Western

437 In relation to Australia generally, refer further to AC Castles *An Australian Legal History* (Law Book Company Sydney 1982); B Kercher *An Unruly Child: A History of Law in Australia* (Allen & Unwin Sydney 1995); G Davidson (ed) *The Oxford Companion to Australian History* (OUP Melbourne 1998); D Ritter 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 Sydney L Rev 5; H Reynolds *Aboriginal Sovereignty* (Allen & Unwin St Leonard's 1996).

438 *R v De Baun* (1901) 3 WALR 1. More generally see *Deloherty v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, 310.

439 Interpretation Act 1984 (WA), s 73.

440 For example, Colonial Laws Validity Act 1863 applied to all British colonies. However, although after the period of this study, note that the Australia Act 1986, s 3 and Australia Act 1986 (WA), s 3 allows the Western Australian Parliament to amend or repeal post 1 June 1829 statutes from the United Kingdom having application in Western Australia and the Australia Act 1986, s 1 and the Australia Act 1986 (WA), s 1 terminated the ability of the Parliament of the United Kingdom to legislate for Western Australia.

441 For example, Imperial Acts Adopting Ordinance 1867 (WA), s 1 lists a number of United Kingdom statutes that may apply to Western Australia when expedient in the circumstances to do so. Refer further to The Law Reform Commission of Western Australia *Report on United Kingdom Statutes in Force in Western Australia* (Law Reform Commission of Western Australia Perth Project No 75 1994) 5-6.

442 For example, the Industrial Schools Act 1857 and Industrial Schools Act 1874 (WA).

Australia apart from those decisions peculiar to a statute or custom not applying to the new colony. Under the English doctrine of precedent, the Civil Court of Western Australia, established in 1832,[443] was bound by the decisions of the English Courts at Westminster except in cases involving an issue without an English counterpart. With the establishment of the Supreme Court of Western Australia in 1861,[444] only the decisions of the English Court of Appeal and higher courts were binding, with decisions from the English Courts of King's Bench, Chancery and Common Pleas being persuasive. When the Full Court of the Supreme Court of Western Australia was established in 1881 the decisions of the English Courts became persuasive only, apart from those of the Judicial Committee of the Privy Council. This remained so throughout the period of this study. Of course, decisions of the High Court of Australia were also binding on Western Australia.[445]

1829 TO 1869 – FROM CIVILISING TO PROTECTING ABORIGINES

1 Initial Contact

When Captain Stirling arrived to establish the Swan River Colony in 1829 traditional Aboriginal society was irrevocably changed. This change affected all aspects of traditional Aboriginal society including tribal life, family relationships, child rearing, and modes of work and collection of the necessities of life. Colonisation also brought with it a number of deaths to Aboriginal people through physical confrontation with the European settlers. Most deaths however, resulted from introduced diseases such as influenza, tuberculosis, pneumonia and venereal diseases. In the southwest region of Western Australia, for example, increased death rates and decreased birth rates caused by dislocation to traditional way of life meant an estimated pre-settlement population of 6,000 was reduced to only 1,529 people of Aboriginal descent (653 of full descent and 867 being classified 'half-castes') by the end of the nineteenth century.[446]

---

443 By the passing of the (1832) 2 Wm IV No 1.
444 By the passing of the Supreme Court Ordinance 1861 (WA).
445 E Russell (Edited and completed by FM Robinson and PW Nichols) *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Nedlands 1980) 60-66.

Not long after settlement of the Swan River region, the British settlers slowly expanded from the Swan River to the Canning River and much of the southwest of Western Australia. In addition to skirmishes between the settlers and the Aborigines, sexual contact between male settlers and Aboriginal women also took place sometimes resulting in the birth of 'light-skinned' children. It was these 'light-skinned' offspring, termed 'half-caste', that in future years were the central target of the legislation, policies and practices of the separation era. Complaints appeared in the *Perth Gazette* newspaper complaining about instances where male settlers were getting Aboriginal men drunk and having sex with their partners.[447] Although this practice was not encouraged in the settler community it was 'grudgingly tolerated'. Occasionally, however, it resulted in violent reprisals from Aboriginal men.[448]

Although the Aborigines of Western Australia did not as whole fare well with the advent of European colonisation, the Imperial Government was cognisant of the original inhabitants and instructed Captain Stirling to Christianize, civilize and educate them:

> And it is Our further Will and pleasure that you do to the utmost of your power promote Religion and Education among the Native Inhabitants of Our said Territory or of the lands and islands thereto adjoining And that you do especially take care to protect them in their persons and in the free enjoyment of their possessions and that you do by all lawful means prevent and restrain all violence and injustice which may in any manner be practised or attempted against them and that you take such measures as may appear to you to be necessary for their conversion to the Christian Faith and for their advancement in Civilization.[449]

Paul Hasluck in his study of Aboriginal affairs in Western Australia from 1829 to 1897 isolates three main principles guiding 'Native' policy from the Colonial Office in Downing Street to Western Australia. The three principles reflect the Imperial instructions that Captain Stirling received from the Realm and the Proclamation he read out on 18 June 1829. The first principle was to civilise and convert the Aborigines to Christianity. Secondly Aborigines were to have the full status and legal rights of British

---

446 A Haebich *'A Bunch of Cast-Offs': Aborigines of the Southwest of Western Australia, 1900-1936* (PhD Thesis School of Social Inquiry Murdoch University 1985) Vol I 130-131.

447 P Hasluck *Black Australians: A Survey of Native Policy in Western Australia, 1829-1897* (2 ed Melbourne University Press Melbourne 1970) 22

448 A Haebich (1985) Vol 1 36-37.

subjects. Thirdly, the physical well being of the Aborigines was to be protected.[450] In reality though, as time progressed, the first two principles were abandoned and the third was given less than adequate attention.[451]

So far as protection was concerned, it appears that as much or even more effort was expended in protecting the settlers from the perceived and actual dangers (generally to settlers' property rather than person, although settlers in a number of skirmishes did suffer some casualties) from the Aborigines as they were in protecting the physical well being of the Aborigines. Appointment of police was in earnest in the first decade of settlement and both the settler and the Aborigines were warned not to engage in wrongdoing to each other. Initially, there were some attempts to educate Aborigines into the European ways with the founding of a native school.[452] In relation to equality before the law, which Captain Stirling had proclaimed, this occurred in a somewhat inconsistent manner. In practice, the Aborigines were more likely to have to abide by the law and be dealt with according to the law in their dealings with the settlers.[453] This was the case in dealings between Aborigines only if such dealings received official attention.[454]

2 Civilising, Christianising and Educating up to 1870

The early nineteenth century was a period of major social reform in Britain and it was with the appointment of the successor to Captain Stirling in 1839 that the colonial policy of treating Aborigines 'justly' and civilising and Christianising them commenced in earnest. Captain Stirling's successor, Governor Hutt, had taken a strong personal interest in Aboriginal affairs and was imbued with the humanitarian views and beliefs dominating official Imperial policy.

The protection of the poor or the most vulnerable in society had taken sharper public policy focus with the delivery to the House of Commons in 1834 of the Royal

---

449 Sir George Murray Secretary of State for the Colonies *Instruction to Captain Stirling* (Court of St James 5 March 1831).
450 P Hasluck (1970) 12-13.
451 P Hasluck (1970) 13.
452 P Hasluck (1970) 42.
453 E Russell (1980) 351.
454 PW Nichols *Police Powers in Western Australia 1829-1970* (PhD Thesis Law Faculty University of Western Australia 2002) 61.

Commission Report on the Poor Laws.[455] The report dealt with the indigent and looked at what measures could be implemented to assist the poor. Interestingly, the view at the time was that a child should remain with their parents. This principle was adopted in the Poor Law Amendment Act 1834.

In 1835, the House of Commons appointed a select committee on Aborigines, which handed down its report in 1837.[456] The select committee was appointed to make recommendations on what measures should be taken in respect to the 'Native Inhabitants' of those countries with British settlements. Its aim was to treat them with justice, protect their rights and 'to promote the spread of civilisation among them, and to lead them to the peaceable and voluntary reception of the Christian religion.'[457]

The report from the select committee on Aborigines was similar to the report on the administration of the poor laws. Looking at both reports together the following policies and principles can be deduced: Britain needing to assure an orderly managed world both at home and abroad; bringing the marginalised, whether they be the poor or the Aborigines into the established institutions and wage economy; applying the British legal machinery to all, with temporary separate laws for those 'outside' the mainstream until they achieved full citizenship; appointing protectors for Aborigines and overseers for paupers; granting special attention to educating and 'saving' the children; accepting that the elderly were probably beyond salvation and not receptive to change; acknowledging a central role that Christianity could play in civilising and producing good citizens; providing regular and orderly reports on the administration and welfare of Aborigines and paupers alike.[458]

The Select Committee on Aborigines offered the opinion that it was crucial to have protectors for Aborigines, who should be assigned a number of duties:

---

455 *Report from His Majesty's Commission for Inquiring into the Administration and Practical Operation of the Poor Laws* (British Parliamentary Papers (1834) vol 27 no 44).

456 *HC Select Committee on Aborigines* (HC Paper (1837) no 425).

457 *HC Select Committee on Aborigines* (1837).

458 Refer further to A Armitage *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (UBC Press Vancouver 1995) 4-5.

> The education of the young will be amongst the foremost of the cases of the missionaries: and the Protectors should render every assistance in their power ...
>
> It should be one branch of the duty of the Protectors to suggest ... such short and simple rules as may form a temporary and provisional code for the regulation of Aborigines, until advancing knowledge and civilisation shall have superseded the necessity of any such special laws.[459]

The welfare of Aborigines in the colonies was given additional attention around the same time by humanitarian organisations such as the anti-slavery groups, Quakers, the Clapham Sect and the Aboriginal Protection Society. These groups influenced Imperial Aboriginal policy; for the duration of the nineteenth century, they advocated the just treatment of Aborigines with Christian missionary zeal and devoted humanitarian language. The colonial settlers did not necessarily welcome the advocacy of these groups, however. Indeed, in relation to the Aboriginal Protection Society that formed in 1836, the Western Australian settlers charged the society with lacking any real appreciation of conditions on the 'colonial front' and 'romanticising' the Aboriginal race.[460]

Governor Hutt was well aware of the feelings and sentiments of the Imperial government and of many in the British public before he set sail to Western Australia. Despite this, he was keen to implement measures that complied with the humanitarian ideals widespread in Britain at the time. However, while Governor Hutt was keen to implement the Aboriginal polices emanating from Downing Street he was not keen to apply English law to the Aborigines. Fortunately, the interest in Aboriginal affairs of Sir James Stephen, the Under-Secretary of State for the Colonies between 1839-1847 matched that of Governor Hutt's. Not surprisingly, this was a period of strong interest and concern over Aboriginal affairs in Western Australia.[461]

Even though Governor Hutt was committed to 'improving' the lot of the Aborigines he had little confidence in their ability to attain the educational level of the colonial settlers. However he hoped that the Aborigines would eventually 'become one

---

459 HC *Select Committee on Aborigines* (1837).
460 P Hasluck (1970) 54.
461 P Hasluck (1970) 45.

people with their intruders.'[462] In contrast to later segregation policies, Governor Hutt was keen to have the Aborigines mingle with the settlers in the townships of the new colony and he encouraged the establishment of Aboriginal schools. For example, in 1840, Wesleyan missionary Reverend John Smithies established a Native school in Perth for the 'Christianising and civilising' of Aboriginal children.[463]

The colonial government passed legislation imposing civil punishment for anyone found guilty of enticing Aboriginal girls from school or employment.[464] The preamble to the Act said:

> Whereas laudable efforts have been made to introduce Christianity and civilisation amongst the aboriginal race of this Colony by instructing their youths of both sexes in schools and admitting them as domestic servants into the families of the colonists, and whereas it is expedient to provide a remedy against mischievous and evil-disposed persons enticing away the girls of that race either from the schools in which they are kept or from the houses in which they are employed ...

For a first offence two pounds was payable. A second offence brought with it a penalty of five pounds. Although the 1844 Act was repealed in 1905, the duty to protect Aboriginal girls was absorbed by the Aborigines Act 1905 Act.[465] This 1844 Act reflected Governor Hutt's view that education and employment were important tools in civilising the Aboriginal population.[466] Also in keeping with general child welfare views of the time, the 1844 Act was concern to 'protect' or prevent girls from being enticed into 'immoral' sexual behaviour. As State intervention into child rearing and child welfare of the general population was to increase throughout Australia as the nineteenth century progressed, in relation to girls a major focus was on their morality and sexual behaviour while with boys there was major concern with the incidence of petty crime.[467]

---

462 F Hart *Western Australia in 1891* (Sands & McDougall Perth 1891) 115.
463 P Hasluck (1970) 89; A Haebich (1985) Vol I 37.
464 (1844) 8 Vic No 6.
465 Repealed by Aborigines Act 1905 (WA) s 66 Sch 2. However, the effect of that statute remained in force per Aborigines Act 1905 (WA) s 44.
466 The first Act relating to Aborigines was: An Act to constitute the Island of Rottnest a Legal Prison 1840 (WA) was refused Royal Assent. Other Western Australian Acts enacted in the 1840s dealing with Aborigines included: (1841) 4 and 5 No 21; (1841) 4 and 5 No 22; Summary Trial and Punishment of Aborigines Act 1849.
467 R van Krieken *Children and the state* (Allen & Unwin North Sydney 1991) 71.

Governors Stirling and Hutt had been active in creating and supporting private and public schools for educating Aborigines. During Governor Stirling's reign there had been unsuccessful attempts to establish a missionary education facility on the Swan River and a Government Native Institution at Mount Eliza Bay. Governor Hutt was even keener to support the educating of Aborigines through the offering of bounties to settlers who trained and employed Aborigines[468] and encouraging Christian mission schools. However, efforts to establish mission schools and other private institutions in the 1840s and early 1850s were not blessed with longevity. Lack of adequate Governmental financial assistance and sufficient missionary resources and teachers of high quality and devotion meant that mission learning institutions were doomed from the start. A lack of coordination and adequate planning between the various public, missionary and other private education institutions also exacerbated the situation.[469] Unfortunately, the failure of the mission and other educational institutions for Aboriginal children in the 1840s only added fuel to the dominance of Social Darwinist thought in the 1870s. This body of thought held to the view that Aboriginal children of full descent were uneducable and beyond salvation.[470]

The interest in Aboriginal affairs displayed by Governors Stirling and Hutt from the time of settlement to around the end of the 1840s was followed by two decades of relatively little interest and official activity in the area. Civilising and Christianising the Aborigines took second place to the protection of the settlers. Although the Colonial Office in London was still interested in the sentiments expressed in the 1837 House of Commons Report on Aborigines, even the interest of the Colonial Office was on the wane by the 1860s.[471]

3 Last Three Decades of the Nineteenth Century: Economic Development and 'Protection' of Aborigines

Until 1870, a nominated Legislative Council, an Executive Council that consisted of officers of the Crown and a Governor, governed Western Australia. The Governor's

---

468 *Government Gazette* 25 June 1841.

469 LR Marchant *Aboriginal Administration in Western Australia: 1886-1905* (Australian Institute of Aboriginal Studies Canberra 1981) 3.

470 A Haebich (1985) Vol 1 55.

powers were only fettered to the extent of his Commission and Instructions and willingness to accept the advice of his Council. Even though the settlers of Western Australia had, as early as 1834, expressed a desire for representative government,[472] it did not arrive until 1870 with the passing of the Legislative Council Act 1870 (WA). After that, the Governor was no longer a member of the Legislative Council, which was now made up of six members nominated by the Governor and twelve elected members. Nonetheless, although the Governor's powers were reduced, he still had veto power over giving legislation the Royal Assent and the Imperial authority still retained final approval powers over all colonial legislation. The settlers had to wait until 1880 for responsible government when the Enabling Act 1890 was passed by the House of Commons and the House of Lords and given the Royal Assent. This meant that the Constitution Act 1889 (WA) became the law of Western Australia.

The 1870s also marked the beginning of nearly three decades of rapid economic growth in Western Australia that involved an expansion of colonial settlement and development in the northern regions of the State. This led to a number of violent clashes between the Aborigines and the colonialists and police.[473] The economic exploration and colonial settlement of the northwest meant there was a demand for Aboriginal labour to service the cattle stations and pearl industry of Broome. Thus, there was increase interest in Aboriginal affairs. This was in contrast with the two decades preceding the 1870s where slow economic activity and a ready supply of convict labour added to the declining interest of the colonialists in Aboriginal affairs.

With the commencement of the 'economic boom' and exploration of the northwest in the 1870s and continuing for most of the remaining years of the nineteenth century, the pastoralists' influence on Aboriginal affairs was marked. Much of the legislation enacted in the last three decades making provision for Aboriginal people or referring to them focussed on the criminal justice system, Aboriginal employment and

471 P Hasluck (1970) 65.
472 E Russell (1980) 46.
473 N Green *The Forrest River Massacres* (Fremantle Art Press Fremantle 1995); A Haebich *Broken Circles* (Fremantle Art Press Fremantle 2000) 210.

Aboriginal sexuality.[474] Much of this legislation was aimed at providing the settlers and particularly the pastoralists with a stable supply of Aboriginal labour and to prevent Aborigines killing cattle and performing other 'depredations.'[475]

Leslie Marchant in his study of Aboriginal affairs in Western Australia between 1886 and 1905 states that this period was marked by policies of paramountcy and protection.[476] Of course, the Governors and their Imperial masters in London had since the time of settlement in 1829 advocated 'protectionists' policies. However, these so-called protectionists policies were aimed as much at protecting the interests of the settlers, as they were the interests of the Aborigines. And as previously mentioned, during the 1850s and 1860s there was a marked decline in the interests of Aborigines. Despite this, there is little doubt that, from the time of representative government until the end of the 1900s, there was an increased 'protectionist' bent to the colonial policies and statutes even if at least part of the motivation was the interests, particularly the economic interests, of the pastoralists and other settlers.

The paramountcy policy desired to preserve the dominance of the colonial European culture and political-legal order over the socio-political and cultural norms and laws of the traditional Aboriginal societies and tribes. Marchant states that it may not be completely accurate to describe the desire for paramountcy as a policy because in many respects it was not 'consciously' planned.[477] When looking at the period prior to the twentieth century and the commencement of a concerted effort to remove Aboriginal children from their families this statement by Marchant is arguably true to some extent at least. However, the desire to maintain the supremacy of the colonial European race over the Aboriginal race was strong in the latter part of the nineteenth century as was the desire to preserve the settlers' interests, particularly their economic interests. Of course, since the time of settlement there was a desire or hope that the Aboriginal population of

---

474 Twenty-one pieces of legislation governing Aboriginal people were passed between 1871 and 1899, touching on *inter alia* employment of women in the pearl shell industry, hunting, capital punishment, Aboriginal evidence in court, selling of alcohol to Aborigines, contracts with Aborigines, trial and punishment of Aborigines involved in the criminal justice system, general employment of Aborigines, whipping of Aborigines, Aborigines and fishing, and protection of Aborigines. Refer further to MK Hill *The Regulation of Aboriginal Women in the Western Australian Pearling Industry* (Honours Thesis Faculty of Law University of Western Australia 1994)

475 A Haebich (2000) 210.

476 LR Marchant (1981) 4.

477 LR Marchant (1981) 4.

Western Australia would change and become more like the European culture. But it was not until the twentieth century that policies aimed at making the 'Aboriginal whiter' came to dominate Aboriginal policy. The desire for paramountcy however was always there and although it may not have been expressly announced in official statements of policy during the nineteenth century, it was, as Marchant says, 'of sufficient persistence to be termed a policy.'[478]

The notion of controlling the Aboriginal population and maintaining the paramountcy of the British-European culture over the Aboriginal culture (and later to change the Aboriginal culture) was based on racial theories and ideologies that were popular in the eighteenth and nineteenth centuries. Armitage claims that the very concept of race is European,[479] and it is undeniably true that European classifications and theorising has dominated the area.

Carl Linnaeus, the eminent Swedish botanist and classifier of plants, made arguably the first steps to sort different 'races' of people into a hierarchical system. In the 1750s Linnaeus proposed a three-fold classification of humans. This schema placed 'Europeans' with what he described as their 'gentle manners' and 'acute judgement', at the top of the list; second came 'Asiatics', with 'grave, haughty and covetous manners'; and last came 'Africans', whom he held to have 'crafty, indolent and careless dispositions'.[480] None of these groupings deals with the Australian Aborigines, but one can assume they would not have been included in the same strata as Europeans.

In the mid- to late-19th century, the ideas surrounding Charles Darwin's *Origin of Species*[481] were coopted to human and racial ends. Herbert Spencer adopted Darwin's biological theories and created Social Darwinism, which rested on the idea of innately superior and inferior races, with Europeans claiming the high ground. According to Spencer, 'black' races would eventually die out if brought into contact with

478 LR Marchant (1981) 5.
479 A Armitage (1995) 221.
480 Q Beresford and P Omaji, *Our State of Mind* (Fremantle Arts Centre Press Fremantle 1998) 32.
481 C Darwin *The Origins of Species* (The Modern Library New York 1936). In relation to discussion on social Darwinism in its Australian or its colonial dimension refer to H Reynolds *Dispossession: Black Australia and White Invaders* (Allen & Unwin Sydney 1989) 9-11, 114-119; M Francis 'Social Darwinism and the Construction of Institutionalised Racism in Australia' (1996) 50 J of Australian Studies 90;Q Beresford and P Omaji, (1998) 33,46,48; A Haebich (2000) 18, 70, 132.

Europeans.[482] This idea was to enjoy influence in governmental and other policy and practice in Western Australia in the late nineteenth century and well into the 20th century.

Other individuals followed in the footsteps of Linnaeus and further explored the 'classification' of humanity. In 1877 for example, Lewis Henry Morgan published *Ancient Society: Or Researches in the Lines of Human Progress from Savagery Through Barbarism to Civilization*.[483] Morgan delineated seven distinct strata of societies, with one clear level of civilisation and three substrata in the 'barbarism' and 'savagery' sections. He believed that North American Indians were mostly in the band from upper savagery to lower barbarism, with a few exceptions who reached middle barbarism.[484] No doubt he would have equated the Australian Aborigines with the Indigenous peoples of North America.

While particular examples such as that of Morgan seem offensive or outlandish today, those ideas, and others based upon them, held considerable sway from the last quarter of the nineteenth century until World War II. Indeed, in the first three decades of the twentieth century, ideas such as the 'dying race' concept held a dominant influence in Western Australia Aboriginal policy. This will be further explored in the next chapter.

The protectionist's policy had been and was still driven in the last third of the nineteenth century by the British humanitarian movement. The colonial government was repeatedly called on to deny allegations of abuses against Aboriginal people, especially in relation to the treatment of Aboriginal workers in the northwest. Peter Biskup in his study of Aborigines and Aboriginal policy in Western Australia states that from 1870 there was a policy of protection that in the marginal regions 'involved the application of the principles of good animal husbandry; in the settled parts it consisted of "smoothing the dying pillow" of a race destined to die out before long.'[485]

---

482 Q Beresford and P Omaji, (1998) 33.

483 L H Morgan *Ancient Researches: Or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (Introduction and annotations E Burke Leacock) (World Publishing Company Cleveland 1963).

484 David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (University Press of Kansas Kansas 1995) 14.

There were allegations made that pastoralists and even more so the pearlers of the northwest treated Aborigines as livestock.[486] Through the 1870s and particularly in the 1880s criticism was made that Aborigines working in the pearling industry were subject to slavery like treatment and abhorrent working conditions.[487] In 1875, the local newspaper, the *Inquirer,* wrote that unlike the open public practice of slavery in the United States, in the Pearl Industry in the northwest it was carried out more secretly: 'Once signed up a [northwest] native becomes virtually a slave for a season. ... I believe it is well known that a government official has hunted up his niggers, driven them through the townsite, passed the Residency, down to the port and locked them up in a kind of second Calcutta Black hole called the Custom House for days until his craft was ready for sea.'[488]

The concerns and criticisms directed to the treatment of Aboriginal workers in the Pearling Industry and the sexual exploitation of women workers in the industry lead to a series of statutes that attempted to improve the employment conditions of the Aboriginal pearling workers and prevent Aboriginal women being employed in the industry.[489] However, even up to the end of the century, reports of the ill treatment of Aboriginal workers in the industry still prevailed and Aboriginal women remained in the industry even though legislative restrictions against their employment dated back to 1871.[490]

It should also be noted that with the gold rushes on the Goldfields in the 1890s, came a new wave of European immigration that made things that more difficult for the original inhabitants of Western Australia. The labour shortage of the 1870s and 1880s was now less acute and thus there was greater competition for the 'skilled' jobs. This resulted in many Aborigines being forced out of skilled jobs. The white employers discriminated against the Aborigines in favour of white men and trade unions that were taking hold of the workforce in the 1890s were in the main, 'colour-prejudiced' towards

485 P Biskup *Not Slaves Not Citizens* (University of Queensland Press St Lucia 1973) 5.
486 MK Hill (1994) 39.
487 Western Australia Parl Debs Dispatch 45 (no 13 1881); Western Australia Parl Debs 190 (24 August 1882).
488 *Inquirer* (28 April 1875).
489 For example, Pearl Shell Fishery Regulation Act 1873 (WA); Pearl Shell Fishery Regulation Amendment Act 1883 (WA); Pearl Shell Fishery Regulation Amendment Act 1887 (WA).

the white man.[491] As the 1890s developed, the economic conditions and status of most Aborigines deteriorated relative to the preceding two decades and the increasingly competitive workforce fostered increasingly negative stereotypes of the Aborigines as inferior workers and people in general. These negative stereotypes were to firmly take hold and 'enjoy' longevity into the twentieth century, as the stereotypes were passed from generation to generation.[492]

Protectionist policies were not the exclusive domain of Aborigines. As previously noted in this and earlier chapters, the legislators in Britain had for some time been concerned about neglected and destitute children which had lead to a series of statutes collectively know as the Poor Laws. From the 1870s, there was an increased focus on cruelly treated and neglected children in Britain and other western industrialised countries and a number of Societies for the Prevention of Cruelty to Children were formed.[493]

The first Society for the Prevention of Cruelty to Children was established in New York in 1874, the first in Britain was in Liverpool in 1883. The first Australian Society for the Prevention of Cruelty to Children was established in Sydney in 1888, with other states following in the 1890, although the Tasmania society was established sometime just after the turn of the century. The Western Australian named Children's Protection Society did not come into existence until 1906.[494] Nonetheless, as early as 1874 in Western Australia, there was legislation enacted giving expanded powers to the directors and managers of schools, orphanages and other institutions founded 'for the purpose of providing for and educating orphan and necessitous children, or children or descendants of the aboriginal race.'[495]

The establishment of universal schooling, reformatories, industrial schools and boarding out systems in western countries became more common in the second half of

---

490 Commissioner W Roth *Royal Commission on The Conditions of the Natives* (Government Printer Perth 1905) 10-12; MK Hill (1994) 40.
491 LR Marchant (1981) 63-64.
492 LR Marchant (1981) 64.
493 L Rowe *The Work of the Societies for the Prevention of Cruelty to Children in Australia, 188-18930; Fighting Cruelty, Neglect and Inexpert Care* (PhD Thesis History Department Murdoch University 2000) 1.
494 L Rowe (2000) 2, 33-37.

the nineteenth century. Much of it was premised on the need to 'rescue the rising generation' from the alleged moral laxity associated with poverty and lack of parental supervision and control amount working class families.[496] This lead to children being separated from their families to be raised in institutions and often the industrial schools became part of the criminal justice system operating as reformatories. In many cases parental contact was restricted as it was thought that such contact would hamper the rescuing and 'socialising' process.[497] In Australia this was no more so than in respect of Aboriginal children and families.

In Britain, the Poor Law Act 1850 made provision for the emigration overseas of children from poor parents who were under sixteen years. Although it should be noted that British child migration had commenced in 1618 when children were sent to Virginia. The period from 1870 until the start of World War I was the most intense period of immigration and the policy ran until the 1960s. Under the policy, British children from poor backgrounds or orphaned children were sent to the colonies, such as Australia, Canada, Rhodesia and New Zealand.[498] From the 1920s Australia became the major receiving country. More often than not the children sent to the colonies were placed in 'farm schools' and other institutions run by religious orders or philanthropic societies. There were many motivating factors for the policy with the emphasis changing over time. One was to 'rescue' the children from a neglected and destitute life in Britain and transport them to a 'healthy' rural lifestyle in the colonies. Also it was thought that by removing the children from Britain, the colonies and not Britain would have to cope with the drain on its resources in providing for the children. Then there was the racially motivated factor of populating the colonies with 'good white' British stock. In the post World War II period the child emigration policy fitted into the general Australian migration policy of 'populate or perish.'[499] In recent times, this British child migration

495 Industrial Schools Act 1874 (WA), preamble.
496 R van Krieken (1991) 61-63.
497 J Mason 'Introduction: Analysing Child Welfare Policy' in J Mason (ed) *Child Welfare Policy: Critical Australian Perspectives* (Hale and Iremonger Sydney 1993) 27.
498 Children from Malta also became part of the emigration scheme.
499 For further reading on the British child emigration scheme to Australia and Canada, refer to J Rose *For the Sake of the Children: Inside Dr Barnardo's: 120 Years of caring for children* (Hodder & Stoughton London 1987). P Bean and J Melville *Lost Children of the Empire* (Unwin Hyman London 1989); J Eekelaar ' "The Chief Glory": The Export of Children from the United Kingdom' in N Lowe and G Douglas (eds) *Families Across Frontiers* (Kluwer Academic Publishers Netherlands 1996) 539; BM Coldrey *The Scheme: The Christian Brothers and Childcare in Western Australia* (Argyle-Pacific Publishing Perth 1993).

population programme has attracted criticism and been the subject of legal action and a number of government inquiries.[500]

Even though the British child migration scheme continues well into the 1960s, as the twentieth century approached there was increasing criticism of the institutionalisation process that treated children *en masse* without adequate consideration and care being given to their individual needs. Critics such as van Krieken argue that this was not conducive to producing cohesive families.[501] The industrial schools and reformatories continued, but there was increased willingness to board children out to 'substitute families'. As the next chapter will show, while the twentieth century saw increasing 'official' concerns raised in relation to separating children from their families, this concern was largely in relation to the non-Aboriginal population. Also it did not seem to stop the separation or removal of British children from parents for emigration to the colonies – though in some cases the children were orphaned and thus had no parents to be removed from.

The Industrial Schools Act 1874 (WA) for example was modelled on the British Industrial Schools Act 1857. It differed however, in that it contained certain provisions applying solely to Aboriginal children. The child welfare or 'neglected children's' legislation of Britain and the various Australian states[502] of the time were enacted in the hope that children would be removed from negligent parents and would be 'transformed' into 'good and useful citizens' who would make good hardworking workers.[503] Much attention was focussed on the families and children of the lower working classes. It should be noted that an earlier statute, the Elementary Education Act 1871 (WA) allowed for a Central Education Board to make by-laws requiring a parent of a child between the ages of six and fourteen years to 'cause such children (unless there is some reasonable

500 For example, Western Australian Legislative Assembly *Select Committee into Child Migration Interim Report* (Government Printer Western Australia Legislative Assembly 1996); HC *Health Committee The Welfare of Former British Child Migrants* (HC Paper (1997-1998) no 755); Australian Senate *Senate Community Affairs References Committee Lost Innocents: Righting the Record-Report on Child Migration* (AGPS Canberra 2001).

501 R van Krieken (1991) 72.

502 Industrial and Reformatory Schools and the Training Act 1864 (Qld); Neglected and Criminal Children's Act 1864 (Vic); Destitute Persons Relief Act 1866 (SA); Better Care of Destitute Children Act 1866 (NSW); Public Charities Act 1866 (NSW); Industrial Schools Act 1874 (WA).

503 R van Krieken (1991) 6; EJ Mellor *Stepping Stones* (Harcourt Brace Jovanovich Sydney 1990) 18; S Swain 'The State and the Child' (1998) 4 Australian J Legal History 57, 57.

excuse) to attend school, which children do not reside beyond three miles from a Government School.'[504] Interestingly enough, a year early, Britain had introduced the Elementary Education Act 1870 making education compulsory over a large part of the country and authorising boards of guardians, the overseers of implementing the poor laws, to pay school fees and making relief conditional on school attendances.[505]

As mentioned above, the Industrial Schools Act 1874 (WA) expanded the guardianship powers of directors of certain schools, orphanages and other institutions. The legislation applied to institutions caring for orphans and necessitous children of any race, and Aboriginal children or descendants of the Aboriginal race.[506] In contrast to non-Aboriginal children, the Aboriginal children did not need to be orphans or necessitous to come within the jurisdiction of the Act. The Act made directors (of orphanages and certain other institutions) the lawful guardians of children voluntarily surrendered to an institution by a parent or guardian.[507] In the case of non-Aboriginal children, the Act required that the parent or guardian provide written consent. This requirement was absent in the case of Aborigines. Further, Aboriginal children, up to the age of 21 years were able to voluntarily surrender themselves. Under other provisions applying only to Aborigines, magistrates were duty bound, once it was brought to their attention, to assume guardianship of any Aboriginal child, including part-Aboriginal children, 'not living under the care or guardianship of either father or mother'.[508] In such cases, the magistrate was required to place the children in the custody of directors of institutions.

Directors were deemed the lawful guardians of these children until the age of 21.[509] The only limitation placed on this period of custody was a term of custodianship or, in the case of females, marriage prior to this age.[510] Directors were afforded 'all the powers and privileges of a father over and in respect of such infant to the exclusion of its natural guardian'.[511]

504 Industrial Schools Act 1874 (WA), s 8.
505 S Webb and B Webb *English Poor Law Policy* (Longmans Green and Co London 1910) 105-106.
506 Industrial Schools Act 1874 (WA), s 2.
507 Industrial Schools Act 1874 (WA), s 5.
508 Industrial Schools Act 1874 (WA), s 18.
509 Industrial Schools Act 1874 (WA), s 5.
510 Industrial Schools Act 1874 (WA), s 5.
511 Industrial Schools Act 1874 (WA), s 5.

By definition, these institutions were required to provide for and educate the children.[512] However, directors were also empowered to apprentice all custodial children over a certain age [513] and could exonerate themselves 'from any chargeability, liability or duty in respect of and from any power over such child,' by given notice of such intention 'to the parent or other persons compellable by law to maintain and provide for the child; and thereupon all rights over and liabilities in respect of such infant shall revive.'[514]

It was hoped that the 'Industrial Schools institutions' could be utilised as reformatories for juvenile offenders. Generally in the child welfare system of the time common in Britain and Australia, neglected children were to be sent to industrial schools and criminal children to reformatories.[515] Under the Industrial Schools Act 1874 (WA), juvenile offenders were 'as far as possible' to be sent to an institution that was conducted 'in accordance with the religious persuasions to which such offender appears to belong.'[516] Further, representation could be made by 'the parent, guardian, or nearest adult relative of any such offender detained in any such institution for a minister of the religious persuasion of such offender' to visit the institution at a fixed time 'for the purpose of affording religious assistance or instructions to such offender.'[517]

The educating of the child in the religion of the parent was also a feature of the Poor Laws of Britain in the nineteenth century. Under the Poor Law Amendment Act 1834 a child in a workhouse had to be educated in the creed of the parent, or, if orphaned, in a creed not objected to by the godparents. And facilities had to be provided in the workhouse for the free entry of ministers of religion of the child's religious persuasion.[518] Although, initially chaplains could only be appointed and services held from the Established Church but eventually provisions were made for children to be visited and receive religious assistance and instruction by a licensed minister of their own persuasion. [519] Religious education being tied to the creed of the parents remained a

512 Industrial Schools Act 1874 (WA), s 2.
513 Industrial Schools Act 1874 (WA), s 6.
514 Industrial Schools Act 1874 (WA), s7.
515 EJ Mellor (1990) 18.
516 Industrial Schools Act 1874 (WA), s 10.
517 Industrial Schools Act 1874 (WA), s 11.
518 Poor Law Amendment Act 1834, s 19.
519 S Webb and B Webb (1910) 77-78.

feature of the English Poor Laws throughout the nineteenth century. For example, under s 1 of the Poor Law Act 1889 the parental 'powers and rights' a guardian could assume were subject to one limitation; that being the guardian could not be educated in a religious creed that the child would otherwise have been educated in. That almost universally meant the religion of the parent.

As noted above the Industrial Schools Act 1874 (WA) did in certain circumstances remove guardianship from the parents, giving it to the directors of certain schools, orphanages and other institutions. Under s 5 of the Industrial Schools Act 1874 (WA), the Director received this guardianship to the exclusion of the father, the natural guardian, and presumably the mother if the father had died or if the child was illegitimate. Arguably, the words of s 5 that afforded the Directors 'all the powers and privileges of a father over and in respect of such infant to the exclusion of its natural guardian' meant that the parents of the child could legally be excluded from involvement in child rearing and child care decisions. This invites some additional comments.

First, if the Director became the legal guardian of the child, the guardian then took on the obligations or duties of guardianship. As these were not spelled out in the Act, the guardian would need to comply with the duties as expressed in Chapter Three of this thesis. And as all guardianship duties had an overriding obligation to act in the best interest of the child, if any attempt was made to exclude the parent from visiting and conversing with their child, it would be up to the Director to show or prove that this was in the best interest of the child.

Second, the issue of religious education is particularly interesting in the context of the Industrial Schools Act 1874 (WA). In relation to juvenile offenders, special provision was provided under ss 10 and 11 for the child to be instructed in the religion they were being brought up in prior to their institutionalisation. This would in most cases be the religion of the parents. On this point the Act follows the English Poor Laws and seems to reflect the importance given by the judiciary of the time on the child being educated in the religion of the parents. [520] Now, in relation to the earlier part of the Act

[520] For example refer to *Re Agar-Ellis, Agar-Ellis v Laselles* (1883) 24 Ch D 37, 49; *Hawksworth v Hawksworth* (1871) 6 LR Ch App 539, 542.

dealing with non-offender children no expressed mentioned is made of religious instruction. As guardian though, the Director had a duty to provide religious education under their care. Even though the Director was afforded guardianship powers and rights to the exclusion of the natural parental guardian this didn't necessarily mean that the religion of the parent became irrelevant. Arguably, unless it was not in the best interest of the child the guardian was to ensure the child received instruction in the religion of the parents or any other religion they were being instructed in before their institutionalisation. Otherwise it seems strange to think that the legislature thought it in the best interest for the juvenile offender to be instructed in the religion they were being brought up by but that this should not be the case for the non-offender child.

The attention given in the Industrial Act 1874 (WA) to educating Aboriginal children was in contrast to the official dormancy in the area in the preceding two decades. It was only a few years before, in 1871, with the enactment of the Education Act 1971 (WA), that the state finally gave attention to a programmed policy of compulsory education for all children. However, only a small number of Aboriginal children were catered for in government schools; this had been the case from the beginning of colonial settlement. With little political will for financing Aboriginal affairs and realising the zealous commitment of the missionaries to civilising, Christianising and educating the Aborigines, the Colonial government was more than happy and willing to leave the task of educating Aboriginal children to the missionaries and their charitable supporters.

Since settlement a number of learning institutions for Aborigines were established in the southwest but as previously stated, their longevity was less than impressive. Three had lasted into the 1870s, they being the New Norcia mission and the Swan and Vasse 'Half Caste' Homes.[521] With the expansion of the northwest from the 1870s, the missionaries turned their attention to establishing learning institutions for Aboriginal children in the region. The 1880s and 1890s saw a rapid development in missions in the northwest. However, the religious bodies lacked financial resources. The government was called on to provide land for the mission and monetary assistance in erecting the schools and supplying them. Successive governments agreed to assist but

[521] LR Marchant (1981) 48.

such help was rather complex. First their was opposition from pastoralists who were concerned that the government was giving the missions land that they planned to bring into production, and they were further concerned that missionary education would significantly reduce their cheap labour supply.[522] Secondly, the government was always trying to satisfy the competing demands of the various missions so as not to be accused of favouring one branch of religion over another. Note also that all the religions were of the Christian faith, there being no room for Aboriginal based religions.

Although government assistance was forthcoming it was often not sufficient. For many of the missions of the 1880s and 1890s, the facilities and standard of teaching was very substandard and significantly inferior to the more centralised and better endowed education system for the colonialists' sons and daughters. Unlike teachers in the state schools, teachers at the mission schools were not subject to examination by the Department of Education inspectors. Indeed, State supervision of the missions for education and the general care of the children housed there was lacking. The teachers were more often than not at the mission because of their religious zeal and biblical knowledge not because of their teaching abilities. Education was focussed on basic literacy and numeracy and practical tasks such as general domestic chores for the girls and house and gardening and farming for the boys, religious education and moral training.[523] There was no room for education or development of the children's aboriginal culture. The children were be 'educated' to be employable as farm hands and domestic servants and received moral training based on the white standards and customs of the Victorian era. And of course, bible lessons and Christian religious education formed a very important part of the education process.

As previously stated the State did not concern itself with providing education for Aboriginal children. It was quite happy to leave it to the missionaries. The missionaries set out to convince the parents of these children that they should give up their children to the missions to be educated. Section 5 of the Industrial Schools Act 1874 (WA) gave the missions increased guardianship powers over the children once the parents had signed an agreement for the child to be 'surrendered' to the mission to be educated. This did

522 CSO 2014/88 minute (31 March 1900); LR Marchant (1981) 51.
523 LR Marchant (1981) 57-59.

provide the missions with greater hold of the child once they were given up to the school but it created 'bad blood' between many Aboriginal parents and the missionaries. When parents changed their minds and wanted their children back they were often meet by resolute resistance from the missionaries who would not return the child to the parents.[524] Tension between Aborigines and missionaries over the education and care of Aboriginal was to remain and increase, as the missions were a significant player in the separation policies of successive governments in the twentieth century.

Although the introduction of the Industrial Schools Act 1874 (WA) and the development of mission schools in the north of the state over the last two and a half decades of the nineteenth century brought renewed attention to Aboriginal child education, the Forrest Commission of 1884 cast doubts on the virtues of educating the Aborigines at all.[525] In fact, the Forrest Commission report painted a pessimistic view of the survival of the Aboriginal race that was to enjoy currency in official circles in the first half of the twentieth century. However, the Forrest Commission was mindful of the need to 'protect' the Aborigines and recommended that they receive learning by way of mission teachers.

It is instructive to quote here from a report that was chaired by the future first Premier of the State, the Right Honourable Sir John Forrest. In relation to the 'Present State of the Aboriginal Race' the report states: 'It is a melancholy fact that throughout Australia the Aboriginal Race is fast disappearing, and that progress of settlement by Europeans means in this Colony, and in all parts of Australia, as it does in many other parts of the world, the gradual extinction of the native races, who have for ages existed upon the land previous to the advent of white man.'[526] The report also seems to cast doubt on the virtues of 'civilising' the Aborigines by saying that the young Aborigines are most healthy when allowed to 'roam' the country and that Aboriginal children 'do not seem to be strong when brought up in civilised ways, and are predisposed to pulmonary complaints; so that, however the question is dealt with, one is met by

524 AD33/00 minute 26 January 1900.

525 Chairman J Forrest *Report of a Commission Appointed by His Excellency the Governor to Inquire into the Treatment of Aboriginal Native Prisoners of the Crown in this Colony: And also into certain other matters relative to Aboriginal Natives* (Government Printer Perth 1884).

526 Chairman J Forrest (1884) 4.

difficulties almost, if not quite, insurmountable.'[527] However, the report also argues that the Aborigines can be of great benefit to the settlers:

> The natives of Western Australia have, to a large extent, the same habits and customs, and are governed by laws that do not differ very much; they are also very similar in disposition, and of the same impulsive nature. Their superstitions, too, are very numerous, and have a very strong hold upon them, appearing often nearly irresistible in their power. Their usefulness to the pioneer settler can scarcely be over-estimated.[528]

The report seems to suggest that Aborigines are best left to leave a nomadic life and do not respond well to attempts to 'convert' them to the settlers more sedentary existence. However at the same time Forrest seems to be saying that differences between traditional Aboriginal society and mainstream settler society should not be overstated and they, the Aborigines, potentially could be beneficial to the settlers – as a good supply of labour no doubt.

The Forrest Commission recognised that there had been difficulties in providing supplies to Aborigines but it believed the government had a duty to treat Aborigines kindly, provide food and clothing, care for the old, infirm and sick and encourage missions. Further the Commission recommended that a Board manage 'Aboriginal matters': 'The appointment of a Board for the management of all matters connected with the Aboriginals, and to which all moneys to be expended on them should be entrusted, seems not only desirable but absolutely necessary; and we have no doubt, that if there were an active Board in existence, with proper means and a suitable staff, some real good might result.'[529] The Commission thought the Government should charge the Board with a 'duty to see to the care of the natives, and funds would be placed at their disposal for the purpose by the Board.'[530] It also recommended that every Resident Magistrate be made a 'Native Protector' and 'Honorary Protectors' who could come from the ranks of Justices of Peace should be appointed 'to look after the welfare of the natives generally.'[531]

527 Chairman J Forrest (1884) 4.
528 Chairman J Forrest (1884) 5.
529 Chairman J Forrest (1884) 5.
530 Chairman J Forrest (1884) 5.

Under the heading 'Missions' the Forrest Commission espoused the merits of having missionaries educating the Aboriginal children but didn't believe the Aborigines could aspire to be more than the servants of the settlers. It concluded that the Aborigines future was not promising:

> It seems quite certain that the best way to teach the Aborigines is through the instrumentality of men devoting their lives to the work, who are willing to endure privations and difficulties in the hope of inculcating knowledge in the natives, without hope of reward other than seeing good results in the happiness of the race on whom their labour and care bestowed.
>
> We would like to see all philanthropic efforts of the kind liberally supported by the State, under adequate supervision, and at each mission station would recommend a small reserve, and the means of teaching useful information which would be serviceable to the native when he reaches manhood.
>
> We have no hope that the Aboriginal native will ever be more than a servant of the white man, and therefore our aim should be devoted to such instructions as will enable him to live usefully and happily among the white population. It seems impossible to expect that much will or can be done. The experience of fifty years finds us at a point as if we had never begun, notwithstanding that good and able *men devoted* their lives and means to attempting their improvement.
>
> It is needless for us to deal any further with this portion of the report, as the experience of the past and the outlook of the future is far from hopeful.[532]

The Forrest Commission's recommendation for an Aboriginal Protection Board and protectors was given legislative force two years later with the enactment of the Aborigines Protection Act 1886 (WA). In commending the Bill to the lower house of the Western Australian Parliament in August 1886, the Acting Attorney General, The Honourable Mr S Burt, was at pains to point out that no evidence of maltreatment of Aborigines provided the motivation for the legislation. In fact, he went so far in his adulation for the compassion of the settlers to say that a 'dispassionate inquiry and investigation into the circumstances' would observe 'that the natives, as a rule, had been most humanely treated, and well looked after and provided for by the settlers, and

531 Chairman J Forrest (1884) 5.
532 Chairman J Forrest (1884) 5-6.

especially by the settlers of the Northern district of the colony. In many stations they had been absolutely kept from starving, fed and clothed, and their wants attended to, when otherwise they would have been in a state of starvation.'[533]

Contrary to the almost apologetic undertones implicit in the second reading speech of the Acting Attorney General - that aimed to placate the less philanthropically inclined settlers - the Act sought to redress two prevailing deficiencies in Aboriginal policy. The first was the 'haphazard' administration of funds and relief granted by the Legislative Council for Aborigines. Until 1886, 'the issue of blankets to these natives had been so ordered, for some reason or other, that the greater part of winter was over before these wretched people obtained their blankets.'[534] It was thought that a centralised body, with a general supervisory and administrative mandate, accountable to the legislature for their funds would cure this and other, related administrative deficiencies.

The second significant remedial aim of the Act was in relation to employment contracts. As mentioned previously, with the expansion of the north of Western Australia, there was demand for Aboriginal labour. With that however came exploitation of the Aboriginal worker and sexual and labour exploitation of the Aboriginal women, particularly so in the pearling industry.

The preamble to the Aborigines Protection Act 1886 (WA) indicates that the Act is to provide 'for the better Protection and the management of the Aboriginal Native affairs, and to amend the law relating to Contracts with and other matters affecting Aboriginal Natives.' The Act deemed persons to be Aboriginal if: they were an 'Aboriginal Native of Australia'; they were a 'half-caste', or a child of a 'half-caste', 'habitually associating and living with Aboriginals'; and lacking sufficient evidence to make a determination, they were so determined by a Justice in judicial proceedings.[535] This is the first statutory appearance of a race based test or definition in the statutes of Western Australia.

533 Western Australia Parl Debs 455 (19 August 1886).
534 Western Australia Parl Debs 456 (19 August 1886).
535 Aborigines Protection Act 1886 (WA), s 45.

The Act did not define the terms 'half-caste' or child of a 'half-caste'. Presumably, it was intended to include Aboriginal children with an Aboriginal parent or a grandparent so long as the child was habitually associating and living within an Aboriginal community.

In creating the Aborigines Protection Board, the government mandated the Board to apportion moneys for the benefit of Aborigines;[536] distribute blankets, clothes and other relief;[537] submit to the Governor proposals for the care, custody and education of Aboriginal children;[538] provide medical assistance, rations, and shelter to the sick, aged and infirm;[539] manage and regulate Aboriginal reserves;[540] and, '[t]o exercise a general supervision and care over all matters affecting the interest and welfare of the Aborigines, and to protect them against ill-treatment, imposition, and fraud'.[541]

The Act empowered the Governor to appoint Aboriginal Protectors[542] whose duties included reporting to the Aboriginal Board 'on the wants and treatment of Aboriginals' and their employment contracts. [543] More specifically, the Aboriginal protectors acted in a role equivalent to guardians in Roman law, providing the *aucutoritas* or added authority by which the acts of Aborigines might acquire legal status. As such, the protectors were empowered to institute, carry on, or defend any action, suit, prosecution, or other proceeding, and enforce any other order or judgment of any Court for and on behalf of any Aboriginal, and either in the name of the Aboriginal or the Protector.'[544]

In many respects this also resembled the common law category of guardian *ad litem*. Although this provision did not expressly mention the term guardianship or the transfer of guardianship to the Protector or other government officials or the State, it perhaps represents the first legislative foray into the realm of guardianship specific to Aborigines. After 1905 this became to surplant the policy of 'protection', and in time

536 Aborigines Protection Act 1886 (WA), s 6(1).
537 Aborigines Protection Act 1886 (WA), s 6(2). Per s 40, such distributed items were only to be on loan.
538 Aborigines Protection Act 1886 (WA), s 6(3).
539 Aborigines Protection Act 1886 (WA), s 6(4).
540 Aborigines Protection Act 1886 (WA), s 6(5).
541 Aborigines Protection Act 1886 (WA), s 6(6).
542 Aborigines Protection Act 1886 (WA), s 16.
543 Aborigines Protection Act 1886 (WA), s 17.
544 Aborigines Protection Act 1886 (WA), s 17

provide the foundation for the significant separation of Aboriginal children from their families.

Further, the Aborigines Protection Act 1886 (WA) required Protectors or certain other persons to endorse Aborigines' employment contracts for those contracts to be valid at law.[545] Custodial powers were also created in the case of Aboriginal prisoners employed beyond the grounds of a prison.[546] Protectors were obligated to ensure that both master and servant complied with their contracts of service, and in particular, that Aborigines were not ill treated under such contracts.[547] Protectors and certain other persons were afforded similar powers in the case of Aboriginal apprentices.[548] However, the effect of this power was somewhat thwarted as many Aborigines were employed without a contract.[549] In 1905, the Western Australian Parliament repealed Part I of this Act dealing with the constitution, powers and duties of the Aboriginal Board and its Protectors.[550] However, this change was largely administrative as the powers of the former Board and Protectors were then vested in the Chief Protector of Aborigines and the Aborigines Department.

In 1889, with the enactment of the Aborigines Act 1889 (WA) the Aborigines Protection Board were given discretionary powers to void or cancel contracts of service if in their opinion the relevant employer was unfit to employ Aborigines.[551] Section 8 of the 1889 Act, meant that Crown Lands that were proclaimed or made native reserves were to be held by the 'Aborigines Protection Board, in trust for the benefit of the aboriginal natives.' This Act was repealed by the Aborigines Act 1905 (WA).

In passing the Constitution Act 1889 (WA) in 1890,[552] the Imperial government retained control of Aboriginal affairs in Western Australia and persuaded the colonial government to incorporate a constitutional provision requiring that the sum of £5,000 or

545 Aborigines Protection Act 1886 (WA), ss 18 and 19.
546 Aborigines Protection Act 1886 (WA), ss 33 and 34.
547 Aborigines Protection Act 1886 (WA), s 24.
548 Aborigines Protection Act 1886 (WA), s 37. See also s 36 providing Magistrates the power to indenture Aboriginal apprentices.
549 MK Hill (1994) 24.
550 Aborigines Act 1905 (WA), s 65 Sch 1; See also, cancellation of apprenticeships created under the 1886 Act, Aborigines Act 1905 (WA), s 16.
551 Aborigines Act 1889 (WA), s 5.
552 Enabling Act 1890.

one per cent of the annual revenue, whichever should be the higher, be annually appropriated out of the Consolidated Revenue Fund for 'the welfare of the Aboriginal Natives'.[553] In particular, the monies were to be 'expended in providing them with food and clothing when they would otherwise be destitute, in promoting the education of Aboriginal children (including half-castes), and in assisting generally to promote the preservation and well-being of the Aborigines'.[554]

In 1897 the Colonial Office relinquished control over Aboriginal matters which, up to then was the responsibility of the United Kingdom Aborigines Protection Board. The Aborigines Act 1897 placed the management of Aborigines in Western Australia under the control of the Western Australian Parliament. Controversy had built up in the colony concerning the Western Australian Parliament's lack of control over Aborigines. In the parliamentary debate introducing the Aborigines Bill 1897 (WA), the Premier of Western Australia Sir John Forrest said that the continual control over Aboriginal matters by the Imperial authorities did not reflect well on the people of the colony. He said that the 'Government were considered able to make laws and control the white inhabitants of the colony, and do everything necessary for the protection of life and property; but yet were not considered sufficiently worthy to make laws for the control of the poor aborigines. That position was resented.'[555]

The Aborigines Act 1897 (WA) abolished the Aborigines Protection Board[556] and replaced it with an Aborigines Department 'charged with the duty of promoting the welfare of Aboriginal natives, providing them with food and clothing when they would otherwise be destitute; providing for the education of Aboriginal children (including half-castes), and in generally assisting in the preservation and well-being of the Aborigines'.[557] It became the first government Department responsible for an exclusive racial group.

The duties of the Department, which came into existence on 1 April 1898, were enunciated in terms similar to those of the Board regarding the apportionment of monies,

553 Constitution Act 1889 (WA), s 70.
554 Constitution Act 1889 (WA), s 70.
555 Western Australia Parl Debs vol 1 series 11 2 RSP Assembly (11 November 1897) col 394.
556 Aborigines Act 1897 (WA), s 4.

the custody, maintenance, and education of Aboriginal children, etc.[558] Pursuant to s 2 of the Aborigines Act 1897 (WA), s 70 of the Constitution Act 1889 (WA) was repealed, however s 6 of the Aborigines Act (WA) s 70, obliged the Colonial Treasurer to ensure a sum of £5,000 was to be provided annually for the purposes of the Aborigines Department.[559] In addition, the Minister was required to report annually on the condition and welfare of Aborigines.[560] Further, the Minister became responsible for ensuring the employers were fit to employ natives.[561] All other powers regarding Aborigines were vested in the Governor.[562] At its creation, the Department consisted of the Chief Protector of Aborigines, a travelling inspector and a clerk. The police assisted the Department by acting as 'protectors' of Aborigines, which in itself was somewhat problematic. Acting in their role as police officers, the police were often called upon to assist in the prosecution against the Aborigines but on the other hand they were charged with 'protecting' the Aborigines. Of course these roles were not necessarily mutually exclusive but they were not always compatible.

Premier Forrest, who had a keen personal interest in Aboriginal affairs fostered by his contacts with Aborigines during his childhood in Bunbury and various expeditions, was the first Minister in charge of the Aborigines Department. In addition to his personal interest in Aborigines affairs, he was also mindful of the need to have the Department function properly to reduce the opportunity of Imperial criticism of the newly established colonial control over Aborigines. Forrest appointed his friend, Henry Prinsep, as the first Chief Protector of Aborigines and the head of the Department. Before immigrating to Western Australia and becoming part of the 'Perth society', Prinsep enjoyed the privileges of life as a prosperous bureaucrat in colonial India and Britain. He had an unimpressive public service record and no previous experience in Aboriginal administration. As Australian historian Anna Haebich comments, there

---

557 Aborigines Act 1897 (WA), s 5.

558 Aborigines Act 1897 (WA), s 7.

559 The validity of this repeal of s 70 has been the subject of relatively recent protracted litigation in the Supreme Court of Western Australia and the High Court of Australia: *Snowy Judamia v State of Western Australia* (SCWA 34/95 1 March 1996); *Snowy Judamia v State of Western Australia* (1996) 13 Leg Rep SL 10b; *Snowy Judamia v State of Western Australia* (1996) 17 Leg Rep 2; *Yougarla v State of Western Australia* (1998) 146 FLR 128; *Yougarla v State of Western Australia* (1999) 21 WAR 488; *Yougarla v State of Western Australia* (2001) 21 (15) Leg Rep SL 3b; *Yougarla v State of Western Australia* (2001) 181 ALR 371.

560 Aborigines Act 1897 (WA), s 10.

561 Aborigines Act 1897 (WA), s 11.

562 Aborigines Act 1897 (WA), s 12.

appeared little to recommend him for the position of Chief Protector apart from a guarantee that he would not challenge the interests of the powerful elites, which included pastoralists in the north-west of Western Australia.[563] Prinsep had firm ideas on Aboriginal affairs and particularly how Aboriginal children of 'mixed descent' should be treated and dealt with. He wanted greater powers to implement his ideas. We turn to those ideas and powers in the next chapter.

563 A Haebich (2000) 213.

CHAPTER FIVE

SEPARATION, SEGREGATION AND ABSORPTION: 1900 - 1945

NEW ERA

During the 1890s, the part Aborigine or half-caste population of the colony, particularly in the southwest, was attracting the attention of the officials. In 1891, there were 571 half-castes in Western Australian; ten years later there were 951 and 691 alone in the southwest region.[564] In 1901, the half-castes formed over 45 percent of the total southwest Aboriginal population.[565] The half-castes, and for that matter the full bloods of the southwest, were marginalised and insignificant players in the economic system. In contrast, the Aborigines of the Kimberley northwest region were an essential part of the pearling and pastoralists industries.

Prinsep was convinced that the half-castes needed to be separated from the full bloods and the full bloods to be segregated from the rest of society. In particular, he believed Aboriginal children of 'mixed descent' living in 'native camps' learned only laziness' and, left to their own devices, would grow up to be 'vagrants and outcasts', 'not only a disgrace, but a menace to our society.' Prinsep believed that it was the government's duty to place the children in missions to be trained as 'useful workers ... and humble labourers.'[566]

Prinsep's desire to move from a merely 'protectionist' focus to one that sought to train and educate the Aborigines, particularly the half-castes, 'to become useful citizens and good "Victorians"' heralded a new era in Aboriginal policymaking.[567] Prinsep continuously lobbied Premier Forrest to have his desires legislated for, arguing that, 'where there are no evil influences these half-castes can be made into good useful workman and women ... But, unfortunately, they are more often found in communities

564 P Biskup *Not Slaves Not Citizens* (University of Queensland Press St Lucia 1973) 42.
565 P Biskup (1973) 29.
566 AD 830/1900, 321/1900, 122/1902. Further look at A Haebich *For Their Own Good* (University of Western Australia Press Nedlands 1988) 57.
567 LR Marchant *Aboriginal Administration in Western Australia:1886-1905* (Australian Institute of Aboriginal Studies Canberra 1981) 13.

whose influence is towards laziness and vice; and I think it is our duty not to allow these children, whose blood is half British, to grow up as vagrants and outcasts, as their mothers now are.'[568]

Forrest agreed to the drafting of a Bill. Not surprisingly, Prinsep was very involved in it's drafting. The Bill, entitled 'An Act for the Further Protection of the Aboriginal Race of Western Australia', prohibited Aborigines from townships and removed them to reserves. Further, to facilitate the removal of Aboriginal children to missions the Bill gave the Chief Protector of Aborigines legal guardianship over these children. Forrest raised no objections to the guardianship provision although he believed it should only be used for a 'good cause.' He was however scathing of the provisions for reserves, arguing that this was a massive infringement of the Aborigines' liberties.

Forrest ultimately rejected the Bill. Prinsep was extremely annoyed by Forrest's criticism of the Bill and argued that the Aborigines could not be assisted to improve their lot 'without this interference in their liberty the objection to which I think rather a stone wall to any effort to promote the future welfare and raising of the native race.'[569]

Forrest resigned as Premier of Western Australia in February 1901 to take up a seat in the newly formed Commonwealth Parliament. Before continuing with the story of Western Australia, it is worth noting and reflecting on some of the speeches made in the first Commonwealth Parliamentary session on the issue of race and Aborigines. These speeches reinforces the White Australia racist's ideology and 'dying pillow' belief that dominated colonial Australia and played such an integral part in the development of Aboriginal affairs policy not only in Western Australia but Australia wide during at least the first half of the twentieth century. The Commonwealth's first Attorney-General, Alfred Deakin, said:

568 Chief Protector of Aborigines H Prinsep *Annual Report of the Aborigines Department 1901* (Government Printer Perth 1901) 3.
569 AD 830/1900.

> There will be no mistake as to our meaning when these speeches are read, and when our votes are seen. Members on both sides of the House, and of all sections of all parties – those in office and those out of office – with the people behind them, are all united in the unalterable resolve that the Commonwealth of Australia shall mean a 'white Australia', and that from now henceforth all alien elements within it shall be diminished. We are united in the resolve that this Commonwealth shall be established on the firm foundation of unity of race, so as to enable it to fulfil the promise of its founders, and enjoy the fullest extent the charter of liberty under the Crown which we now cherish.[570]

The Attorney-General used passive language while predicting an active role for government in diminishing alien elements.[571] Similar passive language was evident when the Attorney-General talked about the future of the Aborigines:

> We have power to deal with people of any race within our borders, except the aboriginal inhabitants of the continent, who remain under the custody of the States. There is that single exception of a dying race, and if they be a dying race, let us hope that in their last hours they will be able to recognise not simply the justice, but the generosity of the treatment which the white race, who are dispossessing them and entering into their heritage, are according them.[572]

The dying race forecast was to play a significant role in Western Australian Aboriginal policy in the first half of the twentieth century. And, as stated by Deakin, Aboriginal affairs remained the domain of the States. Thus, with Forrest's departure to federal politics, Western Australian lost one of its most knowledgeable politicians on Aboriginal issues and for the next three years a series of Colonial Secretaries were in charge of the Aborigines Department. Needless to say this was a period of much political instability and little was achieved in the area of Aboriginal policy.

During this period most of the Aboriginal children in missions, were placed there by parents or were orphans the Department had placed in the missions. However, even though Prinsep lacked the legislative control to force the removal of Aboriginal children to the missions, the Aborigines Department still forcefully removed some children to

570 *Post and Telegraph* HR vol 4 4851 (1901).

571 See further, D Markovich *Genocide, a crime of which no Anglo-Saxon nation could be guilty: Though perhaps there lies a prima facie case?: Stolen Generations v Commonwealth* (Honours Thesis School of Law Murdoch University 2000) 43-44.

572 *Post and Telegraph* HR vol 4 4851 (1901).

missions against the parents' wishes.[573] This was however difficult to achieve and it was very difficult to convince parents to surrender their children to the missions. Prinsep complained in his Annual Report of 1902 that 'the natural affections of the mothers ... stood in [the] way' of inducing parents to send their children to the 'native' missions.[574]

This natural affection and the trauma of forceful separation or removal are evident in the plea from a father for the return of his son from a mission: 'I am afraid that [my wife] will cimmit sueside if the boy is not back soon for she is good for nothing only cry day and night ... I have as much love for my dear wife and churldines as you have for yours ... so if you have any feeling atole pleas send the boy back as quick as you can it did not take long for him to go but it takes a long time for him to come back.'[575]

The first few years of the twentieth century saw a continuation and probably an increase in criticism from humanitarians from within the new immigrants settled in Western Australia, the local media and from within the ranks of British society. Of particular concern was the alleged abuses and maltreatment of Aborigines working in the pastoral industry. For example, the Englishman, Walter Malcolmson was scathing on the colonial legislators, arguing that the legislators of Western Australia

> pretend to wax very indignant at any reputable commission being appointed to inquire into the subject; for they have good reason to know that such an inquiry would end their cheap labour, and they are all aware that they would be proved utterly unfit to deal justly with the natives, but they very generously offer to hold an inquiry themselves. Such a commission would be a farce, and on par with a jury of burglars, presided by a garrotter, trying a prisoner for robbery.[576]

Given this, it is not surprising that pressure was mounting for a Royal Commission into Aboriginal administration. In April 1904, the then Premier, Walter James, approached the Oxford educated Assistant Protector of Aborigines in Queensland, Dr Walter Roth, to illicit his interest in the role of Royal Commissioner into

573 A Haebich (1988) 67.
574 Chief Protector of Aborigines H Prinsep *Annual Report of the Aborigines Department 1902* (Government Printer Perth 1902) 67.
575 AD 12/1903.
576 *Times* 22 January 1904 (weekly edition).

Aboriginal Administration in Western Australia. He agreed and on 31 August Roth was formally appointed as head of the *Royal Commission on the Condition of the Natives.*

Around the same time a new Bill to amend the Aborigines Protection Act 1886, entitled 'A Bill for an Act to make provision for the better protection and care of the Aboriginal Inhabitants of Western Australia', was introduced in the Legislative Council. The Bill incorporated most of the provisions and aims of Prinsep's 1901 efforts and was modelled to a large extent on the Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld). However before the Bill could pass from the Legislative Council to the Legislative Assembly for consideration, the Christmas recess intervened. Further debate on the Bill was postponed pending the report of the Roth Royal Commission.

ROTH ROYAL COMMISSION

Roth completed his report on 24 December 1904 and it was tabled in Parliament in January 1905.[577] Although he was charged with looking into matters throughout the State, Roth confined his physical visits to the northern coastal regions and focussed on conditions in the north-west. An examination of the list of people interviewed reveals only two Aborigines, prisoners at Wyndham prison. Pursuant to his commission he made comments and recommendations on: the administration of the Aborigines Department; the employment of Aborigines under contracts of service and indentures of apprenticeship; employment of Aborigines in the Pearl-Shell Industry and on boats generally; the Native Police system; the treatment of Aboriginal prisoners by the police, the judiciary; distribution of relief to Aborigines; and the general treatment of the Aboriginal population.

Roth found that the employment system did not adequately protect the Aborigines against exploitative employers and that there was no legal provision compelling employers to provide for the education of Aboriginal child and/or indenture employees.[578] The report recommended that the police should be able to control the movement of Aboriginal men so as to reduce the incidences of sexual intercourse

[577] Commissioner WE Roth *Royal Commission on the Conditions of the Natives Report* (Government Printer Perth 1905).

[578] Commissioner WE Roth (1905) 6-10.

'between the Asiatics and aborigines' which Roth considered had 'resultant evils'.[579] Roth believed the criminal justice system should not be invoked in relation to tribal homicides 'unless the killer has become such a terror or "bully" that his clansmen are afraid to deal with him; owing to length of contact with civilisation, he ought to have known better; or the killing has taken place in the neighbourhood of close European settlement.'[580] Even then, Roth recommended that the Aboriginal culprit should be deported to another district where there is employment available.[581]

Roth did not look favourably on prison for Aborigines, writing that Aborigines 'are far better in uncivilised than semi-civilised state, and are a great deal of trouble after they come out of gaol.'[582] Considering the contemporary debate and discourse that has occurred on the negative consequences bestowed on those Aborigines separated from their families and culture,[583] and the underlying causes for the disproportionate contact of the Aborigines with the criminal justice system,[584] it is worth noting that as far back as 1905 Roth wrote: 'When blacks have been away from their native homes so long, they seem forgotten when they return; their tribes will have very little to do with them, and they often commit further crimes because in the meantime their women have been taken.'[585] Roth also looked unfavourably on the practice of neck chains for Aboriginal prisoners and recommended 'the abolition of chains of all description within the precincts of the goals … .'[586]

---

579 Commissioner WE Roth (1905) 11.
580 Commissioner WE Roth (1905) 18.
581 Commissioner WE Roth (1905) 19.
582 Commissioner WE Roth (1905) 20.
583 For example, refer to Stolen Children "must be paid"' The Australian (21 May 1997); 'How do we reconcile the stolen children?' The Australian (21 May 1997); HREOC *Bringing them home* (AGPS Canberra 1997) 177- 228; 'Long delay awaits victims of forced removal' The Australian (27 May 1997); 'Acts of genocide persist, Dodson says' The Australian (5 June 1997); R Brunton 'Betraying the Victims: The "Stolen Generations" Report' (1998) 10 IPA Backgrounder 1; H Wooten 'Ron Bruton & Bringing then Home' (1998) 4 Indigenous L Bulletin 4; P Howson 'Rescued from the Rabbit Burrow' (1999) June Quadrant 10; R Marsh ' "Lost", "Stolen" or "Rescued"?' (1999) Quadrant 15; B Lane 'Rights body a "bad influence' on policy' The Australian (11 September 2000) 26; S Powell 'Sloppy study makes falsehoods fact' The Australian (11 September 2000) 26; A Haebich *Broken Circles* (Fremantle Arts Centre Press Fremantle 2000); R Manne 'In Denial: The Stolen Generations and the Right' (2001) 1 The Australian Quarterly Essay 3; P Carlyon 'Stolen Children: On the Words that Matter' The Bulletin (12 June 2001) 26
584 R W Harding R Broadhurst A Ferrante and N Loh *Aboriginal Contact with the Criminal Justice System* (Hawkins Press Annadale 1995); Q Beresford and P Omaji *Rites of Passage* (Fremantle Arts Centre Press Fremantle 1996)
585 Commissioner WE Roth (1905) 20.
586 Commissioner WE Roth (1905) 20.

Commissioner Roth also looked unfavourably on the practice of some who were given the responsibility by the Government of distributing rations to the Aborigines who 'benefit themselves by buying at wholesale and charging at retail current prices, issuing about half the allowance, distributing the food cooked instead of raw, or as in the case of aboriginal prisoners, giving them native food, e.g., lizards at the cost of nothing, or kangaroo at the price of a Winchester bullet.[587] To reduce the incidence of this type of exploitation and corruption, Roth recommended that Government rations should not be given to able-bodied blacks that were capable of looking after their aged and infirm relatives. Roth added that, from his vast experiences in northern Queensland, he had formed the view that generally, 'it is not in the nature of the aboriginal to neglect his older or younger relatives, much less so in fact than is the case with the lower-caste European.'[588]

Roth then turned to the general treatment of the Aboriginal population with a particular focus on the half-caste. He believed that if the half-caste 'are left to their own devices under the present state of the law, their future will be one of vagabondism and harlotry.'[589] No doubt in reaching this conclusion he was influenced by the evidence given to the Royal Commission by Prinsep.[590] Prinsep had used the same terminology. Prinsep as we know was strongly in favour of the half-caste children being separated from their parents and removed to missions. However, he could not be criticised for being overly ambitions in his expectation in relation to a mission education. He thought that the missions should aim to train the children to be 'useful as domestic and farm servants.'[591] He further believed that '[t]he instructions should be of such a nature as to bring them up as useful workers with merely such an amount of reading, writing, and numbers as would be of service to them in their positions as humble labourers, the position which they cannot hope to rise from for at least two or three generations.'[592] Prinsep went on in his evidence to disclose his frustration and disappointment in having his 1901 Bill rejected by the Government. He commented: 'With the most one-minded zeal and great hope I laid my Bill before the authorities – but with what result? I was met

587 Commissioner WE Roth (1905) 22.
588 Commissioner WE Roth (1905) 23.
589 Commissioner WE Roth (1905) 25.
590 Commissioner WE Roth (1905) 41.
591 Commissioner WE Roth (1905) 40.
592 Commissioner WE Roth (1905) 40.

by indifference at first, and then, almost adverse criticism, as the documents in my possession will show.'[593]

Roth agreed that it was necessary to remove the half-caste children from the general Aboriginal population. In fact, he seems to suggest that most Aboriginal children should be separated from their adult members. He writes: 'There is a large number of absolutely worthless blacks and half-castes about who grow up to lives of prostitution and idleness; they are a perfect nuisance; if they were taken away young from their surroundings of temptation much good might be done with them.'[594] To this effect, Roth recommended that legislation be introduced allowing for the segregation of the Aboriginal population from the general population and making the Chief Protector the legal guardian of all Aboriginal children.[595]

Roth's recommendations were in agreement with the content and aims of the aborted 1901 and 1904 Bills proposed by Prinsep. This is not surprising because, as stated previously, the Bills were similar in content to the Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld) of which Roth had much knowledge and experience of. Roth concluded his report as follows:

> In the settled areas of those portions of the State along which his investigations have lead him, your Commissioner is satisfied that the natives, generally speaking, are not subject to any actual physical cruelty. On the other hand, the wrongs and injustices taking place in these areas, and the cruelties and abuses met with in the unsettled districts cannot be longer hidden or tolerated. Fortunately they are of such a nature that they can be largely remedied by proper legislation, combined with firm departmental supervision. My earnest prayer, on the eve of my departure from Western Australia, is that the next Parliamentary Session will see that the proposed Aborigines Bill of 1904, as originally introduced, supplemented with the recommendations contained in this Report, will become the Aborigines Act of 1905.[596]

Even though there was criticism of Roth's findings and recommendations, many in officialdom thought something needed to be done to help the plight of the Aborigines

593 Commissioner WE Roth (1905) 42.
594 Commissioner WE Roth (1905) 25.
595 Commissioner WE Roth (1905) 26, 28.

and counter criticism levelled at the Government and legislators since the colony had been granted self-government over Aborigines in 1897. In discussing the Roth Royal Commission report in the Western Australian Parliament, one parliamentarian made the following comment: 'a half-caste, who possesses few of the virtues and nearly all of the vices of whites, grows up to be a mischievous and very immoral subject ... it may appear to be a cruel thing to tear an Aborigine child from its mother, but it is necessary in some cases to be cruel to be kind.'[597] Further, it was claimed to be 'wrong, unjust, and degrading to this state' to leave Aborigines as they were and a 'maudlin sentiment' to consider the mother's feelings as they would 'forget all about it in 24 hours, and ... is glad to get rid of it ...'[598]

The recommendations of the Roth Royal Commission report were to receive legislative force through the Aborigines Act 1905 (WA). At last Prinsep's long held desires were to be fulfilled, which Roth also supported. As Roth was the Assistant Chief Protector of Aborigines in Queensland, it was not surprising that the 1905 Act closely resembled the Aborigines Protection and Restriction of the Sale of Opium Act 1897 (Qld). And as previously stated, the aborted 1901 and 1904 Bills, which the 1905 in many respects resembled, had much in common with the Queensland legislation. The 1905 Act acted as a blueprint for much of the specific Aboriginal legislation that was to follow in the other jurisdictions of Australia.

EARLY LEGISLATION

1 1905 Aborigines Act

The 1905 legislation was a reflection of the desire by government and the ruling classes to segregate and control Aboriginal peoples.[599] The Bill past quickly through the Legislative Council as it had in effect previously be debated in 1904. Even though the debate in the Legislative Assembly was longer it is questionable whether it added value

596 Commissioner WE Roth (1905) 32. Roth returned to his Queensland position when he departed Western Australia.

597 Western Australian Parl Debs vol 1 series 25 2RSP Assembly (4 October 1902) col 558.

598 Western Australian Parl Debs vol 1 series 28 2RSP Assembly (3 December 1905) col 426. (Note that in 1905 there was only one volume.)

to the debate on the Bill. Most members spoke from personal experiences and hearsay information without documented or empirical evidence to support their arguments. Indeed, many seemed more concerned with the interests of the white employers and employees than the treatment and conditions of the Aborigines. However the Member for Kanawna, T Walker did empathise with the 'Aboriginal cause'. He said contact with the white man had made the Aborigine 'absolutely demoralised and hopeless. Their hearts are crushed out of them: they are a dying race.'[600] Walker accused members of showing a distinctive lack of interest in debating the Bill and holding unsympathetic and negative attitudes towards the Aborigines: 'They may be packs of dogs, so far as affections of members towards them are concerned. They are loathsome things to get out of one's hands as soon as possible.'[601]

Walker was very forthright in his views on how colonialism had negatively impacted on the Aborigines and what curative measures were needed:

> We have by our civilisation, as we call it, coming amongst them uprooted all their old habits of living. We have left them, as it were, at sea in their existence. They know not what to do with themselves. They cannot enter into competition with whites in the ordinary trades, avocations, and labour channels that are open to us. All their habits, customs, means of livelihood, social laws and bonds between, are swept aside when we go amongst them, and then we expect these people, who have something of energy, something of enterprise, something of pride, love of their traditions, social customs and means, as it were, of carrying them on from generation to generation with hopefulness before we came to rest at ease on 2,000 acres of country! What is necessary before this can be done? It is not only necessary to give them an area of country large enough for every black in the country to go on if he so desires, where they can make homes for themselves and even indulge their habits of hunting if it be necessary, and where game may be preserved to them, and where also they may be taught the arts of civilised life, where teachers may be sent amongst them who can gradually introduce them to the blessings of civilisation and of cultivation of the soil, introducing agriculture.[602]

Although Walker thought missions were worthwhile in training Aborigines for work, he was very critical of the lack of support and protection Aborigines were afforded

[599] P Brock *Outback Ghettoes: Aborigines, Institutionalisation and Survival*, (CUP Cambridge 1993) (1993) 12.
[600] Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 315.
[601] Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 315.

once they left the mission, against exploiting employers and predatory white males looking for sex from Aboriginal girls.[603] This criticism by Walker is quite prophetic considering that many Aborigines telling their stories in the 1990s complained that once they left the missions they were left to fend for themselves without the necessary skills.[604]

As one can imagine, other members subjected Walker's speech to frequent interruptions. One of those members was the Member for Katanning, the Hon F H Piesse. Although Piesse believed something should be done to help the Aborigines he held little hope that many Aborigines could be successfully trained for the workforce. Piesse saw the Aborigines as 'these unfortunate people' and, in espousing orthodox turn-of-the-century social Darwinist views, told his fellow parliamentarians: 'All we can do is to protect them as far as possible and leave nature to do the rest. It is a case of the survival of the fittest but let the fittest do their best.'[605] Likewise, the Member for Yilgarn, A A Horan, doubted that Aborigines could be 'civilised'. He said: 'If these people cannot conform to the advancing reforms of civilisation, then under the inevitable law of survival of the fittest, they must give way.'[606] However, he added: 'I do not wish them to be unjustly treated.'[607] The Member for Mt Magnet, M F Troy, thought that the half-caste had a chance of reaching a higher level if separated from the full-blooded aborigine:

> Regarding the half-castes, I think it very undesirable that they should be put on the same reserves with the aborigines. Half-castes, if bred with white people, become, in some respects almost as expert as the whites; but once they marry with aborigines, they become even more depraved than the aborigines themselves. If we have reserves, we should try to put the half-castes on reserves by themselves; because I firmly believe that they are a grade higher than the aborigines.[608]

602 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 316.
603 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 316.
604 ALSWA *Telling Our Story* (ALSWA Perth 1995); ALSWA *After the Removal* (ALSWA Perth 1996).
605 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 443.
606 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 434.
607 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 434.
608 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 432.

These views of separating the full blood from the half-caste and the breeding of half-caste with the 'white people' was to dominate Aboriginal policy as the century developed, being at its strongest in the 1920s and 1930s.

Although there was scepticism about the 'trainability' of Aborigines and the 1905 Bill in general, Parliament was supportive of the passage of the Bill as members believed that the half-caste could become 'whiter' if separated from the full bloods and the full bloods should be restricted to native reserves. Indeed, the Member for the Pilbarra, J Isdell, told the Legislative Assembly that the Government had a duty to separate the half-caste children from their Aboriginal families and surroundings and place them in institutions 'where they can be useful citizens.'[609] He added: 'There is a great deal of maudlin sentiment about taking away a child from the native mother; but the man who sees it done will lose all that sentiment; because when you take a child away from a native woman she forgets all about it in 24 hours and, as a rule, is glad to get rid of it.'

Unfortunately, this advocacy of removing the Aboriginal child from its parents did not seem to be matched by a strong desire to educate the child. For example, the Member for the Gascoyne, W J Butcher, thought it was 'an absurdity' to attempt to educate the 'native' or 'black' children into Christianity, although he thought this may be possible with the half-caste children. Butcher was in favour of establishing some institutions 'with separate school teachers, so as not to have the half-caste children mixing with the white children at the various centres.'[610] Similarly, the Member for the Kimberley, A Male, argued that educating the natives could demoralise rather than better them if nothing was provided for them afterwards and they returned to 'their natural native state.'[611]

The attitudes of the Parliamentarians as depicted here and the resulting legislation meant, in practice, near total control of the lives of Aboriginal peoples, whereby the right to leave or enter reserves, to marry, or to gain employment were all controlled.[612] The

609 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 426..
610 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 429
611 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 418-419..
612 HREOC (1997) 29.

legislation sought to protect the Aboriginal peoples; but it also endeavoured to protect the colonialist from being 'tainted' by unwelcome contact with Aborigines.

The Aborigines Act 1905 (WA) created a ministerial post and department charged with the duty of promoting Aboriginal welfare, including education, health and general provisions.[613] The annual sum to be provided to the department was increased to £10,000.[614] Section 3 of the 1905 Act deemed, for the purposes of the Act, an Aborigine as: 'an aboriginal inhabitant of Australia';[615] or a 'half-caste', and the child of a half-caste',[616] co-habiting,[617] or otherwise habitually living or associating,[618] with Aborigines, or 'a half-caste child whose age apparently does not exceed sixteen years'.[619] The s 3 definition of 'half-caste' included 'any person born of an aboriginal parent on either side, and the child of any such person'. These combined s 3 definitions were to apply prospectively and retroactively.

Contrary to the s 3 definition of Aborigine, the Act provided a supplementary definition of 'half-caste'.[620] This 'half-caste' definition included any person with an Aboriginal mother and non-Aboriginal father except for 'quadroons', itself a term which was not defined. Where the term 'half-caste' appeared in the Act, apart from s 3, this definition of 'half-caste' served to exclude some Aboriginal children from the scope of the Chief Protector's guardianship obligations. It was not clear when the narrow (s 2) or broad (s 3) definition of 'half-caste' was to apply under any given statutory provision because the narrow definition stated that it would apply 'unless the context [of the provision] otherwise requires'.[621] It appears to have been intended to generally exclude from guardianship Aboriginal children whose immediate matrilineal descent was non-Aboriginal.

The head of the Aborigines Department, the Chief Protector of Aborigines, became the legal guardian of all Aboriginal and 'half-caste' children aged less than 16

613 Aborigines Act 1905 (WA), s 4.
614 Aborigines Act 1905 (WA), s 5.
615 Aborigines Act 1905 (WA) , s 3(a).
616 Aborigines Act 1905 (WA), s 3(a) second para.
617 Aborigines Act 1905 (WA), s 3(b).
618 Aborigines Act 1905 (WA), s 3 (c).
619 Aborigines Act 1905 (WA) , s 3 (d).
620 Aborigines Act 1905 (WA), s 2.

years.[622] There was no statutory codification of the Chief Protector's guardianship powers and duties over the prescribed children, although s 6 did list some of the duties of the department such as the duty '[t]o provide for the custody, maintenance, and education of the children of Aborigines.' Thus, the Chief Protector by implication assumed the powers and duties of a guardian identified under the common law and had the power to remove or separate a child from her or his parents. Of course, under the law of guardianship this would only be sanctioned if it were in the best interest of the child. Significantly, under the new guardianship provision, there was no need to determine whether the child was living with her or his mother or father.

A 1911 amendment extended the Chief Protector's guardianship powers to enable the removal of an illegitimate 'half-caste' child to the exclusion of the rights of the mother.[623] This is rather significant, because customary Aboriginal marriages were not recognised under the dominant legal system. Further, although official figures are not available, one can imagine that many half-caste children would have been illegitimate, as cohabitation between Aborigines and non-Aborigines was not encouraged and, as previously noted, was proscribed by s 43 of the 1905 Act.

There is no doubt that the 1905 Act provided for the legislative interference of parental rights by allowing the child to be removed from the parents – in this case for no other reason but that the child was deemed to be Aboriginal or half-caste under the Act. However, the 1905 Act did not provide for the total abolition of parental rights; for example there was no provision expressly prohibiting the parent from visiting the child or having the child raised in the religion of the parent's choice.

One may seek to argue that the general legal guardianship provision of s 8 of the 1905 Act, by superimposing a 'State guardianship' over the natural parental guardianship removes any parental rights. However, this is difficult to sustain based on the common law and also on the face of the legislation. This is especially so because the 1911 amendment added the words, 'to the exclusion of the rights of the mother of a

---

621 Aborigines Act 1905 (WA), s 2.
622 Aborigines Act 1905 (WA), s 8.
623 Aborigines Act Amendment Act 1911 (WA), s 3.

illegitimate half-caste child.' Thus, the legislation does expressly provide for the rights of the mother of an illegitimate half-caste child to be superseded by the 'State guardianship'. The 1905 Act or its 1911 amendments did not however provide so in the case of the parents of legitimate Aboriginal and half-caste children. However, even if the 1911 amendment did allow significant interference with the mother's rights in relation to an illegitimate half-caste child, the State guardian (Chief Protector) was still obligated to act in the interest of the child.

Some of the Department's custodial duties targeted children only[624] while other provisions were intended to protect all Aborigines regardless of age. These duties included the apportionment of monies, distribution of clothing, maintenance and education of children, health and general supervision and care of Aboriginal welfare.[625] The 1905 Act meant the Aborigines Department now had greater legislative power to inspect the missions taking care of Aboriginal children. However, the evidence available strongly suggests that throughout the period of the child separation policy, the Department failed to adequately supervise the missions. There were insufficient protectors and infrequent inspections and supervision of the missions and other institutions housing the separated children. Mission authorities to a large degree were left to their own devices and their behaviour and standard of care was inadequately investigated and monitored.[626]

The 1905 Act also empowered the Governor to set aside Crown lands for Aboriginal reservations.[627] It imposed restrictions on Aborigines' right of movement,[628] and restricted access by non-Aborigines to reserves[629] or camps.[630] Miscegenation was proscribed.[631] Female Aborigines were prohibited from being within two miles of a river or inlet used by pearlers or other sea boats.[632] A prohibition was introduced to prevent the removal, without the Protector's permission, of children under 16 years or all female

624 For example, Aborigines Act 1905 (WA), s 6 (3)
625 Aborigines Act 1905 (WA), s 6.
626 ALSWA (1995) 2-5.
627 Aborigines Act 1905 (WA), s10.
628 Aborigines Act 1905 (WA), s 12 .
629 Aborigines Act 1905 (WA), ss 14 and 15.
630 Aborigines Act 1905 (WA), s 36.
631 Aborigines Act 1905 (WA), s 43.
632 Aborigines Act 1905 (WA), ss 40 and 41.

'aboriginals' or 'half-castes' from a 'district'.[633] The Act imposed restrictions on the employment of Aborigines and their rights to contract.[634] Restrictions were also imposed on the right of Aborigines to own property,[635] to marry[636] and to consume alcohol.[637]

The 1905 Act also gave the Governor power to make regulations for a number of matters.[638] Among other things, it included regulations '[f]or the control, care, and education of aborigines and half-castes in aboriginal institutions, and for the supervision of aboriginal institutions.'[639] An Aboriginal institution included 'any mission, reformatory, orphanage, school, home, station, reserve, or other institution for the benefit, protection, or care of the aboriginal or half-caste inhabitants of the State, and in receipt of any annual or other subsidy or grant from the Government.'[640] Thus, the 1905 Act gave the Government the power to have greater control and supervision over the conditions and treatment of Aborigines in missions and other private institutions that it previously lacked.

2 1907 Child Welfare Legislation

As mentioned in the previous chapter, early Western Australian legislatures afforded general guardianship powers under the Industrial Schools Act 1874 (WA). In its general application, it applied to children of all races who were 'necessitous'.[641] For non-Aboriginal children, parents had to consent in writing before legal guardianship of their children passed to the directors of institutions. Where the child (of any race) was not voluntarily surrendered, the Act required that the child apparently be an orphan and without a guardian. The managers were afforded all the 'powers and privileges of a father'[642] and the right to apprentice the child.[643] In most cases, legal guardianship remained in force until the age of 21 years.

---

[633] Aborigines Act 1905 (WA), s 9.
[634] Aborigines Act 1905 (WA), ss 16 – 32, 35.
[635] Aborigines Act 1905 (WA), s 33.
[636] Aborigines Act 1905 (WA), s 42.
[637] Aborigines Act 1905 (WA), s 45; see also Aborigines Act Amendment Act 1911, s 10.
[638] Aborigines Act 1905 (WA), s 60.
[639] Aborigines Act 1905 (WA), s 60 (e).
[640] Aborigines Act 1905 (WA), s 2.
[641] Industrial Schools Act 1874 (WA), s 2.
[642] Industrial Schools Act 1874 (WA), s 2.
[643] Industrial Schools Act 1874 (WA), s 6.

This 1874 Act was repealed in 1907 and replaced by the State Children Act 1907 (WA).[644] The 1907 Act was subsequently replaced by the Child Welfare Act 1947 (WA). With the enactment of the Aborigines Act 1905 (WA), Aboriginal children were removed from the general child welfare system of the state. It was not until after the Second World War that changing attitudes and policies saw a gradual 'absorption' of some Aboriginal children into mainstream child welfare. Although, at the time, the 1907 Act did not greatly impact on Aboriginal children, it is nonetheless useful for comparative purposes at least, to briefly examine this Act. Further, the 1907 Act dominated mainstream child welfare in Western Australia for over half a century and was still influential in much of the period after the Second World War where relatively more Aboriginal children were coming under its effects.

Even though the 1907 Act was replaced by the 1947 Act, the later Act maintained most of the provisions of the preceding Act, subject to legislative amendments in the period 1907 to 1947. Some additional comments will be made on the 1947 Act in the next Chapter but to avoid repetition, it is convenient to cover both acts in this section. Accordingly, the text of this section will refer to the 1907 Act, and the equivalent 1947 provisions will be referred to in footnotes.

The 1907 Act applied to children only under the age of 18 years.[645] In the case of female wards, the Governor was empowered to extend the period of supervision or of detention up to the age of 21 years.[646] The Secretary of the newly created State Children Department was afforded the 'care, management and control' of 'state children' and the supervision of children placed in the care of 'foster-mothers'.[647] Foster-mothers were defined as females given charge of a child under the age of three years, and where the female was not a near relative of the child.[648] Near relatives, in the case of legitimate children, were defined as a father, mother, step-father and mother, brother and sister, or

644 State Children Act 1907 (WA), ss 1 and 3, First Schedule.
645 State Children Act 1907 (WA), s 4; Cf: Child Welfare Act 1947 (WA), s 4.
646 State Children Act 1907 (WA), s 40; Cf: Child Welfare Act 1947 (WA), s 49.
647 State Children Act 1907 (WA), s 10(1); Cf: Child Welfare Act 1947 (WA), s 10(1)3.
648 State Children Act 1907 (WA), s 4; Cf: Child Welfare Act 1947 (WA), s 4, child's age increased to six years.

any grandparent of the child.[649] In the case of illegitimate children, near relatives were limited to the child's mother, biological father and the mother's husband.

The Act defined state children as 'neglected' or 'destitute' children placed in an institution, or apprenticed or placed out under the authority of the 1907 Act.[650] Expansive definitions were provided for destitution and neglect. A destitute child meant 'any child who has no sufficient means of subsistence apparent to the [Children's] Court, and whose near relatives are, in the opinion of the Court, in indigent circumstances and unable to support such child, or are dead, or unknown, or cannot be found, or are out of the jurisdiction, or in the custody of the law'.[651]

The definition of 'neglected child' spans an entire page of the Act. In short, however, it included children who were: beggars; associated in some way with immoral or criminal activity; or, illegitimate and whose mother was dead or unable to maintain or take charge of them.[652] This definition of neglected child also included three further categories. In two of these categories, the Act required the Children's Court to determine whether: the child was under the guardianship of a person fit to retain guardianship; or, in the case of an apparently vagrant child, whether the child did not have a home.[653] The final category of children deemed neglected, were children engaged in a circus or the like and their life, health or safety was at risk.[654]

The 1907 Act empowered police and departmental officers to apprehend, without warrant, any child suspected of being destitute or neglected.[655] The relevant provision also provided for the detention of such children pending judicial determination by a Children's Court.[656] The court would then have to satisfy itself that the child was in fact

649 State Children Act 1907 (WA), s 4; Cf: Child Welfare Act 1947 (WA), s 4.
650 State Children Act 1907 (WA), s 4; Cf: Child Welfare Act 1947 (WA), s 4.
651 State Children Act 1907 (WA), s 4; Cf: Child Welfare Act 1947 (WA), s 4.
652 State Children Act 1907 (WA), s 4, neglected child definitions ss 1, 3, 4, 6, 7, and 8; Cf: Child Welfare Act 1947 (WA), s 4.
653 State Children Act 1907 (WA), s 4, neglected child definitions ss 2 and 5; Cf: Child Welfare Act 1947 (WA), s 4.
654 State Children Act 1907 (WA), s 119; Cf: Child Welfare Act 1947 (WA), s 138.
655 State Children Act 1907 (WA), s 23; Cf: Child Welfare Act 1947 (WA), s 29, including incorrigible and uncontrollable children.
656 State Children Act 1907 (WA), s 23; Cf: Child Welfare Act 1947 (WA), s 29.

destitute or neglected.[657] Having so determined, the court could commit the child to the care of the department or to be detained in an institution. Police, departmental officers and parents or near relatives, could also refer uncontrollable or incorrigible children to the Children's Court to seek an order of custodianship or detention.[658] Once again, the court would have to satisfy itself that the child was uncontrollable or incorrigible. Alternatively, a child's mother (if she was the child's guardian) or father could commit a child to the care of an approved person or institution if she or he made written application before a special magistrate.[659] In almost all of the above circumstances, detention was not to extend beyond the age of 18 years.[660]

Nowhere in the 1907 Act was it provided that the State, the State Children Department or the responsible secretary or Minister became the legal guardian of a neglected or destitute child. Unlike the Aborigines Act 1905 (WA) where the Chief Protector of Aborigines became the legal guardians of all Aboriginal children, the 1907 Act states only that 'the Secretary shall have the care, management, and control of the persons and property of all State children, and the supervision of all children nursed by foster-mothers'[661] The Department was also mandated general supervision of all state children detained in institutions, adopted or apprenticed out.[662] Of course, as discussed in Chapter Three, care and control are a subsection of guardianship but not the totality of guardianship.[663] However, more often than not a 'state child' was committed to the care of private persons or societies, to whom guardianship was transmitted.[664]

Committal could only be made to a private person or society approved by the Governor.[665] This provided the State with a large measure of control over the standard of the institutions that the children were being sent to. This was missing under the Aborigines Act 1905 (WA). Although regulations could be made in relation to 'Aboriginal institutions' and the supervision of 'Aboriginal institutions' under the 1905

657 State Children Act 1907 (WA), s 24; Cf: Child Welfare Act 1947 (WA), s 30.
658 State Children Act 1907 (WA), ss 26 and 27; Cf: Child Welfare Act 1947 (WA), ss 32 and 33.
659 State Children Act 1907 (WA), s 86, the provision also required the written consent of the person or institution's manager taking charge; Cf: Child Welfare Act 1947 (WA), s 98.
660 State Children Act 1907 (WA), s 31; Cf: Child Welfare Act 1947 (WA), s 40.
661 State Children Act 1907 (WA), s 10; Cf: Child Welfare Act 1947 (WA), s 10.
662 State Children Act 1907 (WA), s 55; Cf: Child Welfare Act 1947 (WA), s 63.
663 Refer to 50 - 53 of thesis.
664 State Children Act 1907 (WA), s 83; Cf: Child Welfare Act 1947 (WA), s 95.

Act[666] there was no requirement for a mission to be 'approved' before the Aboriginal child was placed there. Supervision of the missions and other Aboriginal institutions was also rather lax due to inadequate manpower within the Aborigines Department. This casts serious doubts on whether the State guardians adequately cared and protective the separated children from abuse and danger.

Committal of a child to a private person or society approved of by the Governor was also subject to the written consent of the person or society taking charge of the child.[667] Further, a person or the manager of a society taking charge of a child was deemed to be the guardian of the child to the exclusion of the rights of the father and every other guardian[668] except as to the religious education of the child.[669] While a warrant was unnecessary for the detention of a custodial child, the court's powers were subject to a writ of habeas corpus.[670] These powers were also contingent on adequate notice of proceedings being given to parents.[671]

Religious education placed a fetter on the rights or power of transferring guardianship from the parents to a private person or society. Under s 85 of the 1907 Act, a child was not to be committed to a private person or society that would educate the child in a religion contrary to the father's wishes. This section continued the historical significance placed on a child separated or removed from their parents being educated in the religion of the parents, usually the father.[672] Such a provision is absent from the Aborigines Act 1905 (WA), however there is nothing in that Act abolishing the common law duty of a guardian to educate the child in the religion of the parents.

The 1907 Act required state children to attend school until the age of 14 years and until they passed the requisite standard of education at that age.[673] Such a requirement was not mandated under the Aborigines Act 1905 (WA). Again, unlike the

665 State Children Act 1907 (WA), s 80; Cf: Child Welfare Act 1947 (WA), s 92.
666 Aborigines Act 1905 (WA), s 60 (e).
667 State Children Act 1907 (WA), s 82; Cf: Child Welfare Act 1947 (WA), s 94.
668 State Children Act 1907 (WA), s 83; Cf: Child Welfare Act 1947 (WA), s 95.
669 State Children Act 1907 (WA), s 85; Cf: Child Welfare Act 1947 (WA), s 97.
670 State Children Act 1907 (WA), s 91; Cf: Child Welfare Act 1947 (WA), s 103.
671 State Children Act 1907 (WA), s 110; Cf: Child Welfare Act 1947 (WA), s 123.
672 Also refer to State Children Act 1907 (WA), s 17.
673 State Children Act 1907 (WA), s 43; Cf: Child Welfare Act 1947 (WA), s 52.

Aborigines Act 1905 (WA), the 1907 Act expressly afforded parents visitation rights of their institutionalised children.[674] Strict penalties applied to foster-parents who ill-treated, injured or neglected state children.[675] The Governor was empowered to make subordinate legislation, in particular, for the 'management, control, and supervision of institutions' and the 'custody, maintenance, education, employment, apprenticing, and placing out of children'.[676] For an action for breach of statutory duty, the Act imposed a limitation period of six months.[677]

In 1919, the government amended the State Children Act 1907.[678] Of particular significance was the added requirement that, in making custodial orders, courts were required to consider the future welfare of the child and to consider options for special training and supervision.[679] The Court was empowered to rehear, and make new orders, when a parent, guardian or departmental officer made such an application.[680] Significantly, it was no longer to be presumed that a child having been classed as a 'state child' should automatically remain so until the age of 18 years.

In making custodial orders, courts were required to determine whether the child should remain under the State's custody until 18 years or a younger age.[681] Further, the definition of foster-mother was extended to include females given custody of children under the age of six years.[682] This had the effect of expanding the obligations of the department in regard to children under foster care.[683]

The 1919 Act empowered the Governor to make regulations for the supervision and inspection of the premises of certain persons granted custody of state children.[684] If such guardians neglected, or were unable, to provide a charge with proper food, attention, adequate shelter, or for any other reason was considered undesirable, the

674 State Children Act 1907 (WA), s 87; Cf: Child Welfare Act 1947 (WA), s 99.
675 State Children Act 1907 (WA), s 54; Cf: Child Welfare Act 1947 (WA), s 62.
676 State Children Act 1907 (WA), s 132(b) and (c); Cf: Child Welfare Act 1947 (WA), s 149(c) and (d).
677 State Children Act 1907 (WA), s 130; Cf: Child Welfare Act 1947 (WA), s 147.
678 State Children Act Amendment Act 1919 (WA).
679 State Children Act Amendment Act 1919 (WA), s 11; Cf: Child Welfare Act 1947 (WA), s 25.
680 State Children Act Amendment Act 1919 (WA), s 8; Cf: Child Welfare Act 1947 (WA), s 27.
681 State Children Act Amendment Act 1919 (WA), ss 10, 12, 13, 20.
682 State Children Act Amendment Act 1919 (WA), s 3(ii).
683 State Children Act 1907 (WA), section 10(1); Cf: Child Welfare Act 1947 (WA), s 10(1).
684 State Children Act Amendment Act 1919 (WA), s 25; Cf: Child Welfare Act 1947 (WA), s 116.

departmental Secretary was authorised to remove the child to an institution.[685] Special provisions were made regarding male guardians to protect female state children from sexual assault.[686] The Act also made parents and guardians criminally liable for wilful misconduct or neglect leading to the delinquency of a child.[687]

In the period 1919 to 1947, the legislature made few additional changes to child custody.[688] A new act introduced in 1920, the Guardianship of Infants Act 1920 (WA), afforded mothers special rights when applying to courts for custody. The 1920 Act required courts, in making custody determinations, to consider the welfare of the infant and the conduct and wishes of the parents.[689] The amending 1926 Act, the Guardianship of Infants Act 1926 (WA), made certain that 'the first and paramount consideration' in dealing with the custody or upbringing of the child is 'the welfare of the infant'.[690] In 1927, 'child welfare' was substituted for 'state children',[691] state children became known as wards,[692] and the relevant department was renamed the Child Welfare Department.[693] In 1947, the existing child welfare legislation was repealed and revamped by the Child Welfare Act (WA) 1947.

In comparing the mainstream child welfare legislation with the Aboriginal specific 1905 Act, some differences become apparent. The greatest difference is that, under the Aborigines Act 1905 (WA), the Chief Protector of Aborigines became the guardian of all Aboriginal children and the child could be separated or removed from its parent without proof of neglect or destitution. Under this provision, the child's Aboriginality was sufficient reason for their separation or removal. In contrast, under the State Children Act 1907 (WA), which dealt with non-Aboriginal children, removal from parents was confined to neglected and destitute children or children whose parents were unable or unwilling to care for them.

685 State Children Act Amendment Act 1919 (WA), s 25; Cf: Child Welfare Act 1947 (WA), s 116.
686 State Children Act Amendment Act 1919 (WA), s 27; Cf: Child Welfare Act 1947 (WA), s129.
687 State Children Act Amendment Act 1919 (WA), s 29; Cf: Child Welfare Act 1947 (WA), s137.
688 State Children Amending Act 1919; State Children Amending Act 1921 (WA); State Children Amending Act 1926 (WA); State Children Amending Act 1927 (WA); Child Welfare Act Amendment Act 1936 (WA).
689 Guardianship of Infants Act 1920 (WA).
690 Guardianship of Infants Act 1920 (WA), s 2.
691 State Children Act Amendment Act 1927 (WA), s 2.
692 State Children Act Amendment Act 1927 (WA), s 3.
693 State Children Act Amendment Act 1927 (WA), s 4.

As we have previously seen, the rationale of the separation or removal powers under the Aborigines Act 1905 (WA) was, at its most basic, to separate the Aboriginal child, particularly the half-caste, from the influence of the Aboriginal parents and to 'educate and train' the children to be useful farm hands, labourers and domestic servants. Similarly, in relation to non-Aboriginal children, education and training was a major driving force behind the State Children Act 1907 (WA). However, the ambitions appeared to be higher than just farmhands, labourers and domestic servants. In debating the 1907 Bill in the Western Australian Parliament, for example, it was said:

> I go farther and say that in my opinion it is essentially the duty of the State, not only to look after those children so far as their materials wants are concerned, but to step in and give them as far as possible equal opportunities with the children of more favoured citizens; because after all, those with the others will later on constitute the people of Western Australia, those upon whom the future of the State will be dependent; and it should be our desire and our effort to give to them a fair deal in every respect. Therefore, this Bill is a step in advance as a recognition of the obligation of the State towards these people, and as a promise perhaps of better things to come in future.[694]

Criticism during the latter part of the nineteenth century regarding the placing of children in institutionalised care become more frequent in the early part of the twentieth century. Concern was also raised about children being separated from their parents. This is why children could not be removed for any reason or no reason – they had to be declared destitute or neglected. Also, the 1907 Act specifically provided for the parent to remain in contact with the separated child.[695] The 1905 Act did not expressly provide the same legislative visitation rights for Aborigines wanting to visit their children although, as argued, the parents' common law rights of visitation was not abolished.

The destitute and neglect precondition to separation or removal and the legislative visitation rights under the 1907 mainstream child welfare legislation compared to the absence of both under the 1905 Aboriginal specific legislation is evidence of the attitudes that the Government and policy makers had towards Aborigines. For non-Aboriginal children separation and state intervention should be a

694 Western Australian Parl Debs vol 1 series 32 2RSP (3 December 1907) col 1177.
695 State Children Act 1907 (WA), s 87; Cf: Child Welfare Act 1947 (WA), s 99.

measure of last resort.[696] Intervention in family life should be minimum and the family unit preserved as much as possible. But the story was different for Aboriginal families and children. Moral disapproval of working class families, prevalent in the 1880s, was dissipating as the new century dawned and was now focussed even more so on the Aboriginal family. Working class parents aspired to the material wealth and social values and status of the ruling middle class; it was just the poverty trap that had lead to problems in child rearing. The official view was that it was best to strengthen the families and assist them, rather than separating the child and removing them to institutions. The aim was to help destitute and neglected children without undue interference of the family.

Aboriginal families however were seen very differently. They had such radically different values and cultures that they could never conform or 'pull themselves up' to an acceptable position within the dominant society.[697] It was these attitudes that propelled the official policy and legislation of taking legal guardianship away from the parents and placing it in the hands of a public servant, while minimising contact between the Aboriginal child and parents. The separation of the Aboriginal and mainstream or non-Aboriginal child welfare systems continued as the twentieth century developed and only started to recede during the 1950s.

3 The 1905 Act in Action

From 1905, the difference in government policy towards the Aboriginal community in comparison to the non-Aboriginal community became even greater. This is no more so than in regards to child welfare as the above examination of the Aborigines Act 1905 (WA) and the State Children Act 1907 (WA) illustrates. While state intervention into family life for non-Aboriginal families was something to be resorted to as a last measure the state apparatus and its instrumentalities were ever eager to be involved in Aboriginal family life and most aspects of Aboriginal life, including minimising contacts with the non-Aboriginal community.

---

696 S Swain 'The State and the Child' (1998) 4 Australian J Legal History 57, 66.
697 R van Krieken *Children and the State* (Allen & Unwin North Sydney 1992) 97, 106-108.

Australian historian Anna Haebich argues that the 1905 Act, 'laid the basis for the development of repressive and coercive state control over the state's Aboriginal population' and 'set up the necessary bureaucratic and legal mechanisms to control all Aboriginal contacts with the wider community, to enforce the assimilation of Aboriginal children and to determine the most personal aspects of Aboriginal lives.'[698] The Aborigines Department was granted the status of a full government department but without the necessary injection of resources to properly and adequately carry out its duties. It relied on local protectors who were not payed an honorarium as recommended by the Roth Royal Commission. Police were also used as protectors, which created confusion and conflict between the police duties to protect and duties to control and prosecute.

Even though the 1905 Act granted the Chief Protector new powers to control the lives of Aborigines and to separate Aboriginal children from their families, between 1906 and 1910 the number of children in missions in the south fell from 133 to 97.[699] More attention was being focussed in the northwest of the State where there was an increase in numbers of children being removed to missions (actual numbers not available)[700] and establishment of new missions and other homes for Aboriginal children. At the time of the enactment of the 1905 Act there were five missions and homes for Aboriginal children. In the period between 1905 and 1914 ten additional institutions were established; seven in the northwest, one in the Perth City area and two in the southwest.

The establishment of missions in the northwest and the removal of Aboriginal children to them were given impetus by the fulsome support given to the process by the Kimberley (northwest) local protector, James Isdell. In 1909 he writes: 'The half-caste is intellectually above the aborigine, and it is the duty of the State that they be given a

698 A Haebich (1988) 83.

699 Chief Protector of Aborigines H Prinsep *Annual Report of the Aborigines Department 1906* (Government Printer Perth 1906) 4; Chief Protector of Aborigines C Gale *Annual Report of the Aborigines Department 1910* (Government Printer Perth 1910) 6.

700 At one northwest mission, Beagle Bay, the number of children increased from 60 in 1907 to 94 in 1909 – Chief Protector of Aborigines C Gale *Annual Report of Aborigines Department 1907* (Government Printer Perth 1907) 7- 10; C Choo *The Role of the Catholic Missionaries at Beagle Bay in the Removal of Aboriginal Children from their Families in the Kimberley Region: Submission to the*

chance to lead a better life than their mothers. I would not hesitate for one moment to separate any half-caste from its aboriginal mother, no matter how frantic her momentary grief might be at the time. They soon forget their offspring.'[701]

In order to facilitate even further the separation of Aboriginal children from their families, police, protectors and the Justices of the Peace were given power to remove half-caste children to a mission without the authorisation of the Chief Protector as previously required. This new regulations related to half-caste children under eight years of age.[702] Removal was furthered facilitated when, as previously stated, in 1911 the Chief Protector's guardianship was extended 'to the exclusion of the rights of the mother of an illegitimate half-caste child.'[703] Also the 1911 Amending Act provided for the governing authorities of missions and other 'Aboriginal institutions' to have the same powers as those given to governing authorities 'in respect of State children by the State Children Act, 1907.'[704]

The 1909 regulations and 1911 amendments expedited the separation of Aboriginal children from families to be placed in missions and other 'Aboriginal institutions'. Also, a number of native reserves were established, primarily on the outskirts of towns in order to keep the Aborigines from entering the townsite. Further, other institutions were set up for Aboriginal people, such as the Lock Hospital scheme in the West Kimberley region of the northwest. All of this amounted to a massive State institutionalisation of Aboriginal life.

The hospitals were established for suspected male Aboriginal venereal disease patients; there were no such establishments for non-Aboriginal venereal disease sufferers. These hospitals, the native reserves, the missions and other government institutions were driven by the segregationist policies that prevailed in this early part of the twentieth century. These segregation policies sought to separate the Aboriginal

Human Rights and Equal Opportunity Commission's Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (C Choo Perth 1996) 13.

701 J Isdell 'Northwest District Report' in Chief Protector of Aborigines C Gale *Annual Report of Aborigines Department 1909* (Government Printer Perth 1909) 11.

702 Western Australian Government *Government Gazette* (19 February 1909) 588.

703 Aborigines Act Amendment Act 1911 (WA), s 3.

704 Aborigines Act Amendment Act 1911 (WA), s 11.

population from the non-Aboriginal population, to isolate the Aborigines. Allegedly, this was done for their own good, to protect them from the evils of white society, but it was also done in the interest of the dominant non-Aboriginal community – to prevent contact with the 'uncivilised' Aborigines. However, the half-caste children, the fairer skin children were considered suitable to being civilised and were thus to be separated from their Aboriginal families and absorbed in to the non-Aboriginal culture and way of life.

Charles Gale, who at the time was the Chief Inspector of Fisheries, succeeded Prinsep in the office of Chief Protector of Aborigines in 1907. He retained the dual roles until 1910, whereafter he acted solely in the role of Chief Protector of Aborigines. In 1909 the Departments of Fisheries and Aborigines were amalgamated, providing the Government considerable savings in salaries and other expenses. Gale, like Prinsep, had no previous experience in Aboriginal Affairs but had had contact with Aborigines as a pastoralist. He had a particular interest in the northwest during his tenure as Chief Protector but over time, there was an increased focus on the 'half-caste problem' in the southwest region.

Gale was in favour of segregating the Aboriginal population from the non-Aboriginal population and in removing Aboriginal children from their families. Increasing restrictions on the entry of Aborigines into towns and using town facilities also played out segregation. Gale's tenure as Chief Protector was placed under stress after the appointment of Rufus Underwood in 1914 as the Minister responsible for Aboriginal affairs. Underwood was no great humanitarian, saying: 'The sooner the aborigines died out in Western Australia the better it would be for all concerned ... That seemed a hard thing to say but it appeared they could not preserve the aboriginal race and at the same time settle the white race in their country.'[705] Underwood did not oppose the separation of Aboriginal children from their families but he was against spending money on the missions to care for Aboriginal children. Underwood dismissed Gale as Chief Protector of Aborigines in early 1915, replacing him with the then Secretary of the Immigration Department, Auber Octavius Neville.

[705] Western Australian Parl Debs vol 3 series 45 2RSP Assembly (22 November 1912) col 3804-3805.

CONTROL OF ABORIGINES AFTER 1915: THE NEVILLE ERA

1 Mr Neville, Reserves, Settlements and Missions

The appointment of the long serving public servant, the English born Neville, to the position of Chief Protector of Aborigines herald a new era in Aboriginal affairs. Neville, like his predecessors in the position, had no previous experience in Aboriginal affairs but, unlike those before him, he also had no experience or contact with Aborigines. He moved quickly to implement a new organisational structure within the Aborigines Department that included changes to the system of record keeping, collecting statistical data, issuing permits for Aboriginal labour hire and recording births and deaths, marriages and relief given to Aborigines. However, although Neville didn't waste time in stamping his mark in his new position, he felt isolated and alone. His predecessor, still smarting from his dismissal, was not there to provide a guiding hand.[706]

Neville travelled extensively around the State and was determined that the Aborigines Act 1905 (WA) apply to all Aborigines. However, between 1920 and 1926, although still the Chief Protector of Aborigines in Western Australia, he was responsible only for the administration of the northwest (that portion of the state north of the 25th parallel). F Aldrick, then Chief Inspector of Fisheries was appointed the Deputy Chief Protector of Aborigines, responsible for Aborigines south of the 25th parallel. During the period 1920 – 1926, Aboriginal affairs came under the control of the North-West and Fisheries Department. In 1926, the North-West Department and the Deputy Chief Protector position were abolished. Aboriginal Affairs now came under the responsibility of the Aborigines Department and Neville once again became responsible for the administration of Aboriginal affairs throughout the state.

Neville's tenure as Chief Protector was marked by a zeal to enforce the 1905 Act. Neville interfered in all aspects of Aboriginal life including the personal lives of Aborigines. For Aborigines, Neville was the symbol of all-encompassing authoritarian control over their lives. In 1928 for example, prominent Aboriginal spokesman, William Harris, said that Aborigines were afraid of him and that Neville was one of the 'worst

[706] P Jacobs *Mister Neville* (Fremantle Art Centre Press Fremantle 1990) 55.

enemies of Aborigines.'[707] Only a year earlier, Neville had advised the Colonial Secretary's Department to declare the City of Perth a prohibited area for Aborigines under s 39 of the Aborigines Act 1905 (WA).[708] This meant Aborigines were not allowed to enter the confines of the City of Perth unless for the purpose of lawful employment. It was to remain a prohibited area until revoked by the Native Amendment Act 1947 (WA).

Neville's views were centred on a belief that the full bloods should be left alone and no attempt should be made to 'civilise' them. They would eventually die out. However, the half-castes should be 'civilised'. If the half-caste children were removed from their Aboriginal surroundings they would make 'as good a citizen as anybody else' and Neville wanted to 'raise them to that stage'.[709] Neville's views were succinctly reported in a newspaper article published in 1937:

> Mr Neville holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population.
>
> Sixty years ago, he said, there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time there would be none. Perhaps it would take 100 years, perhaps longer, but the race was dying. The pure-blooded aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of 20 and upwards. That showed the magnitude of the problem.
>
> In order to secure this complete segregation of the children of pure blacks, and preventing them ever getting a taste of camp life, the children were left with their mothers until they were but two years old. After that they were taken from their mother and reared in accordance with white ideas.[710]

Neville was to exert a profound influence on the formulation and administration of Aboriginal affairs policy for over two decades and was to enjoy national prominence in the 1930s where his absorptionist views were to gain increasing influence. Neville's guiding belief was that the half-castes must be absorbed into the wider community.

707 AD 94/1928.
708 AD 38/1927.
709 A Haebich (1988) 156.
710 *The Telegraph* (Brisbane Wednesday Evening 5 May 1937).

Writing in the 1940s he said that '[t]he native must be helped in spite of himself!'[711] He believed 'the sore spot must be cut out for the good of the community as well as of the patient, and probably against the will of the patient.'[712]

The so-called 'half-caste problem' dominated his thinking during his tenure as Chief Protector of Aborigines. In 1935, reflecting on the changes he had made to his Department since he took charge he wrote:

> Since 1915 the character of our work has gradually changed, the half-caste question, then in its infancy, has now assumed formidable proportions and the activities of the Department have had to be considerably extended to meet ever increasing needs. A new generation, differing from its forebears and demanding greater consideration at our hands has attained manhood. The children of this generation are growing up mainly lacking those essential provisions for their welfare which we have failed to provide to their parents.[713]

Neville adopted the anti–mission stance of his first Minister, Rufus Underwood and came to believe that the 'native reserve system' or 'native settlement scheme' was the solution to the 'Aboriginal problem'. In 1916 he wrote:

> It is already filling a long-felt want in the direction of providing a home to which the various waifs and strays who come under the care of the Department from time to time can be sent and receive proper care, education and training. Naturally the establishment of Government settlements of this kind will to some extent affect the work of the Missions, as some of the children hitherto sent to the Missions and subsidised at a per capita rate, will in future be sent to our own settlements, where they can be more economically dealt with, and where they will always find a home.[714]

---

711 AO Neville *Australian's Coloured Minority: Its Place in the Community* (Currawong Publishers Sydney 1947) 80. Neville wrote the manuscript in 1944 but it was not published to 1947. Although not there is some dispute as to whether this book was written in 1943 rather than 1944. Refer to P Biskup (1973) 70; P Jacob (1990) 297; A Charlton 'Conceptualising Aboriginality: reading AO Neville's Australia's Coloured Minority' (2001) 2 *Australian Aboriginal Studies* 47, 47.

712 GC Bolton 'Black and White after 1897' in CT Stannage (ed) *A New History of Western Australia* (University of Western Australia Press Nedlands 1982) 138.

713 Chief Protector of Aborigines O A Neville *Annual Report of the Chief Protector of Aborigines for the year ended 30 June 1935* (Government Printer Perth 1935) 7.

714 Chief Protector of Aborigines O A Neville *Annual Report of the Chief Protector of Aborigines for the year ended 30 June 1916* (Government Printer Perth 1916) 5.

Neville was convinced the 'half-caste problem' or 'native question would best be solved through the establishment of native settlements.[715] This system or scheme sought to segregate Aborigines from the non-Aboriginal population by 'guaranteeing' Aborigines reserved government-run farming settlements. However, in contradiction to the segregationist purposes, the children were isolated from their parents on the reserves, to be educated into the European way of things and prepared as farmhands and domestic servants. In 1944, reflecting on his time in Aboriginal affairs, Neville wrote of the need to separate the children from their parents:

> Every coloured child then, must be placed at a residential school at a settlement, and I use the word settlement advisedly, because institutions selected for this purpose must necessarily become what we now describe as Government Native Settlements. The child must be free from all parental control and oversight – it must enter at the earliest possible age – it must be considered to all intents and purposes an orphan. Many, of course, are orphans, and there should be no difficulty in these cases. There will be few exceptions other than amongst those of parents who are already assimilated into the community. The children of full-bloods are not of course referred to as coloureds.[716]

Neville believed that the 'lighter' the skin colour of a child; the less contact they should have with Aborigines and their environs. His own words best sum up his position, a position, which was to drive the separation policies and practices for over two decades:

> Quadroons or nearer whites not already properly cared for under white conditions of course must go as soon as possible to institutions for white children and learn to forget their antecedents, and their parents and coloured relatives should be strictly excluded from any contact whatever with them. There is a special home for such youngsters in Western Australia, and this might well be emulated elsewhere.
>
> Many working half-caste girls having infants fathered by white men came to me to discuss the disposal of their children. When I explained to them that separation was inevitable for their children's sake, most of them saw the matter as I did, and on giving them up made and kept a promise not to molest them in any way. I found that these children in their new surroundings had no difficulty in comporting themselves as white children, and any picture of their mothers which they might have retained at first rapidly faded from their minds. They attended the State schools and many of them were well above the average in their work. In later life

715 Chief Protector of Aborigines O A Neville (1916) 5.
716 AO Neville (1947) 177-178.

> there was a possibility of a meeting between the children and their mothers, but though this was unlikely, by that time both would realise the position sufficiently well to avoid any adverse consequences from it. Some of these near white children were adopted by childless white couples, and that too is all to the good. Quite a few mothers went to service in the country having their children with them, and this plan worked well enough in the early years, difficulties arising as the children grew older, eventually leading to separation.[717]

In practice however, once a child was separated from their parents, contact between parent and child was often refused regardless of degree of Aboriginality.[718] Further, the Aborigines Department came into increasing conflict with the missions who were also attempting to 'uplift' the Aboriginal children. Neville's plans to disband the missions in favour of native settlements and other government run institutions and homes was thwarted, particularly in the north of the state, by the Aborigines Department's insufficient resources. The Department didn't have the means to take over the role or 'services' being provided by the missions. Thus, Neville and the Department had no other choice but to allow the missions to take in Aboriginal children. During the period of Neville's tenure (1915-1940), fifteen new Aboriginal specific children institutions were established; of those six were Government established and run,[719] the others being under the control of a number of religious organisations.[720]

Neville faced a difficult job; the administration of Aboriginal affairs in Western Australia has always been difficult and complex. Debate on Aboriginal affairs often aroused high emotions within parliament and the general community. During Neville's tenure, there were three Royal Commissions or inquiries on various aspects of Aboriginal affairs.[721] The most important of these is the Moseley Royal Commission, which we now turn to.

---

717 AO Neville (1947) 179-180.

718 ALSWA (1995) 2-3, 138; ALSWA (1996) 35-37.

719 The Carrolup Native Settlement had two incarnations: 1915-1922; 1938-1852.

720 A Haebich (2000) 229-230.

721 Select Committee of the Legislative Council of Western Australian Parliament *Report of the Select Committee of the Legislative Council on the retirement of Mr CF Gale from the position of Chief Protector of Aborigines* (Government Printer Perth 1915); Commissioner Wood *Report of the Royal Commissioner* (Government Printer Perth 1927); Commissioner Moseley *Report of the Royal Commissioner Appointed to Investigate, Report, and Advise Upon Matters in Relation to the Condition and Treatment of Aborigines* (Government Printer Perth 1935).

2 Moseley Royal Commission

Like the Roth Royal Commission of 1905, the Moseley Royal Commission was established in 1934 in response to allegations of maltreatment of Aborigines and lobbying from humanitarians. Under its terms of reference, Moseley was required to investigate, report and advise on a number of issues that included, *inter alia*: the social and economic conditions of Aborigines in relation to such matters as native camps, physical well-being and diseases amongst Aborigines; employment, native settlements and missions; laws relating to Aborigines; administration of the Aborigines Department; and allegations of ill-treatment of Aborigines.[722]

Moseley spent some time discussing the 'half-caste problem.' He accepted with approval the position of Dr Cecil Bryant, a medical practitioner, that half-castes should not mate with other half-castes, as 'it will perpetuate the black and coloured elements.[723] Bryant, submitted to the Royal Commission:

> The mating of half-castes with half-castes means nothing more than the perpetuation of the black and coloured element against which we all of us are so sent against. If we want to do the fair and just thing by these half-castes and their progeny, and if we have desire to save our own children from the terrible problems presented in the United States today, and growing worse with the minutes as they tick by, we will do all in our power to prevent the mating of a half-caste and a half-caste, and especially with a black. We will on the other hand do all in our power to displace the black strain by an infiltration of white blood. I am not advocating the marriage of white with half-caste. I am dumb on that aspect. What I am advocating is the mating of half-caste with a coloured person who has more white blood in him or her, with one who, as a quadroon or an octoroon, is higher up on the white scale.[724]

While agreeing with Bryant's position, Moseley said he would not interfere if a half-caste decided to marry a half-caste, 'hoping always that, as the coloured race multiplied, effective administration might be the means of raising them in habits if not in colour.'[725]

---

722 Commissioner Moseley (1935) 1.
723 Commissioner Moseley (1935) 24.
724 Commissioner Moseley (1935) s 1032.
725 Commissioner Moseley (1935) 25.

Allegations were made to Moseley that Aboriginal children were being forcefully separated or removed from their parents. Indeed, it has been suggested that some Aboriginal mothers 'voluntarily placed their children in missions so as to avoid having them removed by the authorities.[726] Providing evidence to the Moseley Royal Commission, a group of Broome women asked the Commissioner whether he would 'like to think that when you send your children to school that you would never see them again?'[727]

Further accusations of Aboriginal children being separated or removed from their parents was provided a year after the release of the Moseley Report, where in debating the Aborigines Act Amendment Bill, the Hon T Moore suggested 'that in the past the general rule has been to take the half-castes away.'[728] Even though the Chief Secretary vehemently denied the allegation, Moore asserted that: 'I know there have been round-ups and the half-caste children have been taken away, no matter how they were cared for by their natural mothers. It is hard, and I do not want that sort of thing to be perpetuated. It is a shame to take a child away from its mother. It is inhuman.'[729]

Moseley displayed a sensitivity to separating Aboriginal children from their families that was lacking in others in officialdom that had championed the policy of separation. Moseley's sensitivity to the issue of separating Aboriginal children from their families is clearly demonstrated in the following quote from his Royal Commission report:

726 P Brock 'Aboriginal Families and the Law in the Era of Assimilation and Segregation, 1890s – 1950s' in D Kirby (ed) *Sex Power and Justice Historical Perspectives on Law in Australia* (Oxford University Press Melbourne 1995) 133, 141-142.

727 Commissioner Moseley (1935) s 2004.

728 Hansard vol 1 series 97 2RSP Assembly (6 October 1936) col 978.

729 Hansard vol 1 series 97 2RSP Assembly (6 October 1936) col 978.

> As I have already observed, there is a duty on the community to see that half-castes are placed in surroundings and given a training which will fit them later to take their place, if necessary, in a white civilization. Any easy method from one point of view would be to remove them when young from the influence of the aboriginal and form settlements at which, on similar lines to those applied in the case of orphaned white children, they might receive the training above referred to. That method, however, does not appear practicable for the application to all half-castes. The great objection in many cases is that they have parents, and there is beyond doubt in the native woman a great love for her child, whether that child's father be black or white. It may be said that it is the child we must think of, not the mother: that is true, but we must, I think, in common decency, seek some solution which will benefit the half-caste child but not inflict cruelty on that child's mother, unless indeed the mother, by her mode of living, is deserving of no consideration.[730]

In Moseley's opinion, the Aborigines working and living on the pastoralists' stations in the north of the state were treated well. In many of the stations he inspected, he believed they led an appropriate life on the stations. He also believed that children living on the stations with their parents should be 'left alone, to receive the training which is appropriate to them and later to be usefully employed in the country which they belong.'[731] For those coloured or half-caste children on stations with deplorable conditions, he believed that '[u]nless the mothers are of a dissolute nature and unlikely to mend their ways, I should not care to part them from their children, but would rather see them sent with their children to the Mission at Mount Margaret, where at least the children will have a better chance than they have at present.'[732] If the children were already on Government settlements, Moseley argued there should be 'a gradual weaning from the aboriginal influence and an encouragement to fit themselves for life in a white community, so that, when they reach adult age, they may, if inclined to forsake their bush life, be acceptable in other places.'[733]

Moseley did see problems with the Government native settlements, particularly in the south of the state. With the closure of the Carrolup Native Settlement in 1922 (although it was re-opened in 1938) for example, the Moore River settlement became

[730] Commissioner Moseley (1935) 21-22.
[731] Commissioner Moseley (1935) 10.
[732] Commissioner Moseley (1935) 17-18.
[733] Commissioner Moseley (1935) 26.

unacceptably overcrowded.[734] However, Moseley was in favour of native settlements being established to replace native camps, which he considered 'a disgrace.'[735] Moseley saw the native settlements as a way to improve the living conditions of the Aborigines while still allowing contact between the parents and children. However, as intimated above, he hoped that 'although not debarred altogether from seeing their parents, they may be gradually weaned from the aboriginal influence.'[736]

Considering Moseley's sensitivity to separating children from their parents it may seem somewhat surprising that he spoke highly of Sister Kate's home for Aboriginal children in Queens Park in metropolitan Perth.[737] At this home, children were separated from their parents and there were no facilities for the parents to be housed at the home, even for short-term visits. The home took its name from its founder, Sister Kate, who belonged to a sisterhood called 'The Community of the Sisters of the Church', or the 'Kilburn sisterhood'. This order of Anglican nuns was formed in 1870[738] and was devoted to the education and care of children.[739]

Sister Kate formed the Queens Park home in 1933 after leaving another home called the Parkerville Children's Home. The Sister Kate's establishment was government funded, intended to deal only with 'quadroons' (those with less than 25 percent Aboriginal 'blood'). At the time Moseley inspected Sister Kate's it had only 12 children resident. Over the years it was to take many children and there were a number of allegations of abuse made which are noted in Part III of this thesis. Moseley also spoke favourably of Bennet House in East Perth, a government run home established in 1931 for young girls sent up from the Moore River Native Settlement who were waiting to be placed in domestic service.[740]

---

734 Commissioner Moseley (1935) 48.
735 Commissioner Moseley (1935) 22.
736 Commissioner Moseley (1935) 23.
737 He also spoke highly of another home, the Buckland Hill home. Commissioner Moseley (1935) 51.
738 J McCraken *A Penny for the Ponies: the Work of the Community of the Sisters of the Church at Parkerville Children's Home (1903-1933)* (Honours Thesis Department of History Murdoch University 1990) 1.
739 J Leaming *Nearly White: Assimilation Policies in Practice in Western Australia at Sister Kate's Children's Home from 1933 to 1964* (Honours Thesis History Department University of Western Australia 1986) 20.
740 Commissioner Moseley (1935) 50-51.

In relation to the missions, Moseley expressed some concern with the main focus of the missions; that being 'to Christianise the native.'[741] He believed the missions were doing much good work and educational instructions and results were encouraging, but he queried whether there was sufficient training provided to make the Aboriginal child a 'useful' person in the outside world.[742] In contrast to much criticism the missions have received in relation to their treatment of Aboriginal children,[743] Moseley said there was a perception that in some missions, the children were often indulged and not treated firmly enough. As such, some pastoralists were heard to say, 'I would not have a mission trained boy on the place.'[744]

Moseley made twenty-six recommendations on a wide variety of issues including *inter alia*: appointment of divisional protectors as permanent officials and reduction of honorary protectors and abolition of Police protectors; reserves to be exclusively for Aborigines; native camps to be removed from close proximity to towns and Aborigines to require permits to enter towns; and establishment of more native settlements in the south of the state.[745]

Even though Moseley was sensitive to the pain of separating the children from their parents he did believe it was necessary in many cases to remove Aboriginal children from their families to be educated and 'civilised'; more so in the case of the quadroon children. In this regard, Moseley recommended that: the definition of half-caste being amended to include persons of Aboriginal origin in remote areas and that greater control be given over half-caste minors by making the Minister the legal guardian of every half-caste child under sixteen years, which may be extended by magistrate order to twenty-one years.[746] These measures would facilitate the separation or removal of children from their parents to be placed in institutions for education and learning. Moseley also recommended the prohibition against miscegenation be made stricter.[747]

---

741 Commissioner Moseley (1935) 58.
742 Commissioner Moseley (1935) 66.
743 ALSWA (1996) 69, 155; HREOC (1997) 158 – 167.
744 Commissioner Moseley (1935) 63-64.
745 Commissioner Moseley (1935) 88-90.
746 Commissioner Moseley (1935) 72.
747 Commissioner Moseley (1935) 74-75.

3 1936 Act

Adopting many of the Moseley Report recommendations, the Western Australian Government initiated the Aborigines Act Amendment Act 1936 (WA). The 1936 Act was the first major revision of the Aborigines Act 1905 (WA). Much to Neville's disappointment, the Aborigines Bill 1929 that attempted to give greater controls over Aboriginal marriages and sexual contacts between Aborigines and non-Aborigines was passed by the Legislative Council but failed to pass the Legislative Assembly of the Western Australian Parliament. The 1936 Act was to be read in conjunction with the 1905 Act[748] and its provisions remained largely intact until 1954.[749]

In the second reading speech of the 1936 Act, the Western Australian Premier expressed a desire to implement the Moseley Report recommendations so as to benefit Aborigines.[750] For instance, he expressed great concern over the moral risk posed to young Aboriginal girls[751] and thus the need to increase the powers of the Chief Protector to give him coverage over a larger number of Aboriginal children.

Despite the Premier's and others assertions that the 1936 Act was for the benefit of Aborigines,[752] there were others that queried the so-called benefits for Aboriginal people. The Member for Kimberly, for example, Mr Coverley, said that '[a]t first reading, it appeared to me to be harsh treatment that any person should have power to take charge of children irrespective of the opinions or wishes of the parents; because, after all, the aborigines have just as much affection for their offspring as have the people of any race.'[753] Nonetheless, Coverley deferred to the Royal Commissioner's recommendation, and was willing to accept that 'this proposed power will be necessary so that the Chief Protector can take charge of children and place them in an institution where they will be educated and taught to be useful.'[754]

[748] Aborigines Act Amendment Act 1936 (WA), s 1.
[749] Native Welfare Act 1954 (WA), s 1(2).
[750] Hansard vol 1 series 97 2RSP Assembly (20 October 1936) col 1206-1207.
[751] Hansard vol 1 series 97 2RSP Assembly (20 October 1936) col 1207.
[752] Hansard vol 1series 97 2RSP Assembly (22 September 1936) col 714; Hansard vol 1 series 98 2RSP Assembly (3 December 1936) cols 2374-2375, 2392.
[753] Hansard vol 1 series 98 (3 December 1936) col 2376.
[754] Hansard vol 1 series 98 (3 December 1936) cols 2376-2377.

Many parliamentarians made references to the threatened menace posed by the Aborigines and particularly the half-castes to white society. For example: the Hon J Nicholson said that the Parliament must put a 'check on or stamp out the tremendous menace confronting the State';[755] Hon WJ Mann describes the increase in the 'half-caste' population as a menace;[756] and the Hon GB Woods referred to the ever-increasing and great menace.[757] The Hon GB Woods goes further, seeming to suggest that the ever increasing half-caste population, as contrasted to the decreasing full blood population, had to be curtailed:

> The girls, constituting the greatest problem of the lot, could be put into schools also. I would not be above taking them away from their mothers at the earliest possible stage. We have to face this problem, but so fast are these people breeding that during the last 12 months there has been an increase in the previous population of 4,000 half-castes. So members can work out for themselves what the position is likely to be in a few more years. There will then be so many half-castes and coloured people in the State that we shall not know what to do. But we owe it to the future generations of white people that something should be done to stop this ever-increasing menace. There are many ways of doing it.'[758]

Woods believed that it was necessary to separate the half-castes from the full bloods because, 'the long term distance view is to breed these people right out, but so long as the half-castes can mate with the full blacks, the process is being reversed, and in five years' time we shall have a great many more half-castes and quarter castes then we have to-day.'[759]

In the parliamentary debate over the 1936 Act, this question of reducing the 'menace' posed by the increasing half-caste population received much attention. Part of the concern was based on a view that the Aboriginal race was inferior to the European race and thus should not be allowed to increase its population. In effect this reflects an eugenics' view, evidenced by the thinking of the Hon L Graig:

755 Hansard vol 1 series 97 2RSP Assembly (13 October 1936) col 1068.
756 Hansard vol 1 series 97 2RSP Assembly (30 September 1936) cols 878-879.
757 Hansard vol 1 series 97 2RSP Assembly (29 September 1936) col 831.
758 Hansard vol 1 series 97 2RSP Assembly (29 September 1936) cols 830-831.
759 Hansard vol 1 series 97 2RSP Assembly (29 September 1936) col 831.

> We might help to overcome the difficulty by getting the half-castes and the quadroons away from the full bloods. The natives are of the same blood as we are, and the colour can be bred out of them for the reason that they are not like Asiatics or the Negroes. The danger to-day lies in the native camps in the South-West where the half-castes go back and live with the full-blooded natives, and in that way get back once more to the darker blood. If we can separate the half-castes from the pure blacks we shall go a long way from the half and quarter-castes so that the blending shall be towards the white. The colour must not be allowed to drift back to the black. If we can only segregate the half-castes from the full-bloods we shall go a long way towards breeding the dark blood out of these people ...We should be prepared to spend considerable sums of money in taking away the female children, giving them a good education, and training them to do useful work. If they do go out to service, and then get into trouble, that trouble will be associated with white people which, in itself, will assist to breed out the colour. The main essential is to breed out the dark colour.[760]

This approach will be further discussed in the next section. For now, however, it is worth noting that some parliamentarians even suggested, expressly or by implication, forced sterilisation. The Hon EHH Hall said that 'I wish the Royal Commissioner had embodied a suggestion in his report that action should be taken against such a woman [an Aboriginal woman who had given birth to five children, allegedly all by different white fathers] that would prevent her from ever bringing children into this world again.'[761] The Hon LB Bolton said, 'It would not be too much to suggest that we take steps to sterilise these unfortunate young women.'[762] Even though he said his intentions were motivated by concerns over these women, there is little doubt that he was also concerned about the increasing half-caste population as he was 'staggered to learn of the alarming rate at which the number of half-castes is increasing.'[763]

In the 1936 Act, the parliament expanded the range of persons falling within the powers of the Aborigines Department (now referred to as the Department of Native Affairs)[764] by deleting the 1905 definition of 'half-caste'.[765] This had the effect of including some patrilineal Aboriginal children. This expansion provoked criticism from the Hon N Keenan, who said: 'The parent Act does not touch quadroons at all. The

760 Hansard vol 1 series 97 2RSP Assembly (29 Setember 1936) col 823.
761 Hansard vol 1 series 97 2RSP Assembly (13 October 1936) col 1067.
762 Hansard vol 1 series 97 2RSP Assembly (13 October 1936) col 1068.
763 Hansard vol 1 series 97 2RSP Assembly (13 October 1936) col 1067.
764 Aborigines Act Amendment Act 1936 (WA), s 3(1)(a).
765 Aborigines Act Amendment Act 1936 (WA), s 2(d).

proposal now is to rope in another generation. The net is being extended unduly.'[766] Further, the 1936 Act replaced the 1905 term 'Aborigine' with the term 'native'.[767] A 'native' was defined as 'any person of the full blood descended from the original inhabitants of Australia', regardless of age, and certain 'quadroons'. A 'quadroon' was defined as an Aboriginal descendant with 'one-fourth of the original full blood'.[768] Accordingly, the definition of persons falling within the scope of the legislative regime was broadened to include all 'quadroons' under the age of 21 years and who were associating with or substantially living in the manner of 'full bloods'.[769]

Potentially, the legislative net could be cast further to include yet more Aborigines. Namely, the Act provided that 'quadroons' falling outside the 'inclusive' component of the definition could, under certain circumstances, be classed as a 'native' by order of a magistrate[770] or the Minister.[771] This would ensure that the Chief Protector of Aborigines (now called Commissioner of Native Affairs)[772] retained power over the growing number of 'quadroons' seemingly beyond his powers. Further extending the extent of the Chief Protector's powers, the guardianship age was raised from 16 to 21.[773]

In language similar to the 1911 Amendment Act, the 1936 Act made the Commissioner of Native Affairs the 'legal guardian of every native child notwithstanding that the child has a parent or other relative living'.[774] With this expanded definition, the 1936 Act authorised the Commissioner to forcibly remove virtually any child of Aboriginal descent. The 1936 Act did not take up the Moseley Report recommendation of giving the responsible Minister the legal guardianship; this remained with the now named Commissioner of Native Affairs.

The 1936 Act maintained many of the pre-existing guardianship duties and imposed additional obligations. It provided for expanded medical examination powers,

766 Hansard vol 1 series 98 2RSP (8 December 1936) col 2399.
767 Aborigines Act Amendment Act 1936 (WA), s 2 (e).
768 Aborigines Act Amendment Act 1936 (WA), s 2(f).
769 Aborigines Act Amendment Act 1936 (WA), s 2(e)(b)(i).
770 Aborigines Act Amendment Act 1936 (WA), ss 2(e)(b)(i) and (ii).
771 Aborigines Act Amendment Act 1936 (WA), s 2(e)(b)(iii).
772 Aborigines Act Amendment Act 1936 (WA), s 3(1)(a).
773 Aborigines Act Amendment Act 1936 (WA), s 7.
774 Aborigines Act Amendment Act 1936 (WA), s 7.

by penalty of law,[775] and powers for the administration of Aboriginal estates.[776] The Act strengthened powers restricting the rights of Aborigines, such as rights to marriage,[777] inter-racial co-habitation,[778] enter into employment contracts,[779] and to consume alcohol.[780]

4 1937 Commonwealth and State Native Welfare Conference

The 1936 Premiers Conference in Adelaide decided that there should be a conference of Chief Protectors and Boards controlling Aborigines in the States and the Northern Territory to discuss the issue of Aboriginal affairs policy. As a result, such a Conference was held at Parliament House, Canberra between 21 and 23 April 1937. The conference provided Neville with the perfect national stage to espouse his biological absorption and eugenics views and policies.

Dominating the conference were those jurisdictions with the largest Aboriginal populations: Western Australia, Queensland, and the Northern Territory. The conference passed a resolution supporting the policy of the complete 'absorption' of the Aboriginal peoples of Australia into the European population: 'DESTINY OF THE RACE. – That 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.'[781] This 'dying pillow' or 'dying race' concept was very influential in Western Australia in the 1920s and 1930s and is based on the idea that a discrete 'race' can somehow 'die out'. This idea has many points of genesis, but perhaps the most important is that of 'eugenics'.

Based on the idea of a relationship between racial strength and human heredity, eugenics was seen by its founder, Francis Galton, cousin to Charles Darwin, as practical

775 Aborigines Act Amendment Act 1936 (WA), s 12.
776 Aborigines Act Amendment Act 1936 (WA), s 21.
777 Aborigines Act Amendment Act 1936 (WA), s 25.
778 Aborigines Act Amendment Act 1936 (WA), s 26.
779 Aborigines Act Amendment Act 1936 (WA), s 27.
780 Aborigines Act Amendment Act 1936 (WA), s 28.
781 Commonwealth of Australia *Aboriginal Welfare-Initial Conference of Commonwealth and State Aboriginal Authorities* (AGPS Canberra 1937) 3.

Darwinism.[782] Galton first defined the idea of eugenics in 1884,[783] but the movement was at its strongest in the first four decades of the 20th century.[784] The point of differentiation between eugenics and other racial theories is that eugenicists believed that the 'weaker' races should be bred out of existence.[785] One conference delegate described this policy as the only solution to the Aboriginal 'problem'.[786]

Within this broad policy, the Aboriginal population was broken into two subsets, which would be treated differently. Firstly, those of mixed descent would be absorbed, 'regardless of their wishes in the matter' and those deemed 'full bloods' would be left on reserves.[787] The conference's unanimous consensus was that the 'full blood' population would eventually die out.[788] One commentator states that it was universally accepted at the conference that the various governments had the right to impose biological as well as economic assimilation upon the Aboriginal peoples.[789] The National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families noted that the absorption model, initiated by Neville, was initially a biological model, and that the later incarnation known as assimilation, was a socio-cultural model, both forms carrying the seed of annihilation for Aboriginal peoples.[790]

The attitudes driving the policy of merging the Aboriginal people into the dominant non-Aboriginal population were put on the national stage by the 1937 conference in Canberra. Neville articulated those attitudes in his remarks to the conference. His remarks are worth noting here in some length as they bring together the prevailing attitudes of the first three to four decades of the twentieth century:

---

782 D Austin *I Can Picture the Old Home So Clearly: The Commonwealth and 'Half-caste' youth in the Northern Territory 1911-1939* (Aboriginal Studies Press Canberra, 1993) 17-19; Q Beresford and P Omaji *Our State of Mind* (Fremantle Arts Centre Press Fremantle 1998) 33.

783 M Sanger, 'Dangers of Cradle Competition', in CJ Bajema (ed) *Eugenics Then and Now* (Dowden Hutchinson and Ross, Stroudsbourg Pennsylvania 1976) 113.

784 D Austin (1993) 18.

785 P Brock (1993) 133.

786 D Austin (1993) 196.

787 L Lippmann *Generations of Resistance: Aborigines Demand Justice* (2nd ed Longman Cheshire Melbourne 1992) 24.

788 Q Beresford and P Omaji (1998) 46.

789 D Austin (1993)196.

790 HREOC (1997) 32.

The opinion held by Western Australian authorities is that the problem of the native race, including half-castes, should be dealt with on a long-range plan. We should ask ourselves what will be the position, say, 50 years hence; it is not so much the position to-day that has to be considered. Western Australia has gone further in the development of such a long-range policy than has any other State, by accepting the view that, ultimately the natives must be absorbed into the white population of Australia. That is the principal objective of legislation which was passed by the Parliament of Western Australia in the last session. I followed closely the debates which accompanied the passage of that measure, and although some divergence was, at time, displayed, most members expressed the view that sooner or later the native and white population of Australia must merged. The Western Australian law to which I have referred is based on the presumption that the Aborigines of Australia sprang from the same stock as we did ourselves: that is to say, they are not Negroid, but give evidence of Caucasian origin.

If the coloured people of this country are to be absorbed into the general community they must be thoroughly fit and educated at least to the extent of the three R's. If they can read, write and count, and know what wages they should get, and how to enter into an agreement with an employer, that is all that should be necessary. Once that is accomplished there is no reason in the world why these coloured people should not be absorbed into the community. To achieve this end, however, we must have charge of the children at the age of six years; it is useless to wait until they are twelve or thirteen years of age. In Western Australia we have power under 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.

... in order to prevent the return of those half castes who are nearly white to the black, the State Parliament has enacted legislation including the giving of control over the marriages of half-castes. Under this law no half-caste need to be allowed to marry a full-blooded Aboriginal if it is possible to avoid it ...

... I see no objection to the ultimate absorption into our own race of the whole of the existing Aboriginal race ...

> ... Every administration has trouble with half-caste girls. I know of 200-300 girls, however, in Western Australia who have gone into domestic service and the majority are doing very well. Our policy is to send them out into the white community, and if the girl comes back pregnant our rule is to keep her for two years. The child is then taken away from the mother and sometimes never sees her again. Thus these children grow up as whites, knowing nothing of their own environment. At the expiration of the period of two years the mother goes back into service. So that it really does not matter if she has half a dozen children.[791]

In the general discussion that followed the initial State and Territory presentations Neville commenced by reinforcing his 'dying pillow' concept: 'There are a great many full-blooded aborigines in Western Australia living their own natural lives. They are not, for the most part, getting enough food, and they are, in fact, being decimated by their own tribal practices. In my opinion, no matter what we do, they will die out.'[792] Neville added that because the full bloods were dying out, they were not a problem for the administrators and community. The future problem rested with the ever increasing coloured or half-castes.[793]

The coercive nature of the Aborigines Act Amendment Act 1936 (WA) is reflected in the following excerpt from Neville's conference speech:

> Reference has been made to institutionalism as applied to the aborigines. It is well known that coloured races all over the world detest institutionalism. They have a tremendous affection for their children. In Western Australia, we have only a few institutions for the reception of half-caste illegitimate children, but there are hundreds living in camps close to the country towns under revolting conditions. It is infinitely better to take a child from its mother, and put it in an institution, where it will be looked after than to allow it to be brought up subject to the influence of such camps. We allow the mothers to go to the institution also, though they are separated from the children. The mothers are camped some distance away, while the children live in dormitories. The parents may go out to work, and return to see that their children are well and properly looked after. We generally find that after a few months, they are quite content to leave their children there.[794]

[791] Commonwealth of Australia (1937)10-11, 15
[792] Commonwealth of Australia (1937) 16.
[793] Commonwealth of Australia (1937) 16.
[794] Commonwealth of Australia (1937) 17.

Here, Neville is speaking only of the native settlements where the parents lived on the reserves and the children had been removed to an institution on the settlement or nearby. Neville fails to mention that legitimate children were also removed and omits the missions and homes, such as Sister Kate's Children Home, where there was little contact, if any, between parents and their separated children.

The above extract highlights a number of considerations concerning the Western Australian government's policies in existence at the time. It is clear that there was a policy to transfer the children away from their families and Aboriginal cultures to institutions where they would be subjected to the European way. Neville justifies this policy by benevolent motives. His comment, however, raises questions of consent to the separations or removals. Arguably, what Neville considered contentment on the part of the mothers having their children removed from them could also be described as despair and loss of hope of ever having their children returned.[795]

In response to the question of what happens to the children after they have been separated or removed from their parents, Neville said:

> We recognize that we cannot do much with the older people, except look after them and see that they are fed. As regards the younger people, from twenty years upwards, we can find employment for them if possible, but it is of the children that we must take notice. You cannot change a native after he has reached the age of puberty, but before that it is possible to mould him. When the quarter-caste home, in which there are now nearly 100 children, was started we had some trouble with the mothers. Although the children were illegitimate, the mothers were greatly attached to them, and did not wish to be parted from them. I adopted the practice of allowing the mothers to go to the institution with the children until they satisfied themselves that they were properly looked after. The mothers were then usually content to leave them there, and some eventually forgot all about them.
>
> ... When they enter the institution, the children are removed from the parents, who are allowed to see them occasionally in order to satisfy themselves that they are being properly looked after. At first the mothers tried to entice the children back to the camps, but that difficulty is now being overcome.[796]

795 D Markovich (2000) 77-78.

Again Neville was restricting his comments to the native settlements and illegitimate children. Legitimate children were also removed. He also, once again, confuses the loss of hope of Aboriginal mothers with the consent to separation policies. However, there is little doubt that the legislative regime in Western Australia and the government policy allowed force to be used in separating or removing children. Note, for example, the following extract from the conference proceedings: 'Mr Harkness. [Member of the New South Wales Protection Board] – Can your department take them by force up to any age? Mr Neville.- Yes, up to the age of 21.'[797]

The proceedings of the 1937 conference provide a rich source of historical evidence on the views and attitudes that governed Aboriginal affairs policy during Neville's tenure as Chief Protector of Aborigines/Commissioner of Native Affairs in Western Australia. These attitudes, centred on the 'dying pillow' or 'dying race' concept and eugenic theories drove a legislative, policy and practical scheme of biological absorption that separated Aboriginal children from their parents. Approaching the 1940s this policy was still in force, as ably demonstrated in the following 1939 statement from the District Protector of Midland: 'Would not the separation of the young from close contact with grown members of the settlement tend to minimise the influence of their elders and so help to eradicate what may, if too frequently observed, prove to weaken their characters and usefulness.'[798] This biological absorption model dominated Aboriginal affairs in Western Australia during Neville's tenure and into the early 1940s after Neville had departed from his position of Commissioner of Native Affairs.

5 Early 1940s

In 1940, Neville stood down from his position as Commissioner of Native Affairs to be replaced by Frank Bray. Bray didn't differ markedly in style, approach or policy from Neville although, during his tenure (1940-1948), the drive to 'whitening' the half-caste lost some of its intensity. There are a number of explanations for this including the draining of resources to assist the war effort and the shift in public and government

[796] Commonwealth of Australia (1937) 17.
[797] Commonwealth of Australia (1937) 17.

opinion against policies that may have some commonality with the German Nazi eugenic policies.[799] However, Neville's influence and legacy remained intact during Bray's tenure; the Aboriginal children, more so the half-castes, had to be removed from the negative Aboriginal influences to be raised in the white ways. Indeed, in Bray's 1940 *Annual Report* he praised the superintendent of the Carrolup for removing the 'indolent natives and their children' from the towns thus 'cleansing the towns and districts of the worst types of natives.'[800]

The separation of children of 'lighter skin' from the 'negative influences' of those with darker skin and thus 'more Aboriginal blood' is evidenced in the following Native Welfare file note: 'A careful watch must be kept on all admissions to Sister Kate's Home. All children must been seen as they must be of the right colour. There are already too many dark children at Sister Kate's Home. The Home is for the rescue of near-white children. It is contrary to their welfare to send dark children, deeper than quarter-cast, to the Home.'[801] The attitude and policy that the half-caste and quadroon children once removed should not be allowed contact with their parents is also reflected in correspondence between the Bray and a government official stationed in the northwest:[802]

> I regret it is not possible to agree to Mr Cadoux's request. James is a near-white boy. He is being reared as a white child at Sister Kate's Home, and in due course he will be placed out in employment, and will live as a white person. It would be detrimental to his future welfare to permit him to return to his mother who lives in association with natives. If this were agreed to it would undo all the good work in rearing James to white standard.

798 W S Myles 'Midland District Report' in Commissioner of Native Afairs OA Neville *Annual Report of the Commissioner of Native Affairs for the year ended 30 June 1939* (Government Printer Perth 1939) 55.
799 A Haebich, (2000) 279.
800 Commissioner of Native Affairs F Bray *Commissioner for Native Affairs Annual Report for the year ended 30 June 1940* (Government Printer Perth 1940) 8.
801 Unnamed file note, Native Welfare File (Department of Community Services Perth 28 April 1941) cited in ALSWA (1996) 26.
802 To respect confidentiality, the names of the parties have been changed.

> ...Children placed with Sister Kate are never released to their parents. This would be a direct contradiction of the principle of their segregation from native persons, as they are placed with Sister Kate for this very reason. By Section 8 I am James' legal guardian up to 21 years, notwithstanding that his mother is alive, and since the principle consideration is the lad's welfare I regret I am unable to accede to Mr Cadoux's request. If I did so I would be inundated with similar requests from other native mothers.[803]

The Native Administration Amendment Act 1940 (WA) made it an offence for any Aborigine to 'ask, solicit or procure' alcohol and in 1941 the principal Aborigines Act 1905 (WA) was furthered amended by the passing of the Native Administration Act Amendment Act 1941 (WA). This Act imposed restrictions on the movement of Aborigines from the northwest to anywhere south of the 20th parallel of latitude unless for permitted reasons as prescribed in the Act and must return to the northwest after their official or permitted business has been completed in the south.[804] The motive behind the statute was an attempt to restrict the spread of leprosy that was allegedly spreading among the Aborigines in the north of the state. The Minister for the North-West, the Hon AAM Coverley said: 'Actually, the object of the measure is, in a few simple words, to confine leprosy to the area in which it exists, to prevent its spreading to any other portion of Western Australia, and, lastly, to preserve as far as we can the health of future generations.'[805]

The 1941 statute, and in the preceding period of legislative history, the government had expanded, in depth and breadth, its control over the lives of Aborigines. However, in 1944, in one respect at least, the government moved to narrow the class of Aborigines subjected to racially based control. At a time when Aborigines were not counted as Australian citizens under Commonwealth law, the Western Australian government passed the Natives (Citizenship Rights) Act 1944 (WA). Under this Act, adult Aborigines who obtained a Certificate of Citizenship were able to enjoy the rights, privileges and immunities of a natural born or naturalised subject of Her Majesty'.[806] The

803 Letter from Commissioner of Native Affairs to government official stationed in North-West, Native Welfare File (Department of Community Development Perth 21 July 1944) cited in ALSWA (1996) 27.

804 Native Administration Act Amendment Act 1941 (WA), s 2.

805 Hansard vol 1 series 107 2RSP Assembly (26 August 1941) col 348. The 1941 Act was repealed by the Native Welfare Act 1963 (WA), s 3.

806 Natives (Citizenship Rights) Act 1944 (WA), s 6, para 1.

Act further guaranteed Aboriginal citizens full property rights.[807] In 1950, the government amended the Act to allow for the citizenship certification of the children of adult Aboriginal citizens.[808]

Significantly, the 1944 Act afforded the right of citizenship to only some Aborigines, as defined by the Native Administration Act 1905-1941 (WA).[809] In particular, an applicant for citizenship was required to declare that 'he wishes to become a citizen of the State, that for the two years prior to the date of the application he has dissolved tribal and native association except with respect to lineal descendants or native relations of the first degree, and – '(a) that he has served in the Naval, Military or Air Force of the Commonwealth and has received or is entitled to receive an honourable discharge; or (b) that he is otherwise a fit and proper person to obtain a Certificate of Citizenship'.[810] Magistrates, who were empowered under the Act to grant the certificate, were required, *inter alia*, to be satisfied that 'for the two years immediately prior [to the application,] the applicant has adopted the manner and habits of civilised life'.[811] Upon being granted citizenship, s 6 of the Act provided that the holder of a certificate 'shall be deemed to be no longer a native or aborigine'.[812] Further, the Act made the right of citizenship contingent, *inter alia*, on the adoption of 'the manner and habits of civilised life'.[813] Namely, this required the certificate holders to continue their disassociation from native and tribal affiliations.

It is noted that s 6 of the 1944 Act, delineating between certificate holding Aborigines and other Aborigines, was repealed in December 1951.[814] However, the continued disassociation requirements of sections 4, 5 and 7 remained in force from 1944 until 1958.[815] The 1944 Act was repealed by the Native (Citizenship Rights) Act Repeal Act 1971 (WA).

807 Natives (Citizenship Rights) Act 1944 (WA), s 6, para 2.
808 Natives (Citizenship Rights) Act 1944 (WA), s 2(b).
809 Natives (Citizenship Rights) Act 1944 (WA), s 4(1).
810 Natives (Citizenship Rights) Act 1944 (WA), s 4(2).
811 Natives (Citizenship Rights) Act 1944 (WA), s 5(1)(a).
812 Natives (Citizenship Rights) Act 1944 (WA), s 6.
813 Natives (Citizenship Rights) Act 1944 (WA), s 7(1)(a).
814 Natives (Citizenship Rights) Act Amendment Act 1951 (WA), s 8.
815 Natives (Citizenship Rights) Act Amendment Act 1958 (WA), ss 3, 4 and 6.

At one level the 1944 Act can be seen as reflective of a change in public and official perception of Aborigines, affording them some degree of equality of treatment. However, there still remained a view that Aborigines were inferior to the whites and they could only be given equality if they complied to the 'white standards'. The Minister for the North-West, for example, in the second reading of the Bill said that the Bill would give encouragement to the Aborigines to 'uplift themselves' and apply for the 'privilege' of citizenship and enter 'a higher sphere in life'.[816] And even though Aborigines who met certain conditions were able to apply and be granted citizenship, they were still considered and treated differently. They could have their citizenship cancelled or suspended if they didn't maintain a 'civilised existence', or if they 'had twice been convicted of any offence under the Native Administration Act, 1905-1541, or habitual drunkenness' or had contacted leprosy, syphilis, granuloma or yaws.'[817] Non-Aborigines were not subjected to the same continuing standard of behaviour test.

In this regard, the Member for East Perth, Mr Graham, noted that it is 'grossly unfair' that an Aborigine would forfeit or have their citizenship suspended if they contracted certain prescribed diseases.'[818] It should also be noted that the original and main motivation behind the 1944 Act was rather modest. That was to allow Aborigines in the armed services drinking rights. This is reflected in the 1945 annual report of the Department of Native Affairs: 'This is a most modern piece of legislation and it is well worthy of sympathetic interest and understanding since it enables our native soldiers and other well-behaved natives to acquire the rights of citizenship.'[819] So the 1944 Act cannot be seen as a significant shift in official attitude towards Aborigines and their place in society. They were still second-class citizens at best – most were not even considered citizens.

The negative attitude held by the policy and lawmakers towards the Aborigines and their culture meant that even as the end of the World War II approached, official government policy still favoured the separation of Aboriginal children from their families. This policy continued into the period after World War II but there were some

[816] Hansard vol 1 series 113 2RSP Assembly (28 September 1944) cols 826-829.
[817] Natives (Citizenship Rights) Act 1944 (WA), s 7(1)(a) (b) (c).
[818] Hansard vol 1 series 113 2RSP Assembly (5 October 1944) col 970.

changes in attitudes and policies. There was some move to increase mainstreaming of Aboriginal children into the normal child welfare system. However, the assimilation objective still remained dominant and most Aboriginal children were separated from their families pursuant to the Aboriginal specific legislative scheme.

[819] Commissioner of Native Affairs F Bray *Commissioner for Native Affairs Annual Report for the year ended 30 June 1945* (Government Printer Perth 1945) 20.

CHAPTER SIX

ASSIMILATION AND MAINSTREAMING: 1946 - 1972

THE EARLY YEARS BEFORE COMISSIONER MIDDLETON

The dominance of the eugenic ideology and policy of biological absorption began to wane after 1945, at least in an overt sense. The obvious reason for this was that it was impossible, after World War II, not to notice the racist basis of that policy. Also, governments were moved to repeal discriminatory laws, especially as Australia took a prominent role in the newly formed United Nations.[820]

Australian Aborigines born after 1948 could in some circumstances be granted citizenship of the Commonwealth of Australia under the Nationality and Citizenship Act 1948 (Cth).[821] However, this did not necessarily confer citizenship of the States and Territories. For example, in Western Australia, Aborigines were subjected to the discriminatory provisions of the Native Welfare Administration Act 1936 (WA), were denied a vote in State and Commonwealth Elections[822] and, pursuant to the Native (Citizenship Rights) Act 1944, were forced to make a choice between their Aboriginality or becoming a citizen of the state; they could not be both.

The gradual changing of polices taking place around Australia did not dramatically alter the situation of Aboriginal peoples in Western Australia – at least in the first few years after the cessation of hostilities in World War II. Throughout the 1940s Aborigines in Western Australia were still subjected to discrimination and paternalism and a continue desire to 'civilize' them.[823] It was still considered best to remove the Aboriginal children from contact with their families as the following 1948 correspondence between the Acting Commissioner of Native Affairs and the Superintendent of Roelands Mission aptly demonstrates:

---

820 A Markus *Governing Savages* (Allen and Unwin Sydney 1990) 250.

821 Nationality and Citizenship Act 1948 (Cth), Part III.

822 It was 1962 before the Commonwealth government granted all Aboriginal people the Commonwealth franchise irrespective of whether or not they had been granted state franchise.

823 JR Huelin *On the Road to Equality: Post-War Politics and Law Relating to the Aboriginal People of Western Australia* (United Nations Association of Australia (WA) Perth 1980) 11.

> ...Mr Ronald Jones called upon me some time ago and I have an assurance that I was in complete accord with the mission policy of retaining the native boys and girls until sixteen years of age, and then placing them with Christian families located some distance away from the districts of their parents, in order to minimise the degree of contact and influence which is undoubtedly detrimental to the future of the child in most cases.[824]

Even though the above correspondence points to a different child welfare system for Aboriginal children vis-a-vis non-Aboriginal children, the Child Welfare Act 1947 (WA) did to some extent bring some Aboriginal children within the paradigm of the mainstream child welfare system and this was to increase in the 1950s and 1960s. The 1947 Act defined the term 'ward' as applying to children, under 18 years, who came within that Act, or any other statute, and were received into an 'institution, or apprenticed, boarded out, or placed out'.[825] This had the effect of, for the first time, placing children of Aboriginal descent within the scope of general mainstream child welfare legislative framework. The Secretary of the Child Welfare Department held the, 'care, management and control of the persons and property of all wards and the supervision of all children nursed by foster mothers.'[826] However like the State Children Act 1907 (WA), the 1947 Act did not transfer guardianship to the Secretary of the Child Welfare Department. Under the 1947 Act (as in the 1905 Act) and in practice, persons and managers of societies granted the care of the ward were also generally granted the legal guardianship of the ward.[827] The Department still held a general supervisory responsibility 'over all wards detained in any institution or placed out for adoption or otherwise, or apprenticed.'[828] Thus, even though, the Child Welfare Department or Department Head or responsible Minister was not made legal guardian under the 1947 Act, the Department still retain the responsibility to ensure that a child placed under non-parental care pursuant to the 1947 Act was properly cared for. This responsibility was never tested in the courts.

---

824 Letter from Acting Commissioner of Native Affairs to Superintendent of Roelands Mission dated 27 July 1948 cited in ALSWA *After the Removal* (ALSWA Perth 1996) 28-29.

825 Child Welfare Act 1947 (WA), s 4.

826 Child Welfare Act 1947 (WA), s 10 (1).

827 Child Welfare Act 1947 (WA), s 95.

828 Child Welfare Act 1947 (WA), s 63.

Even though there was some move towards the general child welfare system, most Aboriginal children separated from families were dealt with under the separate Aboriginal child welfare system. Moreover, the objective of assimilating Aboriginal children into white society also prevailed. In fact, the assimilation of the Aboriginal population per se was still being encouraged leading to another inquiry into native affairs in Western Australia.

BATEMAN INQUIRY AND REPORT

On 21 July 1947 the Minister for Native Affairs, Hon R McDonald, appointed Resident Magistrate FEA Bateman to 'carry out a survey into the native affairs throughout the State.' The stated reason for commissioning the survey was that the government thought sufficient time had lapsed since the 1935 Moseley Royal Commission for a further survey on Native Affairs to take place.[829] The Bateman survey was not a Royal Commission and Bateman had a free reign on how to conduct the survey. He was instructed to investigate on a wide range of issues, including, *inter alia*: native institutions and 'the education and welfare of natives generally, including their employment and vocational opportunities.'[830]

Bateman inspected and reported on the twenty-eight existing native institutions, although three of these[831] were not native institutions 'within the common meaning of the term'.[832] His report card was mixed, noting a variation in living conditions and standards of education.[833] These twenty-eight institutions were made up of church run missions and government controlled establishments. The main difference between the two types was the spiritual training or Christianising focus of the missions.

Bateman argued that the Government had to develop a policy for the missions to follow that went beyond a focus on Christian education: 'The day of evangelising the natives unaccompanied by other activities to uplift them has gone. Something more than

829 Hansard vol 1 series 119 2RSP Assembly (6 August 1947) col 82.
830 FEA Bateman *Report on Survey of Native Affairs* (Government Printer Perth 1948) 3.
831 Holy Child Orphanage, Broome; Sister Kate's Children Home, Queens Park; Native Girls' Home, East Perth.
832 FEA Bateman (1948) 15.
833 FEA Bateman (1948) 4-15.

religious training, accompanied by elementary teaching of the 3R's, is necessary. The need for the teaching of hygiene and the imparting of technical knowledge and training in the handcrafts must be concurrent with evangelism.'[834] He noted that criticism had been made that some missions tended to 'encourage idleness' among the Aborigines.[835] While conceding to some extent that this was true he went on to say: 'The causes mitigating against the missions achieving successful results in my view are twofold. Firstly there is an absence of policy and secondly a shortage of money.'[836] Earlier he had said when reporting on the Forrest River Mission that 'like most of the other missions, [it] is hindered in its progress by two impediments, malnutrition and a lack of any fixed policy prescribed by the Government.'[837]

Bateman was also prepared to criticise the government controlled institutions. For example, in relation to the Moore River Native Settlement, Bateman wrote: 'The buildings at Moore River in general present a dilapidated appearance which is accentuated upon entering them.'[838] He added that: 'Sanitation and hygiene are merely words without meaning at Moore River, the lavatory, bathroom and laundry conveniences being not only primitive but in some cases disgraceful. The bedding in the children's dormitories was filthy and it was evident that a preconceived idea that native children cannot be expected to be clean was being fostered.'[839] In contrast, he was more positive in his assessment of the Wandering Brook Mission. Even though it had not yet commenced operations he liked what he saw and commented that there was sufficient money being spent on the institution and 'for practically the first time a mission is being established to proper plan and with a long-term policy view.'[840] He added: 'I believe this mission will be operated on ideal principles and it is certain that it will play a major part in the uplifting of the half-caste population of the south.'[841]

In his report on the native institutions Bateman made repeated mention of the need to remove the Aboriginal children from contact with other Aboriginal people and

834 FEA Bateman (1948) 10.
835 FEA Bateman (1948) 10.
836 FEA Bateman (1948) 10.
837 FEA Bateman (1948) 5.
838 FEA Bateman (1948) 13.
839 FEA Bateman (1948) 13.
840 FEA Bateman (1948) 10.
841 FEA Bateman (1948) 10.

the 'aboriginal way of life'. For example, in referring to the Jigalong Mission he said: 'When the buildings are completed they will be housed in dormitories and the process of gradually weaning them from the aboriginal way of life will be carried a stage further.'[842] In reporting on what happens to the children once they leave the New Norcia Mission, Bateman commented negatively on reunification with the parents: 'Those with parents return to them wherever they may be and in most cases the education and training is immediately undone.'[843] And then again, in his report on Moore River Native Settlement, he offered the following:

> It is abundantly clear in my mind that the only chance of successfully training the children is to segregate them from the adults. In certain parts of the State this may not be possible but where possible institutions should be provided for children only. The children at Moore River, in my opinion, should be removed from the present contaminating influences to a children's institutions and Moore River should be retained only for the adult natives.[844]

In addition to surveying the position and situation of the native institutions, Bateman also considered the provision of education for Aboriginal children. He noted that, although Aboriginal children were able to attend State schools, this had often resulted in hostile protests from the parents of non-Aboriginal children. Bateman believed this hostile reaction was due to a fear among the 'white parents' that their children would be exposed to infectious diseases carried by the Aboriginal children who allegedly lived in 'squalid, filthy conditions.'[845] Bateman also concluded that Aboriginal home conditions were not conducive to education. As such, the neglected Aboriginal child, like non-Aboriginal children, should come under the jurisdiction of the Child Welfare Act 1947 (WA) and be removed to children's institutions.[846]

This last conclusion is somewhat strained for two reasons. First, as previously stated, Aboriginal children could be dealt with under the Child Welfare Act 1947 (WA). Second, neglected Aboriginal children could be and were removed from their parents under the Native Administration Act 1936 (WA); they didn't even have to be classified

842 FEA Bateman (1948) 7.
843 FEA Bateman (1948) 9.
844 FEA Bateman (1948) 13.
845 FEA Bateman (1948) 23.
846 FEA Bateman (1948) 26.

as neglected as the Commissioner of Native Affairs could remove them under his guardianship powers. Indeed, it was easier to remove an Aboriginal child from their family than a non-Aboriginal child from their family.

Bateman advocated segregated schools for Aboriginal children but didn't hold great educational expectations for these children. For example, he appears to agree with the opinion of some teachers 'that the average native child cannot be educated beyond the fourth or fifth standard.'[847] He asserts: 'Realising that there is a vast difference between native and whites in tradition, outlook and inherent ability, I favour a special curriculum for native children in these envisaged settlements. Higher education is unnecessary except in rare cases and the objective should be to eradicate laziness and indolence and replace them with industry and consistent effort.'[848] Bateman thought it thus necessary 'to inculcate habits of cleanliness and promote the desired moral and spiritual values'[849] and to assimilate Aboriginal children into the dominant European economic and social order.[850]

Interestingly, Bateman agreed with the Moseley Report in criticising the dual roles of the police as prosecutors and protector of Aborigines. For him, the objection to this dual role 'is so obvious and so well founded as to require no further comment.'[851] He added that many Aborigines feared the police and in isolated areas the police officer wielded great powers that placed the Aborigines in a hopelessly weak position if the officer was unsympathetic towards them.[852]

Bateman also said that the 'regrettable tendency' of appointing police officers to the Department, often as inspectors had led to some of them now holding senior positions in the Department. He concluded that insufficient care had been given to the task of selecting staff with the necessary experiences and capabilities to tackle the difficult task of Aboriginal affairs.[853] Further, in relation to the administrative system of the Department, he was critical of the administration of the Department and the fact that

847 FEA Bateman (1948) 24.
848 FEA Bateman (1948) 27.
849 FEA Bateman (1948) 27
850 FEA Bateman (1948) 25.
851 FEA Bateman (1948) 22.
852 FEA Bateman (1948) 22.

the Commissioner of Native Affairs had not made sufficient visits to native institutions; in some cases not even one visit.[854] Bateman believed there were insufficient field officers employed to adequately administer and supervise the vast landmass of Western Australia. In his opinion, more had to be employed and a Deputy Commissioner should be appointed to relieve the Commissioner of some of his administrative duties. This would free him to inspect the institutions under his care.[855]

Even though Bateman was prepared to offer criticism, his report was cautious and its recommendations were minimal, general and reflected many of the views of the dominant European or white society towards Aborigines.[856] The aims and mindset that framed Bateman's report is probably best summarised in the final three paragraphs of his report:

> It seems to me that in dealing with the aboriginal question as a whole there is a danger of becoming too idealistic. Without admitting that the aborigines have been badly treated in the past and that our treatment of them today leaves room for improvement, I believe that it is important to realise their limitations and to approach the problem in a practical way. The Full Bloods and even the Mixed Bloods are still a primitive race and it is unreasonable to expect them to advance to the white standards in a matter of a generation or two. A little over 150 years ago these people were living in the Stone Age. In fact some authorities contend that their standards were hundreds of years before the Stone Age, so that it is plain that the upliftment of the aborigines is a matter which must be considered in terms of generations rather than years.
>
> Unfortunately the results of any new methods for their betterment cannot be foreseen with any certainty. It is necessary to wait until the next generation in order to ascertain the full effects of any new methods adopted and it is this feature which makes the problem so difficult. As will have been gathered from the tenor of this report, I believe that these people can attain a standard equal to our own – in time. Just how long the process will take, time alone will tell.

853 FEA Bateman (1948) 36.
854 FEA Bateman (1948) 35.
855 FEA Bateman (1948) 35.
856 P Biskup *Not Slaves Not Citizens* (University of Queensland Press St Lucia 1973) 230; JR Huelin (1980) 20.

> During my investigations I have heard expressions of opinion from all sections of the community. The lack of unanimity of most aspects of the native questions was most noticeable. In compiling the report I have endeavoured to be practical and can only hope that my views on this most difficult subject will be of some assistance to the Government and will bring some benefits to the aborigines themselves.[857]

Bateman's comments and observations reflect the view that had long been expressed by Neville and others that the full bloods were dying out and the best hope for the half-castes was for them to be 'made white'.

MIDDLETON'S NEW VISION OF ABORIGINAL LIFE

1 New Broom

The *Bateman Report* was completed on 4 June 1948. SG Middleton, Assistant Director of the Papua-New Guinea Department of Native Affairs and District Services was appointed to the position of Commissioner of Native Affairs in August 1948. Arguably, the *Bateman Report* facilitated the appointment of someone like the forty-six year old Middleton. The report had recommended that the vacant Commissioner's position be filled by someone with 'sound administrative experience possessing anthropological training' but if that combination is not possible they should at least have the former requirement.[858] Previous to twenty-two years of experience with the Papuan New Guinean public service and a brief spell with a Papuan New Guinean mining company, Middleton, a New South Welshman, had worked as a journalist and as a clerk with the Queensland railways.[859]

Middleton oversaw changes in the Department of Native Affairs, with some of the changes emanating from the *Bateman Report* recommendations. He guided a number of structural and policy reforms during his tenure (1948–1961). These included the employment of Aborigines within the Department, the appointment of a number of district and senior administrative officers and decrease in the number of police officers acting as protectors. However, there still was insufficient Department personnel

857 FEA Bateman (1948) 39.
858 FEA Bateman (1948) 35.
859 P Biskup (1973) 228.

appointed adequately to supervise the missions and other institutions that housed Aboriginal children, and of course Middleton's visits to these institutions were infrequent.

Middleton held a negative view of the native stations and settlements and advocated for their closure. He also championed moving children to missions for care and education. Indeed, his support for missions attracted several new missionary societies to Western Australia[860] and an increase in government subsidies to the missions. In early 1954, subsidies paid per child in a native institution were raised to conform to the subsidy payed to institutions caring for white children.[861]

Middleton was very pleased with his efforts in moving Aboriginal children from the stations and settlements to missions, writing in 1954: 'Of all current developments by far the most pleasing and encouraging is the accelerated habilitation of our missions through increased subsidisation, grants-in-aid to cover capital expenditure and technical advice and assistance rendered by other departments.'[862]

In addition to increased financial support for missions, Middleton also encouraged, with varying success, attendances by Aboriginal children at State schools. In contrast to Bateman, he thought there was some virtue in Aboriginal children seeking higher education. To this effect, two hostels were opened in the Perth metropolitan area to cater for Aboriginal students completing their junior certificates. The Alvan Home for girls opened in Mt Lawley in 1951 and the Sir Ross McDonald Home for boys opened in West Perth in 1952.

Heulin writes that the Middleton regime represents a period of 'sympathetic and humane organisation' that sought to sweep 'away much that was degrading and paternalistic.'[863] Middleton did bring a humanitarian spirit to his administration and had empathy for both Aboriginal adults and children under his responsibility or legal guardianship. This comes through clearly in his 1953 annual report where he writes:

---

860 P Biskup (1973) 242.

861 Commissioner of Native Affairs SG Middleton *Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1954* (Government Printer Perth 1954) 3.

862 Commissioner of Native Affairs SG Middleton (1954) 3.

> The prejudice and discrimination against them which has obtained and been practised in the past – and undoubtedly still exists at most points of their contact with the white community – have deep historical roots, but the cardinal cause undoubtedly stems from the manner in which they were treated at the time of first settlement by whites in this land, and when the nation was in the earlier stages of its development.[864]

He concludes this part of the annual report by saying:

> The foregoing observations represent my sincere beliefs and opinions, supported above and below by those of my senior Field Officers. They represent what we believe to be "the native problem" as it is seen by us who live in almost daily contact with it. We feel that as prejudice and discrimination are eliminated from our way of life, the natives' rights will be established, but with the utmost sincerity of purpose we press for urgent consideration of our view that the only way to learn democracy is to practice it and that no positive progress will be made until natives are given the opportunity to do so. Given this, and with help of God, and us, it is not impossible that they will make the twentieth century one of notable achievement for the natives and white Australia alike.[865]

This version of democracy didn't mean that the Aborigines should be consulted about what they thought was best for them or that white society should accommodate the various Aboriginal cultures. On the contrary, the best way forward for the Aborigines, Middleton argued, was through assimilation into the dominant white society. Middleton felt that if the 'native problem is to be solved, the policy of assimilation must be accepted by whites without reservation'.[866] Whether the Aborigines had to accept assimilation or would accept it was not considered. Presumably they had no choice in the matter. However, Middleton did show some sympathy for the difficulties that assimilation might pose for Aborigines. In 1958 for example, he writes that 'the simple need appears to merely be one of mutual adjustment, the native must inevitably adjust himself to our way of life and we must adjust our thoughts, attitudes and actions (to

863 JR Huelin (1980) 27.
864 Commissioner of Native Affairs SG Middleton *Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1953* (Government Printer Perth 1953) 3.
865 Commissioner of Native Affairs SG Middleton (1953) 8.
866 Commissioner of Native Affairs SG Middleton (1953) 4.

enhance) our understanding of the difficulties they encounter in the complicated business of civilised living.'[867]

2 Assimilation

In 1951, at a meeting between the Commonwealth Minister for the Territories, Mr Paul Hasluck, a Western Australian, and the relevant State ministers, 'assimilation' was formally spelt out and became official Aboriginal policy. In this context, assimilation meant that all Aborigines: 'shall attain the same manner of living as other Australians, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and being influenced by the same beliefs, hopes and loyalties.'[868]

This statement created a national fiction by purporting the existence of a homogenous and unified Australian society sharing the same interests and beliefs and hid the fact that the assimilation policy had been, at least unofficially, government policy and procedure from at least the 1937 Commonwealth and State Native Welfare Conference in Canberra. Even though the 1937 conference talked in language compatible with the biological absorption model by saying 'their ultimate absorption',[869] the tenure and content of the conference speeches also reflected a desire to assimilate the Aborigines, in particular the half-castes into the economic and social fabric of white society. Indeed, the biological racial absorption model worked in tandem with a social and cultural assimilation model. Middleton, who was responsible for the formal implementation of the assimilation policy towards Aborigines in Western Australia, acknowledged that assimilation of Aborigines into the general community was first approved at the 1937 conference and re-approved at two subsequent conferences in 1948 and 1951.[870] One could even go further back and argue that the period of segregation in the early part of the twentieth century also had assimilation elements, through which the full bloods were to be separated from the half-castes, who it was believed had more chance of successfully 'assimilating' into European society.

---

867 Commissioner of Native Affairs SG Middleton *Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1958* (Government Printer Perth 1958) 5.

868 L Lippman *Generations of Resistance: Aborigines Demand Justice* (2nd ed Longman Cheshire Melbourne 1992) 38.

869 Commonwealth of Australia *Aboriginal Welfare-Initial Conference of Commonwealth and State Aboriginal Authorities* (AGPS Canberra 1937) 3.

As early as 1936, Hasluck advocated action to separate 'mixed race Aborigines' away from the 'Aboriginal natives' to join the 'whites'. He outlined various proposals for the removal of Aboriginal children from their families, including *inter alia*, boarding schools, missions and farm training institutions.[871] Hasluck remarks:

> Whatever is done, it should be done at once. The conclusions to be reached are a reproach to the State, an outrage to human beings, and a waste of materials. If there are any feelings of humanity in the community the present order will not be allowed to continue. If we recognise the claim that these people have on us by blood relationship we will lift them up instead of pushing them back to the blacks. If we remain indifferent to that appeal, we cannot escape the fact that we are faced with an embarrassing nuisance, which grows worse each year.[872]

Integral to this 1950s assimilation process that Middleton oversaw, was the separation of Aboriginal children, more so the half-caste, quadroons and 'lighter skinned' children, from their parents to be raised in the 'white ways' in missions, government institutions and foster homes. Most of these separations were made pursuant to Aboriginal specific legislative provisions; although, from the mid 1950s, there were some moves to bring Aboriginal children under the mainstream child welfare situation - meaning that parental neglect, rather than race, was to take prominence in whether a child should be separated from its family. However, it must be stressed that Aboriginal children were still treated and processed under the Aboriginal child welfare system, where parental neglect was not a perquisite to child separation.

There is a lack of statistical information available as to the actual mix of Aboriginal separated children processed under the mainstream child welfare system vis-a-viv the Aboriginal child welfare system. But what is known for sure is that the separate Aboriginal system still held paramountcy for Aborigines and the policy of Aboriginal child separations for assimilation purposes still remained – whether carried out under the Aboriginal specific legislation or the mainstream legislative regime.

---

870 Commissioner of Native Affairs SG Middleton (1954) 4.

871 A Haebich Submission to the Human Rights and Equal Opportunity Inquiry into the Removal of Aboriginal Children from their families (Unpublished Murdoch University Perth 1996) 5.

872 P Husluck 'Aboriginal Policy' *West Australian* (27 July 1936) 16.

Even though there was some move towards mainstreaming, the process of separations accelerated in the 1950s.[873] In reality, government agencies more closely scrutinised Aboriginal families than non-Aboriginal families, increasing the chances of Aboriginal children being separated or removed for alleged neglect.[874] Further, the courts more readily ruled in favour of removing Aboriginal children, even though there was some recognition that it was preferable to improve the 'environmental circumstances' of Aboriginal families rather than removing them from their family.[875] Nonetheless, the attitude still prevailed that an Aboriginal child would be better off if they learnt the ways of the 'whitefellow.'

3 1954 Act

In 1954, the Western Australian government revamped all existing legislation concerning Aborigines and enacted the Native Welfare Act 1954 (WA). The 1954 Act was a watered down version of the 1953 Bill that was passed in the Legislative Assembly but rejected in the Legislative Council, where the Labour Government was in a minority. The Bill sought to, *inter alia*, free up the prohibition on the supply of liquor to Aborigines and abolish the right or power of the administration to remove Aborigines to reserves. It also proposed to confer citizenship on all 'part-aborigines' unless disqualified for being unfit, which meant they would be classified as a 'native'.

In debating the 1953 Bill in the Legislative Council, the Department of Native Affairs and Middleton came under strong criticism. Particular opposition was directed at public criticism Middleton had made of Aboriginal administration.[876] One member went as far as saying that Middleton's 1953 annual report, was propagandist in nature and that Middleton was 'an idealist and a little inclined, at times, to haste when a more cautious approach to his objective would be better.'[877]

873 HREOC *Bringing them home* (AGPS Canberra 1997) 34.
874 HREOC (1997) 34.
875 Commissioner of Native Affairs SG Middleton *Annual Report for the Commissioner of Native Welfare for the Year ended 30 June 1960* (Government Printer Perth 1960) 1.
876 Hansard vol 3 series 136 2RSP Assembly (13 December 1953) cols 2775-2776.
877 Hansard vol 3 series 136 2RSP Assembly (16 December 1953) col 2763.

Even though the 1954 Act was a watered down version of the 1953 Bill, it has been described as a 'landmark in the history of Western Australian aborigines' because it removed some of the humiliating legal discrimination Aborigines were confronted with.'[878] Among the first of the Act's provisions was an amendment to the long title of the principal act, replacing the words 'better protection and care' with the word 'welfare'.[879] Presumably, this was intended to reduce the overt paternalism of the legislation and break the nexus with the protection era.

The amending Act afforded the Minister for Native Affairs discretionary power of the 'general supervision and care over all matters affecting the interests and welfare of the aborigines'.[880] Further, the discretionary power extended to 'assist[ing] in their [the Natives] economic and social assimilation by the community of the State'.[881] The Minister was also granted additional powers to acquire and transfer land on behalf of Aborigines.[882] However, the Commissioner of Native Affairs retained power of guardianship over Aboriginal children, unfettered from Ministerial directives – the Commissioner as guardian still retain the discretion as to whether an Aboriginal child should be separated from family and where they should be housed and educated.[883]

The 1954 Act also provided that the Minister could permit 'natives' to traverse north-south divide of Western Australia for the purposes of education, employment or welfare.[884] It was asserted by the Minister for Native Welfare, Hon W Hegney, in debating the Bill in parliament, that because the missions in the north were making rapid advances in educating the Aborigines there had to be provisions made to allow Aborigines above the twentieth parallel to travel south to Perth for further education.[885]

---

878 P Biskup (1973) 259.
879 Native Welfare Act 1954 (WA), s 3.
880 Native Welfare Act 1954 (WA), s 8(a), the phrase 'a general supervision and care' was replaced by the phrase 'such supervision and care.'
881 Native Welfare Act 1954 (WA), s 8(b).
882 Native Welfare Act 1954 (WA), s 9.
883 Native Welfare Act 1954 (WA), s 11.
884 Native Welfare Act 1954 (WA), s 13.
885 Hansard vol 2 series 139 2RSP Assembly (16 September 1954) col 1694.

For around 50 years the departmental head of Aboriginal/Native welfare had retained full guardianship powers over most[886] Aboriginal children. As previously stated, the guardianship powers were extended to cover almost all Aboriginal children in 1936.[887] However, in 1954, parliament diminished the scope of the Commissioner's legal guardianship powers. Now excluded were those Aboriginal children made wards under the general child welfare legislation.[888] Nonetheless, the new guardianship provision made clear that the Commissioner of Native Affairs retained the power to direct custody of those 'native children' for whom the Commissioner retained legal guardianship. In other respects, the 1954 Act maintained the expanded definition of 'native' including most 'quadroons' as per the 1936 Act.

The power to appoint and dismiss Protectors remained vested in the Governor.[889] Importantly, while the Protectors remained obligated to exercise their powers and duties for the benefit of Aborigines,[890] the Commissioner of the restructured Native Affairs department was authorised to delegate all or any of her or his powers or functions.[891] Furthermore, the Act made it clear that delegates were able to exercise independent judgment in place of the Commissioner.[892] Nonetheless, having delegated such powers and functions, the Commissioner or the Minister retained their respective powers and functions under the Act,[893] and nowhere in the Act is it expressly provided that the Commissioner could delegate his guardianship responsibilities.

In the parliamentary debate of the Bill for the 1954 Act, there is strong support for the removal of children to missions and the assimilation policy. For example, the Minister for Native Affairs states:

[886] Bar those Aboriginal children excluded from operation of various Aborigines/Native acts, such as; some 'quadroons' up to the time of the Aborigines Act Amendment Act 1936 (WA) expanded definition of native; and, those Aborigines granted citizenship under the Natives (Citizenship Rights) Act 1944.
[887] Aborigines Act Amendment Act 1936 (WA), s 2 (d) (e).
[888] Native Welfare Act 1954 (WA), s 11.
[889] Native Welfare Act 1954 (WA), s 10.
[890] Per Aborigines Act 1905 (WA), s 7.
[891] Native Welfare Act 1954 (WA), s 10(h)(3)(a).
[892] Native Welfare Act 1954 (WA), s 10(h)(3)(c).
[893] Native Welfare Act 1954 (WA), s 10(h)(3)(b).

> Now I come to the matter of subsidies payable to missions. I do not think any remarks on native welfare legislation would be complete unless one were to take each opportunity of publicly expressing admiration, and the thanks and appreciation of the Government of Western Australia to all the missions that are doing such wonderful work for the under-privileged section of this community. Right from Forrest River to Roelands and from Beagle Bay to Norseman the missions are in operation staffed by wonderful men and women, many of whom have given up their lives for the purpose of protecting, caring and teaching the full-blood native boys and girls and also the quadroons. They are doing a magnificent job.
>
> There is a wonderful humanitarian spirit, and a wonderful urge on the part of those churches to do something in the interests of the native population of Western Australia; and they have done a remarkable job. The Education Department is co-operating to the fullest extent; and as far as the Government is concerned, it will, to the best of its ability, from every point of view, including the financial aspect, do everything it can to further the interests of the missions. If we did not have the missions functioning in these outlying places, a number of the boys and girls would today be still in the tribal stage, or in the stage of the bush natives.
>
> But they are receiving a wonderful training, and one of the difficulties which we will have to face is to direct these boys and girls through the formative years, from, say, 14 to 17, after they have received their education. It is part of the Government's policy of assimilation, wherever circumstances permit, to have them absorbed into the community. Whether we believe it or not, Mr Speaker, - and you know more about this subject than I do – these people must either be assimilated or go back to the mia-mia or creek. By giving these children a good moral and religious background, we hope they will be able to take their places in the community when they leave school to earn their own living.[894]

This glowing assessment of the missions is questioned by testimonial evidence from a number of Aborigines removed to missions.[895] Also, the late 1950s herald some recognition by the bureaucracy of the harmful effects of a child being removed from its parents and family. There had also been earlier warnings of the harmful effects of parental deprivation.

Evidence of harmful effects of depriving the child of their parents is very pertinent to the 'standards of the time' defence to current criticism of the Aboriginal child separation policies and practices. If both white and Aboriginal peoples in the 1950s or earlier were arguing about the undesirability of separating children from their parents,

[894] Hansard vol 2 series 139 2RSP Assembly (16 September 1954) cols 1702-1703.

it does weaken the argument that the authorities were doing what was unanimously believed to be in the best interest of the child at the time. In many cases it seems that warnings or criticisms were not heeded, or were considered by policy makers and legislators not to apply to Aboriginal children. In their view, only separating them from their Aboriginal families and culture would save them and give them some chance of making it in the dominant white society. I now turn to look at Aboriginal and mainstream child welfare in the 1950s, including examples of warnings against depriving children parental contact.

4 Child Welfare, Law and Reports in the 1950s

As previously noted, there was a move after the Native Welfare Act 1954 (WA) to bring some Aboriginal children under the mainstream child welfare legislation; the principal statute being the Child Welfare Act 1947 (WA). The 1947 Act was subjected to a number of changes in the 1950s.[896] Only a few of the changes are noted here.

The major amendments provided by the 1954 Amending Act[897] involved definitional changes to the terms destitute child and ward. The definition of destitute child was broadened to include children whose near relatives had failed to regularly contribute child maintenance.[898] Similarly, the expansive definition of neglected child was broadened to include children 'living under such conditions as to indicate that the mental, physical or moral welfare of the child is likely to be in jeopardy'.[899] However, the term ward was narrowed and a child's wardship could cease at an age of less than 18 years if the child's committal to the Child Welfare Department's care ended prior to that time.[900] The effect of the definitional change to the term ward was reinforced by a variation in the court's powers so as to require it to consider whether a child should be

895 ALSWA *Telling our Story* (ALSWA Perth 1996); HREOC (1997) 153- 176.

896 Child Welfare Act Amendment Act 1950 (WA); Child Welfare Act Amendment Act 1952 (WA); Child Welfare Act Amendment Act 1954 (WA); Child Welfare Act Amendment Act 1955 (WA); Child Welfare Act Amendment Act 1956 (WA); Child Welfare Act Amendment Act (No 2) 1956 (WA); Child Welfare Act Amendment Act 1957 (WA); Child Welfare Act Amendment Act 1957 (No 2) (WA); Child Welfare Act Amendment Act 1958 (WA); Child Welfare Act Amendment Act 1959 (WA); Child Welfare Act Amendment Act (No 2) 1959 (WA).

897 Child Welfare Act Amendment Act 1952 (WA).

898 Child Welfare Act Amendment Act 1952 (WA), s 2(b).

899 Child Welfare Act Amendment Act 1952 (WA), s 2(c).

900 Child Welfare Act Amendment Act 1952 (WA), s 2(d).

declared destitute or neglected for a period expiring prior to the child attaining the age of 18.[901]

In 1958, a number of further changes were instituted to the 1947 Act. These had the effect of broadening the scope and content of guardianship powers.[902] In particular, the Minister was authorised to delegate his powers to act on a court's mandatory recommendations regarding wards.[903] The Minister was also empowered to commit a child to the care of the Department where it appeared that a child had been placed in the care of another person or body without the payment of child maintenance.[904] The Governor's powers to extend the period of guardianship of female wards were altered to also apply to boys.[905] The 1958 Act excluded the Minister and all departmental officers from personal liability for all good faith actions and omissions.[906]

Of course, the major difference between the mainstream child welfare system and the Aboriginal specific child welfare system was under the former, a child could only be removed from their family if classified as destitute or neglected. The requirement of neglect or destitution existed because the general view in the 1950s, as it is today, is that children should in normal circumstances stay with their parent and families; a family home environment offers the best possible basis for a normal childhood and development.[907] Establishment of neglect or destitution was not required to remove an Aboriginal child from their family under the Aboriginal specific legislation – their Aboriginality was sufficient to trigger their removal. And, as previously stated, the rate of Aboriginal child removals from family to mission accelerated in the 1950s even though warnings on the harmful separation of a child from its family were being aired.

Repeating the latter, in 1951, child psychiatrist John Bowlby produced a report for the World Health Organisation on the issue of maternal care and mental health.[908]

901 Child Welfare Act Amendment Act 1952 (WA), s 3.
902 Child Welfare Act Amendment Act 1958 (WA).
903 Child Welfare Act Amendment Act 1958 (WA), s 2.
904 Child Welfare Act Amendment Act 1958 (WA), s 4.
905 Child Welfare Act Amendment Act 1958 (WA), s 5.
906 Child Welfare Act Amendment Act 1958 (WA), s 10.
907 J Bowlby *Maternal Care and Mental Health* (World Health Organisation Geneva 1951) 11-12; United Nations Department of Social Affairs *Children Deprived of Normal Home Lives* (United Nations Department of Social Affairs Geneva 1952).
908 J Bowlby *Maternal Care and Mental Health* (World Health Organisation Geneva 1951).

Drawing on research that had been conducted from the late 1930s by a number of child psychiatrists, psychologists and researchers, Bowlby developed a theory of maternal deprivation that still has currency today.[909] He wrote that 'what is believed to be essential for mental health is that the infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother substitute).'[910] Bowlby believed that this relationship 'is so easily provided within the family, and so very difficult to provide outside it.'[911] He goes on to comment on partial and complete deprivation. Partial deprivation is most likely when someone the infant or child already has learned to know and trust looks after the child. This will not occur if this person is a stranger. Complete deprivation is most likely 'in institutions, residential nurseries, and hospitals, where the child often has no one person who cares for him in a personal way and with whom he may feel secure.'[912] Much of the testimonial evidence of Aboriginal children reared in institutions describes an environment of near-complete emotional deprivation.[913]

In 1955 the High Court of Australia, in a case not related to Aboriginal children, recognised the potentially harmful effects upon children who were separated from their parents.[914] This can be conjoined to the long-established English and Irish jurisprudence holding that generally it is in the child's best interest to be cared for by its parents.[915] Separation of a child from its family should be seen as a measure of last rather than first resort.

In 1958, a Legislative Assembly appointed a Special Committee on Native Matters which noted with apparent approval the study of Bowlby and recommended that children under six years of age should not in normal circumstances be admitted to the missions.[916] An earlier 1956 Select Committee into Native Welfare in Laverton said that it was not in favour of removing children from missions within the child's tribal locality,

909 ALSWA (1995) 33.
910 J Bowlby (1951) 11 .
911 J Bowlby (1951) 11.
912 J Bowlby (1951) 12 .
913 For example of such testimonial evidence refer to ALSWA (1995) 91-92, 103-104, 156-157; HREOC (1997) 168-170.
914 *Mace v Murray* (1955) 92 CLR 370,380.
915 For example, *Re Gyngall* [1893] 2 QB 232, 243; *In re O'Hara* [1900] 2 IR 232, 239-240.
916 Chairman FE Gare *Report of the Special Committee on Native Matters (With Particular Reference to Adequate Finance)* (Government Printer Perth 1958) 28.

'unless the parents are taken as well and cared for adequately and in a scientific manner to outweigh any disadvantages to them of such removal from their tribal grounds.' [917]

In the report of the Special Committee on Native Matters, Chairman Gare Committee remarked that Aboriginal parents sent their children to the missions voluntarily.[918] How genuine was this voluntary action is open to question; at first glance the claim seems to be even perverse. In writing on the separation experience nationwide, Brock commented in 1995 that some mothers 'voluntarily' placed their children in missions so as to avoid having them removed by the authorities.[919] Haebich and Delroy noted in 1999 that parents who attempted to prevent the removal of their children were subject to prosecution.[920] No doubt in some cases parents did consent to their children being removed to missions for education purposes but they did not consent to the children being separated from them forever. As noted in Chapter Five, speaking at an earlier time, a group of Broome women asked Commissioner Moseley whether he would 'like to think that when you send your children to school that you would never see them again.'[921]

It should also be noted that the committee while cautioning against the admission of children less than six years of age to missions, didn't advocate the closure of missions. In fact it recognised that as the number of Government institutions had diminished the 'relative responsibilities and importance of the Missions' had increased.[922]

The report of the Special Committee on Native Matters comments that children placed in missions should not be cut off from contact with their parents or relatives. Parents and relatives should not be refused visitation to the missions or the children not

---

917 Government of Western Australia *Report of the Select Committee into Native Welfare in Laverton-Warburton Range Area* (Government Printer Perth 1958) 104; W Grayden *Adam and Atoms* (Frank Daniels Pty Ltd Perth 1957) 31

918 Chairman FE Gare (1958) 27, 29.

919 P Brock 'Aboriginal Families and the Law in the Era of Assimilation and Segregation 1890s – 1950s in D Kirby (ed) *Sex Power and Justice: Historical Perspectives on Law in Australia* (Oxford University Press Melbourne 1995) 133, 141-142.

920 A Haebich and A Delroy *The Stolen Generations: Separation of Aboriginal Children from their Families in Western Australia* (Western Australian Museum Perth 1999) 37.

921 Commissioner Moseley *Report of the Royal Commissioner Appointed to Investigate, Report, and Advise Upon Matters in Relation to the Condition and Treatment of Aborigines* (Government Printer Perth 1935) section 2004.

922 Chairman FE Gare (1958) 27.

allowed to return to their families during the holidays.[923] Also, it recommended that children be housed in 'cottage homes' rather than dormitories and that missionary teachers have some knowledge and training in social anthropology, the impact of assimilation and Aboriginal culture and lore.[924] Also, it agreed with a submission presented to the committee that:

> ...it is essential that any white institution must not develop an authoritarian attitude that reveals an opposition to the authority of the tribe. Indeed, we must alter the tribal outlook and elevate its cultural concepts. The natives must have a sense of dignity and pride in respect of their own culture, yet so absorb our Western approach that the inner core and not merely the external customs will change. The native has a spiritual view of life, and his culture is integrated along religious lines.[925]

The Committee reported that a constant argument it received 'was the necessity for developing in the child removed from his parents at an early age a sense of security – a feeling of acceptance.'[926] The report then goes onto say that it was expressed to them that too often the children separated from their parents were subjected to an authoritarian approached to their education and a denouncing of their Aboriginal culture. This bred insecurity in the children and latter defiance and hostility to authority. [927] Furthermore, like the Bateman Report before it, the Special Committee on Native Matters also expressed concerned with the lack of adequate staff within the Department of Native Welfare to properly apply a positive welfare policy.[928]

THE 1960S

1 Moving Towards Mainstreaming

Returning to the pre-1936 definition of 'native'/'Aborigine', the 1960 Act restricted the coverage of the native welfare legislation by excluding all 'quadroons' and Aborigines of

---

923 Chairman FE Gare (1958) 29.
924 Chairman FE Gare (1958) 16, 29, 33, 35.
925 Chairman FE Gare (1958) 29.
926 Chairman FE Gare (1958) 16.
927 Chairman FE Gare (1958) 16.
928 Chairman FE Gare (1958) 31.

less than 'quadroon' blood.[929] As a significant advance in the civil rights of Aborigines, the 1960 Act also afforded 'natives' equal rights with natural born or naturalised Australian subjects.[930] In reality, however, Aborigines did not have equal rights. Nor were they equal citizens.

Giving 'natives' (alleged) 'equal rights' and decreasing the pool of Aborigines coming under the jurisdiction of the Aboriginal specific legislative regime reflected the trend towards mainstreaming of the administration of Aboriginal affairs and welfare, including Aboriginal child welfare. The 1958 Special Committee on Native Matters commented that there was an increasing tendency for the functions of the Child Welfare Department to overlap those of the Department of Native Welfare and thus a policy of integration of the two was inevitable.[931] The Special Committee also recommended that the current government welfare agencies amalgamate into a single Welfare Department with three branches – Aboriginal, Family and Welfare.[932]

In 1960, the government introduced new legislation, which exempted the Minister and all departmental officers from personal liability for good faith actions or omissions made under the Native Welfare legislation.[933] The government felt it was desirable that the Minister for Native Affairs and his officers should enjoy similar immunity from liability as enjoyed in other ministerial portfolios and government departments.[934]

In 1962, the general welfare legislation made the Child Welfare Department Director the guardian of all wards.[935] This was in addition to the provision, first made in 1907, that the Secretary[936] has the 'care, management and control' of the person and property of 'state children',[937] and the supervision of children nursed by foster mothers.[938] The Minister's powers to commit a child to the care of the Department were

929 Native Welfare Amendment Act 1960 (WA), s 2.
930 Native Welfare Amendment Act 1960 (WA), s 2 (c).
931 Chairman FE Gare (1958) 31.
932 Chairman FE Gare (1958) 36.
933 Native Welfare Amendment Act 1960 (WA), s 6.
934 Hansard vol 1 series 155 2RSP Assembly (1 September 1960) col 932.
935 Child Welfare Act Amendment Act 1962 (WA), s 3.
936 As the title then was.
937 As then defined.
938 State Children Act 1907 (WA), s 10(1).

extended to include children, though not destitute or neglected, who were left without a parent or guardian, or if the child's parent, near relative or guardian could not be located.[939] Aboriginal children came within the jurisdiction of the Child Welfare Act 1947-1962 (WA)[940] but if they were classified as native under the Native Welfare Act 1936-1960 (WA), they also came under the legal guardianship of the Commissioner of Native Affairs. However, as previously noted, s 11 of the Native Welfare Act 1954 (WA) had the effect of excluding the Commissioner of Native Affairs guardianship jurisdiction from an Aboriginal child if the child was committed as a ward under the Child Welfare Act 1947 (WA). But it was not until 1962 that the Child Welfare Department via the Director of the Department obtain guardianship of wards.

In Middleton's penultimate 1960 annual report he stated that his department would gradually move away from the practice of encouraging and assisting Aboriginal parents to put their children into missions and instead encourage them to maintain their families in better 'environmental circumstances'.[941] The Department of Native Affairs was proposing a policy of discouraging separating Aboriginal children from their families to be 'educated.'[942] Nonetheless, child separations and reliance on missions was still strong upon Middleton's retirement in 1961. It was not until the passing of the Native Welfare Act 1963 (WA) that this reliance was significantly reduced.

2 1963 Act

The Native Welfare Act 1963 (WA) repealed the Native Welfare Act 1954 (WA), along with all preceding acts, including the incorporated Aborigines Act 1905 (WA) and its precursor acts.[943] This finally removed the Commissioner of Native Affair's

939 Child Welfare Act Amendment Act 1962 (WA), s 8.
940 The Child Welfare Act 1947-1962 (WA) was subjected to a number of further relatively insignificant amendments the 1960s and early 1970s: Child Welfare Act Amendment Act 1962 (No 2) (WA); Child Welfare Act Amendment Act 1965 (WA); Child Welfare Act Amendment Act 1967; Child Welfare Act Amendment Act (No 2) 1967 (WA); Child Welfare Act Amendment Act 1968 (WA); Child Welfare Act Amendment Act 1969 (WA); Child Welfare Act Amendment Act 1970 (WA); Child Welfare Act Amendment Act 1971 (WA); Child Welfare Act Amendment Act 1972 (WA); Child Welfare Act Amendment Act (No 2) 1972.
941 Commissioner of Native Affairs SG Middleton *Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1960* (Government Printer Perth 1960) 1.
942 Commissioner of Native Affairs SG Middleton *Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1960* (Government Printer Perth 1960) 3.
943 Repealed by Native Welfare Act 1963 (WA), s 3.

guardianship powers over Aboriginal children and continued the transfer of Aboriginal child welfare into the mainstream child welfare system; now coming under the jurisdiction of the Child Welfare Department and the Child Welfare Act 1947-1962 (WA). However, differences still remained. Even though the Education Department was becoming more interested and involved in the education of Aboriginal children, many of these children were still being reared in missions and other Aboriginal institutions. Also, the Governor was still empowered to regulate 'the care, custody and education of the children of natives',[944] and 'the control, care and education of natives in native institutions, and for the supervision of native institutions'.[945]

Under the 1963 Act, the Minister for Native Affairs was charged with the duty of promoting the welfare of the 'natives'.[946] The 1963 Act maintained, as established in 1960, the restricted pre-1936 definition of 'native' and included all 'full blood' original inhabitants and their descendants, and other descendants with more than 'one-fourth of the original blood'.[947] Nonetheless, the 1963 Act provided the Minister with discretionary powers to extend application of the Act to Aborigines not falling within the above definition.[948]

Despite scrapping all of the preceding acts concerning Aboriginal welfare, the 1963 Act maintained the previous Department of Native Welfare;[949] 'charged with the duty of promoting the welfare of natives'.[950] As provided for since the 1905 Act, the government allocated the annual sum of £10,000 for the purposes of the Department.[951] The 1963 Act extended the limitations on personal liability of government officers[952] and the 'Minister' was deemed a corporate entity.[953] As such, it possessed all the powers and obligations of a corporation. Powers to appoint departmental officers were afforded to

944 Native Welfare Act 1963 (WA), s 37(2)(d).
945 Native Welfare Act 1963 (WA), s 37(2)(e).
946 Native Welfare Act 1963 (WA), s 5(1).
947 Native Welfare Act 1963 (WA), s 4; the definition excluded current or former Aboriginal servicewomen and men.
948 Native Welfare Act 1963 (WA), s 10.
949 Native Welfare Act 1963 (WA), s 5(2).
950 Native Welfare Act 1963 (WA), s 5(1).
951 Native Welfare Act 1963 (WA), s 6(1).
952 Native Welfare Act 1963 (WA), s 16, first provided for in the Native Welfare Amendment Act 1960 (WA).
953 Native Welfare Act 1963 (WA), s 8.

the Governor and Minister.[954] In the case of appointment of a deputy Commissioner of Native Affairs, the Act provided that the Commissioner's powers and duties were non-delegable.[955] However, the Minister and Commissioner were afforded powers to delegate their statutory powers and functions.[956] The Governor's regulatory powers also provided for delegation.[957]

The express duties of the Department, in keeping with all Aboriginal protection and welfare legislation since the Aborigines Protection Act 1886 (WA), included powers to: 'apportion, distribute and apply [monies], as may seem most fit';[958] 'provide and distribute relief to natives at the discretion of the Department';[959] 'provide for the custody, maintenance and education of the children of the natives';[960] 'provide, as far as practicable, for the supply of medical attendance, medicines, rations and shelter to natives who are sick, aged or infirm';[961] 'manage and regulate the use of all reserves set apart for the benefit of natives';[962] and 'exercise such general supervision and care in respect to all matters affecting the interests and welfare of natives as the Minister in his discretion considers most fit to assist in their economic and social assimilation by the community of the State, and to protect them against injustice, imposition and fraud'.[963]

The Minister was afforded broad discretionary powers over the acquisition and transfer of lands, and their development, for the benefit of 'natives'.[964] The Act also entitled the Commissioner to restrict the movement of Aborigines beyond the State[965] and the access to reserves of non-Aborigines;[966] to control Aborigines' employment conditions;[967] to control, and without consent in the case of minors, the personal and real

954 Native Welfare Act 1963 (WA), ss 11 and 12.
955 Native Welfare Act 1963 (WA), s 11(2).
956 Native Welfare Act 1963 (WA), ss 14 and 15.
957 Native Welfare Act 1963 (WA), s 37(2)(b).
958 Native Welfare Act 1963 (WA), s 7(a).
959 Native Welfare Act 1963 (WA), s 7 (b).
960 Native Welfare Act 1963 (WA), s 7(c).)
961 Native Welfare Act 1963 (WA), s 7(d).
962 Native Welfare Act 1963 (WA), s 7(e).
963 Native Welfare Act 1963 (WA), s 7(f).
964 Native Welfare Act 1963 (WA), s 9.
965 Native Welfare Act 1963 (WA), s 17.
966 Native Welfare Act 1963 (WA), s 20.
967 Native Welfare Act 1963 (WA), ss 21, 22 and 27.

property of Aborigines;[968] and, to declare and abolish reserves.[969] A special Fund was established with the purpose of promoting 'native' culture.[970]

The Governor was afforded virtually unlimited discretionary power to create regulations relevant to the 1963 Act.[971] The inclusive list of regulatory power incorporated many of the provisions specified in the 1905 Act. In particular, the Governor was, as mentioned above, empowered to regulate on Aboriginal child welfare matters.[972] The Governor also had regulatory power to prescribe the duties of departmental officers,[973] the control of reserves,[974] and the employment conditions of Aborigines.[975] The 1963 Act remained in force until 1972 where it was repealed by the Aboriginal Affairs Planning Authority Act 1972 (WA).

In the introduction to his second reading speech for the 1963 Native Welfare Bill, the Minister for Native Welfare, Hon Mr Lewis, made it clear that the history of Aboriginal specific legislation from 1886 had been based on a desire to assimilate Aborigines into the mainstream non-Aboriginal community and the laws enacted were not based on race but on a need to assist Aborigines in making that transition.[976] He thought that the Aboriginal population would 'ultimately be assimilated into the community:'[977]

> This goal of assimilation was defined at the conference of the appropriate Minister from each State and the Commonwealth, held at Darwin last July. This policy of assimilation was held to mean that all natives and part natives will attain the same manner of living as other Australians and live as members of a single Australian community enjoying the same responsibilities, observing the same customs, and influenced by the same beliefs, hopes and loyalties as other Australians.[978]

968 Native Welfare Act 1963 (WA), ss 22, 25, 33 and 34.
969 Native Welfare Act 1963 (WA), s 18.
970 Native Welfare Act 1963 (WA), ss 24 and 25.
971 Native Welfare Act 1963 (WA), s 37.
972 Native Welfare Act 1963 (WA), s 37(2)(d)(e).
973 Native Welfare Act 1963 (WA), s 37(2)(a).
974 Native Welfare Act 1963 (WA), s 37(2)(i).
975 Native Welfare Act 1963 (WA), s 37(2)(h).
976 Hansard vol 3 series 166 2RSP Assembly (21 November 1963) col 3052.
977 Hansard vol 3 series 166 2RSP Assembly (21 November 1963) col 3053.
978 Hansard vol 3 series 166 2RSP Assembly (21 November 1963) col 3052.

The 1965 Commonwealth and State/Territory Conference for Aboriginal Affairs Ministers reworded the definition of assimilation so that the aim was that 'all persons of Aboriginal descent will choose to attain a similar manner of living to that of other Australians and live as members of a single community'.[979] This was not of great significance and like some other changes that had taken place since the end of World War II, they are best described as terminological shifts. Even though there were also some significant changes and a more humane approach, Aborigines were still not equal citizens.[980] And testimonial and documentary evidence collated by ALSWA points to the conclusion that many in the Child Welfare Department in the 1960's and even early 1970s were of the view that it was not desirable for an Aboriginal parent to make contact with a child that had been separated.[981]

COMMONWEALTH CONTROL AND THE RECOGNITION / GRANT OF AUTONOMY

On 27 May 1967, the Australian people agreed in a referendum that s 51 (xxvi) of the Australian Constitution should be altered so as to omit the words 'other than the Aboriginal race in any State'. This alteration meant that the Commonwealth Parliament was now able to make laws 'for the people of any race for whom it is deemed necessary to make special laws'. As a result, the Commonwealth government had concurrent powers with the States with regard to Aboriginal affairs, and for the first time, made grants to the States and Territories for Aboriginal welfare programs via the newly formed Office for Aboriginal Affairs.[982] In addition, the 1967 referendum approved an alteration to s 127 of the Australian Constitution, so that Aboriginal people were considered part of the people of Australia in the counting of the national census.

While these constitutional changes were looked on favourably by many Aborigines and others advocating for Aboriginal rights in Western Australia, it was the election of the Tonkin State Government that brought about more substantive legal

979 HREOC (1997) 34.
980 J Huelin (1980) 29.
981 ALSWA (1995) 109-123.
982 Under the territories power of the Australian Constitution (s 122) the Commonwealth Government has always had power to enact laws for Aborigines in the Australian Capital Territory and Northern Territory.

changes to the regime governing Aborigines in Western Australia. The Tonkin Government enacted the Native (Citizenship Rights) Act Repeal Act 1971 (WA) to repeal the Native (Citizenship Rights) Act 1944 (WA) that had made Aborigines choose between being classified as non-Aboriginal or a citizen of the State. As previously noted, the Native Welfare Act 1963 (WA) was repealed by the Aboriginal Affairs Planning Authority Act 1972 (WA). The welfare functions of the Department of Native Welfare were also transferred into the mainstream. In addition, the newly created Department of Community Welfare that had been established under the Community Welfare Act 1972 (WA)[983] took over the welfare of Aborigines, including the children.

The Aboriginal Affairs Planning Authority Act 1972 (WA) established the Aboriginal Affairs Planning Authority, 'charged with the duty of promoting the well-being of persons of Aboriginal descent in Western Australia' and were to take Aboriginal views into consideration.[984] However, this policy and legislative shift did not mean that paternalistic and negative views of Aborigines no longer formed part of the political and community democratic process. There was however support for the 'worth' of Aborigines, although often this too was qualified. In that regard, the following extract from the parliamentary debates on the 1972 Aboriginal Affairs Planning Authority Bill probably reflects the sentiments and views of some in the community at the time:

> ...The more we do for them the more they seem to sit back and ask for more. I emphasise that this attitude is displayed by some Aborigines only. I am well aware of the fact that a great number of them are really trying to improve themselves.
>
> If at any time one despairs that Aborigines will ever make progress, I would recommend that one visits some of the student hostels where one can see young Aborigines who are attending secondary school or who are apprenticed, adopting a standard of life which is comparable with our own. One can see how those people live, and read the histories of those people who have gone on before them and are now living in the ordinary community and holding down responsible jobs. This is indeed an encouraging feature.

983 Also known as the Community Services Act 1972 (WA) and also refer to Child Welfare Act Amendment Act (No 2) 1972.

984 Aboriginal Affairs Planning Authority Act 1972 (WA), ss 12, 13.

> As I have often said, probably Aborigines may be likened to a mob of sheep which go to the water trough on a summer afternoon. Later in the afternoon the leader and many of the other sheep straggle back to the paddock, but the weaker sheep always hang around the trough. Some Aborigines like to hang around the trough.[985]

The election of the Whitlam Labor Commonwealth Government in 1972 continued the policy shift to give Aborigines 'more say' in decisions affecting their future. In particular, the Whitlam government created the first Commonwealth Department of Aboriginal Affairs and formulated a policy of self-determination.

It is here that we end this history of the attitudes, policies and legislation that shaped the treatment of Aborigines and particularly the policy of separating Aboriginal children from their parents in Western Australia. However, separations or removals of Aboriginal children still continued well into the 1970s and beyond under mainstream child welfare legislation and a number of missions and other Aboriginal institutions remained in operation throughout the 1970s and even into the 1980s.[986]

---

985 Hansard vol 2 series 194 2RSP Assembly (30 May 1972) col 1656.
986 Refer to A Haebich *Broken Circles* (Fremantle Arts Centre Press Fremantle 2000) 229-230.

PART III

CHAPTER SEVEN

IMPLICATION OF THE HISTORY AND WHERE TO NOW?

INTRODUCTION

Having examined the history of guardianship law, the duties of guardians to children and the historical separation of Aboriginal children from their families, this thesis now turns to a more critical assessment of the implications of that history. This chapter seeks to do a number of things. It commences with a discussion on allegation of guardianship breaches followed by an examination of State accountability and responsibility. This is followed by an assessment of how the Australian legal system has responded to these alleged breaches in guardianship duties. This assessment will show that litigation has not offered and will not offer solutions to those Aborigines who believe they have been wronged. This thesis argues that what is needed are extra-judicial or political solutions.

Before continuing I offer a brief comment on passing judgment on historical events or practices. While there may be a need to be somewhat cautious in passing moral judgment on the ideology, policies and some of the practices of separation, such as denial of cultural heritage, no such caution is required in relation to the failure to protect the separated child from sexual and physical abuse. Here we had grave failures of governmental accountability and responsibility involving inadequacy of supervision and accountability of the Aboriginal child welfare scheme established by the government.

THE GUARDIAN OF THE SEPARATED ABORIGINAL CHILDREN AND THEIR DUTIES

1 Introduction

As demonstrated in Chapter Two, the law of guardianship has evolved and developed over time to a stage where, during the historical period under examination here, the best interest principle of the child has held paramount consideration when giving content and standards to the duties of guardians. Although defining these duties is not an exact science, this is no more so than when considering the duties of non-parental guardians. Having said that, Chapter Three identified and discussed a number of guardianship duties relevant to the historical factual situation under examination.

Before continuing, it is useful to recap and summarise the historical State guardianship paradigm under investigation. The Aborigines Act 1905 (WA) commenced the State guardianship of Aboriginal children. The Aborigines Act Amendment Act 1936 (WA) increased the coverage of the guardianship power of the senior Aboriginal affairs public servant. The State Children Act 1907 (WA) had no, or very little, impact on Aboriginal children with Aboriginal children being exclusively or nearly exclusively dealt with under the Aboriginal specific legislative regime. This changed with the enactment of the Child Welfare Act 1947 (WA), after which there was an interaction between the mainstream and Aboriginal child welfare systems. Until 1963 Aboriginal children remained under the guardianship of the Commissioner of Native Affairs, unless they were State wards, in which case they came under the jurisdiction of the Child Welfare Act 1947 (WA). If State wards, the Aboriginal children nearly always came under the guardianship of persons or managers of societies who were granted the care of them. These people were, however, answerable to the relevant State government department – thus maintaining the State guardianship nexus. In 1962, pursuant to the Child Welfare Act Amendment Act 1962 (WA) the Director of the Child Welfare Department became guardian of all State wards and in 1963, the Native Welfare Act removed the guardianship powers of the Commissioner of Native Affairs. All Aboriginal children then came under the jurisdiction of the Child Welfare Act 1947 (WA) and the Child Welfare Department. However, the Department of Native Welfare still had a duty 'to provide for the custody, maintenance and education of the children of natives'. This remained until 1972 wherein the Community Welfare Act 1972 (WA) took over the welfare of all children.

Although Aboriginal children were sometimes sent to individual foster families, the focus of the historical material available and presented in Part II relates to Aboriginal children sent to missions and government homes. These missions and institutions have dominated discussion and debate in Australia. Although what is said here is equally applicable to the situation when an individual family was granted guardianship of an

Aboriginal child, in most cases individual families did not acquire guardianship over the children; rather, the mere custody and care. In many of these cases, State legal guardianship was operational. In situations where the State may not have had actual legal guardianship, the State, via its departments, held ultimate care and welfare responsibility over the children separated from their families.

As discussed in Part II, the statutes do not give content to the guardianship duties, although they do list some of the duties. For example, s 6 of the Aborigines Act 1905 (WA), states that the Aborigines Department has a duty '[t]o provide for the custody, maintenance, and education of the children of Aborigines,' and in relation to all Aborigines, to 'exercise a general supervision and care over all matters affecting the interests and welfare of the aborigines, and to protect them against injustice, imposition, and fraud.' Subsequent statutes did not significantly alter these broad guidelines or give more specific substance to them. Also, as noted in Part II, mainstream child welfare legislation was expressed in similar general language. Thus, in investigating the guardianship duties owed to the separated Aboriginal children, one must turn to the common law.

There is a paucity of curial analysis of State guardianship and of the legislation under question. However, apart from some minor adjustments or variances, the duties of State guardians do not differ from those of private guardians. There is nothing in the various judgments in the only case found on State guardianship duties, *Bennett v Minister for Community Welfare*,[987] which disagrees with this assertion. Moreover, at first instance, Nicholson J of the Supreme Court of Western Australia, equated the guardianship duties of the Director of the Department of Child Welfare pursuant to s 10 of the Child Welfare Act 1947 (WA) with those recognised for guardians generally. Justice Nicholson mentions that s 10 of the Child Welfare Act 1947 (WA) makes the Director of the Community Welfare the guardian of the State ward and he then goes onto outline the duties of guardianship, being those recognised by the common law as guardianship duties.[988] The judgments of the Full Court of the Supreme Court of Western Australia and the High Court of Australia didn't explore the content of the

[987] (1988) Aust Torts Reports 80-210, 68,084; (1990) Aust Torts Reports 81-048; 68,155; (1992) 176 CLR 408.
[988] (1988) Aust Torts Reports 80-210, 68,089-68,090.

guardianship duties focusing on the general tort duty of care issue and to a lesser extent, fiduciary duty.

Thus, what can be said in relation to the historical study of this thesis is that the legislative scheme established in Western Australia created a State guardianship apparatus whereby the relevant State officials had a general guardianship responsibility over those Aboriginal children separated from their families. These guardianship duties and the content of these duties are those to be found in the common law of guardianship. Moreover, as previously mentioned, the legislative scheme also expressly provided that the relevant state official and/or Department had a duty of care for the welfare of Aboriginal children.

We now turn to examine these guardianship duties in the context of the historical study in question. Here the duties are grouped into three main sections. The first being maintenance – the 'necessities of life' duty. The second group consists of protection, discipline, punishment, affection and emotional support. I call these the 'protection and well- being' duty. The third group, the 'education, family and cultural heritage' duty joins together education, domicile, access and visitation. This last group also includes aspects of affection and emotional support. As can be seen, some of the individual duties can find a home in more than one of the groupings. Also, overlaying all duties is the best interest of the child principle even though through the period under study, this principle was based on the welfarist model more than the child right's based model. At all times the guardian had to act in the best interest of the child.

A number of allegations are made here in relation to breaches of guardianship duties. In support of these allegations, reliance is placed on testimonial evidence and documentary evidence collated during my work with the ALSWA. This evidence has not yet been tested before a court of law and is included here only to give the reader a flavour of the allegations of guardianship breaches that have been made.

2 The Necessities of Life Duty

The 'duty to maintain' requires the provision of necessities such as food, clothing and shelter in order for the child to survive with some acceptable level of dignity. This is one of the most basic common law duties of a guardian, reinforced by the principal separation legislation, the Aborigines Act 1905 (WA)[989] Under mainstream child welfare legislation, the Governor had the power to make subordinate legislation on matters of maintenance.[990] The legal guardianship legislatively granted to the Chief Protector of Aborigines and the Commissioner of Native Affairs meant they had to provide for the children separated or removed from their families, and there was no legislatively provision for seeking a contribution from the parents for the children's maintenance.

Some Aborigines who were separated as children from their families and sent to missions and other institutional care have made allegations of inadequate living conditions, insufficient warm clothing and footwear and inadequate food, including maggot infested food.[991] These allegations have received some credence in official government reports. As noted in Chapter Six, the 1948 Bateman Report into native affairs in Western Australia comments on malnutrition problems in missions and in some cases unacceptable sanitation and hygiene.[992]

Allegations and reports of inadequate living conditions and provision of the necessities of life probably do not come as a surprise. Western Australia is a relatively new State, with a vast geographical area that is sparsely populated – this being more so in the first six decades of the twentieth century. This meant that the State Government's ability to adequately resource the missions and other government institutions housing Aboriginal children was always going to be inadequate. This was only made worse by the traditionally low priority given to funding for Aboriginal affairs.

However, unlike the issue of denying the children their cultural heritage and minimising familial contact, breaches of the maintenance duty was not a deliberate

989 Aborigines Act 1905 (WA), s 6.
990 State Children Act 1907 (WA), s 132(b) and (c); Child Welfare Act 1947 (WA), s 149 (c) and (d).
991 For example, refer to ALSWA *Telling Out Story* (ALSWA Perth 1995) 4; ALSWA *After the Removal* (ALSWA Perth 1996) 69, 381.

planned government policy. It came about because of inadequate funding of the missions and other institutions that cared for the Aboriginal children. Of course, the government should arguably have increased the funding, but this is an issue of priorities, available resources and competing interests. This does not necessarily absolve the State guardian (Chief Protector of Aborigines/Commissioner of Native Affairs or in some cases the Director of the Child Welfare Department) and the State from liability or responsibility for breaches of this guardianship duty but the moral and possibly legal wrong (if any) flowing from it are not as grave as if there was a deliberate policy of denying adequate maintenance to the institutionised Aboriginal children.

3 Protection and Well–Being Duty

The 'protection and well-being' duty encompasses many different and connected duties – protection, discipline and punishment, affection and emotional support. All of these duties go towards the physical and emotional well being of the child. The duty to provide for the necessities of life can also be canvassed here as it connects to the physical and emotional well being of the child.[993] It should also be added that in protecting the child, there may also be a positive duty to enforce the rights of the child – for instance, instigating legal action or obtain legal advice in order to protect the rights of the child or to claim for damages resulting from a wrong committed.[994] In discussing the basis and extent of the general duty of care the Director of Community Welfare had to the plaintiff State ward, the High Court of Australia in *Bennet v Minister of Community Welfare* held that: 'the duty of care appears to have been equated to, even derived from, a fiduciary duty owed by the Director to the appellant arising out of his statutory office of guardian. That fiduciary duty was a positive duty to obtain independent legal advice with respect to the possible existence of a cause of action ....'[995]

There have been a number of allegations made of physical and sexual abuse of Aboriginal children housed in missions and other institutions. In a self-referred sample

992 FEA Bateman *Report on Survey of Native Affairs* (Government Printer Perth 1948) 5, 13.
993 WGW White 'A Comparison of Some Parental and Guardian Rights' (1980) 3 Canadian J Family L 219, 234.
994 *In the Marriage of Newbery* (1977) 27 FLR 246, 249; *Bennet v Minister of Community Welfare* (1992) 176 CLR 408, 431.
995 (1992) 176 CLR 408, 411.

study of 411 respondents who had been placed in missions, 258 stated that they had been physically abused (62.8 per cent) and 45 alleged sexual abused (10.9 per cent).[996] While this study by the ALSWA may not conform to strict procedures of social science empirical research, the incidences of physical and sexual abuse are not isolated to this investigation. The HREOC National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families (hereafter National Inquiry)[997] also records incidences of physical and sexual abuse, as have plaintiffs in court.[998]

Even if only a small proportion of these allegations are 'proveable', they cast serious doubts on the State's actual compliance to its stated motivation of separating or removing the children from their families for their best interest. And in those cases that are factually correct, the Chief Protector of Aborigines or the Commissioner of Native Affairs (or sometimes the relevant Director of the Department of Community Welfare or the managers of the societies holding custody of the children) were in breach of one of the most fundamental guardianship duties – the duty to protect from harm.[999] The legal guardian would have an obligation to instigate legal action for a child that has been sexually or otherwise abused – there is no indication or evidence that such action took place.

In relation to the common law guardianship power to discipline and punish their charges,[1000] extra care must be taken when it is the State that is the enforcer. This is more a power of the guardian than a duty but it is important in the context of the factual paradigm of this thesis, as there have been allegations of abuse of this power. Many of the physical abuse allegations are consequences of missionary and institutional personnel 'going too far' with discipline and punishment. Of course, this raises the difficult issue of what is reasonable discipline and punishment and this standard changes over time. Despite this, some alleged incidences of discipline and punishment could never be

996 ALSWA (1996) 50-53.

997 HREOC *Bringing them home* (AGPS Canberra 1997) 194-195.

998 For example, *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86 (hereafter *Williams Trial*); *Cubillo and Anor v Commonwealth* (2000) 103 FCR 1(hereafter *Cubillo Trial*).

999 *Wedd v Wedd* [1948] SASR 104, 106-107.

1000 *Hewer v Bryant* [1970] 1 QB 357, 374.

accepted under normal child rearing standards, such as electric shocks to the penis as discipline for bed-wetting and being placed naked in a pigpen.[1001]

It should be noted that allegations of physical and sexual abuse and excessive discipline and punishment are not made against the State guardian *per se*. It was the personnel that work inside the institutions that allegedly engaged in abusive and sometimes criminal conduct, although on other occasions it was outsiders who perpetuated abuse or attacks. In these latter occurrences the missions and other institution supervisors failed to protect the children from outside harm and danger. Likewise, the State guardian failed to protect the children from harm and danger by ensuring a safe and well-run institutional environment.

A State guardian can't be expected to offer the kindness and affection that a private guardian can offer. As the 1951 *Bowlby Report* argues, the care of a child in an institutional situation can't approach the personal and intimate atmosphere of a stable home environment.[1002] However, this does not mean that the State guardian is completely absolved from this duty of kindness and affection. More importantly, it is not excusable for the State guardian or the people he has entrusted with the physical custody and care of the children to expound negative views to the child about their Aboriginality or their parents. Unfortunately, consistent with the official view that the children had to be separated from their Aboriginal families and culture, many Aborigines have relayed stories of mission and institution management and personnel speaking negatively to them about their parents and that they were better off without them and were often denied access to their parents.[1003] Even worse, some of the children were allegedly told that their living parents were deceased and that they were orphans.[1004] These allegations were still being made in the 1960s.[1005]

Proponents of the separation policies and practices might argue that, in order to achieve the assimilation of Aboriginal children into non-Aboriginal society, which was in the child's best interest, it was necessary that the child not hold onto positive or

1001 ALSWA (1995) 4.
1002 J Bowlby *Maternal Care and Mental Health* (World Health Organisation Geneva 1951) 11-12.
1003 ALSWA (1995) 66.
1004 ALSWA (1995) 109, 118.

romantic views of their parents or family or culture. This argument, however, is contrary to the judicial and non-judicial support given to the importance of the family unit and parental contact and control in the upbringing of the child.[1006] Of course, staying with the family and parental control is subject to the best interest of the child principle.

Moreover, reports from the Western Australian parliament itself supported a positive image being presented to the institutionalised children about Aboriginal culture. For example, the 1958 *Gare Report* states:

> A feature frequently stressed was the necessity for developing in the child removed from his parents at an early age a sense of security – a feeling of acceptance. It was pointed out that too often those who devote their lives to his interests develop an authoritarian approach, denouncing native culture and failing to understand the resulting native reactions. In consequence the child's dignity and pride in his cultural background are shattered and he is left in a state of bewilderment which leads him to regard the white man's ways as something imposed on him and hence views them with suspicion and distrust. This insecurity in early life leads in adolescence to defiance and hostility and the youth develops a pride in flouting authority with the results of which we are all to familiar.[1007]

Gare goes onto recommend that mission workers gain some training and knowledge in Aboriginal life and culture and present a positive picture of Aboriginal folklore and culture to the institutionalised children.[1008] However, one should not be mistaken in believing that the *Gare Report* advocated for the cessation of the separation and assimilation policy – it did not. However, it did recognise the need for the institutionalised children to have a positive view of their Aboriginal families and culture. There is no evidence though of this occurring to any significant or marked degree. The next section examines the issue of cultural heritage.

1005 ALSWA (1995) 109.

1006 For example, refer to *R v Gyngall* [1893] 2 QB 232; *In re O'Hara* [1900] 2 IR 232; J Bowlby (1951) 11-12; United Nations Department of Social Affairs *Children Deprived of Normal Home Life* (United Nations Department of Social Affairs Geneva 1952); J Blancher *When There's No Place Like Home* (Paul Brookes Publishing Company Sydney 1994) 141.

1007 Chairman FE Gare *Report of the Special Committee on Native Matters (With Particular Reference to Adequate Finance)* (Government Printer Perth 1958) 16.

1008 Chairman FE Gare (1958) 16.

4 Education, Family and Cultural Heritage Group

Blackstone writes that education is one of the principal duties guardians have to children.[1009] Historically, in England this meant to the standard suitable to the child's rank and expectation in life. In the universal education system of Australia, however, this education duty refers to the standard provided by the State public education system. This is especially so here, as one of the stated reasons for separating Aboriginal children from their families was to assimilate them into white society. Surely this would require the same educational standard as non-Aboriginal children received, unless the intention was to educate them to take their place at the lower end of the socio-economic order – say, for instance, to work as farmhands, labourers and domestic servants.

Unfortunately, most of these children were ushered into such menial tasks and there is evidence provided in reports commissioned by the Government and from personal testimonials that the Aboriginal children in missions and other segregated institutions received an inferior standard of education. For example, the 1948 *Bateman Report*, comments that the missions tended to focus too much on evangelising without the necessary education and training beyond the '3 R's'.[1010] Even though Bateman saw the need to improve the standard of teaching and education emanating from the missions he did not hold high expectations regarding the education of Aboriginal children.[1011]

Some in officialdom did hold higher aspirations for Aborigines. As noted in Chapter Six, Commissioner Middleton did establish two hostels in the Perth metropolitan area to accommodate Aborigines engaged in higher education. There are also examples, though far and few between, of Aborigines who had been sent to missions or other institutions eventually attending university. [1012]

The assessment on providing adequate education to Aboriginal children in missions and other institutions is somewhat mixed. There is sufficient official and

[1009] W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) Vol 1 450. (Special edition LB Adams Jr The Legal Classics Library Birmingham Alabama 1983). Also note that the principal Act, the Aborigines Act 1905 (WA) obliged the Aborigines Department to provide for the education of Aboriginal children.
[1010] FEA Bateman (1948) 10.
[1011] FEA Bateman (1948) 24.

testimonial evidence available to seriously question whether the education, in the traditional scholastic sense, was acceptable. Poor standards may have been offered also to non-aboriginal children. Overall, however there is little doubt that the mission and segregated Aboriginal education system was inferior to the general public education system of instructions.[1013]

The State guardian failed to comply with their duty in the area of religious and cultural education. The separation policy was aimed at assimilating the Aboriginal children into the mainstream society, not providing instructions in native languages or about Aboriginal culture. Children separated from their families were prevented from speaking their native language and only received instructions in English and Christian religions: 'We were inculcated into a Christian religion and my Aboriginal culture or history is non-existent. That was completely irrelevant to our lifestyles at that stage. It was really an understatement to say that we were not taught anything about our Aboriginal culture or history. The fact is that our Aboriginality was never mentioned, it was never a consideration.'[1014]

As discussed and examined in Chapter Three, the duty of the guardian to provide religious instructions in the creed of the parents is a fundamental obligation of guardianship law.[1015] However, Eekelaar argues that a guardian appointed 'to supersede the parent's guardianship' may act contrary to the parent's wishes in regards to education and religion.[1016] One may challenge Eekelaar's thesis on the grounds that not taking into consideration the views of the parents, especially in matters of religious education, is more likely than not to be detrimental to reunification of the family unit. Arguably, this is potentially detrimental to the child. However, in the end, what religion the child separated from its parents should be educated in will turn on what is in the child's best interest. This would have to be determined on a case by case basis and not by a general policy of educating a child in a religion contrary to the parents.

1012 ALSWA (1996) 42-43.
1013 ALSWA (1996) 184.
1014 ALSWA (1995) 40.
1015 Refer to 62 – 67 of this thesis.
1016 JM Eelelaar 'What are Parental Rights?' (1973) 89 LQR 210, 222. Also refer to 65-66 of thesis.

Moreover, there is nothing in the provisions of the various Aboriginal specific statutes that ousted the duty to educate the child in the religion of the parents. However, unlike the general child welfare statutes, there was also no express provision in the Aboriginal specific legislation providing a statutory fetter on the right of the non-parental guardian to educate the child in a religion contrary to the religion of the parents – the general child welfare statutes provided that the child was not to be sent to a mission or institution that would educate them in a religion contrary to the parents.[1017] Similar provisions prevailed in respect to the English Poor Laws.[1018] So there is no doubt that the policy intention was for the Aboriginal child to be educated in a religion of the State's choosing. However, there is nothing in the legislation expressly supporting that policy decision or ousting the common law duty to educate the child in the wishes of the parents, usually the father.

The parliamentary debates do not offer any indication as to why the religious limitation clause is included in the general child welfare legislation but not the Aboriginal specific statutes. One could argue that this is because the legislators did not consider that the Aborigines had a recognisable religion or that it was an unacceptable religion within the Christian dominant religious creed of the white society of Western Australia.

The High Court of Australia has held that religion involves a 'belief in a supernatural Being, Thing or Principle', and 'the acceptance of canons of conduct in order to give effect to that belief'.[1019] There is sufficient evidence available that Aboriginal cultures include religious practices and beliefs that come within the acceptable meaning of religion.[1020] Indeed, as cited in Chapter Six, the 1958 Special Committee on Native Affairs agreed that the Aboriginal 'has a spiritual view of life, and his culture is integrated along religious lines.'[1021]

1017 For example, refer to State Children Act 1907 (WA) ss 17 and 85. Also refer to 132-133 of thesis.

1018 For example, refer to Poor Law Amendment Act 1834, s 19; Poor Law Act 1889, s 1. Also refer to 100 – 101 of thesis.

1019 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

1020 W E H Stanner 'On Aboriginal Religion' (1959) 30 Oceania 2; R M Berndt *Australian Aboriginal Religion* (Brill Leiden 1974); T Swain *Aboriginal Religions in Australia* (Greenwood Publishing Group Sydney 1991); R Tokinson *The Mardu Aborigines: living the dream in Australia's desert* (2nd ed Holt Rinehart and Winston Fort Worth 1991).

1021 Chairman FE Gare (1958) 29. Refer further to 185 of thesis.

Having said this however, it should not be assumed that all Aboriginal parents whose children were separated from them, practiced or believed in 'Aboriginal religions'. It has to be remembered that many of these parents had also as children been sent to missions and were 'converted' to Christian based denominations. However, even in these cases, there does not appear to be any deliberate effort made to ensure that the children were sent to missions with similar religious creeds to those, which their parents followed. There is no evidence to suggest that there was a policy of ensuring that a child of Roman Catholic parentage was sent to a Roman Catholic run mission and so on. This suggests, at least prima facie, that the Government and the policy makers and practitioners attached little value to Aboriginal family ties and bonding. Or even worse, those in authority wanted to destroy the link between the parents and the child separated. In this case the assimilation argument cannot be used – here we are concerned with children whose parents were followers of Christian religions.

The non-adherence to the parents' religious creed, in the cases when the parents' religion was an 'Aboriginal religion', is reflective of the assimilation policy that drove the separation scheme and practices. In fact, assimilation was given statutory recognition by s 8 of the Native Affairs Act 1954 (WA), whereby the Minister of Native Affairs had discretionary power to assist the economic and social assimilation of Aborigines into the wider community of Western Australia. However, this legislative approval of the assimilation process didn't mean that the Minister had carte blanche to undertake any measure that he saw fit to aid the assimilation process. Indeed, as noted in Chapter Five, the principal Act, the Aborigines Act 1905 (WA) provided that the Aborigines Department, for which the Minister of Aborigines was responsible for, had a duty to assist 'in the preservation and well-being of the aborigines'[1022] and to care for their interests and welfare and prevent injustices.[1023] This welfare obligation was to remain with the Department throughout the period of this study. And further, based on guardianship law, the State guardian of the Aboriginal children was obliged to see that the child was educated in the religion of their parents.

[1022] Aborigines Act 1905 (WA), s 6.
[1023] Aborigines Act 1905 (WA), s 6.

Even if one holds the contrary view, that the State guardian was not legally obligated to educate the separated Aboriginal child in the 'Aboriginal religion' of their parents, they had to make sure they acted in the best interest of the child. Testimonial evidence indicates that they did not:

> We were inculcated into a Christian religion and my Aboriginal culture or history was non-existent. That was completely irrelevant to our lifestyles at that stage. It was really an understatement to say that we were not taught anything about our Aboriginal culture or history. The fact is that our Aboriginality was never mentioned, it was never a consideration.
>
> ... One of the greatest travesties I think that Sister Kates has ever committed on children that have been there, including myself, is that they never prepared us for the fact that we had to one day leave the home and go into the outside world and deal with the fact that we were Aboriginal and how we would communicate with our own families and with the white community as Aboriginals. That is something that was very neglected by Sister Kates and they basically just ignored the fact that we were Aboriginal. We were being brought up as whites and to live in a white society.[1024]

The failure to educate the separated children in the religion of their parents was consistent with the failure to educate the children about their Aboriginal heritage and to deprive them of contact with their families. As previously noted, the 1958 Special Committee on Native Matters recommended that missionary teachers should receive training in social anthropology, Aboriginal culture and the impact of assimilation.[1025] Despite this, there is no evidence available, either official or anecdotal, that this took place. To the contrary, there is testimonial evidence and correspondence from the Commissioner of Native Affairs or Department of Native Affairs that the Commissioner of Natives, the legal guardian of all Aboriginal children, deprived the separated children from family and cultural heritage.[1026] For example: 'At the mission it was bad. No mother and father ...no family.'[1027] This quote is from an Aboriginal man who was removed to Wandering Mission, a German Catholic mission, in the late 1950s. His sister, also at Wandering Mission at the same time says:

[1024] ALSWA (ALSWA Perth 1995) 40.
[1025] Chairman FE Gare (1958) 16.
[1026] More examples of deprivation of cultural heritage can be found throughout ALSWA (1995) and ALSWA (1996).
[1027] ALSWA (1995) 129.

> We weren't allowed to talk when we were kneeling, praying. We weren't allowed to act our way. We had to be good little Catholics. We had the catechism. That was shoved down our mouths. ... Sometimes, some of the things I don't really want to remember about the place. I don't because it was too hurtful. I think what affected me the most, they just wouldn't let me have anything to do with my brothers.[1028]

Examples from official documentation include the following from the Commissioner of Native Affairs to 'family friends' in 1949: 'I have noticed in cases such as these, that eventually the girls settle down, a procedure that is rendered slower when being written to by their relations, but they eventually reach the stage when they do not want to revert back to native living and our object has been attained.'[1029] Even as late as 1967, the Native Welfare Department was intent on depriving those removed of their parental and culture heritage: 'Jenny is not aware she is part Aboriginal. It does not seem necessary that she be told as it is not noticeable from her appearance and she has no contact with family.'[1030] This reinforces the view that at the core of the separation policies and practices was a commitment to severing the family tie and assimilating the separated Aboriginal child into the British-European way of life.

As noted in Chapter Three, guardians have duties in relation to domicile, access and visitation.[1031] With these duties, as with all guardianship duties, the guardian must act in the best interests of the child. In the historical paradigm of this study, the State guardian did not seem concerned with the interests of the child. Determination of domicile centred on practical matters of availability at any particular mission and complying with the assimilation and in some cases eugenic rationale of the separation or removal policies. The following two citations from official correspondence clearly demonstrate the assimilation policy imperative to issues of domicile:

1028 ALSWA (1995) 158.

1029 Letter from Commissioner of Native Affairs to 'family friends' dated 10 March 1949 Native Welfare file cited in ALSWA (1996) 29.

1030 File note dated March 1967 Native Welfare Department File cited in ALSWA (1996) 31.

1031 Refer to 68 - 70 of thesis.

> The admittance of the Lyn and Thatcher children, and the child of Mr Hann depends entirely on their colour, as I could not possibly agree that dark hued children be accommodated. As you know, Sister Kate's Home was established for the education and training of quarter-caste children, with the object of ultimate absorption into the community in the same manner as children who are inmates of white institutions.[1032]
>
> Mr Smart, the Inspector of Natives for the Murchison, who has his headquarters at Geraldton, can arrange to inspect the Fulton children and this officer could then let me know if he is of the opinion that they are sufficiently fair for admittance to Sister Kate's Home. In any case, I would require to personally see all the children involved, and doubtless they could be placed at the Roelands Mission Farm if they were considered to be too dark in colour to be successfully absorbed ultimately as whites.[1033]

Despite the recommendation from the 1958 Special Committee on Native Matters that contact with parents, holidays with parents and visits to the missions by parents and relatives should not be denied,[1034] in practice this often was the case.[1035] It was felt that allowing contact between the separated child and the Aboriginal family would only slow down the assimilation process.

The policy of depriving the separated child from family and cultural heritage was also adhered to when the children reached the age where they were placed out into employment. As noted in Chapter Six, the *Bateman Report* commented negatively on reunification with parents after the children left the missions, saying it undid the education and training of the missions.[1036] Of course this meant it undid the assimilation process. Whenever possible, the Chief Protector of Aborigines or the Commissioner of Native Affairs or the Director of the Child Welfare Department placed most of the institutionalised children with non-Aboriginal families to be employed on the farm or in the home. Reunification with family was not encouraged. It must be remembered that in relation to those children who were under the guardianship of the Chief Protector of Aborigines or Commissioner of Native Affairs or the Director of the Department of Child Welfare, the guardianship did not cease when the child left the mission or other institution. It continued until the child was twenty-one. In many cases, the Aboriginal

[1032] ALSWA (1996) 27.
[1033] ALSWA (1996) 28.
[1034] Chairman FE Gare (1958) 29.
[1035] For example, refer to ALSWA (1996) 111, 118.

child turned late teen or early adult was not sufficiently supported by their State guardian or the Aborigines Department or Department of Native Welfare that had a duty to care for the interests and welfare of Aborigines generally.

For those that did make contact with their parents or Aboriginal families after leaving the missions and other institutions, the experience was often not rewarding. Many of the testimonial statements collected by the ALSWA attest to this. For example: ' ...There appears to be some barrier that cannot be broken down that seems to somehow separate me from the closeness of my family, and for me to be fully aware of the family network. ...'[1037] Then there is the separated child that after leaving the mission is unable to find a place in either the Aboriginal community or the non-Aboriginal community: 'I couldn't seem to associate or live with Aboriginal people and I couldn't associate with the white people, so I was caught in between.'[1038] Many Aborigines, separated as children from their families, endured adulthoods marked by isolation and alienation from Aboriginal and non-Aboriginal society.[1039]

Loss of Aboriginal identity was one of the more common effects of the separation experience as relayed in the personal testimonials collected by the ALSWA[1040] and the HREOC National Inquiry[1041] and supported by the earlier findings of the Royal Commission into Aboriginal Deaths in Custody[1042] and the HREOC Mental Illness Inquiry.[1043] The research and evidence collected ALSWA[1044] and the two earlier mentioned inquiries[1045] confirm that the separation policies and practices that deprived children of their parents and Aboriginal cultural history manifested itself in problems with identity, adjustment and numerous mental illness problems. This is supported by other literature,[1046] and as noted in Part II of this thesis, for much of the period under

1036 FEA Bateman (1948) 9 and 13. Also refer to 168-169 of thesis.
1037 ALSWA (1995) 2.
1038 ALSWA (1995) 19.
1039 ALSWA (1995) 3; ALSWA (1996) 64-65.
1040 ALSWA (1995) 38; ALSWA (1996) 61.
1041 HREOC (1997) 177-231.
1042 Commissioner E Johnston *National Report of the Royal Commission into Aboriginal Deaths in Custody* (AGPS Canberra 1991) Vol 2 72-73.
1043 HREOC *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS Canberra 1993) 692 –704.
1044 ALSWA (1995) 28-29; ALSWA (1996) 53-54, 61.
1045 Commissioner E Johnston (1991) 72-73; 111-123, 131-138; HREOC (1993) 692 –704.
1046 For example, J Bowlby (1951) 11-12.

investigation, the prevailing policy in the non-Aboriginal child welfare system was family unity where possible.[1047] This is why separating or removing non-Aboriginal children from their families was considered to be a measure of last resort.

STATE ACCOUNTABILITY AND RESPONSIBILITY

The State as the creator and funding source of the system that allowed the separation or removal of Aboriginal children from their families to be raised in missions and institutions must accept the ultimate responsibility for the welfare of the separated child. However, it was the Chief Protector of Aborigines or the Commissioner of Native Affairs (and sometimes other designated individuals) that were charged with the guardianship of the separated Aboriginal children. Also the Aborigines Department and the Department of Native Welfare held a duty to protect the interest and care for the welfare of all Aborigines. Moreover, as previously mentioned, the Aborigines Department and the Native Welfare Department had a duty to 'exercise a general supervision and care over all matters affecting the interests and welfare of the aborigines, and to protect them against injustice, imposition, and fraud.'[1048]

Before continuing it should be acknowledged that it may be difficult to impute legal liability on the State or the responsible Minister of the Crown for breaches of guardianship duty by the Chief Protector of Aborigines or the Commissioner of Native Affairs. This is because of the so-called 'independent discretion rule.' Under this rule, the Minister of the Crown or the Crown itself is not vicariously responsible and therefore not liable for acts of its employees and officers who have an independent discretion in the exercise of their public office or public duties.[1049] In the factual and legislative historical paradigm of this thesis, the Chief Protector of Aborigines and the Commissioner of Native Affairs exercised independent discretion outside of the relevant Minister's control in relation to his guardianship powers and duties, such as to whether the child should be separated from their family and where they should be institutionalised.

[1047] Refer to 135-136, 182-183 of thesis.
[1048] Aborigines Act 1905 (WA), s 6.

The barrier to attaching legal liability on the Crown for wrongs committed against separated and institutionalised children and inadequate supervision of the separated children has been demonstrably made clear in the case of *Cubillo* where the relevant Northern Territory legislative provisions under question in that case[1050] gave the Northern Territory Director of Native Affairs are very similar in effect to the previously mentioned guardianship provision of the Western Australian legislative scheme.[1051] The trial judge in *Cubillo,* O'Loughlin J found that the Northern Territory statutory scheme granted the Director of Native Affairs with an independent discretion. The Director was required to form an opinion on whether a child should be separated from their family and placed in his care, custody or control based on the best interest of the child and not the view of the relevant Minister or the Commonwealth.[1052] The Commonwealth could not be held liable for any decision, acts or omission of the Director in relation to the care, custody or control of the child.[1053] Of course the Director could personally be held liable for a wrong, but in the context of the historical paradigm under investigation, the relevant Chief Protector of Aborigines or Commissioner of Native Affairs are deceased.

The independent discretion rule has been criticised for being antiquated[1054] and as further enhancing 'the protected position of governments.'[1055] Professor Paul Finn notes that 'Crown liability should [not] turn on the quite arbitrary fashion in which functions ... are allocated by statute.'[1056] Notably, the independent discretion rule has been abrogated by statute in New South Wales and South Australia.[1057] However, it remains the law in the rest of Australia and was approved by the Full Court appeal in *Cubillo.*[1058]

1049 *Tobin v The Queen* (1864) 143 ER 1148; *Stanbury v Exeter Corporation* [1905] 2 KB 838; *Enever v R* (1906) 3 CLR 969; *Little v Commonwealth* (1947) 75 CLR 94, 114; *Oceanic Crest Shipping Co v Pilbra Harbour Services Pty Ltd* (1986) 160 CLR 626, 637.

1050 Aboriginal Ordinance 1918 (NT), ss 6 and 16.

1051 Refer to of 124-125, 152 thesis.

1052 *Cubillo Trial* (2000) 103 FCR 1, 345-348.

1053 *Cubillo Trial* (2000) 103 FCR 1, 348–349.

1054 G Sawer 'Crown Liability in Tort and the Exercise of Discretions' (1951) 5 Res Judicatae 14.

1055 P Finn and KJ Smith ;The Citizen, the Government and "Reasonable Expectations"' (1992) 66 Australian L J 139, 145.

1056 P Finn 'Claims against Government Legislation' in P Finn (ed) *Essays on Law and Government* (Law Book Company Sydney 1996) Vol 2 27, 36-37.

1057 Crown Proceedings Act 1972 (SA); Law Reform (Vicarious Liability) Act 1983 (NSW).

1058 *Cubillo and Anor v Commonwealth* (2001) 112 FCR 455, 529-531 (hereafter *Cubillo Appeal*).

In comparison, pursuant to s 10 of the Child Welfare Act 1947 (WA), the Director of Community Welfare was subject to the control of the relevant minister, so the independent discretion rule does not apply.[1059] Some of the separated Aboriginal children would have come under this statute, but the majority came under the Aboriginal specific legislation that facilitated the assimilation process and thus is the focus of this discussion.

The independent discretion rule will not provide a barrier to crown liability if the Chief Protector of Aborigines or Commissioner of Native Affairs acted ultra vires or without exercising their statutory powers.[1060] In the historical scheme under consideration, that would be most relevant to the issue of forced removals. One would need to establish that the relevant government officer authorised the removals from family without purporting to exercise their statutory powers. Because of the broad nature of the public servant's discretion this will be difficult to establish. One may seek to argue that the Chief Protector or Commissioner removed children not because he thought it was in their best interest, the overlying principle governing guardianship duties, but in order to further the assimilation policies of the government. No doubt the removals were consistent with the assimilation policies of government, but the Chief Protector or the Commissioner would argue that this was in the best interest of the child. And even though, as shown in Part II,[1061] under non-Aboriginal child welfare policy, the prevailing thought was to work with the family rather than removing the child, this was not the view held in relation to Aboriginal children. It may have been a view, based on racist thought, but it was the contemporary view, even though it was not a unanimous view. This makes it difficult to argue that the Chief Protector or Commissioner acted outside his statutory powers.

An alternative argument may be made that the Chief Protector of Aborigines or Commissioner of Native Affairs did act outside their statutory powers because they were implementing a government sanctioned policy of genocide, rather than welfare. It has been argued that the Aboriginal child separation policy was genocidal in that the

---

1059 *Bennett v Minister of Community Welfare* (1988) Aust Torts Reports 68,084, 68,089; (1992) 176 CLR 408, 411.

1060 *Cubillo Trial* (2000) 103 FCR 1, 360.

1061 Refer to 134–136 of thesis.

intention of the policy was to destroy the Aboriginal race by assimilating the next generation of Aborigines into mainstream European society and culture.[1062] The Royal Commission into Aboriginal Deaths in Custody[1063] and National Inquiry also labeled the separation policy genocidal.[1064] The basis of the argument is that the separation policy had the intention of assimilating Aboriginal children into white society, whereby they would lose their 'Aboriginality'. Views expressed by officials such as Chief Protector AO Neville give credence to such a view. For example, as cited in Chapter Five, Neville believed that the 'Aboriginal problem' could be solved by assimilating the 'quick breeding half-castes' into white society and allow the 'slow breeding full blood' to die out.[1065] At the 1937 Commonwealth-State Aboriginal Affairs Conference in Canberra Neville remarked: 'I see no objection to the ultimate absorption into our own race of the whole of the existing Aboriginal race ... .'[1066]

Moreover, the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter Genocide Convention)[1067] includes as part of the definition of genocide the forcible transfer of 'children of the group to another group' with the intention 'to destroy, in whole or in part, any national, ethnical or religious group.'[1068] However, the difficulty the proponents of the genocidal argument have is that they argue cultural genocide, which is not included in the definition of genocide under the Genocide Convention.[1069] It may be possible to argue that cultural genocide comes under the

[1062] C Tatz 'Australia's Genocide: They Soon Forget Their Offspring' (1991) 55 Social Education 97, 98; M Storey 'Kruger v The Commonwealth: Does Genocide Require Malice?' (1998) 21 U of New South Wales L J 234

[1063] Commissioner JH Wootten *Report of the Inquiry into the Death of Malcolm Charles Smith of the Royal Commission into Aboriginal Deaths in Custody* (AGPS Canberra 1989) 35.

[1064] HREOC (1997) 271-275.

[1065] *The Telegraph* (Brisbane Wednesday Evening 5 May 1937).

[1066] Commonwealth of Australia *Aboriginal Welfare-Initial Conference of Commonwealth and State Aboriginal Authorities* (AGPS Canberra 1937) 15. Refer further to 155 - 157 of thesis.

[1067] United ations General Assembly Resolution 260 (III).

[1068] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Article II

[1069] *Kruger and Anor v Commonwealth* (1997) 190 CLR 1, 72, 159; Cf: Storey (1998) 226-227.

international customary law on genocide[1070] but this faces difficulties with domestic incorporation.[1071]

It is not proposed to explore the genocide argument further here. While it has some superficial appeal, the argument is beset with contradictions, emotive and polemic. Notably, Sir Ronald Wilson, former Justice of the High Court of Australia, former President of HREOC and leading Commissioner of the National Inquiry has more recently said: 'With hindsight, I think it was a mistake to use the word genocide,' and '[g]enocide is very much a side issue.'[1072]

Another possible argument to overcome the independent discretion rule barrier is the statutory provisions that gave the Aborigines Department or the Department of Native Affairs the duty to supervise and generally take care of the welfare of Aborigines. An argument could be made that this general departmental statutory duty of supervision and care means that the State could be held directly or vicariously liable for breaches of that duty. However, the guardianship provision in the Western Australian Aboriginal specific legislative scheme, as was the case in *Cubillo*, supports the view that the Chief Protector of Aborigines or Commissioner of Native Affairs exercised independent discretion on matters of guardianship outside the Minister's control. So, the independent discretion rule stands as an obstacle to attaching vicarious liability on the State for breaches of guardianship duties but the State may be open to action directed at the Minister's statutory duty to provide general care for all Aborigines. To date no such action has been instigated.

The State could have legal liability attached to it in relation to breaches of guardianship duty or other wrongs committed on those children institutionalised in government homes, as they were owned by the State. However, this would not be the

1070 *Reservations to the Genocide Convention Case* ICJ Reports (1951) 15; *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* ICJ Reports 1970 3, 33-34

1071 *Kruger and Anor v Commonwealth* (1997) 190 CLR 1, 72, 159. Also refer to S Peters 'The Genocide Case: Nulyarimma v Thompson' [1999] Australian International L J 233; A Mitchell 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law' (2000) 24 Melbourne U LR 15; B Saul 'The International Crime of Genocide in Australian Law (2000) 22 Sydney L R 527.

1072 *The Bulletin* (12 June 2001) 27.

case in relation to the missions.[1073] The Church run missions were not agents of the State, having independence in the hiring of their staff and much of their general governance. Arguably, the superintendents of the missions could have been agents of the State, which would attract vicarious liability. However, if the mission superintendents were agents only of the Chief Protector of Aborigines or Commissioner of Native Affairs, the independent discretion rule would prevent liability attaching to the State.

Even though the above discussion highlights the difficulties with attaching legal liability to the State for wrongs, including breaches of guardianship duties against the separated children, the fact remains that the State failed to ensure adequate accountability and supervision of the scheme that it advocated, legislated for and funded. This scheme, based on a large body of testimonial and anecdotal evidence, suggests that the missions and other institutions were austere environments, where children were vulnerable to sexual and physical abuse, received an education that was inferior to the mainstream system, were often educated in religions foreign to their parents beliefs, were cut off from their families, deprived of their cultural heritage and denied their Aboriginal identity.

The State can be criticised and held responsible for developing a child welfare system that in comparison to other polices for developing child welfare (apart from the British Child Migration Scheme), resulted in excessive disruption of familial, social and cultural relationships. This criticism must however be tempered by the prevailing but not unanimous contemporary official view that the separation policy was in the best interest of the Aboriginal children.

In regards to sexual abuse, excessive punishment and discipline, even if measured against the yardstick of the relevant period, the Government cannot offer historical defences to criticism. Aboriginal children were separated from their families and placed in missions and institutions where they were vulnerable to any missionary or institutional official or worker who was irresponsible, flawed, sadistic, immoral, amoral or criminally inclined. It is here that the issue of State accountability and responsibility comes into sharp focus.

[1073] *Cubillo Trial* (2000) 103 FCR 1, 351.

In many cases, the State guardian failed in one of the most fundamental guardianship duties – the duty to protect or ward off the child from danger and harm. And in these cases, the Aborigines Department or Department of Native Welfare failed in its general welfare duty to Aborigines. The Government set up a system whereby children were separated from their families to be raised in missions and other institutions, supposedly for their own good, but insufficient attention was played to supervising the missions and institutions. There were insufficient officials appointed to inspect the missions and institutions and the Chief Protector of Aborigines and the Commissioner of Native Affairs (and in some cases the Director of the Department of Child Welfare) made infrequent and insufficient visits to the missions and institutions.[1074] The State Government also failed to sufficiently finance the Aborigines Department and Department of Natives (and possibly the Department of Child Welfare) to ensure adequate supervisory care.[1075]

Just as damaging was the apparent inadequate response by the State guardian and State Government to inquiries and reports initiated by government or parliament. Although Commissioner Middleton did manage, in response to the 1948 *Bateman Report*, to decrease the number of police officers acting as protectors and increase the number of district and field officers,[1076] there remained inadequate supervision of missions and other institutions. While there may have been some improvements in the substandard mission and institutional conditions after the Bateman Inquiry,[1077] anecdotal evidence collected by the ALSWA[1078] and the HREOC National Inquiry[1079] suggests that conditions remain inadequate until the closure of most of the missions and institutions in the 1970s. Also, there is evidence of a segregated Aboriginal education system that was clearly substandard:[1080] 'The authorities said I was removed from my parents so I could

[1074] FEA Bateman (1948) 22; Chairman FE Gare (1958) 31.
[1075] Commissioner of Native Affairs SG Middleton *Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1954* (Government Printer Perth 1954) 2.
[1076] Commissioner of Native Affairs SG Middleton (1954) 3.
[1077] FEA Bateman (1948) 4-15.
[1078] For example, ALSWA (1995) 4; ALSWA (1996) 114.
[1079] HREOC (1997) 158-161.
[1080] FEA Bateman (1948) 10-11, 24; Chairman FE Gare (1958) 15.

receive an education but the fact is the nuns never gave me that education. I didn't receive an education. I was very neglected.'[1081]

Remembering that the Chief Protector of Aborigines and Commissioner of Native Affairs was legal guardian of all Aboriginal children until the age of twenty-one (apart from those that were under the jurisdiction of the Department of Child Welfare), and that the Aborigines Department and Department of Native Welfare had the duty to protect the interests and care for the welfare of all Aborigines, questions of Government accountability and responsibility also relate to the after-care of the separated children once they left the missions and other institutions. The lack of attention given to the issue of after-care was acknowledged by the Hon LA Logan when debating the Native Welfare Act 1954 (WA): 'Our biggest problems is from the time the child leaves the missions at 15 or 16 until he reaches 18.'[1082] He adds: 'We still have to find some means of occupying these adolescent children until they are able to go out into the world and fend for themselves. That will be our most pressing problem in the years to come.'[1083] Some children were encouraged to continue with their studies and the Alvan Home for girls and the Sir Ross McDonald Home for boys in West Perth housed these children. However, most were sent out as farm hands, labourers and domestic servants. There is little or no evidence that the State guardian or the Aborigines Department or Department of Native Affairs gave much attention to the children once they left the confines of the missions or institutions – no supervisory care to ensure they were not exploited economically, physically or sexually.

Also, little attention was given to the problem of whether the children who had been separated or removed from an Aboriginal culture to an institutionalised non-Aboriginal culture were then able to adjust to the non-Aboriginal, non-institutionalised world. As noted above, many Aboriginal children were unable to adjust to the outside world – whether they remained in the non-Aboriginal mainstream society or attempted to return to their Aboriginal roots. For too many Aborigines, their life after the missions and other institutions involved periods of homelessness and contact with the criminal justice system. In the earlier mentioned empirical study undertaken by the ALSWA,

[1081] ALSWA (1995) 49.
[1082] Hansard Western Australian Legislative Council vol 3 series 140 2RSP (9 November 1954) col 2687).
[1083] Hansard Western Australian Legislative Council vol 3 series 140 2RSP (9 November 1954) col 2687.

twenty five percent of respondents had been in prison.[1084] Further, nineteen of the thirty-two deaths in Western Australia investigated by the Royal Commission into Aboriginal Deaths in Custody, had spent time as a child separated from their families in a mission, institution or non-Aboriginal foster parents.[1085]

As to why the State guardian, the government departments and the government failed to provide adequate supervisory after-care is speculative. Perhaps officialdom believed that the assimilation process of the missions and other institutions would sufficiently assimilate the children to cope with life after institutionalisation. Eekelaar makes a similar suggestion in relation to the British child migrants to Canada.[1086] Or perhaps officialdom thought that their duty was complete once they had sufficiently trained the Aboriginal child for menial tasks and placed them into such employment. Or maybe, as was the case with the supervision of the missions and other institutions, there was insufficient manpower to pay attention to after-care. Whatever the reason or reasons, there is little doubt that there was a gross failure in relation to after care accountability and responsibility by officialdom – the State guardian, government departments and the State Government.

The failure by the State guardian and ultimately the State government that established the guardianship regime and departmental supervisory scheme in complying adequately with their guardianship duties and accountability responsibilities has in many cases resulted in significant damage to many of those separated. Psychological damage that has been linked to the separation process and practice include problems with identity, adjustment, mental illness, self-injury and suicide. Then there are the social and cultural effects resulting from inadequate education, problems with identity, lack of cultural connection, contact with the criminal justice system, substance abuse and parenting.[1087] This last problem, but also some of the other effects, has lead to intergenerational consequences.[1088] Dr Beverley Raphael, a psychiatrist, comments that the effects of the separation process and practice have produced trans-generational

[1084] ALWSA (1996) 55.
[1085] Commissioner E Johnston (1991) Vol 2 66.
[1086] J Eekelaar '"The Chief Glory": The Export of Children from the United Kingdom' in N Lowe and G Douglas (eds) *Families Across Frontiers* (Netherlands Kluwer Academic Publishers 1996) 539, 556-557.
[1087] ALSWA (1995) 5; ALSWA (1996) 53-58, 61-65.

trauma and loss and 'many years of horrific memories, distress and mental health problems that still need to be addressed.'[1089]

Of course, care must be taken in claiming causal links between the separation and assimilation process and the various claimed damages. Nonetheless, it would appear that, in many cases there is a link or at least a significant contributing factor to the damage suffered by those Aborigines separated from their families as children.[1090] Of course there is also the anger and bitterness associated with the loss of identity and familial relationships: 'I would like to say something from the bottom of my heart to the government, to the welfare. You have left me and my brothers and sisters with nothing of our parents but sad memories of the Kurrawang Mission which I hate.[1091]

The damaging effects of the separation policy have also been recognised by the judiciary. In the case of *In the Marriage of B and R*,[1092] the Full Court of the Family Court of Australia recognised the devastating effects of placing Aboriginal children in non-Aboriginal environments. Justices Fogarty, Kay and O'Ryan 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.'[1093]

Their Honours, in discussing the harmful effects of placing Aboriginal children in non-Aboriginal environments, applied Deane and Gaudron JJ's 'utterable shame" passage from *Mabo v Queensland (No 2)*[1094]:

1088 HREOC (1997) 222-228

1089 P Swan and B Raphael *'Ways Forward': National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health Parts 1 and 2* (AGPS Canberra 1995). Also refer to BA Stevens and V Bushell 'The Stolen Generation: Psychological Effects of the Systematic Removal of Indigenous Children from their Families and Culture' (2000) 178 *Ethos* 17.

1090 Refer further to E Johnston (1991); HREOC (1993) 692 –704; ALSWA (1995) 28-66; ALSWA (1996) 38-58; HREOC (1997) 177-231.

1091 ALSWA (1995) 3.

1092 (1995) 19 Fam LR 594.

1093 (1995) 19 Fam LR 594, 602.

1094 (1992) 175 CLR 1, 104.

> In Mabo v Queensland (No. 2) (1992) 175 CLR 1; 107 ALR 1 Deane and Gaudron, J.J. spoke of the dispossession of Aboriginals from their land 'as a conflagration of oppression and conflict which was, over the (19th) Century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame' (at CLR 104); and that it represented 'the darkest aspect of the history of this nation (at CLR 109). There can, in our view, be little doubt that on a more directly personal level the policy of Colonial, and later State, administrations in Australia to systematically remove Aboriginal children from their parents and place them in institutions or other care and the consequences of that can be described in equally strong terms.[1095]

In concluding this section, mention should be made of the lack of contemporary curial assessment or supervision of the separation scheme. The legislative scheme was uniquely different from the mainstream child welfare system in that the Chief Protector of Aborigines or the Commissioner of Native Affairs was not required to seek a court order or satisfy a non-judicial tribunal that an Aboriginal child should be separated from their family. There was no requirement for court orders; the paper trail commenced and ended with the Chief Protector of Aborigines or the Commissioner of Native Affairs requesting that an Aboriginal child be removed from their family and sent to an institution or foster family. Additional documentation was complied and held by the Aborigines Department of the Department of Native Affairs in relation to correspondence between the officers of the Department, between the Department and the child's parents and between the Department and the missions or government institutions.

The guardianship authority legislatively granted to the Chief Protector of Aborigines or Commissioner of Native Affairs gave him wide powers in relation to the welfare of the Aboriginal child. Of course, the fact that the legislation expressly provided for the senior Aboriginal Affairs public servant to supervise and provide for the welfare care of Aborigines and made him the guardian of Aboriginal children, did mean that the Chief Protector or Commissioner had to comply with a general duty of care and the duties of a guardian. However, during the contemporary period of this historical study, the courts were never called to adjudicate on the conduct of the Chief Protector or Commissioner of Native Affairs. Though, from the 1990s, Australian courts, even if not

[1095] *In the Marriage of B and R* (1995) 19 Fam LR 594, 602.

the courts of Western Australia have been asked to assess judicially this assimilation scheme and the conduct of those involved including the State.

JUSTICIABILITY AND LEGAL REDRESS

1 Introduction

The story is an unhappy one for those separated children, now in adult life, some in their later lives, who have sought legal redress through the court system. Claimants (being few in number) who have decided on the litigation pathway have been defeated on a number of issues. There is the protective nature of the Aboriginal specific legislation that prevents or severely inhibits liability being attached to the State because of the operation of the already discussed 'independent discretion rule.' Add to this, the judiciary's doctrinal reasoning in relation to the various causes of action and the evidentiary and legal problems associated with the passage of time. Then there is also the problem of the judiciary being asked to judge on assimilation policies legislated for by parliament. What follows is an assessment of these issues, apart from the previously examined 'independent discretion rule.' However, because the results of the cases have been so substantially negative for the separated claimants and the future looks no better, especially when one considers the High Court of Australian's refusal to give leave to the *Williams* and *Cubillo* claimants to appeal to that Court,[1096] the discussion will be brief.

2 Overview of the Aboriginal Separated Cases

Various causes of actions have been argued on behalf of separated Aboriginal children. One of the more novel arguments mounted was by the plaintiffs in *Kruger v Commonwealth of Australia* and *Bray v Commonwealth of Australia* (hereafter *Kruger*).[1097]

The plaintiffs were people removed from families as children between 1925 and 1949 (being detained as late as 1960) and the mother of a child removed. The plaintiffs

[1096] *William v The Minister, Aboriginal Land Rights Act 1983 and Anor* (HCA S 246/2000 22 June 2001); *Cubillo and Anor v Commonwealth* (HCA D10 and 11/2001 3 May 2002).

[1097] (1997) 190 CLR 1.

challenged the constitutional validity of the Aboriginal Ordinance 1918 (NT) which provided the legal basis for the removal of Aboriginal children from their families and communities in the Northern Territory.[1098]

The Ordinance was enacted pursuant to Commonwealth legislation providing for the government of the Northern Territory. The plaintiffs argued that the Ordinance was unconstitutional on a number of grounds: exceeding the Territorial powers of s 122 of the Australian Constitution; violating the separation of powers doctrine mandated by Ch III of the Constitution; breaching implied constitutional guarantees against detention without due process of law; breaching implied constitutional guarantees of equality, freedom of movement and association; breaching an implied constitutional guarantee against genocide and crimes against humanity; and breaching s 116 of the Constitution relating to the free exercise of religion under Commonwealth laws.

The plaintiffs claimed that, by reason of the asserted constitutional invalidity of the impugned provisions, they were entitled to recover damages from the Commonwealth – for tort of wrongful imprisonment and deprivation of liberty and for breach of their constitutional rights. The plaintiffs sought damages both with respect to the losses they has suffered in personal, cultural, spiritual and financial terms and in terms of their possible entitlements to participate in land claims.[1099]

The plaintiffs were demonstrably unsuccessful. No justice found the Ordinance contrary to s116 (freedom of religion) or s122 (power to make laws for the government of a territory) of the Australian Constitution.[1100] All who considered the issue concluded that the Ordinance was a 'beneficial' law and not genocide[1101] and, no implied constitutional guarantees or prohibitions (if there are such guarantees or prohibitions)

[1098] The impugned provisions were ss 6,7, 16 and 67 of the Ordinance.

[1099] The factual issues in the actions before the High Court have not been tried. From an earlier interlocutory hearing, Brennan CJ reserved seven 'questions of law arising on the pleadings in each of the cases for the opinion of the Full Court': *Kruger and Anor v Commonwealth* (1995) 69 ALR 885.

[1100] *Kruger* (1997) 190 CLR 1, 43-4 (Brennan CJ), 60, 62 (Dawson J), 141-43 (McHugh J).

[1101] *Kruger* (1997) 190 CLR 1, 70 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 158 (Gummow J) was violated.[1102] The decision also confirm that under Australian law there is no basis upon which an action for damages would arise for breaches of a constitutional right.[1103]

The *Kruger* judgment reinforces the notion that in any cause of action, it is the community standards at the time of the exercise of the legislative power and/or 'welfare care' under challenge that is relevant. Chief Justice Brennan and Dawson J commented in *Kruger* that one must look to the standards of the time. Chief Justice Brennan commented that in determining whether any law is reasonable one must turn to the community standards of the time and 'it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken.'[1104] Similarly, Dawson J remarked '… a shift in view upon the justice of morality of those measures taken under an Ordinance which was repealed over 40 years ago does not itself point to the constitutional validity of that legislation … .'[1105]

Thus, as it is with passing moral judgment, in determining questions of law, it is the standards of the period under question that are the relevant standards. Standards of child chare may have changed or developed over the last one hundred years whereby practices acceptable say fifty years, may be unacceptable today. However, it is the community standard of the period under challenge, which will focus the courts' attention, not today's standards. Although determining the community standards at any particular time is not without difficulties. But in any case, in relation to the Aboriginal child separation policy, while there were voices of protests from some members of the community, in general the policy was reflective of the prevailing community standards of the time.

[1102] *Kruger* (1997) 190 CLR 1, 44-45 (Brennan CJ), 63-68 (Dawson J), 93, 97 (Toohey J), 112-14 (Gaudron J), 142 (McHugh J), 153-55 (Gummow J).
[1103] *Kruger* (1997) 190 CLR 1, 46-7 (Brennan CJ), 93 (Toohey J), 125-26 (Gaudron J), 146-48 (Gummow J).
[1104] *Kruger* (1997) 190 CLR 1, 36-37.
[1105] *Kruger* (1997) 190 CLR 1, 52-53.

The Aboriginal Ordinance 1918 (NT) was again placed under judicial scrutiny in *Cubillo*.[1106] The plaintiffs were Lorna Cubillo and Peter Gunner. Mrs Cubillo was born in 1938 on a remote pastoral station in the Northern Territory. Her mother had died while she was very young and her mother's sister cared her for. She claimed that in or around 1945, patrol officers forcibly took her to a depot a Seven Mile Creek, eventually ending up at the Retta Dixon home in Darwin. She stayed there until she was eighteen years of age. Mr Gunner was born in 1948, also on a pastoral station. He claimed he was seven or eight years old when he was removed and after some time at a transit station, was sent to St. Mary's in Alice Springs. He remained there until he was sixteen years of age.

The plaintiffs claimed that their removal and detention constituted wrongful imprisonment and deprivation of liberty. They also alleged that the Director of Native Affairs and the Commonwealth by virtue of the doctrine of vicarious liability breach their statutory duty, duty of care and fiduciary duty to the plaintiffs. The plaintiffs also claim for breach of 'duty as guardian'. However even though claims for breach of duty as a guardian were described as a separate cause of action they replicated the particulars and allegations of breach of statutory duty, breach of fiduciary duty and breach of common law duty of care. The breach of duty as guardian was not developed at trial or relied upon for any other purpose than being part of the allegations of the other breaches mentioned.

Justice O'Loughlin of the Federal Court of Australia rejected the Commonwealth's strikeout application. His honour remarked: 'these cases are of such importance - not only to the individual applicants and to the larger Aboriginal community, but also to the nation as a whole - that nothing short of a determination on the merits ... is warranted.'[1107] Any joy the plaintiffs felt with victory in defending the strikeout application disappeared when O'Loughlin J found against the plaintiffs on the merits of the case at trial.[1108] The plaintiffs appeal to the Full Court of the Federal Court was dismissed[1109] and leave to appeal to the High Court of Australia was rejected on the grounds that there was little or no likelihood of success in overturning the lower courts'

[1106] *Cubillo v Commonwealth of Australia* [1999] 89 FCR 528 (hereafter *Cubillo Strike-out Application*); *Cubillo Trial* (2000) 103 FCR 1; *Cubillo Appeal* (2001) 112 FCR 455.
[1107] *Cubillo Strikeout Application* [1999] 89 FCR 528, 599.
[1108] *Cubillo Trial* (2000) 103 FCR 1.

decisions.[1110] The reasoning of O'Loughlin J, reaffirmed on appeal brings into reality the multiple legal and evidential obstacles involved in pursuing litigation to redress the alleged wrongs of past Aboriginal child separations.[1111]

The only other case on Aboriginal child separations policy to reach trial is *Williams*,[1112] a case involving the jurisdiction of New South Wales and therefore a State government as the defendant.[1113] The plaintiff, Joy Williams, is a woman of Aboriginal descent. In the early 1940's she was placed as a newborn at the Bomaderry Children's Home, New South Wales. At the age of four and a half years, due to her 'fair skinned' appearance, the plaintiff was transferred to Lutanda Children's Home, an institution run by the Plymouth Community for 'white' children of European background. She alleged that the subsequent discovery of her Aboriginality had caused her considerable distress, as she was told that she had 'mud in her veins.'[1114]

In 1960, after leaving Lutanda at the age of eighteen, the plaintiff 'entered into a period of her life that was disturbed and extremely unhappy.'[1115] She became a vagrant and turned to prostitution and petty crime as a means of supporting herself. In 1961 she served a short term of imprisonment and by 1965 had been admitted eight times to Macquarie Hospital, North Ryde, for various mental disorders. In 1985, the plaintiff commenced study and it was soon after that time that 'she began to associate in her mind the adverse effects of mental disturbance and social dislocation with the fact that she had been removed in infancy from a supportive Aboriginal environment.'[1116] In 1988, on the

---

1109 *Cubillo Appeal* (2001) 112 FCR 455.

1110 *Cubillo and Anor v Commonwealth* (HCA D10 and 11/2001 3 May 2002).

1111 J Clarke 'Cubillo v Commonwealth' (2001) 25 Melbourne U L Rev 218; R van Krieken 'Is Assimilation Justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' (2001) 23 Sydney L Rev 239.

1112 *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (SCNSW 25 August 1993) (hereafter *Williams (No 1) Unreported); Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (1994) 35 NSWLR 497 (hereafter *Williams [No 1]*); *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* (1999) 25 Fam L R 86 (hereafter *Williams [No2] Trial*); *Williams v Minister, Aboriginal Land Rights Act 1983 and Anor* [2000] Aust Torts Reports 81-578, 64,136 (hereafter *Williams [No2] Appeal)*).

1113 As mentioned in Chapter One, there have been two other Aboriginal separated cases but they of little significance and don't add little to the debate and are thus not discussed here: *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 and *Johnson v Department of Community Services and Anor* [2000] Aust Torts Reports 81-540, 63,472.

1114 *Williams [No 1]* (1994) 35 NSWLR 497, 501.

1115 *Williams [No 1]* (1994) 35 NSWLR 497, 502.

1116 *Williams [No 1]* (1994) 35 NSWLR 497, 502.

advice from Aboriginal Legal Aid, she attended the Department of Child and Adolescent Psychiatry and diagnosed with an 'extremely severe form of personality disorder.'[1117]

The plaintiff commenced legal action in 1993, seeking an extension of time under the Limitation Act 1969 (NSW). In the first instance, Studdert J rejected her request.[1118] At first instance, Studdert J rejected the plaintiff's request but the New South Wales Court of Appeal granted the extension. President Kirby, who wrote the lead judgement remarked: 'It is not just and reasonable in this case to close the doors of the Court in Ms William's face. She should have the chance to prove her case. She might succeed. She might fail. But her cause will have been heard in full. It will then have been determined as our system of law provided to all Australians – Aboriginal and non-Aboriginal – according to law, in open court and on its merits.'[1119] The case brought by the plaintiff changed considerably over the period of the trial[1120] and appeal.[1121] The trial judge, Abadee J found that the plaintiff failed to prove her allegations[1122] and he held against her on the law.[1123] Interestingly, even though the relevant institution were charged by the Aboriginal Welfare Board with the care and control of the plaintiff, Abadee J found that the relevant legislation, Aborigines Protection Act 1909 (NSW) did not transfer guardianship from the mother to the Aboriginal Welfare Board or other body or person.[1124] The New South Wales legislation differs in this aspect from the legislation of Western Australia, Northern Territory, Queensland and South Australia that clearly transferred guardianship to the most senior Aboriginal Affairs public servant in the jurisdiction.[1125]

His honour also held that for 'policy' reasons, particularly in relation with concerns about 'floodgate' litigation, negated against imposing a duty of care in an institution – child relationship.[1126] The Court of Appeal upheld Abadee J's decision

1117 *Williams [No 1]* (1994) 35 NSWLR 497, 502.
1118 *Williams (No 1) Unreported* (SCNSW 25 August 1993).
1119 *Williams [No 1]* (1994) 35 NSWLR 497, 514-515.
1120 *Williams [No2] Trial* (1999) 25 Fam L R 86, 101-02.
1121 *Williams [No2] Appeal* [2000] Aust Torts Reports 81-578, 64, 146.
1122 *Williams [No2]Trial* (1999) 25 Fam L R 86, 176-179.
1123 *Williams [No2]Trial* (1999) 25 Fam L R 86, 226-243.
1124 *Williams [No2]Trial* (1999) 25 Fam L R 86, 234-235.
1125 For example, refer to Aborigines Act 1905 (WA), s 8; *Northern Territory Aboriginals Act* 1910 (SA), s 9; Aboriginal Ordinance 1918 (NT), s 7; *Aboriginals Preservation and Protection Act* 1939 (Qld), s 18; *Aborigines Act* 1911 (SA), s 10.
1126 *Williams [No2] Trial* (1999) 25 Fam L R 86, 249-350, 260.

remarking that the plaintiff's case suffered from 'an insuperable causation problem.'[1127] The Court of Appeal also agreed with the policy considerations expressed by Abadee J in refusing to impose a duty of care:

> [T]he potential impact of imposing a duty of care in the present circumstances is, as the trial judge noted, potentially wide ... Any body having a statutory responsibility for non-Aboriginal children brought up in State charitable or denominational institutions or brought up by foster parents would probably be under a like duty. If so, analysis of the State's powers to inspect non-State schools or other institutions affecting children, or adults, might support the existence of a similar duty. The State could thus be exposed to the risk of claims from every citizen alleging a relevant injury.[1128]

This reinforces the Australian judiciaries reluctance to make a decision, which may have far reaching consequences on public policy. The judiciary appears sensitive to being held responsible for the possible public and charitable financial consequences that may flow from a decision attaching liability on the State for wrongs committed against the separated Aboriginal children.

3 Guardianship and Fiduciary Relationship

As stated in Chapter Two, the Court of Chancery has historically afforded protection to children and had the power to refer preliminary questions relating to the guardian's fitness and willingness to act to the masters and to even make orders involving financial and criminal sanctions.[1129] In modern times, and especially so in the Aboriginal child separated cases of *Williams*,[1130] and *Cubillo*[1131] alleged breaches of guardianship duty have been consumed into actions based in tort and fiduciary duties. However, these cases have recognised guardianship duties and their continued modern existence.[1132] It is the fiduciary relationship that the guardianship relationship most resembles that we now turn to. Although it should be noted that neither Gibbs CJ nor Mason J in the Australian seminal case on fiduciary relationships, *Hospital Products International v United States*

[1127] *Williams [No2] Appeal* [2000] Aust Torts Reports 81-578, 64,175.
[1128] *Williams [No2] Appeal* [2000] Aust Torts Reports 81-578, 64,176-64,177.
[1129] Refer to text to notes 25 - 29 in Chapter Two.
[1130] *Williams [No 2]Trial* (1999) 25 Fam L R 86; *Williams [No2] Appeal* [2000] Aust Torts Reports 81-578, 64,136.
[1131] *Cubillo Trial* (2000) 103 FCR 1; *Cubillo Appeal* (2001) 112 FCR 455.

Surgical Corporation included guardian and ward in their established categories of fiduciary relationships.[1133] However, Dawson J in the same case did so,[1134] and other judges and commentators have recognised the fiduciary nature of the guardian and ward relationship.[1135]

In the Aboriginal separated case of *Williams*, the trial judge was hostile to the fiduciary claim on the part of the plaintiff. Nowhere is this more apparent than when he states that while it is not necessary for him to decide the issue he would not follow the *Cubillo* strikeout application[1136] 'to the extent that it even suggests that a fiduciary relationship might give rise to a fiduciary duty of the kind urged in the instant case.'[1137] Justice Abadee's refusal to entertain the fiduciary claim was based on three issues: the non-economic character of the interest the fiduciary principle was being invoked to protect;[1138] not allowing equity to encroached into the traditional common law territory of tort (even if the common law offers no remedy);[1139] and a suggestion that the fiduciary claim was made only in order to circumvent a limitation period.[1140] When Abadee J's decision was appealed to the Court of Appeal of the Supreme Court of NSW, the fiduciary claim was all but abandoned.

Justice Abadee's opposition to the fiduciary claim is consistent with the decision a year earlier in the Federal Court of Australia case of *Paramasivan v Flynn*.[1141] In this case, the non-Aboriginal plaintiff brought an action against his non-parental private guardian for assault and breach of fiduciary duty, alleging the guardian had sexually abused him over a period of ten years commencing when the plaintiff was eleven years old. The plaintiff claimed damages for assaults and breach of fiduciary duty.

1132 *Williams [No 2]Trial* (1999) 25 Fam L R 86, 234; *Cubillo Trial* (2000) 103 FCR 1, 575-578

1133 (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J).

1134 1984) 156 CLR 41, 141.

1135 P Finn *Fiduciary Obligations* (Law Book Company Sydney 1997) 33; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 411, 426-427; *Williams [No 1]* (1994) 35 NSWLR 497, 511; *Clay v Clay* (1999) 20 WAR 427, 472; *Clay v Clay* (2001) 202 CLR 410, 432.

1136 *Cubillo Strikeout Application* [1999] 89 FCR 528.

1137 *Williams [No 2]Trial* (1999) 25 Fam L R 86, 235.

1138 *Williams [No 2]Trial* (1999) 25 Fam L R 86, 239.

1139 *Williams [No 2]Trial* (1999) 25 Fam L R 86, 240

1140 *Williams [No 2]Trial* (1999) 25 Fam L R 86, 240-241.

1141 (1998) 160 ALR 203

The Supreme Court of the Australian Capital Territory refused to grant an extension of time to bring the claim with Gallop J saying he doubted that the fiduciary argument had any realistic prospect of success.[1142] The matter was appealed to the Full Court of the Federal Court of Australia, which concurred with Gallop J in failing to find for the plaintiff. Even though the court was prepared to find that the alleged conduct of the respondent could 'be described in terms of abuse of trust or confidence' and 'allowing personal interest (in the form of self gratification) to displace a duty to protect the appellant's interests',[1143] it was not prepared to find a breach of duty. In fact, the court said this illustrated 'not only the incompleteness, but also the imperfection of all the individual formulae which have at various times been suggested as encapsulating fiduciary relationships for duty.'[1144]

This was the underbelly of the case. As the majority held in the earlier High Court decision of *Breen v William*, under the Australian jurisprudence of fiduciary law, it is not the finding of the fiduciary relationship or obligation that is determinative, rather it is the nature of interest seeking to be protected that determines if a fiduciary duty will be held.[1145] It is economic interest and not non-economic interests that activates the application of fiduciary law in Australia.[1146]

Moreover, Australian fiduciary law imposes only proscriptive duties. As Paul Finn writes, fiduciary law in Australia 'is concerned with the maintenance of fidelity to the beneficiary, and it is activated when the fiduciary seeks improperly to advance his own or a third party's interest in or as a result of the relationship.'[1147] The High Court of Australia made this clear in *Breen v Williams* when it refused to contemplate the Canadian approach[1148] of imposing positive duties on fiduciaries.[1149] The High Court of Australia in *Breen v Williams* held that Australian fiduciary law imposes proscriptive duties to avoid conflict of interest and unauthorised profit. It, however, 'does not

1142 *Paramasivam v Flynn* (SCACT SC 296/96 2 March 1998).
1143 *Paramasivam v Flynn* (1998) 160 ALR 203, 219.
1144 *Paramasivam v Flynn* (1998) 160 ALR 203, 219.
1145 (1996) 186 CLR 71, 82.
1146 *Breen v Williams* (1996) 186 CLR 71, 82-83, 111 cf: 134-135 (Gummow J); *Paramasivam v Flynn* (1998) 160 ALR 203, 218.
1147 P Finn (1977) 25.
1148 *McInerney v MacDonald* (1992) 93 DLR (4th) 415; *KM v HM* (1992) 92 DLR (4th) 289.
1149 *Breen v Williams* (1996) 186 CLR 71, 95.

otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.'[1150]

It should also be noted that although some justices of the High Court of Australia have been prepared to consider the imposition of a *sui generis* fiduciary duty on the Crown towards Aboriginal people based on the colonisation process and the vulnerability of the later to the former,[1151] no majority has done so. Moreover, the consideration has only been in respect to interests in land, thus economic interests. Here again, the Australian judiciary has not been prepared to follow the lead of the Canadian judiciary in recognizing a *sui generis* Crown-Aboriginal fiduciary relationship. The Canadian courts have recognised a Crown-Aboriginal fiduciary relationship based on the *sui generis* nature of Aboriginal land title and the historical control and interference of the Crown over Aboriginal people, which means 'the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.'[1152]

The narrower approach to fiduciary law in Australia is also demonstrated when looking at how the Australia courts treat pleads of breaches of fiduciary duty in relation to child sexual abuse cases. The Canadian approach is to allow the application of fiduciary law in child sexual abuse cases in the protection of non-economic interests of children.[1153] This is in stark contrast to the Australian position as exemplified in *Paramasivam v Flynn* where the court said that it was 'unnecessary' to seek the assistance of the law of fiduciary duty when dealing with childhood abuses because the law of tort can deal with the issues. The court comments that to allow the law of fiduciary to enter into an area traditionally the purview of the law of tort 'would, in our

1150 (1996) 186 CLR 71, 113.

1151 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 166-167 (Dawson J); 201-204 (Toohey J). Also refer to Brennan CJ's willingness to consider the application of the fiduciary concept to a new native title situation: *Wik Peoples v Queensland* (1996) 187 CLR 1, 95-96. Although he did not find a Crown-Aboriginal fiduciary relationship based on the facts of the case which related to the issue of whether a pastoral lease extinguished native title.

1152 *R v Sparrow* (1990) 70 DLR (4th) 385, 408. Also refer to *Guerin v The Queen* (1984) 13 DLR (4th) 321, 334, 361; C Hughes 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16 U New South Wales L J 70; S Dorsett 'Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*' (1996) 8 Bond L Rev 158;

1153 *KM v HM* (1992) 92 DLR (4th) 289. Also refer to N Mullany 'Civil Actions for Childhood Abuse in Australia' (1999) 115 LQR 565, 568.

view, involve a leap not easily to be justified in terms of conventional legal reasoning.[1154]

The decisions of the Australian courts in relation to fiduciary duty hold little solace for the Aboriginal separated children. If any further convincing was needed, it came in the form of the other major Aboriginal separated case of *Cubillo*. Justice O'Loughlin regarded that as trial judge it was not appropriate for him to expand the tentacles of Australian fiduciary law into matters of non-economic interests.[1155] The Full Court of the Federal Court held no differently saying: 'Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a matter that conflicts with established tortuous and contractual principles.'[1156]

The Australian fiduciary jurisprudence is unsatisfactory in relation to sexual and physical abuse in the context of a guardianship duty. As Canadian academic Nathalie Des Rosiers has written, the distinction between economic and non-economic interests is not all convincing in that children who have suffered childhood sexual abuse may have their ability to work in later life severely affected.[1157] No fanciful leap in imagination or reasoning is required to hold the view that the education of a child may be severely interrupted or affected if that child is the subject of sexual or physical abuse by a guardian.

And herein lies the other major criticism of Australian fiduciary law in these matters. Childhood abuse, especially sexual abuse, can lead to severe psychological trauma,[1158] the anecdotal and empirical evidence collected by the ALSWA will have testified to that.[1159] While tort law can award damages in these cases, and even exemplary damages, it does not have the doctrinal basis to adequately recognise the associated breach of trust. Tort law does not differentiate between the stranger who commits the abuse and the guardian who does so (although the imposition of punitive damages may to a degree), but the point is the child may do and the criminal law

1154 *Paramasivam v Flynn* (1998) 160 ALR 203, 219.
1155 *Cubillo Trial* (2000) 103 FCR 1, 408.
1156 *Cubillo Appeal* [(2001) FCR 455, 576.
1157 N Des Rosiers 'Childhood Sexual Abuse and the Civil Courts' (1999) 7 Tort L Rev 201, 202.
1158 A Marfording 'Access to Justice for the Survivors of Child Sexual Abuse' (1997) 5 Tort L Rev 221.
1159 ALSWA (1996) 50-57.

does.[1160] Moreover, when a child is abused by someone who society, and in the context of the historical study in question, the government has placed in a position of trust and power over the child, it is arguable that the injury to the relationship of trust is as or even more damaging than the injury to the body.[1161]

The fact remains though, that Australian fiduciary law is hostile to allowing fiduciary law to come to the assistance of children who have suffered sexual or physical abuse in the context of a guardianship relationship, or for that matter who have suffered any loss or damage to their non-economic interests. However, persuasive arguments may well be able to be made that the guardianship-child relationship is a sub-category of the fiduciary relationship, which should protect non-economic interests of separated Aboriginal child plaintiffs.[1162] As identified earlier in this thesis many of the duties of guardians relate to non-economic personal interests that in order to be protected require the imposition of positive duties on the guardian.[1163] Not just a duty to protect from harm, which is of particular relevance in the context of sexual and physical abuse, but duties in relation to maintenance, well-being and education (including religion and culture).[1164] However, the Aboriginal child separation cases of *Williams*[1165] and *Cubillo*[1166] did not argue a special case in relation to the guardianship fiduciary role of the State. For example in *Cubillo*, the plaintiffs concentrated on the traditional narrow fiduciary duty of the no conflict rule. Basically it was argued that the interests of the State, to *inter alia*, assimilate the separated Aboriginal children into mainstream society, conflicted with the interests of the plaintiffs, to *inter alia*, maintain their connection with their family and culture group.[1167]

Perhaps the plaintiffs should have focused on the guardianship nature of the fiduciary relationship between the State guardian and the separated children. A argument could have been made that in relation to the guardianship fiduciary relationship, the court

1160 For example, the Criminal Code Compilation Act 1913 (WA), ss 320, 322 and 329, Schedule 1.
1161 N Des Rosiers (1999) 203.
1162 A Jones 'The State and the Stolen Generation: Recognising a Fiduciary Duty' (2002) 28 Monash U L R 59.
1163 A Jones (2002) 59, 80.
1164 Refer to 59-67, 200-211 of thesis.
1165 *Williams [No 2]Trial* (1999) 25 Fam L R 86.
1166 *Cubillo Trial* (2000) 103 FCR 1.
1167 *Cubillo Trial* (2000) 103 FCR 1, 407.

should recognise the protection of non-economic interests, because many of the duties relate to fundamental personal interests such as well being, protection from harm and education (although all these interest and especially the later have possible economic consequences in future life such as affecting the employability of the person). Moreover, an argument based on developing the guardianship relationship as a special category, may improve the chances of accommodating the recognition of prescriptive duties. For example, as cited earlier in this chapter, in *Bennett v Minister for Community Welfare*, where the plaintiff did not receive appropriate legal advice on his right to sue the Director of Community Welfare, Mason CJ, Deane and Toohey JJ commented: 'the duty of care appears to have been equated to, even derived from, a fiduciary duty owed by the Director to the appellant arising out of his statutory office of guardian. That fiduciary duty was a positive duty to obtain independent legal advice with respect to the possible existence of a cause of action … .[1168] Further, the special nature of the guardianship relationship was recognised in the separate judgment of McHugh J where he held that in addition to a general duty of care the Director had to the ward to obtain legal advice for him, that obligation of obtaining legal advice also 'arose out of the guardianship and out of circumstances which occurred during the course of the guardianship.'[1169]

It is the non-economic personal interests that are the cornerstone of the guardianship duty to always act in the best interest of the child that warrants recognition by the Australian judiciary of a fiduciary duty cause of action in relation to the Aboriginal child separation cases. This relates to all the duties of guardianship relevant to the Aboriginal child separation context but no more so than in respect to the duty to ward off harm. To ward off harm and ensure the well-being of the child under care goes to the crucial trust element of the guardian – child relationship. And it is here that in many cases that the senior public servants and ultimately the State failed the separated Aboriginal children. Moreover, in relation to the historical study under investigation, it is the alleged wrongs of sexual and/or gross physical abuse that are probably most indefensible. Such wrongs are not amenable to historical defences and they go to the heart of the guardian's duty to ward off any harm to the child.

1168 (1992) 176 CLR 408, 411.
1169 (1992) 176 CLR 408, 431.

While there are no suggestions that the Chief Protector of Aborigines or Commissioner of Native Affairs, the legal guardian of the separated Aboriginal children, personally abused the children, it is he who placed these children in a trust situation where they were vulnerable to abuse. And the State failed to ensure adequate supervision against abuse. Here we have a number of breaches of trust. There is the breach of trust between the child and the perpetrator of the physical offence, often being the mission worker, supervisor or foster father. Then there is the breach of trust between the Chief Protector or Commissioner and the child, as the public servant failed to ward off the harm. Then there is the breach of trust between the State and the child, with the State creating a legislative and policy scheme that allowed children to be placed in vulnerable and dangerous situations but failed to ensure an adequate and properly funded supervisory system.

Fiduciary law is better placed than tort or contract law to recognise abuses of trust resulting in harm to the fundamental personal interests of the separated Aboriginal children. Because fiduciary law has developed to prevent abuses in trust relationships, where the duties of loyalty and fidelity to the person owed that trust are sacrosanct. However, while this may be the case, and while I have presented an argument based on the law of guardianship as to why the Australian courts should allowed fiduciary law to protect the non-economic personal interests of former separated Aboriginal children, the fact is that the Australian judiciary remains firmly opposed to such an expansion of the fiduciary principle. In any case, even if the guardianship fiduciary argument presented here ever did persuade the Australian courts, separated Aboriginal child plaintiffs face other litigation difficulties.

4 The Passage of Time

Basing an action in equity, such as on breach of fiduciary duty, does have the added bonus of possibly circumventing limitation statutes. This approach was commented on in the Court of Appeal hearing in the case of *Williams* where the court said: 'The claim based on breach of fiduciary duty caused the limitation period to be extended in 1994. It loomed very large in the submissions to the trial judge and in the written submissions on the appeal. But it shrank to complete insignificance in oral argument on the appeal.'[1170] It is not proposed here to delve into detail on the issue of statute barred time limitations issues, except to make two points.

First, in some jurisdictions, actions in equity are not caught by the limitation statute[1171] but in others they are. Most notably in this later category are the limitations statutes of Western Australia, which applies to all actions, including equitable actions.[1172]

Secondly, in those jurisdictions where the limitation statutes do not run against actions in equity, or where the statute provides a discretion to grant an extension,[1173] the passage of time that we are dealing with in relation to the Aboriginal child separation cases means that in all likelihood the dictates of prejudice to the respondent and the justice of the case means that the court will decide not to proceed. Either the court will not grant an extension,[1174] when that is required, or in relation to equitable claims not caught by limitation statutes, the court will invoke the equitable defence of laches.[1175] The passage of time creates immense evidentiary problems because witnesses are deceased or unable to be located and memories are vague. This all goes to making it easier for the State to claim it would be grossly unfair to allow an Aboriginal child separation case to proceed against them.[1176]

5 Judging Policy

The courts are not the forum to judge the policies of assimilation that lead to the separation of Aboriginal children from their families. The separation policies and practices were legislated for by Parliament, and not being unconstitutional makes legal

1170 *Williams Appeal* [2000] Aust Torts Reports 81-578, 64,147.
1171 For example, ss 14, 23 and 60G of the Limitation Act 1969 (NSW), have been held to not apply to actions for equitable relief, except by analogy: *Williams [No 1]* (1994) 35 NSWLR 497, 508-511.
1172 Limitation Act 1935 (WA), ss 3, 47A; Crown Suits Act 1947 (WA),. Refer to *Western Australia v Watson* [1990] WAR 248, 316-317. Also note Limitation Act 1969 (ACT), s 11 (1) which applies time barriers for actions in tort and fiduciary duty.
1173 For example, Limitation Act 1981 (NT), s 44(3) (b).
1174 *Cubillo Trial* (2000) 103 FCR 1, 443-444.
1175 *Cubillo Trial* (2000) 103 FCR 1, 447-448.
1176 *Cubillo Trial* (2000) 103 FCR 1, 447-448.

attacks on them difficult.[1177] As O'Loughlin J states: 'This Court has no jurisdiction to review the desirability of policies underlying Acts of the Parliament. It is therefore not open to this Court to review those policies that were enacted in the Ordinances and embodied in the powers conferred by the Ordinances. Those provisions, being valid laws, bind this Court and bind the applicants.'[1178] Although his honour did not find that the separation policies or practices were unlawful it did not stop him criticising those same policies and practices. In concluding his judgment he remarked that the prevailing view of the time was that the best interests of Aboriginal children, particularly 'part-Aboriginal' children, was for them to be assimilated 'into the European mainstream and that the best way to do that was through western style education.'[1179] He goes on to say: 'Having made the decision to remove the child, there was a total disregard of the fact that the child was also part Aboriginal, of the fact that the child's mother or family with whom the child was living was or were Aboriginal and the fact that the child had been brought up only aware of Aboriginal culture and unaware of European culture.'[1180]

It was this insensitivity and disregard of the child's aboriginality and connection to their Aboriginal family that 'those in authority stand condemned on today's standards.'[1181] But this does not necessarily equate to a legal wrong or legal liability as the *Cubillo* decision demonstrably reinforces.

Even if the courts are prepared to pass (moral) judgment on the policy of Aboriginal child separations or assimilation, the courts have a difficult task. Although the policy and scheme was underpinned by racist beliefs, it was also motivated in part, at least, by the contemporary prevailing view that it was in the children's best interest to be separated from their Aboriginal families and culture and assimilated into the dominant non-Aboriginal society.

This conflicting base for the transfer of guardianship and child separations creates a dilemma for those seeking to criticise or judge the laws and policies of separation. As Eekelaar comments about the difficulty in passing moral judgment on the

1177 In the Northern Territory context, refer to *Kruger* (1997) 190 CLR 1.
1178 *Cubillo Trial* (2000) 103 FCR 1, 367.
1179 *Cubillo Trial* (2000) 103 FCR 1, 482.
1180 *Cubillo Trial* (2000) 103 FCR 1, 482.

proponents and actors in the emigration of British children to the colonies,[1182] the same difficulty is encountered with the historical Aboriginal child separation issue. Specifically, Eekelaar writes that the proponents of the emigration scheme were motivated 'in their mission of rescue and the vision of exploiting lands of endless opportunities. In their perception, the children were seen as a kind of raw material, fresh vessels receptive to the influences of the new environment, which would drive out whatever pernicious residue remained in them from the old.'[1183] The proponents of the Aboriginal child separations were in part at least motivated by a belief that the only way these children could be 'rescued' was to separate or remove them from the influences of their parents and families and rear them in the ways of the whites.

However, it is not so difficult to pass moral judgment or for that matter unreasonable to have the courts pass legal judgment on the guardianship conduct of the State and those it entrusted with the guardianship duties. It is one thing to say that the policies and laws that allowed separation from families and the granting of State guardianship are not justiciable, but it is another thing to pass legal judgment on the historical post separation guardianship. However, as we have seen, for a number of reasons litigation of this history has not borne favourable results for the Aboriginal plaintiffs. The demand for justice, as perceived by members of the separated Aboriginal children group, is unlikely to come by way of a judicial solution. One must look to an extra judicial political solution.

POLITICAL SOLUTION

It is not proposed here to provide a model for a political solution. This would be too ambitious a task and it is not the aim of this thesis. This thesis set out to investigate a historical issue through a guardianship paradigm. The guardianship paradigm was selected because it allowed an exploration of the legal responsibilities the State and/or its officials had to comply with as a result of the Western Australian Parliament legislatively creating a scheme or system that separated Aboriginal children from their

---

1181 *Cubillo Trial* (2000) 103 FCR 1, 482.
1182 J Eekelaar (1996) 556.
1183 J Eekelaar (1996) 551.

families to be raised in the ways of the dominant British-European culture. This exercise also allowed a discussion of the political and social forces and dynamics that shaped the separation scheme. But most importantly, for the first time, the root of the relationship between the State and the separated children has been investigated in detail, that relationship being a guardianship relationship.

Having done that, and having investigated the litigation pathway that some separated Aborigines have taken in response to the allege breaches of guardianship duties, it is clear that the Australian judicial system has not provided and is unlikely to provide satisfaction to the Aboriginal community. This necessitates a political solution to the issue. This is not a novel idea, and has been part of the political and community debate in Australia since the release of the HREOC National Inquiry report in 1997.[1184] The Western Australian government, other State governments and the Commonwealth government have made some attempts at political solutions through various reparations measures[1185] that have been canvassed elsewhere.[1186] But what remain the most

1184 HREOC (AGPS Canberra 1997).

1185 For discussion of reparations generally, refer to Justice Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 American J of International L 863; H Wagatsuma and A Rosett 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 Law and Society Rev 461; JO Haley 'Comment: The Implications of Apology' (1986) 20 Law and Society Rev 499; DF Orentlicher, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation' in L Henkin and JL Hargrove, (edd) *Human Rights: An Agenda for the Next Century,* (The American Society of International Law Washington DC 1994) 425-426;.T van Boven *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117* (U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996) 2; HJ Steiner and P Alston *International Human Rights in Context: Law, Politics and Morals* (Clarendon Press Oxford 1996) 1081-1109; S Pritchard 'The Stolen Generations and Reparations' (1997) 21 U of New South Wales L J 259; M Minow, *Between Vengeance and Forgiveness* (Beacon Press Boston 1998); M Gannage *An International Perspective: A Review and Analysis of Approaches to Addressing Past Institutional or Systemic Abuse in Selected Countries* (Law Commission of Canada Ottawa 1998); J Allen 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission (1999) 49 U of Toronto L J 315;E Barkan *The Guilt of Nations* (WW Norton & Company New York 2000); D Grace, 'The question of an apology: reconciliation and civility' (2001) 7 Australian J of Human Rights 77; T Govier and W Verwoerd 'Taking Wrongs Seriously: A Qualified Defence of Public Apologies' (2002) 65 Saskatchewan L Rev 139; J Waldron 'Redressing Historic Injustice' (2002) 52 U of Toronto L J 135.

1186 For a discussion on what reparations have been forthcoming to date, refer to I Scanlan 'An Analysis of the Western Australian Government's Response to the Recommendations of the Bringing Them Home Report' (School of Politics and International Studies Parliamentary Internship Programme Murdoch University 2000); The Parliament of the Commonwealth of Australia, Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations: The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (AGPS Canberra 2000); A Cornwall *Restoring Identity* (Public Interest Advocacy Centre Sydney 2002).

outstanding issues are an apology by the Commonwealth Parliament and the establishment of a compensation tribunal. Even though historically, except in the case of the Northern Territory, it was the State governments that established and maintain the separation schemes, in contemporary Australian society it is the Commonwealth Government that has dominated the debate on this issue and from whom the Aboriginal and non-Aboriginal community have demanded national leadership.

A political solution may offer some recognition of the seriousness of breaches of guardianship duty, especially in relation to physical and sexual abuse that a successful (unlikely) action in fiduciary duty may also do but that tort law would struggle to do. Monetary compensation can never fully compensate for the harm done, but it is a symbolic gesture that can provide vindication to the person wronged.[1187] The payment of monetary compensation accommodates 'the acceptance of government responsibility even where that is not demanded by law, even where the Government could rely on the legal positivism it relies on in relation to responsibility' for the Aboriginal child separated class.[1188] In relation to a parliamentary apology, which the current Australian Prime Minister, Hon Mr John Howard, has consistently refused to make[1189] the significance could even be greater. It may go to restoring dignity to those that were wronged and it may also, like monetary compensation, provide public acceptance by the Government that the State is ultimately responsible for the breaches of the child best interest principle and breaches of trust and care that go to the heart of a guardianship relationship.[1190]

In concluding this section and this chapter, it is argued that the guardianship analysis, while not offering great hope in relation to legal redress, may provide added impetus towards a political non-legal solution to the demands for reparations. Up to now, the advocates of the 'separated class' have argued in general terms about the wrongs or evils of separation and assimilation. There has been a lack of attention on the

1187 S Pritchard (1997) 264.

1188 J Cockayne 'More Than Sorry: Constructing a Legal Architecture for Practical Reconciliation' (2001) Sydney L Rev 577, 582.

1189 Cf: Transcript of the Prime Minister The Hon. John Howard MP Motion of Reconciliation 26 August, 1999 [Internet] URL <http://www.pm.gov.au/media/pressrel/1999/reconciliation2608.htm> 1.

1190 On apologies generally, refer to N Tavuchis *Mea Culpa* (Stanford University Press Stanford 1991); T Govier and W Verwoerd (2002) 139.

guardianship relationship between the legislatively created State guardians and the separated Aboriginal children. This has been a major failing by the advocates of the separated children. The guardianship analysis brings to the fore the failings of the State guardians to adequately attend to their duties. Even allowing for caution in passing moral judgment on past accepted practices, the fact remains that the State guardians failed in their most basic duty to adequately provide for the long term welfare of the separated children, to ward off harm to some of these children and to adequately investigate allegations of maltreatment. These failings in complying with duties that are paramount to the guardianship relationship add to the severity of the State's culpability and thus provide a higher order political argument for awarding of reparations.

CHAPTER EIGHT

CONCLUSION

This thesis has explored and examined the history of Aboriginal child welfare policy in Western Australia. This historical scheme allowed thousands of Aboriginal children to be separated from their families. From the time of British-European settlement in Western Australia in 1829, governments have interfered in the lives of Aboriginal people. A vital component of Aboriginal affairs in Western Australia, as in all Australia, has been the separation of Aboriginal children from their families. Equally important, as closely linked to the practice of separations, has been the question of Aboriginal child rearing and education.

From the time Captain Stirling established the Swan River Colony in 1829, colonialists have interfered in Aboriginal life. The Imperial Government instructed Captain Stirling to Christianise, civilise and educate the Aborigines. This instruction has been played out in policy and legislation that has interfered in nearly all aspects of the lives of Aborigines. Terms such as protection, segregation, biological absorption and assimilation have been used to describe the legislative-policy dimension of Aboriginal affairs in Western Australia. While these terms have different emphasis, they are all part of the one continuum – a policy to control the interaction of Aborigines with non-Aborigines and, where possible, move Aborigines into the dominant British–European legal-political-economic-social-cultural system. For much of the period under examination in this thesis and particularly during the first six decades of the twentieth century, the cornerstone of this policy objective was the separation of Aboriginal children from their families. The emphasis was placed on separating the lighter coloured children, as they were considered more 'saveable' and 'educable'. In practice, however, the net was caste wider, to catch more than the so-called half-caste children.

There is little doubt that the policy of separating Aboriginal children from their families was in part driven by benevolent paternalistic motives – that is, it was thought that Aboriginal children were best served by being separated from their families, institutionalised and raised in 'mainstream' society. Even though for much of the period under consideration, separation of children from their families was considered to be a measure of last resort under mainstream child welfare policy, this was not the case for Aboriginal children. This is because the policy of Aboriginal child separations was, at its most basic, founded on a racist ideology – specifically, the inferiority of the Aboriginal culture.

This policy of separating Aboriginal children from their families to be raised in the 'white way' was underpinned by an intrusive legislative scheme that made the Chief Protector of Aborigines or the Commissioner of Native Affairs the legal guardians of all Aboriginal children regardless if they had living parents or not.[1191] In some cases though, when the Aboriginal child was separated pursuant to general child welfare legislation, guardianship was granted to the relevant child welfare department or its Director or the head of the private society to which the child was sent to. However, the statutes, Aboriginal specific or mainstream, remained relatively silent on the content of the guardianship duties. Thus to ascertain these duties of guardianship one has to rely on the common law.

The common law jurisprudence on guardianship is grounded in the principles and jurisdiction of equity. It has developed with one overriding principle – the guardian, whether a parent or non-parental guardian, including a State guardian, must always act in the best interest of the child. The best interest of the child is the first and paramount principle of guardianship and child welfare law. Thus, the State guardian, in this case the Chief Protector of Aborigines or the Commissioner of Native Affairs (or sometimes the child welfare department or its Director or the head of the private society), had an overriding duty to act in a way that was best for the child.

The common law has identified a number of guardianship duties that seek to protect the child from physical, sexual, psychological and emotional harm and which aim to enhance the intellectual and psychological development of the child. From this, we know that the guardian of the separated Aboriginal children had a duty to protect them

1191 Although there were some delimitations on what Aboriginal children were governed by the guardianship powers. Refer to the discussion on the various 'Aborigines and Native Welfare Acts' in Part II of the thesis.

from harm and to provide for their maintenance and education. The guardian also had a duty to show affection to these children and to provide for their emotional support.

Unfortunately, according to testimonies and some corroborating official documents, many children were not protected from physical or sexual abuse or provided with adequate or appropriate secular and religious education. Also, the duty to provide for affection and emotional support was often violated; children were denied their Aboriginal culture and heritage and deprived of familial contact.

Although it may be difficult to make direct causal linkages, there is little doubt that many of the physical, psychological and social problems and harms endured by many Aborigines children separated from their families resulted from the separation and institutionalisation that followed. Many of these effects have been long enduring and trans-generational.

While some may argue that you cannot criticise or judge, legally or morally the policy of separation – because it was what was thought best at the time[1192] - no such argument can be made in respect to breaches of guardianship duties. It has never been the case that government or the general community has condoned or approved of physical, sexual or psychological harm to children, whether from a parental or non-parental guardian.

Of course, the harm and damage to those separated raises issues of responsibility. There is no doubt that the missions and other bodies that were in charge of the institutions that housed and raised the children are partly responsible for these guardianship breaches and consequential damage. But the inadequate monitoring and inspection of the missions and institutions is also a serious breach of accountability on the part of the State guardian and ultimately the State that appointed the guardian and established the scheme of separation.

Some Aborigines who were separated from family as children have sought legal redress through the courts. Whether the causes of actions have been based on the

[1192] Although as discussed in Part II and III, this was not a universally held view.

constitution, fiduciary law or tort, the results have all been the same – failure for the plaintiffs.

This thesis has argued that guardianship law has been neglected or under-utilised in litigation thus far. It is argued the courts should see the guardianship relationship as a sub-category of the fiduciary relationship requiring protection of the non-economic personal interests of the separated Aboriginal children. However, it is acknowledged that the protection of non-economic interest is foreign to Australian fiduciary jurisprudence. It is furthered acknowledged that the separated Aboriginal children also face legal hurdles emanating from the 'passage of time' and the justiciablity of the assimilation policies.

The difficulties with judicial redress demand a political solution to the calls for justice by the separated Aboriginal children. A political solution may offer some recognition of the seriousness of the breaches of guardianship duty, especially in relation to physical and sexual abuse suffered by those separated from families and institutionalised.

In relation to advocating for a political solution, guardianship law, as is the case with litigation, has been under-utilised. The seriousness of the breaches of guardianship duties, especially in relation to the pivotal guardianship duty of protection from harm, provides added political impetus for awarding non-legal reparations. There is considerable political force in examining and demonstrating the failings of the State guardians, who by legislation were made responsible for the welfare of the separated Aboriginal children.

This thesis commenced with an extract from the famous 1992 'Redfern speech' of then Prime Minister of Australia, the Hon Mr Paul Keating acknowledging the State's culpability in the Aboriginal separation process. This thesis ends with another quote from that speech, where the Prime Minister stresses the need to provide justice for those Aborigines separated from their families: 'We simply cannot sweep injustice aside. Even if our own conscience allowed us to, I am sure, that in due course, the world and the people of our region would not.'[1193]

[1193] The Honourable Prime Minister, Paul Keating MP 'Speech by the Honourable Prime Minister, PJ Keating MP Australian Launch of the International Year for the World's Indigenous People: Redfern 10 December 1992' (1993) 3 Aboriginal L Bulletin 4, 4. It should be noted that the Prime Minister was also referring to other alleged injustices such as dispossession of land.

BIBLIOGRAPHY

Books and Book Chapters

A Armitage Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand (UBC Press Vancouver 1995)

D Austin I Can Picture the Old Home So Clearly: The Commonwealth and 'Half-caste' youth in the Northern Territory 1911-1939 (Aboriginal Studies Press Canberra 1993)

T Austin Never Trust a Government Man: Northern Territory Aboriginal Policy 1911 – 1939 (Northern Territory University Press Darwin 1997)

E Barkan *The Guilt of Nations* (WW Norton & Company New York 2000)

P Bean and J Melville *Lost Children of the Empire* (Unwin Hyman London 1989)

Q Beresford and P Omaji *Rites of Passage* (Fremantle Arts Centre Press Fremantle 1996)

Q Beresford and P Omaji, *Our State of Mind* (Fremantle Arts Centre Press Fremantle 1998)

RM Berndt *Australian Aboriginal Religion* (Brill Leiden 1974)

RM & CH Berndt *The World of the First Australians* (Angus and Robertson London 1964)

W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) (Special edition LB Adams Jr The Legal Classics Library Birmingham Alabama 1983)

P Birks *An Introduction to the Law of Restitution* (revd edn Clarendon Press Oxford 1989)

P Biskup *Not Slaves Not Citizens* (University of Queensland Press St Lucia 1973)

J Blancher W*hen There's No Place Like Home* (Paul Brookes Publishing Company Sydney 1994)

GC Bolton 'Black and White after 1897' in CT Stannage (ed) *A New History of Western Australia* (University of Western Australia Press Nedlands 1982)

J Bowlby *Maternal Care and Mental Health* (World Health Organisation Geneva 1951)

P Brock 'Aboriginal Families and the Law in the Era of Assimilation and Segregation, 1890s – 1950s' in D Kirby (ed) *Sex Power and Justice Historical Perspectives on Law in Australia* (Oxford University Press Melbourne 1995)

P Brock Outback Ghettoes: Aborigines, Institutionalisation and Survival (CUP Cambridge 1993)

PM Bromley *Family Law* (3rd ed London Butterworths 1962) PW Nichols *Police Powers in Western Australia 1829-1970* (PhD Thesis Law Faculty University of Western Australia 2002)

WW Buckland A Textbook of Roman Law from Augustus to Justinian (2nd ed CUP Cambridge 1933)

AC Castles *An Australian Legal History* (Law Book Company Sydney 1982)

JCD Clark *English Society 1688-1832* (CUP Cambridge 1985) 409

BM Coldrey The Scheme: The Christian Brothers and Childcare in Western Australia (Argyle-Pacific Publishing Perth 1993).

A Cornwall *Restoring Identity* (Public Interest Advocacy Centre Sydney 2002)

C Darwin *The Origins of Species* (The Modern Library New York 1936).

G Davidson (ed) The Oxford Companion to Australian History (OUP Melbourne 1998)

R Storry Deans *The Law of Parent and Child, Guardian and Ward* (Reeves and Turner London 1895)

A Dickey *Family Law* (3rd ed Law Book Company North Ryde 1997)

J Eekelaar 'Families and Children: From Welfarism to Rights' in C McCrudden and G Chambers (eds) *Individual Rights and the Law in Britain* (Clarendon Press Oxford 1994)

J Eekelaar '"The Chief Glory": The Export of Children from the United Kingdom' in N Lowe and G Douglas (eds) *Families Across Frontiers* (Netherlands Kluwer Academic Publishers 1996)

WP Eversley *The Law of the Domestic Relations* (3rd ed Stevens and Haynes London 1906)

H A Finlay and R J Bailey-Harris *Family Law in Australia* (4th ed Butterworths Sydney 1989)

P Finn 'Claims against Government Legislation' in P Finn (ed) *Essays on Law and Government* (Law Book Company Sydney 1996)

P Finn 'The Fiduciary Principle' in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell Toronto 1989)

P Finn *Fiduciary Obligations* (Law Book Company Sydney 1997)

J Fonblanque *A Treatise of Equity* (J and W T Clarke London 1820)

H Gamble *Law for Parents and Children* (2nd ed The Law Book Company Sydney 1986)

W Grayden *Adam and Atoms* (Frank Daniels Pty Ltd Perth 1957)

N Green 'Aborigines and White Settlers in Nineteenth Century' in C T Stannage (ed) *A New History of Western Australia* (University of Western Australia Press Nedlands 1981)

N Green *The Forrest River Massacres* (Fremantle Art Press Fremantle 1995)

M Grossberg *Governing the Hearth* (Studies in Legal History University of North Carolina Press Chapel Hill 1985)

A Haebich *Broken Circles* (Fremantle Arts Centre Press Fremantle 2000)

A Haebich *For Their Own Good* (University of Western Australia Press Nedlands 1988)

A Haebich and A Delroy The Stolen Generations: Separation of Aboriginal Children from their Families in Western Australia (Western Australian Museum Perth 1999)

R W Harding R Broadhurst A Ferrante and N Loh *Aboriginal Contact with the Criminal Justice System* (Hawkins Press Annadale 1995)

F Hargrave and C Butler (eds) E Coke The First Part of the Institutes of the Laws of England: A Commentary upon Littleton (15th ed W Clarke London 1817)

F Hart *Western Australia in 1891* (Sands & McDougall Perth 1891)

P Hasluck Black Australians: *A Survey of Native Policy in Western Australia, 1829-1897* (2 ed Melbourne University Press Melbourne 1970)

W Holdsworth *History of English Law* (2nd ed (4th reprint) Methuen Sweet & Maxwell London 1987)

W Holdsworth *History of English Law* (4th ed (3rd reprint) Metheun Sweet & Maxwell London 1983)

W Holdsworth *History of English Law* (4th ed (6th Impression) Metheun Sweet & Maxwell London 1982)

J Isdell 'Northwest District Report' in Chief Protector C Gale *Annual Report of Aborigines Department 1909* (Government Printer Perth 1909)

P Jacobs *Mister Neville* (Fremantle Art Centre Press Fremantle 1990)

B Kercher An Unruly Child: A History of Law in Australia (Allen & Unwin Sydney 1995)

GW Knowles A Treatise on the Law and Practice Relating to Infants (4th ed Sweet & Maxwell London 1926) 121

G W Knowles *Simpson on the Law of Infants* (4th ed Sweet and Maxwell London 1926)

R van Krieken *Children and the State* (Allen & Unwin North Sydney 1992)

EM Leonard *Early History of English Poor Relief* (Frank Cass & Co London 1965)

L Lippmann *Generations of Resistance: Aborigines Demand Justice* (2nd ed Longman Cheshire Melbourne 1992)

George Long 'Curators' in William Smith (ed) *A Dictionary of Greek and Roman Antiquities* (John Murray London 1875)

KJ Maddock 'Aboriginal Customary Law' in P Hanks and B Keon-Cohen (eds) *Aborigines and the Law* (Allen & Unwin Sydney 1984)

LR Marchant *Aboriginal Administration in Western Australia:1886-1905* (Australian Institute of Aboriginal Studies Canberra 1981)

A Markus *Governing Savages* (Allen and Unwin Sydney 1990)

M Mason *From Father's Property to Children's Rights* (Columbia University Press New York 1994).

J Mason 'Introduction: Analysing Child Welfare Policy' in J Mason (ed) *Child Welfare Policy: Critical Australian Perspectives* (Hale and Iremonger Sydney 1993)

EJ Mellor *Stepping Stones* (Harcourt Brace Jovanovich Sydney 1990)

M Minow *Between Vengeance and Forgiveness* (Beacon Press Boston 1998)

CH Monro (tr) *The Digest of Justinian* (CUP Cambridge 1904)

L H Morgan Ancient Researches: Or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization (Introduction and annotations E Burke Leacock) (World Publishing Company Cleveland 1963)

JB Moyle (tr) *The Institutes of Justinian* (4th ed Clarendon Press Oxford 1906)

AO Neville Australian's Coloured Minority: Its Place in the Community (Currawong Publishers Sydney 1947

C Norton Separation of the Mother and Child by the Law of Custody of Infants Considered (Roake & Varty London 1838).

DF Orentlicher, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation' in L Henkin and JL Hargrove, (edd) *Human Rights: An Agenda for the Next Century,* (The American Society of International Law Washington DC 1994)

I Pinchbeck and M Hewitt *Children in English Society* (Routledge and Kegan Paul London 1973)

J Raz *The Morality of Freedom* (Clarendon Press Oxford 1989) 166

P Read The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969 (NSW Ministry of Aboriginal Affairs Sydney 1981) Occasional Paper No 1

H Reynolds *Aboriginal Sovereignty* (Allen & Unwin St Leonard's 1996)

H Reynolds Dispossession: Black Australia and White Invaders (Allen & Unwin Sydney 1989)

J Rose For the Sake of the Children: Inside Dr Barnardo's: 120 Years of caring for children (Hodder & Stoughton London 1987)

E Russell (Edited and completed by FM Robinson and PW Nichols) *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Nedlands 1980)

M Sanger, 'Dangers of Cradle Competition', in CJ Bajema (ed) *Eugenics Then and Now* (Dowden Hutchinson and Ross, Stroudsbourg Pennsylvania 1976)

G Spence The Equitable Jurisdiction of The Court of Chancery (Lea & Blanchard Philadelphia 1846)

HJ Steiner and P Alston International Human Rights in Context: Law, Politics and Morals (Clarendon Press Oxford 1996)

Hon Mr Justice Story *Commentaries on Equity Jurisprudence* (11th ed Stevens and Haynes London 1873)

Hon Mr Justice Story *Commentaries on Equity Jurisprudence* (15th ed Stevens and Haynes London 1884)

LI Stranger-Jones *Eversley's Law of Domestic Relations* (6th ed Sweet and Maxwell London 1951)

P Swan and B Raphael 'Ways Forward': National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health Parts 1 and 2 (AGPS Canberra 1995).

T Swain *Aboriginal Religions in Australia* (Greenwood Publishing Group Sydney 1991

N Tavuchis *Mea Culpa* (Stanford University Press Stanford 1991)

R Tokinson *The Mardu Aborigines: living the dream in Australia's desert* (2nd ed Holt Rinehart and Winston Fort Worth 1991).

United Nations Department of Social Affairs *Children Deprived of Normal Home Life* (United Nations Department of Social Affairs Geneva 1952)

C Viner *General Abridgement of Law and Equity* (GGJ & J Robinson London 1793)

David Wallace Adams Education for Extinction: American Indians and the Boarding School Experience 1875-1928 (University Press of Kansas Kansas 1995)

S Webb and B Webb *English Poor Law Policy* (Longmans Green and Co London 1910)

Articles

S Abramowicz 'English Child Custody, 1660-1839: The Origin of Judicial Intervention in Paternal Custody' (1999) 99 Columbia L Rev 1344

J Allen 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission (1999) 49 U of Toronto L J 315

M Bailey 'England's First Custody of Infants Act' (1995) 20 Queen's L J 391

P Batley 'The State's Fiduciary Duty to the Stolen Generations' (1996) 2 Australian J of Human Rights 177

S Berns 'Women in English Legal History: Subject (almost), Object (irrevocably), Person (not quite)' (1993) 12 U of Toronto L Rev 26

M Brandl 'The Aboriginal Children and Families Heritage Project' (1980) 5 Australian Child and Family Welfare 20

R Brunton 'Betraying the Victims: The "Stolen Generations" Report' (1998) 10 IPA Backgrounder 1

A Charlton 'Conceptualising Aboriginality: reading AO Neville's Australia's Coloured Minority' (2001) 2 *Australian Aboriginal Studies* 47

E Clark 'City Orphans and Custody Laws in Medieval England' (1990) 34 American J of Legal History

E Clark 'The Custody of Children in English Manor Courts' (1985) 3 Law and History Rev 333

J Clarke 'Commonwealth Not Liable: Cubillo and Gunner v Commonwealth' (2000) 5 Indigenous L Bulletin 11

J Clarke 'Cubillo v Commonwealth' (2001) 1 U of Melbourne L Rev 218

J Cockayne 'More Than Sorry: Constructing a Legal Architecture for Practical Reconciliation' (2001) Sydney L Rev 577

B Cummings J Blokland and R La Forgia 'Lessons from the Stolen Generations Litigation' (1997) 19 Adelaide L Rev 25

L Custer 'The Origins of the Doctrine of Parens Patriae' (1978) 27 Emory L J 195

N Des Rosiers 'Childhood Sexual Abuse and the Civil Courts' (1999) 7 Tort L Rev 201

S Dorsett 'Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*' (1996) 8 Bond L Rev 158

JM Eekelaar 'What are Parental Rights?' (1973) 89 LQR 210

H Finlay '"First" or "Paramount"? The Interests of the Child in Matrimonial Proceedings' (1968) Australian L J 96

P Finn and KJ Smith 'The Citizen, the Government and "Reasonable Expectations"' (1992) 66 Australian L J 139

M Flynn and S Stanton 'Trial by Ordeal: The Stolen Generation in Court' (2000) 25 Alternative L J 75

M Francis 'Social Darwinism and the Construction of Institutionalised Racism in Australia' (1996) 50 J of Australian Studies 90

T Govier and W Verwoerd 'Taking Wrongs Seriously: A Qualified Defence of Public Apologies' (2002) 65 Saskatchewan L Rev 139

D Grace 'The question of an apology: reconciliation and civility' (2001) 7 Australian J of Human Rights 77

JO Haley 'Comment: The Implications of Apology' (1986) 20 Law and Society Rev 499

JC Hall 'The Waning of Parental Rights' (1972) 31 CLJ 248

R H Helmholz 'The Roman Law of Guardianship in England, 1300-1600' (1978) 52 Tulane L Rev 223

W Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 32 Yale L J 16

MC Howard *Aboriginal Politics in South-western Australia* (University of Western Australia Press Nedlands 1981).

P Howson 'Rescued from the Rabbit Burrow' (1999) June Quadrant 10

C Hughes 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16 U New South Wales L J 70

F Johns and V Joiner Bowers 'Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century – A March of Folly? Or Just a Mask of Virtual Reality?' (1997) 27 Stetson L Rev 1

A Jones 'The State and the Stolen Generation: Recognising a Fiduciary Duty' (2002) 28 Monash U L R 59

Rvan Krieken 'Is assimilation justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' (2001) 23 Sydney L Rev 239.

R Manne 'In Denial: The Stolen Generations and the Right' (2001) 1 The Australian Quarterly Essay 3

A Marfording 'Access to Justice for the Survivors of Child Sexual Abuse' (1997) 5 Tort L Rev 221

R Marsh '"Lost", "Stolen" or "Rescued"?' (1999) Quadrant 15

ML McCall 'An Analysis of Responsibilities in Child Welfare Systems' (1990) 8 Canadian J Family L 345

A Mitchell 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law' (2000) 24 Melbourne U LR 15

N Mullany 'Civil Actions for Childhood Abuse in Australia' (1999) 115 LQR 565

P O'Connor 'History on Trial: Cubillo and Gunner v The Commonwealth of Australia' (2001) 26 Alternative L J 27

S Peters 'The Genocide Case: Nulyarimma v Thompson' [1999] Australian International L J 233

S Pritchard 'The Stolen Generations and Reparations' (1997) 21 U of New South Wales L J 259

B Saul 'The International Crime of Genocide in Australian Law (2000) 22 Sydney L R 527

E Sommerlad 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 Australian Journal of Social Issues 167

D Ritter 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 Sydney L Rev 5

Justice Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 American J of International L 863

G Sawer 'Crown Liability in Tort and the Exercise of Discretions' (1951) 5 Res Judicatae 14

J Seymour 'Parens Patriae and Wardship Powers: Their Nature and Origin' (1994) 14 OJLS 159

W E H Stanner 'On Aboriginal Religion' (1959) 30 Oceania 2

BA Stevens and V Bushell 'The Stolen Generation: Psychological Effects of the Systematic Removal of Indigenous Children from their Families and Culture' (2000) 178 *Ethos* 17

O M Stone 'Jurisdictions Over the Custody and Upbringing of Children in Canada and their Judicial Exercise' (1979) 2 Canadian J Family L 364

M Storey 'Kruger v The Commonwealth: Does Genocide Require Malice?' (1998) 21 U of New South Wales L J 234

S Swain 'The State and the Child' (1998) 4 Australian J Legal History 57

C Tatz 'Australia's Genocide: They Soon Forget Their Offspring' (1991) 55 Social Education 97

H Wagatsuma and A Rosett 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 Law and Society Rev 461

J Waldron 'Redressing Historic Injustice' (2002) 52 U of Toronto L J 135

S S Walker 'Wrongdoing and Compensation: The Pleas of Wardship in Thirteenth and Fourteenth Century England' (1988) 9 J of Legal History 267

WGW White 'A Comparison of Some Parental and Guardian Rights' (1980) 3 Canadian J Family L 219

H Wooten 'Ron Bruton & Bringing then Home' (1998) 4 Indigenous L Bulletin 4

DC Wright 'De Manneville v De Manneville: Rethinking the Birth of Custody Law under Patriarchy' (1999) 17 Law and History Rev 247

Parliamentary, Government and Inquiry Reports

Commissioner of Native Affairs F Bray Commissioner for Native Affairs Annual Report for the year ended 30 June 1940 (Government Printer Perth 1940)

Commissioner of Native Affairs F Bray Annual Report for the Commissioner of Native Welfare for the Year ended 30 June 1945 (Government Printer Perth 1945)

Commissioner of Native Affairs F Bray Annual Report for the Commissioner of Native Welfare for the Year ended 30 June 1945 (Government Printer Perth 1945)

C Choo The Role of the Catholic Missionaries at Beagle Bay in the Removal of Aboriginal Children from their Families in the Kimberley Region: Submission to the Human Rights and Equal Opportunity Commission's Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (C Choo Perth 1996)

Chairman J Forrest Report of a Commission Appointed by His Excellency the Governor to Inquire into the Treatment of Aboriginal Native Prisoners of the Crown in this Colony: And also into certain other matters relative to Aboriginal Natives (Government Printer Perth 1884)

Commissioner E Johnston National Report of the Royal Commission into Aboriginal Deaths in Custody (AGPS Canberra 1991)

Chief Protector of Aborigines C Gale *Annual Report of Aborigines Department 1907* (Government Printer Perth 1907)

Chief Protector of Aborigines C Gale *Annual Report of the Aborigines Department 1910* (Government Printer Perth 1910)

Chairman FE Gare Report of the Special Committee on Native Matters (With Particular Reference to Adequate Finance) (Government Printer Perth 1958)

Australian Senate Senate Community Affairs References Committee Lost Innocents: Righting the Record-Report on Child Migration (AGPS Canberra 2001).

Commissioner Moseley Report of the Royal Commissioner Appointed to Investigate, Report, and Advise Upon Matters in Relation to the Condition and Treatment of Aborigines (Government Printer Perth 1935)

Commissioner of Native Affairs prior to SG Middleton Annual Report for the Commissioner of Native Welfare for the Year ended 30 June 1960 (Government Printer Perth 1960)

Commissioner of Native Affairs SG Middleton Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1953 (Government Printer Perth 1953)

Commissioner of Native Affairs SG Middleton Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1954 (Government Printer Perth 1954)

Commissioner of Native Affairs SG Middleton Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1958 (Government Printer Perth 1958)

Commissioner of Native Affairs SG Middleton Annual Report of the Commissioner of Native Affairs for the Year ended 30th June, 1960 (Government Printer Perth 1960)

Chief Protector of Aborigines O A Neville Annual Report of the Chief Protector of Aborigines for the year ended 30 June 1916 (Government Printer Perth 1916)

Chief Protector of Aborigines O A Neville Annual Report of the Chief Protector of Aborigines for the year ended 30 June 1935 (Government Printer Perth 1935)

HREOC *Bringing them home* (AGPS Canberra 1997)

HREOC Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness (AGPS Canberra 1993)

FEA Bateman *Report on Survey of Native Affairs* (Government Printer Perth 1948)

Family Law Council Watson Committee Report (Wardship, Guardianship, Custody, Access, Change of Name) (AGPS Canberra 1982)

HC Health Committee The Welfare of Former British Child Migrants (HC Paper (1997-1998) no 755)

W S Myles 'Midland District Report' in Commissioner of Native Afairs OA Neville *Annual Report of the Commissioner of Native Affairs for the year ended 30 June 1939* (Government Printer Perth 1939)

Government of Western Australia Report of the Select Committee into Native Welfare in Laverton-Warburton Range Area (Government Printer Perth 1958) 104

The Parliament of the Commonwealth of Australia, Senate Legal and Constitutional References Committee, Healing: A Legacy of Generations: The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home (AGPS Canberra 2000)

Report from His Majesty's Commission for Inquiring into the Administration and Practical Operation of the Poor Laws (British Parliamentary Papers (1834)

Commissioner WE Roth Royal Commission on the Conditions of the Natives Report (Government Printer Perth 1905)

Chief Protector of Aborigines H Prinsep *Annual Report of the Aborigines Department 1901* (Government Printer Perth 1901)

Chief Protector of Aborigines H Prinsep *Annual Report of the Aborigines Department 1902* (Government Printer Perth 1902)

Chief Protector of Aborigines H Prinsep *Annual Report of the Aborigines Department 1906* (Government Printer Perth 1906)

Select Committee of the Legislative Council of Western Australian *Parliament Report of the Select Committee of the Legislative Council on the retirement of Mr CF Gale from the position of Chief Protector of Aborigines* (Government Printer Perth 1915)

Select Committee of the Legislative Council of Western Australian Parliament *Select Committee into Child Migration Interim Report* (Government Printer Western Australia Legislative Assembly 1996)

Sir George Murray Secretary of State for the Colonies *Instruction to Captain Stirling* (Downing Street 30 December 1829)

Lieutenant-Governor James Stirling *Proclamation* (Swan River 18 June 1829)

Commissioner Wood Report of the Royal Commissioner (Government Printer Perth 1927); Commissioner Moseley Report of the Royal Commissioner Appointed to Investigate, Report, and Advise Upon Matters in Relation to the Condition and Treatment of Aborigines (Government Printer Perth 1935)

Commissioner JH Wootten Report of the Inquiry into the Death of Malcolm Charles Smith of the Royal Commission into Aboriginal Deaths in Custody (AGPS Canberra 1989)

Parliament Debated and Hansard

Hansard vol 1 series 155 2RSP Assembly (1 September 1960)

Hansard vol 1 series 107 2RSP Assembly (26 August 1941)

Hansard vol 1 series 113 2RSP Assembly (28 September 1944)

Hansard vol 1 series 113 2RSP Assembly (5 October 1944)

Hansard vol 1 series 119 2RSP Assembly (6 August 1947)

Hansard vol 1 series 97 2RSP Assembly (13 October 1936)

Hansard vol 1 series 97 2RSP Assembly (20 October 1936)

Hansard vol 1 series 97 2RSP Assembly (29 September 1936)

Hansard vol 1 series 97 2RSP Assembly (30 September 1936)

Hansard vol 1 series 97 2RSP Assembly (6 October 1936)

Hansard vol 1 series 98 2RSP (8 December 1936)

Hansard vol 2 series 139 2RSP Assembly (16 September 1954)

Hansard vol 2 series 194 2RSP Assembly (30 May 1972)

Hansard vol 3 series 136 2RSP Assembly (13 December 1953)

Hansard vol 3 series 136 2RSP Assembly (16 December 1953)

Hansard vol 3 series 166 2RSP Assembly (21 November 1963)

Hansard Western Australian Legislative Council vol 3 series 140 2RSP (9 November 1954)

Post and Telegraph HR vol 4 4851 (1901)

Western Australia Parl Debs 190 (24 August 1882)

Western Australia Parl Debs 455 (19 August 1886)

Western Australia Parl Debs Dispatch 45 (no 13 1881)

Western Australia Parl Debs vol 1 series 11 2 RSP Assembly (11 November 1897)

Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905)

Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905)

Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905)

Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905)

Western Australian Parl Debs vol 1 series 25 2RSP Assembly (4 October 1902)

Western Australian Parl Debs vol 1 series 28 2RSP Assembly (3 December 1905)

Western Australian Parl Debs vol 1 series 32 2RSP (3 December 1907)

Western Australian Parl Debs vol 3 series 45 2RSP Assembly (22 November 1912)

Law Commission Reports

Alberta Law Reform Institute *Family Law Project: Child Guardianship, Custody and Access* (Alberta Law Reform Institute Edmonton 1998)

Australian Law Reform Commission Reference on Aboriginal Customary Law-Aboriginal Customary Law: Child Custody, Fostering and Adoption (Australian Law Commission Sydney Research Paper No 4 1985)

Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Australian Law Commission Sydney No 31 1986)

M Gannage An International Perspective: A Review and Analysis of Approaches to Addressing Past Institutional or Systemic Abuse in Selected Countries (Law Commission of Canada Ottawa 1998)

Law Commission *Family Law: Review of Child Law: Guardianship* (Law Commission Working Papers No 91 1985-1986)

Law Reform Commission of The Australian Capital Territory *Report on the Law of Guardianship and Custody of Infants* (AGPS Canberra 1974)

Law Reform Commission of Western Australia *Report on United Kingdom Statutes in Force in Western Australia* (Law Reform Commission of Western Australia Perth Project No 75 1994)

Thesis and Unreported Papers

A Haebich 'A Bunch of Cast-Offs': Aborigines of the Southwest of Western Australia, 1900-1936 (PhD Thesis School of Social Inquiry Murdoch University 1985)

A Haebich Submission to the Human Rights and Equal Opportunity Inquiry into the Removal of Aboriginal Children (Unpublished Murdoch University Perth 1996)

A Haebich *The Noongar Stolen Generations* (Unpublised Paper Seminar 'Albany's History and Heritage' Albany 24 April 1997)

MK Hill *The Regulation of Aboriginal Women in the Western Australian Pearling Industry* (Honours Thesis Faculty of Law University of Western Australia 1994)

J Leaming Nearly White: Assimilation Policies in Practice in Western Australia at Sister Kate's Children's Home from 1933 to 1964 (Honours Thesis History Department University of Western Australia 1986)

D Markovich Genocide, a crime of which no Anglo-Saxon nation could be guilty: Though perhaps there lies a prima facie case?: Stolen Generations v Commonwealth (Honours Thesis School of Law Murdoch University 2000)

J McCraken A Penny for the Ponies: the Work of the Community of the Sisters of the Church at Parkerville Children's Home (1903-1933) (Honours Thesis Department of History Murdoch University 1990)

L Rowe The Work of the Societies for the Prevention of Cruelty to Children in Australia, 188-18930; Fighting Cruelty, Neglect and Inexpert Care (PhD Thesis History Department Murdoch University 2000)

I Scanlan 'An Analysis of the Western Australian Government's Response to the Recommendations of the Bringing Them Home Report' (School of Politics and International Studies Parliamentary Internship Programme Murdoch University 2000)

Other Primary Documents

Letter from Acting Commissioner of Native Affairs to Superintendent of Roelands Mission dated 27 July 1948 cited in ALSWA *After the Removal* (ALSWA Perth 1996)

AD 38/1927

AD 830/1900

AD 122/1902

AD 94/1928

AD 33/00 minute 26 January 1900

ALSWA *After the Removal* (ALSWA Perth 1996)

ALSWA *Telling Out Story* (ALSWA Perth 1995)

'Acts of genocide persist, Dodson says' The Australian (5 June 1997)

'How do we reconcile the stolen children?' The Australian (21 May 1997)

'Long delay awaits victims of forced removal' The Australian (27 May 1997)

'Stolen Children "must be paid"' The Australian (21 May 1997)

A Bolt 'Stolen Generation Myth Sells Us All Short' The Daily Telegraph (24 February 2001)

T van Boven, Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117 (U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996)

P Carlyon 'Stolen Children: On the Words that Matter' The Bulletin (12 June 2001)

Commonwealth of Australia Aboriginal Welfare-Initial Conference of Commonwealth and State Aboriginal Authorities (AGPS Canberra 1937)

Letter from Commissioner of Native Affairs to 'family friends' dated 10 March 1949 Native Welfare file cited in ALSWA (1996)

Letter from Commissioner of Native Affairs to government official stationed in North-West , Native Welfare File (Department of Community Development Perth 21 July 1944) cited in ALSWA (1996)

CSO 2014/88 minute (31 March 1900)

Transcript of the Prime Minister The Hon. John Howard MP Motion of Reconciliation 26 August, 1999 [Internet]

JR Huelin On the Road to Equality: Post-War Politics and Law Relating to the Aboriginal People of Western Australia (United Nations Association of Australia (WA) Perth 1980)

P Husluck 'Aboriginal Policy' *West Australian* (27 July 1936)

The Honourable Prime Minister, Paul Keating MP 'Speech by the Honourable Prime Minister, PJ Keating MP Australian Launch of the International Year for the World's Indigenous People: Redfern 10 December 1992' (1993) 3 Aboriginal L Bulletin 4

B Lane 'Rights body a "bad influence' on policy' The Australian (11 September 2000) 26

D Modjeska 'A Bitter Wind Beyond the Tree Line' Sydney Morning Herald (18 September 1997)

File note dated March 1967 Native Welfare Department File cited in ALSWA (1996).

Unnamed file note, Native Welfare File (Department of Community Services Perth 28 April 1941) cited in ALSWA (1996)

S Powell 'Sloppy study makes falsehoods fact' The Australian (11 September 2000)

S Rintoul 'Going Home' The Australian Magazine (21-22 April 2001)

Stolen Children "must be paid"' The Australian (21 May 1997)

Times (22 January 1904 weekly edition)

Western Australian Government *Government Gazette* (19 February 1909)

Sir Ronald Wilson (Interview) ABC Radio Programme (1 August 1997)

Sir Ronald Wilson (Interview) ABC Television 7.30 Report (2 August 1997)