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The Limitations of Litigation in Stolen Generations Cases

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Abstract	2
1. Introduction	3
2. The Applicants and Their Claims	5
Joy Williams	5
Alex Kruger and others	6
Lorna Cubillo and Peter Gunner	7
Christopher Johnson	9
Valerie Wenberg Linow	10
The respondents	11
3. The Judicial Response	11
Constitutional questions	11
Wrongful imprisonment	13
Breach of statutory duty	15
Breach of duty of care: negligence	15
Fiduciary duty	19
Damages	20
Crimes compensation tribunals: Linow	22
4. Evidentiary Hurdles: Reconstructing a Colonialist Narrative	23
History, beneficial intent and ‘standards of the time’	24
5. Adversarial Court Processes, Credibility and Re-Traumatisation	28
Victim vulnerability	30
6. Statute of Limitations	32
Statute of limitations defence and reparations	35
7. Limitations of Monetary Compensation	36
Inequitable outcomes	36
8. The Cost of Litigation	37
9. Failure to Deal with Underlying Issues Relevant to Removal	38
Undisclosed settlements	39
Underlying problem of race-based removal and the harms caused by or after removal	40
10. The Need for Reparations	41
References	43

Abstract

The purpose of this Discussion Paper is to review the progress of litigation by members of the Stolen Generations before the courts in Australia. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families found that forcible removal breached a range of domestic laws and international human rights standards. Yet, despite this finding, court action by members of the Stolen Generations has been unsuccessful. It is our purpose to consider these failures in more detail.

This Discussion Paper sets out the key applicants and their legal claims, followed by the various and, at times, unique difficulties confronting Stolen Generation claimants before the courts. Our analysis is from a socio-legal perspective that places in context the experiences of Indigenous persons who have sought to use the legal system.

The major limitations of the litigation process which we identify include the problem of overcoming statutory limitation periods, the difficulty of locating evidence, the emotional and psychological trauma experienced by claimants in the hostile environment of an adversarial court system, the enormous financial cost and time involved, the problem of establishing specific liability for harms that have been caused, and the problem of overcoming the judicial view that ‘standards of the time’ justified removal in the best interests of the child.

We conclude by noting the importance of alternative approaches to achieving justice for the Stolen Generations.

1. Introduction¹

It is estimated that ten per cent of Indigenous Australian children were removed from their families and communities under state sanctioned policies and removal practices in Australia between 1910 and 1970 (HREOC 1997:18). Today, most Indigenous families continue to be affected in one or more generations by the forcible removal of children during this time (HREOC 1997:37). There has been widespread discussion as to whether litigation initiated by Indigenous persons in response to the harmful consequences of these past practices is capable of leading to a satisfactory resolution for claimants. The purpose of this Discussion Paper is to review the progress of relevant cases brought before the courts in Australia for the purpose of analysing why this litigation has been unsuccessful.

These cases will be analysed from a socio-legal perspective that places in context the experiences of those who have sought remedies through the courts. In particular, central to the experiences of Stolen Generation² claimants is the fact that they are Indigenous persons. As such, their removal and subsequent life stories are mediated by the policies, practices and politics of living within the boundaries of a nation-state built on dispossession, violence, and legal regimes which denied to Indigenous peoples the fundamental rights enjoyed by non-Indigenous Australians. As a consequence, Indigenous Australians remain significantly disadvantaged according to all major social and economic indicators including criminal justice, health, education, housing and employment. In addition, the struggle for the recognition of their collective rights as Indigenous peoples continues to this day.

We are also interested in contrasting the limitations of the Stolen Generations' litigation with the consideration of a more restorative and reconciliatory approach based on a process of reparations for the gross violation of human rights. There is not the space in this Discussion Paper to go into detail of how a reparations tribunal would work, and why it is more likely than litigation to provide a just and expeditious resolution of the issues. These issues have been discussed elsewhere (HREOC 1997; PIAC 2000; SLCRC 2000).

We accept that, in line with the findings of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, the systemic removal of Indigenous children from their families constituted a gross violation of human rights (HREOC 1997). In summary, the Inquiry found that the policy of forced removal of Indigenous children was contrary to prohibitions on racial discrimination and genocide, and was contrary to accepted legal principle found in the common law. The removals also led to other forms of criminal victimisation including widespread sexual and physical assault (HREOC 1997:277-278).

There has been considerable argument in Australia as to whether the policy of removal constituted genocide, and if so, did it continue to constitute genocide in the post 1945 period when policies moved towards assimilation (Manne 2001). To some extent this debate has overshadowed the broader basis on which the claim for compensation and reparations exists. The finding of genocide was one part of the claim concerning the violation of international human rights standards – the other was racial discrimination. Furthermore, international human rights violations were only one of five legs to a claim for compensation and reparations: the others being breaches of statutory

and common law duties and principles, including deprivation of liberty, deprivation of parental rights, abuses of power and breach of guardianship duties. In short, we could remove the claim of genocide and not disturb the overall grounds for compensation and reparations.

Yet, despite the findings of the HREOC inquiry, court action by members of the Stolen Generations have been unsuccessful. It is our purpose to consider these failures in more detail. The major limitations of the litigation process can be summarised as follows:

- the problems Indigenous persons have in overcoming statutory limitation periods, when these events occurred many decades ago;
- the difficulty of finding evidence, particularly when governments were lax in recording matters involving Indigenous peoples;
- the emotional and psychological trauma experienced by claimants in the hostile environment of an adversarial court system;
- the enormous financial cost;
- the length of time involved before the outcome of litigation is finalised;
- the problem of establishing specific liability for harms that have been caused; and
- overcoming the judicial view that ‘standards of the time’ justified removal in the best interests of the child.

We will deal with these limitations more fully below. While the focus of this Discussion Paper is on the limitations of the litigation process, we also acknowledge that there are some perceived advantages to such claims being brought before the courts. For example, the courts provide a public forum through which claimants may seek recognition of their rights and redress for the wrongs they have suffered. As the judicial system itself is accorded legitimacy and authority, a successful outcome here might be considered a greater ‘victory’ than through other, alternative means for resolving claims (Llewellyn 2002:266). In addition, a successful outcome might have significant consequences beyond the immediate and favourable resolution of the case itself, such as through the creation of a binding precedent which would allow other similar claims to be successfully resolved. Potentially, it might also force the development of a political solution to a much deeper problem for the community as a whole.

Indeed, the courts have already indicated their preference for a political and social solution rather than a legal solution to the issue. In *Cubillo* (2000: para 105),³ Justice O’Loughlin stated:

The removal and detention of part Aboriginal children has created racial, social and political problems of great complexity... it must be left to the political leaders of the day to arrive at a social or political solution to these problems.

This Discussion Paper sets out the key applicants and their legal claims, followed by the various and, at times, unique difficulties confronting Stolen Generations claimants before the courts.

2. The Applicants and Their Claims

In recent times, questions as to the liability for and validity of past removal policies and practices have come before Australian courts in a variety of jurisdictions. This litigation has been buoyed in part by the findings and recommendations of the National Inquiry Report, as well as the Federal Government response to the Inquiry which rejected both a national apology,⁴ as well as broad scale monetary compensation (Young 1998:79). In the absence of compensation, the cases have been fought on two major fronts: that is, actions alleging the violation of constitutional rights and, more frequently, civil claims for damages (Saul 2000:570). In regard to the civil claims, litigation is seen by some as challenging the Australian judiciary to develop the principles of torts and equity in a way which can acknowledge liability for the specific harms which arose as a result of Australia's assimilationist history (Young 1998:85), particularly given similar problems and legal developments in Canada (Llewellyn 2002; O'Connor 2000).

Many of the claims by members of the Stolen Generations seek to establish civil liability through a variety of causes of action including, negligence, breach of statutory duties, wrongful imprisonment and breach of fiduciary duties.⁵ Exceptions to this include Valerie Linow's application for compensation before the New South Wales Victims' Compensation Tribunal and the Kruger plaintiffs, who claimed that the Northern Territory *Aboriginals Ordinance* violated their constitutional rights (discussion below).

Joy Williams

Joy Williams was born on 13 September 1942. Her mother, Dora Williams, was an Aboriginal woman who had been removed from her family and made a ward of the Aborigines Welfare Board (AWB) from the ages of seven to 18. After living in a home run by the AWB in Cootamundra, Dora Williams was placed with a White family as a domestic worker at the age of 15. She fell pregnant with Joy as a result of a sexual encounter between herself and the son of her employer. She was 18 years old when she gave birth to her daughter.

At four weeks old, Joy Williams was placed in the custody of the United Aborigines Mission at its Aboriginal Children's Home at Bomaderry. The Home itself was overseen by the AWB. She was subsequently transferred to Lutanda Children's Home in Wentworth Falls when she was four years old. Lutanda was a Home primarily for white children. She was discharged in 1960 at the age of 17, to take up employment as a housemaid.

Cody (2001:155), who worked as a solicitor on the Williams case, summarises the allegations as follows:

The plaintiff alleged that, at Lutanda, she was inadequately cared for and was treated more harshly than the other children. Joy claimed that she did not know she was Aboriginal until she ran away from the home at about 13 years of age. The plaintiff alleged that during her time at Lutanda she began to exhibit disturbed behaviour, fought regularly with other children, was unable to participate in group play, was attention seeking, and engaged in acts of self mutilation. Having received no psychological assistance during her childhood, Joy left Lutanda and spent long periods in psychiatric institutions, became involved in criminal activity, substance abuse and spent some time

in gaol. Joy alleged that her difficulties in rearing her three children was caused by her own lack of parenting which had impaired her ability to parent, and to form relationships. She was diagnosed with the severe psychiatric disorder, borderline personality disorder.

The action brought by Joy Williams was the first by an Indigenous person in Australia for a remedy for losses suffered as a result of state sanctioned removal policies. In 1993, she commenced proceedings against the defendants claiming damages for negligence, wrongful imprisonment and breach of fiduciary duty. In addition, an application was made under the *Limitation Act* 1969 for an order extending the time within which proceedings could be commenced.⁶ In 1993, Justice Studdert delivered his judgment in which he declined to extend the limitation period on the grounds that it was 'neither just nor reasonable' to do so (*Williams* 1993:36), although this decision was subsequently reversed by a majority of the NSW Court of Appeal (*Williams* 1994).

Joy Williams alleged, inter alia, that the Aborigines Welfare Board (AWB) had committed trespass in taking her to and keeping her at the Bomaderry Children's Home. She further alleged that the AWB had failed to adequately supervise her during her residence at the Bomaderry and Lutanda Children's Homes. Had the AWB provided adequate supervision during this time, they would have been alerted to the fact that her behaviour was exhibiting symptoms of an attachment disorder and as such, she would have been referred to a Child Guidance Clinic. Child Guidance Clinics were available at that time and employed suitably qualified professionals to work with and treat disturbed and/or difficult children (Cody 2001:156). There was also evidence that she had not received any 'visits, letters or supervision' from the AWB in the twelve years that she lived at the Lutanda Children's Home (Cody 2001:156). Joy Williams alleged that in the absence of appropriate treatment and care for her welfare, she developed the psychiatric disorder, Borderline Personality Disorder.

Joy Williams alleged that the conduct of the AWB placed it in breach of a duty of care, in breach of a statutory duty and in breach of a fiduciary duty to her. In addition, these breaches had caused her losses and damage for which the defendants were liable. Evidence was provided as to her experiences after leaving the Lutanda Children's Home. This included periods of unemployment, substance abuse, psychiatric care and imprisonment. She further alleged that her own lack of parenting had resulted in an inability to form relationships and to raise her three children. The plaintiff claimed damages by way of economic loss, general damages and exemplary or aggravated damages.⁷

Alec Kruger and others

The Kruger claim involved nine plaintiffs: Alec Kruger, Hilda Muir, Connie Cole, Peter Hansen, Kim Hill, Rosie Napangardi McClary, George Ernest Bray, Janet Zita Wallace and Marjorie Foster.

Except for one, all of the plaintiffs were children living in the Northern Territory when they were removed, detained and kept in the care, custody and/or control of the Chief Protector under the *Aboriginals Ordinance 1918*. Each child was taken to institutions or reserves away from his or her mother and family. The removals occurred between 1925 and 1944, with the last detention ending in 1960 (Byers 1997:225). The

other plaintiff, Ms Rose Napangardi McClary, was the mother of a child who was removed without her consent.

Alec Kruger's experience is illustrative of those shared by the other claimants; Schaeffer (1998:248) noted:

He was born in 1924, in Katherine, Northern Territory, to an Aboriginal mother and a white father. Alec was taken away at three years of age and placed in a succession of institutions including the Kahlin Half Caste Home in Darwin, and the Bungalow in Alice Springs. At 11 years of age, Alec left to work under supervision at a cattle station until joining the Australian Army during World War II. Alec was eventually reunited with his mother some twenty years after his removal.

In 1995, the plaintiffs commenced legal proceedings in which they challenged the constitutional validity of the *Aboriginals Ordinance 1918* (NT). The Ordinance provided for the appointment of a Chief Protector of Aborigines and conferred extensive powers on that position including the discretion to undertake the care, custody and control of any 'aboriginal or half-caste' (section 6(1)). Section 16 empowered the Chief Protector to remove any 'aboriginal or half-caste' to any 'reserve' or 'aboriginal institution' so defined to include mission stations, schools, reformatories, orphanages or other institutions declared to be an 'aboriginal institution' for the purposes of the Ordinance. Finally, section 7(1) provided that the Chief Protector and later from 1953, the Director of Native Affairs, be the legal guardian of all Aboriginal persons.

The plaintiffs advanced several reasons for challenging the constitutional validity of the relevant provisions of the *Aboriginals Ordinance*. These reasons may be summarised as follows. Firstly, the detention powers of the *Ordinance* invalidly conferred a judicial power on a non-judicial body in contravention of the separation of powers doctrine enshrined in Chapter III of the Constitution – that is, the Chief Protector who was part of the executive arm of government was also carrying out judicial functions in relation to Aborigines. Secondly, the plaintiffs claimed that the Ordinance infringed their implied constitutional right to legal equality. In addition, they claimed that the Ordinance violated their implied constitutional right to freedom of movement and association as well as an implied constitutional right to freedom from genocide. The plaintiffs further contended that the Ordinance violated the express protection of freedom of religion enshrined in section 116 of the Constitution.

The plaintiffs further argued that a breach of these implied constitutional rights, guarantees, and freedoms gave rise to a right of action to recover damages from the Commonwealth. They also relied upon causes of action recognised by the common law; that is, the tort of wrongful imprisonment and deprivation of liberty. The plaintiffs sought damages in regard to the losses they had suffered in personal, spiritual as well as financial terms and further, in regard to their potential land claim entitlements (Buti 1998:234).

Lorna Cubillo and Peter Gunner

Lorna Cubillo was born in 1938 on a pastoral property known as Banka Banka Station, some 985 kilometres south of Darwin in the Northern Territory. In 1947, Lorna was one of 16 Aboriginal children removed from the Phillip Creek Native Settlement where she had been living and attending school. She was eight years old at the time. The

Settlement was operated by the Aborigines Inland Mission (AIM) for the Commonwealth Department of Native Affairs. Justice O'Loughlin found that the children's removal was 'an occasion of intense grief' and that it had caused the children and their families 'terrible pain' (*Cubillo* 2000: paras 443, 452). Further, he found that there was no evidence, one way or the other, to justify a finding that Aboriginal families at that time had been consulted about, or had consented to, the removal of their children (*Cubillo* 2000: paras 440 and 457).

Lorna Cubillo was taken to the Retta Dixon Home in Darwin, which had been established by the AIM in 1946. There was some evidence as to the poor conditions of the Home, which were said to be in 'need of substantial improvement' (*Cubillo* 2000: para 558). The staff administered corporeal punishment and O'Loughlin J found that on one such occasion, a missionary worker had viciously assaulted Lorna Nelson (*Cubillo* 2000: para 705). She remained at the Retta Dixon Home until the age of 18.

Peter Gunner was seven years old when he was removed from a 'native camp' at Utopia station in central Australia. O'Loughlin J found that Peter was in the care of his mother at the time and that she had consented to his removal for the purpose of him receiving a 'European' education (*Cubillo* 2000: para 787). Her 'consent' was indicated by a thumb print on a consent form – although there was no way of knowing whether she had understood the content of this document.

In 1956, Peter Gunner was placed in the Australian Board of Missions (ABM) St Mary's Church of England Hostel in Alice Springs. St Mary's was licensed at the time under the *Aboriginals Ordinance* as an 'Aboriginal Institution for the maintenance, custody and care of half-castes' (*Cubillo* 2000: para 744). There was evidence as to the shocking conditions and facilities of the Hostel as well as to the inadequate care provided to the children (*Cubillo* 2000: para 1073). In addition, O'Loughlin J found that one staff member had engaged in some form of sexual impropriety directed towards Peter Gunner (*Cubillo* 2000: para 993). His Honour described the acts, admitted by the staff member concerned, as 'perverted behaviour' (*Cubillo* 2000: para 992). Peter Gunner left St Mary's Hostel in 1963 to work at Angas Downs Station. He was 14 years of age.

In 1996, Lorna Cubillo and Peter Gunner each commenced proceedings against the Commonwealth in the High Court claiming damages for wrongful imprisonment and deprivation of liberty, negligence, breach of statutory duty and breach of fiduciary duty. In addition, an order was sought extending the time within which proceedings could be commenced (pursuant to section 44 of the *Limitation Act*). The proceedings were subsequently remitted to the Federal Court and the parties consented to orders that they be heard together.

In response, the Commonwealth filed a notice of motion seeking summary dismissal of both actions. The Commonwealth's decision to make such an application reveals an insensitivity to the 'importance of the case being seen to have its day in court' and further, that a defence based on 'avoidance' of this kind merely perpetuates the damage caused by the policies in issue (Flynn and Stanton 2000:75-6).

On 30 April 1999, O'Loughlin J delivered an interlocutory judgment⁸ in which he declined to make the orders sought by the Commonwealth to dismiss the claims made by Lorna Cubillo and Peter Gunner. In doing so, he remarked: '[T]hese 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’ (*Cubillo* 1999: para 203).

The lawyers for Lorna Cubillo and Peter Gunner set out the basis of their claim as follows (*Cubillo* 2000: para 2):

These cases concern great injustice done by the Commonwealth of Australia to two of its citizens. By the actions of the Commonwealth, Lorna Cubillo and Peter Gunner were removed as young children from their families and communities. They were taken hundreds of kilometres from the countries of their birth. They were prevented from returning. They were made to live among strangers, in a strange place, in institutions which bore no resemblance to a home. They lost, by the actions of the Commonwealth, the chance to grow among the warmth of their own people, speaking their peoples languages and learning about their country. They suffered lasting psychiatric injury. They were treated as orphans when they were not orphans. They lost the culture and traditions of their families. Decades later, the Commonwealth of Australia says in this case that it did them no wrong at all.

Specifically, the plaintiffs alleged that they had been forcibly removed from their families and detained in institutions against their will because of a state-sanctioned policy whereby ‘part-Aboriginal’ children were removed from their families. They acknowledged that the *Aboriginals Ordinance* conferred upon the Director of Native Affairs the power to remove and detain part-Aboriginal children if, in the Director’s opinion, it was necessary or desirable in the interests of the child to do so. However, the plaintiffs alleged that the Director had not exercised this power properly, for their individual best interests had not been taken into account. Further, the plaintiffs alleged that the conduct of the Director, in failing to provide for their custody, maintenance and education as required by the Ordinance, constituted a breach of the statutory duty owed to each of them. As a result of these and other breaches, the plaintiffs had suffered losses and damages for which they sought compensation. They each claimed general damages as well as aggravated and exemplary damages.

Christopher Johnson

Christopher Johnson was born in Wilcannia, New South Wales on 2 August 1968. In 1973 (*Johnson* 2000: para 4),

... he was removed from the care and custody of his family and parents and committed by an order of the Childrens Court at Wilcannia under the *Child Welfare Act 1939* (NSW) to the care of the Minister for Community Services to be dealt with as a ward and admitted to State control.

He was four years old at the time. Over the next ten months, he was placed in three separate institutions before his placement as a foster child with a White foster family in Sydney. He remained there until 1981.

Christopher Johnson was 13 years old when he was removed from his foster family and placed in an institution under the control of the Minister and the Department of Community Services (DOCS) (*Johnson* 2000: para 5). Within approximately two months, he was placed in another institution known as Weroona in the Blue Mountains, New South Wales. He left Weroona when it closed in December 1985. He lived for a

short time thereafter with an officer of DOCS, until some time in April 1986 when he ‘was forced to fend for himself’ (*Johnson 2000*: para 5).

In 1997, Christopher Johnson commenced proceedings against the defendants claiming damages for negligence, breach of statutory duty and breach of fiduciary duty. In addition, an application was made under the *Limitation Act 1969* for an order extending the time within which proceedings could be commenced. In 1999, Master Harrison delivered her judgment in which she declined to extend the limitation period, although this decision, like *Williams (1994)* was reversed on appeal.

Christopher Johnson alleges that the defendant was responsible for his care and upbringing from the age of four to 18 years and thereafter, for his support and supervision as an ex-ward until the age of 20. He sought to establish that the conduct of DOCS during this time placed it in breach of a duty of care, in breach of a statutory duty and in breach of a fiduciary duty owed to him. The relevant conduct of the defendant includes removing him from his family at age four and placing him with a non-Aboriginal foster family (*Johnson 2000*: 10). He further alleges that the defendant did not adequately supervise or protect him against the mistreatment he suffered whilst in the care of the foster family and at subsequent institutions, despite (on one occasion) DOCS having received notification to this effect (*Johnson 2000*:10).

Christopher Johnson claims that the defendant’s conduct has caused him damage in that he has suffered and continues to suffer from chronic depression, acute anxiety and post-traumatic stress disorder (*Johnson 2000*:11). In addition, as a result of his exposure to physical and sexual abuse during this time, he developed a predisposition towards violence himself. As a consequence of this, he committed, and was convicted and imprisoned for various violent offences (*Johnson 2000*:11).

Other losses set out in Mr Johnson’s Statement of Claim include: his rejection by his Aboriginal and foster family which left him feeling as though he belonged neither to white nor Aboriginal society; his experience of trauma and separation from his own family; the loss of an opportunity to know, love and be loved by his own family; his deprivation of family and cultural heritage; the loss of his ability to realise scholastic and academic potential; his loss of acceptance and appreciation of and confidence in his Aboriginality; his trauma of having to come to terms with his Aboriginality in the context of having been exposed to, and partially absorbed by, prejudiced views about the inferiority of Aborigines; and the loss of the chance to acquit himself to his potential for employment – as a result of which he has suffered and continues to suffer a loss of earning capacity (*Johnson 2000*:12). Christopher Johnson is claiming damages by way of equitable compensation, interest, costs and ancillary relief.

Valerie Wenberg Linow

In the early 1940s, Valerie Linow was taken from her mother and placed in the Bombaderry Children’s Home in New South Wales. She was two years old at the time. At age 16, the AWB placed her with a family as a domestic worker. During this placement, sometime between May and October 1958 (*Forster 2002*:186):

... she was sexually assaulted and thrashed with barbed wire ‘by a white man who ran the station’ and who was a member of the household The applicant ran away from the house and informed the authorities of the assaults. The police investigated the

allegations but found insufficient evidence to pursue the matter. The matron of Cootamundra Girl's Home, where she was residing prior to the placement and to where she returned after the assaults, wrote to the Welfare Board saying she had not made Linow return to the placement 'for fear' that her allegations were true.

More than forty years later, Valerie Linow lodged an application for compensation for the sexual assaults with the New South Wales Victims' Compensation Tribunal.

The respondents

In *Kruger* as well as in *Cubillo*, the Commonwealth Government was the sole defendant to the actions brought by the Stolen Generations claimants. In regard to the *Cubillo* case, the applicants did not sue the Director of Native Affairs or the Director of Welfare (who were the former holders of statutory office administering Aboriginal affairs). Nor did they join the AIM, ABM (the operators of the institutions in which the applicants were placed) or their staff as co-defendants. This was to have important ramifications.

O'Loughlin J found that the Commonwealth was not liable for the actions of the Directors (where they had exercised an independent discretion outside of the Ministers control) or the missions (which were not agents of the Commonwealth) (Clarke 2001:266-269). In other words, the Commonwealth was not liable for either the Directors or the missions. The applicants had sued the wrong defendant, although it is 'doubtless' that there were good reasons for not joining the other parties to the proceedings (Cubillo 2001: para 8).

By way of contrast, the Minister, *Aboriginal Land Rights Act* (who is legal successor of the Aborigines Welfare Board), as well as the New South Wales State Government were the defendants in the *Williams* case. Similarly, in the matter of *Johnson* the Department of Community Services (DOCS) as well as the State Government are the defendants. It is also worth noting that at the time of writing, a claim for injuries suffered as a result of removal is currently pending against the State of South Australia (Cunneen and Grix 2003:15).

3. The Judicial Response

Constitutional questions

In July 1997, the High Court of Australia handed down its decision in *Kruger* (1997). In sum, the plaintiffs' claims were rejected on all grounds.

The Court rejected the plaintiffs' claim that the detention powers of the Northern Territory *Aboriginals Ordinance* invalidly conferred a judicial power on a non-judicial body. All judges agreed that the power conferred by the Ordinance to remove and detain 'aboriginal and half-caste' children was not an exclusive exercise of judicial power in light of the 'welfare' objective of the Ordinance considered by the standards of the day.

In regard to the plaintiffs' claim that the Ordinance infringed their implied constitutional right to legal equality, Chief Justice Brennan and Dawson, McHugh,

Gaudron and Gummow JJ all rejected the existence of such a right limiting the exercise of power conferred on the Commonwealth by section 122 of the Constitution.⁹ Only Toohey J accepted its existence, although he was unable at that stage in the proceedings to determine the issue.

The majority decision also rejected the plaintiffs' claim that the *Aboriginals Ordinance* violated their implied constitutional right to freedom of movement and association. Although Toohey, Gaudron and McHugh JJ each recognised the existence of an implied constitutional right to freedom of movement and association, only Gaudron J found some of the provisions in the Ordinance to be invalid on that basis. The majority, comprising Brennan CJ and Dawson, McHugh and Gummow JJ, clearly rejected the application of any such implied constitutional right to the Northern Territory *Ordinance*.

In relation to the plaintiffs' claim that the Ordinance violated an implied constitutional right to freedom from genocide, only Gaudron J expressly acknowledged the existence of such a right therein. All six judges held that in authorising the removal and detention of 'aboriginal and half-caste' children, the *Ordinance* did not authorise acts of 'genocide' as defined in Art II of the *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*. In contrast to Gaudron J, Dawson J stated that consistent with the doctrine of parliamentary supremacy, there was no constitutional restriction on Section 122 of the Constitution not to authorise acts of genocide.

The majority, comprising Brennan CJ, Dawson, Toohey and Gummow JJ, also rejected the plaintiffs' claim that the *Ordinance* violated the express protection of freedom of religion enshrined in section 116 of the Constitution. The *Ordinance* was held not to violate Section 116 because it did not, on its face, have the purpose of restricting or prohibiting religious freedom. Dawson and McHugh JJ, both held that Section 116 does not restrict the operation of Section 122, due to the 'plenary' nature of that power. Gaudron J observed that the Ordinance could be in contravention of Section 116, but only if certain questions of facts and law could be determined at trial.

Finally, in relation to the plaintiffs' submission that a right of action in damages arose by virtue of the breaches the constitutional rights and guarantees set above, Brennan CJ, Toohey and Gaudron JJ found that there is no such action available. Dawson, McHugh and Gummow JJ found it unnecessary to determine the issue.¹⁰

While the decision in *Kruger* has been described as 'shocking' (Byers 1997:227) and a 'severe blow to the plaintiffs' (Buti 1998:239), its influence on the future of litigation for members of the Stolen Generations cannot be understated. In the wake of the *Kruger* decision, the submissions in *Cubillo* were amended to remove constitutional arguments which were analogous to those raised in *Kruger* (Buti 1998:239).

The *Kruger* decision determined that the government had the power to enact legislation such as the Northern Territory Ordinance. However, it expressly left open the possibility of legal claims based on the misuse of the powers conferred by legislation. It is the *misuse* of those powers which is said to be at the 'core' of post-*Kruger* litigation (Champion 1998:10). As Brennan CJ observed (*Kruger* 1997:99):

... a power which is to be exercised in the interests of another may be misused.
Revelation of the ways in which the powers conferred by the Ordinance were exercised

in many cases has profoundly distressed the nation, but the susceptibility of a power to its misuse is not an indicium of its invalidity.

Wrongful imprisonment

Lorna Cubillo and Peter Gunner alleged that their removal and subsequent institutionalisation constituted wrongful imprisonment and deprivation of liberty by the Director of Native Affairs. In doing so, however, in contrast to *Kruger*, the plaintiffs did not challenge the Director's power under the *Aboriginals Ordinance* to remove and detain Aboriginal children. Instead, they argued that their removal and detention was *beyond* the power conferred by the *Ordinance*. The plaintiffs alleged that the Director had acted without regard to their individual interests and welfare as required by the *Ordinance*. The lack of regard to their individual interests and welfare arose because of the Commonwealth's general policy of removing part-Aboriginal children from their families and communities. In this way, according to the plaintiffs' submissions, the Commonwealth actively 'promoted or caused' their detention (*Cubillo* 2000: para 1158).

The Commonwealth rejected the plaintiffs' submissions concerning the existence of a general policy of removal of part-Aboriginal children without regard to their individual circumstances. Both parties introduced a significant amount of evidence to support their respective arguments. The evidence supporting the existence of such a policy included the fact that 'familial consent to removal was sought but not required, and the presumption from the highest policy level of the Minister down to the individual Patrol Officers, that the mere fact of part-Aboriginality dictated that it was in the child's best interest that they be removed' (Van Krieken 2001:245). The evidence used in the reasoning of O'Loughlin J to counter-balance these aspects of the removal policy include (Van Krieken 2001:245):

- the expression of concern for part-Aboriginal children's welfare by some patrol officers, administrators, and institution staff;
- the Commonwealth's lack of capacity actually to realise such a policy fully;
- the existence of cases where decisions had not been taken to remove part-Aboriginal children;
- the existence of categories of removals where there was familial consent or initiative, or where it was a clear case of neglect or abuse.

O'Loughlin J concluded that the evidence did not justify a finding that the Commonwealth had a policy of the kind alleged by the plaintiffs: that is, 'a policy of indiscriminate removal irrespective of the personal circumstances of the child' (*Cubillo* 2000: para 300). However, he also found that, if contrary to his view there was such a policy, it had not been implemented as a matter of course in the relation to the plaintiffs (*Cubillo* 2000: para 1160).

O'Loughlin J held that the *detention* powers of the Director conferred under the *Ordinance* were so broad that the decisions to institutionalise Lorna Cubillo and Peter Gunner, which were exercised by way of committal orders in 1953 and 1956 respectively, 'could not be impeached' (Clarke 2001:270). In relation to Lorna Cubillo's detention prior to 1953, there was not sufficient evidence to determine whether or not the Director was acting in accordance with the powers conferred by the *Ordinance*. Although His Honour found that the Commonwealth had failed to discharge the onus to

prove that the Director had exercised the power to *remove* Lorna Cubillo lawfully, the Commonwealth was not liable for any action taken by the Director (Clarke 2001:270). Instead, the plaintiff had established a prima facie cause of action for wrongful imprisonment against the estates of the former Director and patrol officer of Native Affairs, as well as the former Superintendent of the Retta Dixon Home and the AIM (Cubillo 2000: para 1162).

In regard to Peter Gunner's action for wrongful imprisonment, O'Loughlin J found that the Director had not unlawfully removed him from Utopia Station but rather, that his removal was the result his mother having given her 'informed' consent – as evidenced by a thumb print on a consent form. His Honour observed (Cubillo 2000: para 788):

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

The document 'Form of Consent by a Parent' states, in part:

1. Topsy Kundrilba, being a full blood aboriginal (female) within the meaning of the Aboriginals Ordinance 1918-1953 of the Northern Territory ... do hereby request the director of native affairs to declare my son Peter Gunner, aged 7 years, to be an aboriginal within the meaning and for the purposes of the said Aboriginals Ordinance. My reasons for requesting this action by the director of native affairs are ...
2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
- ...
4. By placing my son in the care, custody and control of the director of native affairs, the facilities of a standard education will be made available to him by admission to St Mary's Church of England Hostel, Alice Springs.

In relation to the finding that the thumb print on this document constituted consent, counsel for the plaintiffs recently remarked: '[t]his was a consent by a mother who could write no English and on any view of the evidence had never travelled beyond the lands of her clan' (Rush 2002:11). We will discuss the issue of consent more fully in the context of 'evidentiary hurdles'. To conclude, O'Loughlin J held that Lorna Cubillo and Peter Gunner each failed to establish a cause of action against the Commonwealth for wrongful imprisonment.

At this juncture, it is also worth noting that in the matter of *Williams*, Studdert J found that there was no evidence to support the plaintiff's claim of wrongful imprisonment (*Williams* 1993:31). At the conclusion of subsequent proceedings before the Supreme Court, Abadee J also held that the plaintiff had failed to establish an action in trespass (*Williams* 1999: para 674). His Honour found that Joy Williams had become a ward of the defendant shortly after her birth, on application by her mother, Dora Williams, to the AWB. Dora Williams was found to be the plaintiff's legal guardian at all times. Joy Williams' placement at the Bomaderry Children's Home, and subsequent

transfer to Lutanda, was with the consent of her mother and as such, was held to be lawful.

Breach of statutory duty

Although neither the 1918 nor 1953 Northern Territory ordinances provided for a right to compensation for any breach of statutory duty, such a right to compensation might still arise in certain circumstances (Van Krieken 2001:249). In *Cubillo*, O'Loughlin J held 'that the circumstances of both these cases are such that it would be appropriate to make a prima facie finding that Mrs Cubillo and Mr Gunner have private rights of action for breach of statutory duty available to them' (*Cubillo* 2000: para 562).

In *Williams*, Abadee J disagreed with O'Loughlin J's reasoning, finding it neither 'persuasive' nor 'binding' upon him in the circumstances of the case (*Williams* 1999: para 683). At trial however, O'Loughlin J ultimately rejected the plaintiffs' claims for breach of statutory duty in relation to the Directors' *guardianship* powers (Clarke 2001:271). The plaintiffs had argued that the Director as legal guardian should have had regard for their best interests and welfare in relation to their removal and the institutions in which they were detained. According to O'Loughlin J, the plaintiffs' claim could not be sustained in the absence of any evidence as to the actions of the Director being beyond power: that is, being 'exercised for a malicious purpose or for an objective that was foreign to the mandates of the legislation' (*Cubillo* 2000: para 1191).

In *Williams*, Abadee J held that there was no actionable statutory duty. The provisions of the Act were not intended to confer a right of action in tort having reference to the nature, scope and terms of the child-welfare legislation. Even if this duty was owed, His Honour held that there had been no such breach by the defendants. In *Johnson*, Rolfe J examined the views of O'Loughlin J in *Cubillo* and Abadee J in *Williams*, and noted the differences between them concerning the scope and applicability of a statutory duty. His Honour also noted the importance of factual findings in determining whether the actions in question were 'based on policy or operational matters' (*Johnson* 2000: para 117), the importance of the distinction being that courts were unlikely to review matters of policy. Rolfe J concluded that it could not be said that there was not an arguable case as to whether a statutory duty was owed and breached (*Johnson* 2000: para 119). The *Johnson* matter is still proceeding through the courts.

Breach of duty of care: negligence

Both Lorna Cubillo and Peter Gunner alleged that their removal from their families and subsequent detention in institutions gave rise to a claim in negligence against the Commonwealth. In this way, they each alleged that the Commonwealth was under a legal duty of care to protect them from physical and emotional harm and that their removal and detention was in breach of that duty. O'Loughlin J held that no duty of care could be imposed on the Commonwealth directly, as it had no statutory power itself, nor did it have a duty to direct others to act (*Cubillo* 2000: para 1198). The position of guardian and the power to remove and detain part-Aboriginal children in accordance with the Ordinance belonged to the Director alone.

O'Loughlin J also found that imposing a liability on either the Commonwealth or the Director in relation to the use of the discretionary power enshrined in section 6 of the Ordinance 'would arguably challenge the 'core policy-making' function of the legislation (*Cubillo* 2000: para 1230). O'Loughlin J's reasoning here reflects the approach of the courts in not reviewing policy decisions. 'Although it is not an absolute test, a pure policy decision where parliament has entrusted the decision to a public authority is not something a court would normally be expected to review' (*Cubillo* 2000: para 1563).

O'Loughlin J further examined whether the Director had a common law duty of care to the plaintiffs and if so, whether the Commonwealth could be held vicariously liable for any breach of that duty. His Honour held that, with respect to the removal and detention of the plaintiffs, the Director owed no duty of care if such acts were within the scope of the power conferred by section 6 of the Ordinance. In coming to this conclusion, O'Loughlin J took into account competing policy considerations as set out in the authorities. He favoured the approach taken by the House of Lords in *X (Minors) v Bedfordshire Council* (1995) that 'a decision to take a child into care is one that courts are not fitted to assess' (*Cubillo* 2000: para 1237) unless that decision exceeds the ambit of the discretion conferred by the Ordinance. O'Loughlin J held that, on the evidence available, the plaintiffs had failed to establish that the Director had acted (and if at all, in the case of Peter Gunner) beyond his discretion. The Commonwealth in turn could not be held vicariously liable for acts that were within the exercise of an independent statutory duty (*Cubillo* 2000: para 1123).¹¹

O'Loughlin J accepted, however, that once the plaintiffs came into the care of the Director, a duty of care arose from the *exercise* of those powers conferred by the Ordinance to ensure their safety and well being (Clarke 2001:276). Specifically, Section 5 of the 1918 *Aboriginals Ordinance* and Section 8 of the 1953 *Welfare Ordinance* conferred certain statutory duties to supervise and regulate the use and management of the institutions. His Honour found however, that the Director had not breached his duty of care to Lorna Cubillo in relation to the conditions at the Retta Dixon Home which, although 'not good ... were not so bad as to create a cause of action' (*Cubillo* 2000: para 1267). By way of contrast, in regard to Peter Gunner's claim, O'Loughlin J found that the Director had failed to ensure that reasonable standards were maintained at St Mary's Hostel. However, as the duty of care was owed by the Director alone, the Commonwealth could not be held vicariously liable for its breach.

In his reasoning, O'Loughlin J agreed with the views expressed by Abadee J in *Williams* (1999) concerning the imposition of a common law duty of care on a statutory body for the treatment of children in its care. In *Williams* (1999), His Honour declined to impose a duty of care on the state and the successor to the Aborigines Protection Board. He supported this conclusion in part, by taking into account the public policy considerations set out in the 'novel categories of negligence' cases. In particular, His Honour considered it unsatisfactory to impose a common law duty of care upon a third party for harm caused in circumstances where no such duty would arise as between a parent and child. To do so, in Abadee J's view, would be to impose a higher duty on third parties (*Williams* 1999: para 787) which might in turn, have wider ramifications for the exercise of statutory powers by public authorities in a social welfare context. Although the NSW Court of Appeal declined to consider whether such a duty should be

imposed, the judgment unanimously affirmed Abadee J's reasoning (Williams 2000: para 162):

[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.

In this respect, O'Loughlin J's judgment is considered 'more adventurous' than that of Abadee J. At least Justice O'Loughlin was prepared to find that once the official care relationship was established between a child and the state agency, a duty of care could arise (Clarke 2001:272).

In the matter of *Johnson*, the New South Wales State Government and DOCS (the respondents) argued that the facts of this case were so closely aligned to those in *Williams* (1999) that Rolfe J should follow the decision of Abadee J in finding, *inter alia*, that there was no common law duty of care (*Johnson* 2000: para 90). The respondents relied in part on the potential policy implications, well canvassed in *Williams* (1999), of a finding that a relationship of this kind could give rise to such an obligation at common law. These included the financial consequences for child-caring bodies and the reduction in the provision of substitute care services (*Johnson* 2000: para 97). In his judgment, Rolfe J also noted counter-policy considerations: namely, that as a child cannot be precluded, in appropriate circumstances, from suing his or her own parents, a child-caring body should not be placed 'in any better position, in that regard, to the natural parent' (*Johnson* 2000: para 99). Further (*Johnson* 2000: para 100):

It may also be argued, and in my respectful opinion there would be much force in this argument, that as a matter of policy children, who are basically unable to protect themselves and therefore, find themselves subject to the control of the respondents, are entitled to expect that they will not be placed into foster care in circumstances where they are likely to be mistreated and, if they are, once again as a matter of policy, that the person with the ultimate control over the foster caring situation should be held to be negligent in failing to act in the child's interests, if it comes to that person's knowledge that the child is being mistreated and that person fails to act .

Rolfe J observed that these policy considerations 'have to be considered in light of whether they are, in law, policy matters or operational matters'. And further, as this area of the law remains unsettled, it is unlikely to be resolved in circumstances where the facts, as in *Johnson*, are not yet established (*Johnson* 2000: para 101).

Justice Rolfe ultimately rejected the respondent's submission that, in accordance with the decision in *Williams* (1999), the relationship between the appellant and the respondents could not give rise to a duty of care at common law. Rolfe J held that nothing in the judgment in *Williams* (1999) provided any support for such a generalisation and that every case would need to be determined according to its facts. Rolfe J concluded that he was not satisfied for the purposes of these proceedings, that there could not be an available action based on the existence of a common law duty of care and breach of it by the respondents (*Johnson* 2000: para 106).

It may well be that once the facts are determined the legal principles, which Abadee J applied, will apply to those facts and deny a plaintiff, maybe the appellant in this case,

the right to recover. However, one cannot simply assert that because there appears to be some commonality of facts in *Williams* to the present case, that will inevitably lead to the same conclusion to which His Honour came.

Even where it is possible for a litigant to establish a duty of care at common law, 'final factual findings' can be detrimental to establishing any breach of such a duty. For example, in *Williams* (1999), Abadee J held that even if a duty of care was owed to the plaintiff, the defendants had not breached it in the circumstances of this case. Of relevance to this conclusion are the findings of fact determined by His Honour. Abadee J held that the Lutanda Children's Home was a caring environment staffed by individuals who honestly acted in what they believed was the plaintiff's best interests. He made a similar finding in relation to the Bomaderry Children's Home. Further, His Honour held that the plaintiff's behaviour in her early teenage years was 'normal' and that no psychological or psychiatric condition would have been diagnosed had she been taken to a Child Guidance Clinic over the course of her institutionalisation.

In *Cubillo* (2000), O'Loughlin J held that both plaintiffs had suffered considerable trauma and shock as a result of their removal from their families. His Honour also found that this harm continued throughout their institutionalisation and that each of the plaintiffs suffered from a psychiatric injury as a consequence. However, O'Loughlin J attributed this harm to their removal and detention and not to the conditions of the institutions in which they were forced to live (for which, His Honour held, the Directors could not be held liable in the circumstances of this case). For example, in relation to Lorna Cubillo, O'Loughlin J remarked, 'I do not think that overcrowding or unsatisfactory aspects of hygiene caused or contributed to the sense of loss. That loss came from the severing of her ties with her family and the loss of her language' (*Cubillo* 2000: para 1247). Thus while there was recognition of the injury to both Lorna Cubillo and Peter Gunner, the court held that this injury arose from removal rather than subsequent treatment, and that there was insufficient evidence to show that the removals had been unlawful.

There is also an interesting parallel with the initial finding by the Assessor in Valerie Linow's claim for victims compensation. The initial decision not to award compensation was based on the apparent failure to distinguish whether her psychiatric disorder was 'caused by the sexual assaults or by prior or later life events' (New South Wales Victims Compensation Tribunal February 2002). The Assessor noted that had Ms Linow 'had the opportunity to be reared in a loving family, she would have been a capable parent and would not have suffered from Dysthymic Disorder, Alcoholism or Mixed Anxiety Disorder'. As Goodstone (2002:1) noted, 'in other words the claim failed because the effects of the removal from her family had caused such extreme psychological harm that the subsequent sexual assaults did not, in the view of the Assessor, cause Mrs Linow harm'. This initial decision by the Assessor was thus a cruel irony on the effects of Government policy. If Government policies of removal caused such great psychological harm, then later criminal victimisation was apparently inconsequential and unlikely to be compensated.

The *Williams* and *Cubillo* cases also included claims for damages for physical and sexual assault. As with other aspects of the cases, the plaintiffs had to produce evidence of beatings and sexual misconduct. Although O'Loughlin J accepted that both plaintiffs had been assaulted over the course of their institutionalisation, His Honour held that no one in authority knew, or ought reasonably to have known of the assaults perpetrated

against them (*Cubillo* 2000: para 1255). In the case of Lorna Cubillo, this finding is particularly contentious in light of documented evidence expressing concern as to her assailant being ‘a basher’ (Clarke 2001:279). In the *Williams* case, the claim of sexual assault was withdrawn because she could not satisfy the onus of proof. Her claim was undermined by expert evidence that suggested her psychological disorder ‘distorted her vision of reality’ (Cody 2001:160).

Fiduciary duty

In *Cubillo*, the plaintiffs alleged that a fiduciary relationship existed between each of them and the Commonwealth. In the alternative, they alleged that a fiduciary relationship existed between each of them and the Directors, for which the Commonwealth was vicariously liable. And finally, they alleged that the Commonwealth knowingly participated in the Directors’ breaches of the fiduciary duties owed to them (*Cubillo* 2000: para 1270). The plaintiffs argued that the fiduciary relationship between them and the Commonwealth arose, *inter alia*, because of the role of Commonwealth agents and servants in the plaintiffs’ removal and detention (*Cubillo* 2000: para 1276) and further, because of the Commonwealth’s ‘vast’ power and control over Aboriginal persons in the Northern Territory (*Cubillo* 2000: para 1287). It was also said to arise from the ‘powers, obligations and discretions’ of the Directors in their role as legal guardians and the vulnerability of each plaintiff to the exercise of those powers (*Cubillo* 2000: para 1276).

The plaintiffs identified a variety of fiduciary duties allegedly owed to each of them by the Commonwealth. These included duties to have regard to and to act in the plaintiffs’ best interests; to avoid conflict between its interests and the interests of the plaintiffs; to properly supervise the institutions or individuals into whose care the plaintiffs were placed; and to advise the plaintiffs to obtain independent advice (*Cubillo* 2000: para 1277). The plaintiffs pleaded that the Commonwealth had acted in breach of these duties by removing and detaining them in institutions. They relied, in the main, upon the same evidence used in support of their claims for breaches of statutory duty and the common law duty of care. The plaintiffs’ allegations concerning the duties owed, and the breaches committed, by the Directors were framed in much the same way (*Cubillo* 2000: para 1281). In response, the Commonwealth denied the existence of any such fiduciary relationship between the Directors and the plaintiffs. Alternatively, if such a relationship could be found, the Commonwealth argued that the Director’s conduct could not amount to a breach of fiduciary duty (*Cubillo* 2000: para 1283).

O’Loughlin J noted some of the circumstances that may give rise to a fiduciary relationship such as ‘inequality of bargaining power, an understanding to act in the interests of another person, an ability to exercise a power or discretion that may affect the rights of another and issues of dependency and vulnerability’ (*Cubillo* 2000: para 1284). His Honour also observed that fiduciary duties may arise from a relationship that has been created by statute although this is a matter to be determined according to the facts in the case: *Northern Land Council v Commonwealth of Australia*. In his interlocutory judgment, O’Loughlin J was prepared to accept, on the authority of *Bennett v Minister for Community Welfare* (1992), that the relationship of statutory guardian and ward gave rise to a fiduciary relationship (*Cubillo* 2000: para 1300). However, His Honour distinguished this case from *Bennett* because of his ‘factual findings that the applicants have failed to prove that any of their rights were infringed’

(*Cubillo* 2000: para 1289). In *Williams* (1999), Abadee J also distinguished *Bennett* on the grounds that the *Aborigines Protection Act 1909* imposed a duty to control state wards which, His Honour held, did not equate to guardianship (Cornwall 2002:45; Cody 2001:163).

In regard to the imposition of fiduciary duties on the relationship of guardian and ward, O'Loughlin J considered himself bound by the decision in *Parasivam v Flynn* (*Cubillo* 2000: para 1291):

In Anglo-Australian law, the interests which [these] equitable doctrines ... have hitherto protected are economic interests ... Here, the conduct complained of is within the purview of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter.

As the plaintiffs had limited their claims to losses and damages flowing from their respective psychiatric injuries and cultural losses, His Honour was not prepared to find a breach of fiduciary duty where the alleged conflict of interest did not involve an economic aspect (*Cubillo* 2000: para 1307):

It would appear to be inappropriate for a judge at first instance, to expand the range of the fiduciary relationship so that it extends, as would be the case here, to a claimed conflict of interest where the conflict did not include an economic aspect.

In *Williams* (1999), Abadee J stated (*Williams* 1999: para 312) that:

Any extension of the law to protect other than economic interest had to be justified in principle with regard to the particular interest protected by equitable doctrines. In my view, no such principles exists to warrant extension into a case such as the present.

In sum, Abadee J appeared to reject the general view that there could be a fiduciary relationship giving rise to fiduciary obligations of the kind claimed in *Williams*. His Honour found that there was no breach of any such duty owed to the plaintiff even if it could be shown that a fiduciary relationship existed (*Williams* 1999: para 703). In *Cubillo*, O'Loughlin J held that the plaintiffs had not established that, if there had been a fiduciary relationship between them and the Commonwealth or the Directors, there had been any breach of that relationship (*Cubillo* 2000: para 1307).

Despite judicial reluctance in Australia to expand the range of fiduciary obligations in *Cubillo* and *Williams*, Rolfe J nonetheless found in *Johnson* that it could not be said that there was no action available based on the existence of a fiduciary duty (*Johnson* 2000: para 136). Justice Rolfe interpreted the majority decision in *Williams* (1994) as well as other authorities such as *Brunninghausen*, as lending support to the conclusion that the class of those who stand in a fiduciary relationship is not yet closed.¹² For this reason, Rolfe J rejected the absoluteness of the respondent's submission that the relationship of child and guardian does not give rise to a fiduciary obligation (*Johnson* 2000: paras 135, 136).

Damages

In *Cubillo*, both plaintiffs sought general damages for their pain and suffering and for their loss of enjoyment of life. In advancing their claim, 'great emphasis' was placed on

the loss of the plaintiffs' Aboriginal language, culture and way of life (*Cubillo* 2000: para 1488), as well as the loss of their entitlements to land under the *Aboriginal Land Rights (NT) Act 1976* (Cth). In addition, the plaintiffs sought aggravated and exemplary damages for the Commonwealth's 'conscious and contumelious disregard' for their interests (*Cubillo* 2000: para 16).

Although O'Loughlin J ultimately concluded that the proceedings should be dismissed, he assessed the damages the plaintiffs would have been awarded in the event that he was overruled on appeal. His Honour accepted on the evidence that there was a 'causative link' between the plaintiffs' mental injuries and their removal and detention sufficient to justify an award of damages in tort and equitable compensation (*Cubillo* 2000: para 1493). His Honour also accepted that damages could be awarded for the loss of Aboriginal culture as claimed by the plaintiffs (*Cubillo* 2000: para 1499). However, O'Loughlin J held that the plaintiffs were in turn, under a duty to mitigate any such losses from the time in which they were able to reunite with their Aboriginal communities in adult life (*Cubillo* 2000: paras 1522-4). For this reason, any such award would be 'modest'. In total, His Honour notionally awarded Lorna Cubillo \$110 000 plus \$16 800 interest, and Peter Gunner \$125 000 plus \$19 800 interest. O'Loughlin J made no award of exemplary or aggravated damages as His Honour found that the Commonwealth had not acted in 'contumelious disregard' of the welfare and rights of the plaintiffs (*Cubillo* 2000: para 1556).

In reaching his notional award for damages, O'Loughlin J had regard to Abadee J's assessment of general damages in *Williams* (1999) – although His Honour noted that, in contrast to that case, his assessment was based on the non-consensual removal of the plaintiffs (*Cubillo* 2000: para 1545). Although Abadee J ultimately found against the plaintiff, His Honour nonetheless assessed the damages the plaintiff would have been awarded had she been successful in establishing her claim. His Honour found that even if there had been a breach of duty owed by the AWB causing loss to the plaintiff, she was only entitled to recover \$100 000 in damages plus interest. He notionally awarded \$50,000 for general damages (*Williams* 1999: para 1017); \$35 000 for past economic loss (*Williams* 1999: para 1026); \$10 000 for past care pursuant to *Griffiths v Kerkemeyer* (*Williams* 1999: para 1020); and \$5000 for past medical expenses (*Williams* 1999: para 1031). Finally, Abadee J rejected the plaintiffs' claim for aggravated or exemplary damages as 'without merit' (*Williams* 1999: para 1036).

It is interesting to compare the damages *notionally* awarded in cases involving Stolen Generations claimants with those *actually* awarded in other civil claims litigated before Australian courts (Clarke 2001:284). Indeed, Clarke notes a recent award for damages of \$2.5 million to a Sydney man for receiving the strap eight times at school (2001:284). Arguably, such a contrast reflects poorly on the capacity of Australian courts to recognise the kinds of losses and harms experienced by members of the Stolen Generations. The lack of access to employment and to medical, psychological and psychiatric services further restricts the ability of Aboriginal persons to quantify losses to the same extent as non-Aboriginal persons.

Crimes compensation tribunals: Linow

Governments provide compensation for persons who have suffered particular types of harm. Statutory compensation schemes for victims of crime are one example (PIAC 2000:24):

Most Australian states and territories have legislative arrangements for compensation for victims of crime. An example is the Victims Compensation Act 1996 (NSW), which provides compensation for people who receive injuries as a result of violent crimes. Victims include those who are primary victims, those who suffer harm from witnessing or becoming aware of the violent act and for immediate members of the family of primary victims. The types of injury that are compensable include physical injury, and psychological or psychiatric disorder.

Some members of the Stolen Generations have sought compensation for crimes committed against them while wards of the state or in foster care under criminal injuries compensation schemes.¹³ Persons seeking compensation under these schemes generally need to prove that the relevant crime occurred and that harm occasioned to them was a result of that crime. There is no prerequisite that a person has been prosecuted or convicted of the crime. The claimant does not need to establish liability. Usually the tribunal relies on police reports of the crime and expert evidence as to the psychological impact of it upon the claimant.

In February 2001 Valerie Linow lodged an application in the New South Wales Victims Compensation Tribunal (VCT) for compensation in relation to sexual assaults which occurred between May and October 1958. These events were well outside of the two-year limitation period provided under section 26(1) of the *Victims Support and Rehabilitation Act 1996* (NSW). Leave was granted on 5 April 2001 for the matter to be determined by the Tribunal. The Assessor noted the fact that Valerie Linow 'was only able to revisit the incidents in 1994 and the substantial and ongoing emotional and psychological difficulties which are in evidence'. However, the Assessor also noted that the application 'faces significant hurdles in establishing that the applicant was the victim of an act of violence on the balance of probabilities, or that a compensable injury was sustained as a direct result of that act, pursuant to sections 5 and 7 of the legislation'. Indeed, with this in mind, the Assessor emphasised the fact that the 'onus rests squarely on the applicant or her legal representative to establish her eligibility for statutory compensation' (New South Wales Victims Compensation Tribunal 2001).

Valerie Linow's claim was determined by an Assessor on the documentary evidence provided.¹⁴ On 15 February 2002, her application for compensation was dismissed (NSW Victims Compensation Tribunal 2002a). While the Assessor accepted, on the balance of probabilities, that Ms Linow had been subjected to a series of indecent and sexual assaults, the Assessor was not satisfied, on the balance of probabilities, that her injuries were caused as a result of these incidents.

Following the dismissal of Valerie Linow's claim, her lawyers lodged an appeal on 13 August 2002 with the VCT. The appeal was allowed and the determination of the compensation assessor was set aside accordingly. In a written determination on 30 September 2002, the Chairperson of the VCT stated that he was satisfied that Ms Linow had suffered an injury as required by section 5(1)(c) of the *Victims Support and Rehabilitation Act 1996* (NSW) (NSW Victims Compensation Tribunal 2002b). Further, the Chairperson was satisfied that this injury, which included the diagnosed disorders,

was caused either as a direct result of the sexual assaults or as a result of the sexual assaults in combination with ‘other stressors’ (NSW Victims Compensation Tribunal 2002b). It is clear from the facts set out in the determination that the ‘other stressors’ include Ms Linow’s removal prior to the sexual assaults and/or subsequent life events.

The compensable injury of sexual assault category 3 was established and Ms Linow was awarded \$35 000 accordingly. ‘I have got my justice after 45 years. I’m free because it was tormenting me all the time. I feel like I am reborn. I can go forward and leave this dreadful past behind It’s not the money that’s important to me. It is the knowledge and recognition that this happened to Aboriginal people. No one could pay any amount for what happened to us because we lost a lot’ (quoted by Jopson 2002).

The use of statutory compensation schemes for victims of crime has been one of the few areas of success for members of the Stolen Generations. However, as we discuss later, even this avenue is only of limited benefit to a minority of those who were removed.

4. Evidentiary Hurdles: Reconstructing a Colonialist Narrative

Who writes? For whom is the writing being done? In what circumstances? These it seems to me are the questions whose answers provide us with the ingredients making a politics of interpretation [Edward Said, cited by Smith 1999:37].

The earlier sections of this Discussion Paper set out the Stolen Generations applicants and their claims. It discussed the courts’ responses to various legal issues including wrongful imprisonment, breach of statutory duty, breach of duty of care and fiduciary duty. We now turn to discuss the various and, at times, unique difficulties confronting Stolen Generations claimants before the courts.

Litigation presents very particular evidentiary hurdles for members of the Stolen Generations. Indigenous culture utilises (and continues with) rich and complex oral and artistic traditions as an essential part of the communicative process. Conversely, writing and record keeping were an essential part of the imperial culture. Indeed, record keeping is integral to the project of colonisation: it is the tool for describing, itemising and controlling the colonised. Knowledge through writing constructs ‘the Other’ and places the colonised within a particular relationship to colonial power.

From the law’s standpoint, oral traditions lack materiality and cannot be transfixed in time and place. Thus Aboriginal knowledge about the historical events affecting themselves, their families and their communities is seen by the Court as inherently unreliable. The issues around the treatment of historical evidence has been widely discussed in relation to native title cases – both in Australia and Canada (Bartlett 2003; Borrows 2001). Many of the same problems in the way the court chooses to deal with Indigenous evidence are apparent in the Stolen Generations cases.

History, beneficial intent and ‘standards of the time’

For the purposes of litigation, the records of removal are the inscriptions, notes and forms of Government and Church (PIAC 2000:16-17).

Evidentiary requirements make it difficult for people whose only records in relation to their childhood are often the records maintained by government, to prove that they were wrongly removed because of particular (unrecorded) breaches of state duties, or suffered harm because of particular (unrecorded) incidents. Government records, not surprisingly, fail to reveal the level of abuse, deprivation and racism which the National Inquiry exposed.

There are profound ironies in the demand for written records, when colonial power itself was satisfied with literal inscriptions of the bodies of the colonised. For example, the thumbprint of Peter Gunner’s mother, Topsy, was found on the balance of probabilities to signify her express and ‘informed consent’ to her son’s removal and subsequent institutionalisation (*Cubillo* 2000: para 787). The body of the colonised becomes a site of colonial record-keeping, but what meaning can we attach to a thumbprint? During the proceedings, there could be no real examination of, or challenge to, the consent of Peter Gunner’s mother in the absence of evidence (O’Connor 2001:30-31). By the time of the hearing, Topsy herself was dead and there was no way of identifying the officer from the Native Affairs Branch who obtained her thumbprint – or indeed, if the thumbprint truly belonged to her. Without more, His Honour accepted the documents compiled in the Native Affairs Branch as favouring a positive conclusion that Topsy had given her informed consent to her son’s removal and detention (*Cubillo* 2000: paras 787-8).

In *Williams* (1999) there was evidence of a written record of Dora Williams seeking permission from the AWB to visit her daughter. Abadee J stated that it is unclear ‘[w]hether she has forgotten that she had consented to the child going to Lutanda or whether she believed any visit to her wherever she was required the Board’s permission’ (Williams 1999: para 181). With respect, this comment reveals an extraordinary lack of insight into the issues of consent and the power of the AWB over Aboriginal persons.

The question of consent goes directly to the heart of the context of colonial power and Aboriginal peoples. What can we mean by ‘consent’ when there are such profound imbalances of power?¹⁵ The powers under various Aborigines Protection Acts had been to institute legal regimes that provided for the total control of all Indigenous activities and certainly not to require their consent. Indeed, the idea that Aborigines would exercise any kind of informed decision-making was fundamentally alien to the racial ideology that underpinned Protection legislation. To the extent that Protection legislation made Indigenous persons ‘wards of the State’ in a legal sense, it also treated them as *incompetent* to make decisions about matters affecting their daily lives.

Government records are likely to paint a picture in which the removal and subsequent treatment of Indigenous children complied with ‘their best interests’ and met the standards of the time. Protection laws are characterised as benign in their intent, as ‘beneficial’ laws – even if discriminatory. Under these circumstances, the likelihood that the forced removal of Indigenous children will be considered by the courts as constituting genocide is remote.

The central defence of the Commonwealth in *Kruger* has been characterised by La Forgia (1997:194) as the defence of ‘history’:

The Commonwealth argued that the Aboriginals Ordinance was made when community attitudes were different and the Ordinance should be viewed as intending the care and protection of Aboriginal people. It could not, therefore, be judged or characterised by contemporary attitudes or laws. The majority of the High Court effectively accepted this defence and found that the Aboriginals Ordinance was not constitutionally invalid, rejecting the implied and specific rights argued by the plaintiffs. The court was unanimous in not defining the Aboriginals Ordinance as genocidal.

The decision in *Kruger* 1997 reinforced the view that it is the community standards and perceptions ‘of the time’ which are relevant to the determination of the validity of the exercise of legislative power. As stated above, the Commonwealth argued that the constitutional validity of the *Aboriginals Ordinance* must be considered by reference to the standards and perceptions prevailing at the time of its enactment, and not by reference to contemporary standards. To do otherwise, the Commonwealth stated, would be to engage in the ‘retrospective re-writing of the course of our Constitutional evolution’ by applying ‘back 80 years or so the operation of newly articulated Constitutional rights, entitlements, or freedoms’ (Transcript, 12 February 1996, cited in Blokland 1997:12). The majority of the High Court appears to have agreed with the Commonwealth’s proposition; Kruger (1997:53-54) wrote that:

The measures contemplated by the legislation of which the plaintiffs complain would appear to have been ill-advised or mistaken, particularly by contemporary standards. However, a shift in view upon the justice or morality of those measures taken under an Ordinance which was repealed over 40 years ago does not itself point to the constitutional invalidity of that legislation.

This is not simply the ‘defence of history’. It is, more precisely, the defence of a colonialist history: the history of the exercise of imperial power for the benefit of all. This was not the only conclusion open to the court. The plaintiffs argued against the proposition that racist and discriminatory views *at any time* can determine the meaning and effect of the Constitution, suggesting that such a reading ‘directly contradicts the very nature of the compact and the inherent equality of the parties to it’ (Plaintiff’s submission quoted by Blokland 1997:12). Alternatively, the point argued in the *Bringing Them Home* report (HREOC 1997) is that neither genocide nor discrimination was acceptable in the aftermath of the Second World War according to the prevailing contemporary legal values of that time. Even prior to Australia’s ratification of the Genocide Convention in 1949, it was widely accepted that genocide was contrary to international law (Lemkin in Cummings 1998:42).

In sum, the decision in *Kruger* is premised on a history of ‘justification’ rather than a history of ‘harm’ (Cummings 1998). It is a history that accepts as inviolable the values and the laws of the dominant power at a particular time. In this way also, it accepts that there was ‘only one set of common and shared values in the past’ (HREOC 1997:247). The reasoning of the majority stands in direct contrast to the work of the United Nations Commission on Human Rights which recognises the necessity of successor governments being bound by the responsibilities incurred by predecessor governments for gross violations of human rights (Cummings et al 1997:42; Blokland 1997:12).

In *Cubillo*, O’Loughlin J found that the Commonwealth had pursued a policy of assimilation, ‘in the sense of integration’, which he dated back to the early twentieth

century (*Cubillo* 2000: para 162). His Honour held that the purpose of this policy to ‘assimilate part Aboriginal children into non-Aboriginal society’ was ‘not based on race’ (*Cubillo* 2000: para 162) but rather, on ‘what was thought to be in the best interests of the children’ at that time (*Cubillo* 2000: para 1146). Similarly, in *Williams* (1994), Studdert J was not satisfied that there was sufficient evidence available to the plaintiff to establish her case because the actions of the AWB were based upon policies of beneficial intent, according to the standards and values of the 1940s (*Williams* 1994:36).

His Honour referred to the assimilationist policies of the Board expressed in its annual report in 1947 (*Williams* 1994:28):

... one of the principal features of the Board’s policy is the assimilation of the better class of aborigines, particularly those of lighter caste, into the general community.

Studdert J observed (*Williams* 1994:29):

Much of what is contained above would be viewed today as inappropriate and erroneous; also as being patronising and offensive to Aboriginal people, and as failing to recognise their essential dignity and as failing to respect their culture and traditions; further, as failing to appreciate how their interests can best be advanced. Nevertheless, the stated policies of the Board in these annual reports were expressed as being for the betterment and welfare of the Aboriginal people and it is a reasonable inference that the Board believed in those policies and considered the policies as soundly based.

In *Williams* (1999), Abadee J found that the enactment of the *Aborigines Protection Act* reflected the national policy of assimilating Aborigines into the general community according to the contemporary values and standards of the 1940s and 1950s (*Williams* 1999: para 647). On the issue of applying the contemporary community standards of that time rather than those that exist today, His Honour referred to the *Kruger* decision. Abadee J found that assimilation was not only a policy of the AWB, but that the AWB had a statutory duty under the provisions of the legislation to act ‘in the best interests of the Aborigines’ accordingly (*Williams* 1999: para 88). His Honour held that the AWB had in fact acted in accordance with its statutory duty as well as in the plaintiffs’ best interests according to the assimilation policy of the time.

On a broader level, it is apparent from these judgments that litigation has provided a forum where a revisionist colonial account of history has been privileged and legitimatised. In *Kruger*, for example, much of the analysis in the judgments has been labelled ‘unsatisfactory’ (Clarke 2001:222-3):

Some judges glossed up to 80 years of legislative history, drawing inappropriate analogies between early 19th century ‘protection’ regimes (which were concerned with small ‘remnant’ populations) and the more managerial regimes of the early 20th century (which threw a broad, finely woven net over most people of Aboriginal descent, in particular from the 1930s). In subsequent cases, this conclusion seems to have hardened into a form of ‘fiat history’ – an historical conclusion reinforced via the doctrine of precedent.

Similarly, in *Cubillo*, there is concern with O’Loughlin J’s finding that there was no general policy of removal of part-Aboriginal children during the 1940s and 1950s. His Honour found that even in the absence of evidence concerning the number of part-Aboriginal children living in the Northern Territory at that time, ‘one can, nevertheless, feel satisfied that the number ... far exceeded’ the capacity of the Commonwealth or the

institutions to implement such a policy (*Cubillo* 2000: para 300). His Honour referred to official records concerning the number of Aboriginal children removed, describing them as ‘very low’ (*Cubillo* 2000: para 224) and non-consensual forced removals, as ‘rare’ (*Cubillo* 2000: para 248). In this way, he concluded that the evidence did not support the argument that there was a general policy of forced removal or, if he was wrong, that it had been implemented in respect to the plaintiffs in this case (*Cubillo* 2000: para 1160).

However, some commentators have identified the limitations of O’Loughlin J’s analysis. For example, Van Krieken (2001:246) noted that neither the Commonwealth’s lack of capacity to implement a policy, nor the existence of situations in which it was not implemented, necessarily equates to it not having existed:

No evidence ruled out the possibility that decisions not to remove children might have been the result of balancing the aims of the policy with pragmatic concerns. The mere selective application of a policy does not render its existence logically impossible.

In litigation, the onus is on members of the Stolen Generations to show that the removals, detentions or other exercises of statutory power were unlawful. In other words, claimants are placed in a position whereby they must counteract the official version of history. The Indigenous task of counteracting this official portrayal is made more difficult by a number of factors (PIAC 2000:17):

- The events in question occurred up to 50 years or more ago, so that witnesses may be difficult to locate, no longer alive or fail to remember relevant facts.
- The experience of removal, institutionalisation and isolation meant that many children, understandably, never made complaints about abuse, particularly sexual abuse, and hence no records exist to substantiate their story.
- The nature of sexual abuse itself meant that many victims did not talk about it to anyone until later in life, if at all.

These limitations are clearly demonstrated by the litigation in *Williams* and in *Cubillo*. In both of these cases, the courts placed great emphasis on the documentary record, due in part to the absence of witnesses and the fallibility of witnesses’ memories after such long periods of time. In *Cubillo*, for example, although more than 50 witnesses gave evidence, O’Loughlin J named more than 100 others whose testimony might have been of assistance to the court. Of this number, approximately 90 were dead at the time of trial (Clarke 2001:286). Some witnesses were too ill to give evidence; the whereabouts of other witnesses were unknown; some died over the course of the proceedings; and the evidence of others was contradictory or clouded by the passage of time (Clarke 2001:286). Finally, adverse inferences were drawn, in the case of Peter Gunner, from the failure to call particular witnesses (*Cubillo* 2000: para 837).

It is important to note that the emphasis of the courts on documentary evidence can present particular difficulties for Stolen Generations claimants who must discharge the onus of proving their causes of action – especially after a significant lapse of time. In *Cubillo* and in *Williams*, much of the written record had been lost or destroyed by the time of trial, leaving the courts with some difficulty in making findings of fact (Cody 2001; Clarke 2001). In *Cubillo*, for example, O’Loughlin J referred to a ‘total absence of documentary evidence’ concerning the removal and detention of the plaintiffs and questioned whether such records ever existed, or whether they had been lost or destroyed by such events as Cyclone Tracey (*Cubillo* 2000: para 442). In *Williams*

(1994), Studdert J noted that relevant material records were either incomplete or missing, including those from the Lutanda Children's Home, the AWB, and the school. The absence of documentary evidence and indeed, its primacy, played a significant role in His Honour's reasoning that the prejudice to the defendant would be too great to grant the plaintiff an extension to the limitation period (*Williams* 1994:36).

Cases involving more recent separations, such as *Johnson*, are less likely to be hampered by lack of existing documentary evidence. However, the culture and work practices of organisations like DOCS will still limit the utility of such documents. Official documents are unlikely to reveal the level of institutional abuse or reflect the ongoing trauma of inter-generational removals.¹⁶

5. Adversarial Court Processes, Credibility and Re-Traumatisation

Members of the Stolen Generations who proceed with litigation will be subjected to extensive cross-examination. Over the last 20 years, there has been much discussion of the disadvantages that arise when Aborigines are required to give evidence in court proceedings (e.g. ALRC 1986; Eades 1995; CJC 1996). More recently, Flynn and Stanton (2000) have analysed the problematic way Aboriginal evidence was treated in *Cubillo*. In particular, they note that the Commonwealth objected to the plaintiffs' counsel providing the Judge with information explaining some matters relevant to Aboriginal witnesses.

While Indigenous persons are already disadvantaged in the court process, there is no doubt that the Stolen Generations will face added trauma. They will be required to disclose their experiences of suffering in a largely unsympathetic environment. All aspects of their lives will be subject to public scrutiny. It is likely they will be required to undergo psychological testing in order to prove harm. At the same time, the environment will not provide the space in which victims can tell their stories. As Llewellyn has noted in the Canadian context, victim testimony is limited to those events and experiences relevant to the legal issue under consideration. 'Only certain parts of the truth – those deemed relevant to the cause of finding liability – will receive public attention through this process' (Llewellyn 2002:270).

For this reason the court process may involve a period of re-traumatisation for those who were removed. The personal difficulties experienced by the plaintiffs during the cases are well known. In *Cubillo* for example, the negative impact of the decision on Peter Gunner was evident even in the ABC television broadcast of O'Loughlin J's judgment, handed down on 11 August 2000. His Honour agreed with Peter Gunner's psychiatric expert who told the court that 'he could not remember seeing a man who seemed so beaten as Peter Gunner' (*Cubillo* 2000: para 1473). Peter Gunner had not confronted the issue of being sexually assaulted until the case became public.

In discussing the *Cubillo* and *Williams* cases, Cornwall (2002:46) noted that:

The plaintiffs in these cases had their lives opened up for scrutiny as part of a major public controversy, only to be disappointed by what the legal system could offer. The adversarial nature of the litigation is particularly inappropriate for plaintiffs who have, by the nature of their claims, suffered emotional and psychological harm and are required to undergo extensive cross-examination in relation to difficult and sensitive

matters. It is also an inappropriate process for resolving important social and political issues.

Beyond the individual plaintiffs, the litigation of these matters may have a wider negative impact on the class of persons it was intended to benefit. Evidence to the Senate Legal and Constitutional References Committee (SLCRC 2000:43) suggests that similar plaintiffs or potential litigants have refrained from seeking counselling to address the long-term effects of removal on legal advice that their counselling records might be subpoenaed in court.

In many of the cases, the courts have viewed the credibility of those who were removed as a significant problem. This may arise from the young age at which the claimants were removed, as well as from the emotional trauma they have suffered since that time. The psychological nature of the harm done by removal may well work against the interests of the victims in terms of their ability to present as credible witnesses. In *Cubillo*, for example, O’Loughlin J stated (*Cubillo* 2000: paras 124-5):

I have no doubt that they believe that their experiences – what they might call their incarcerations – were legally, as well as morally, wrong. Armed with this powerful persuasion, there is the risk that ... they may have given distorted, but not deliberately false accounts of matters to which they deposed in their evidence I am concerned about their ability to recall, accurately, events that occurred so many years ago when they were small children. I am also concerned that they have unconsciously engaged in exercises of reconstruction, based, not on what they knew at the time, but on what they have convinced themselves must have happened or what others may have told them.

Clarke (2001:265-266) summarised some of the problems perceived by O’Loughlin J concerning the credibility of the plaintiffs. His Honour described Lorna Cubillo’s response to cross-examination as ‘progressively defensive, evasive and argumentative’, and her replies as ‘rambling [and] nonsensical’ at times (*Cubillo* 2000: paras 728, 1369). His Honour also found that she had magnified and exaggerated certain events to which she had testified. Although O’Loughlin J regarded Peter Gunner to be a ‘truthful person’ at base, His Honour also found him to be ‘a very poor witness’, ‘slow thinking and easily confused’, as well as ‘sullen and moody’ (*Cubillo* 2000: para 869). Consequently, his evidence was described as ‘highly confusing’ and ‘quite obtuse’ (*Cubillo* 2000: para 925). The negative impression formed at times by O’Loughlin J concerning the plaintiffs’ credibility resulted in some of their evidence being regarded as unreliable.

In *Williams* (1999), Abadee J made adverse findings against the plaintiff concerning her credibility and the reliability of her evidence. Joy Williams was too ill to attend the trial and thus, was unable to be cross-examined on the contents of her affidavits. Over the course of the proceedings, certain inconsistencies became apparent which in themselves, counsel submitted, were evidence of the plaintiff’s attachment disorder. Abadee J rejected that submission. His Honour found that ‘there was no such disorder’ and further, that the ‘objectively untrue’ and ‘exaggerated allegations’ in the plaintiff’s affidavits reflected ‘deleteriously on the reliability and credibility of the plaintiff’s evidence generally’ (*Williams* 1999: para 243). This finding also undermined much of the expert evidence supporting the plaintiff’s claim because it was based on her recollection of events (*Cody* 2001:160).

In sum, Abadee J rejected all of the plaintiff's allegations of abuse at the institutions. As referred to elsewhere in this paper, Joy Williams was also forced to withdraw other allegations of sexual abuse, due in part to expert evidence which suggested that her psychological disorder 'distorted her vision of reality' (Cody 2001:160). It is clear that Abadee J's assessment of the plaintiff's credibility and the reliability of her evidence significantly affected the findings of fact in this case. As Cody suggested, the New South Wales Court of Appeal's reluctance to disturb the trial judge's findings of fact indicates that decisions which rely heavily on findings of fact will be difficult to challenge in the future (2001:168).

Victim vulnerability

The *Williams* and *Cubillo* cases highlight the way in which the evidentiary burden placed upon Stolen Generations claimants can prove extremely onerous to discharge. This is particularly so in cases where severe psychiatric damage has been sustained. Indeed, it is ironic that the litigation process requires claimants to establish 'damage', and yet this 'damage' can effectively preclude claimants not only from participating in, but achieving a successful outcome from the litigation process itself. In this context, it is hardly surprising that in piecing together the evidence, inconsistencies emerge at times. However, inconsistency itself does not equate to untruth.

As part of the research on Stolen Generations litigation, we interviewed a solicitor with a leading law firm who has taken instructions from six potential claimants. We select two of the case studies to further reflect the difficulties faced by members of the Stolen Generations in pursuing litigation.

Case Study 'Anne'

Anne was born in 1946. By the time she sought legal advice, she was in her late fifties. Anne and her brother were removed from their mother's care when she was approximately two years of age. Although it appears from official documents that her mother consented to her removal, she also appears to have subsequently changed her mind. In addition, Anne's grandparents made an application for custody with the AWB at the time of her removal. However, the matter does not appear to have proceeded to hearing. Anne did not know any of this information until her solicitor obtained, with great difficulty, various documents relevant to her claim.

Anne was taken to southern New South Wales and placed in the foster care of an Aboriginal family on a mission. She remained with this family until she was eleven years of age. All of the AWB documentation available from that time was extremely positive about her behaviour. After the death of her foster mother, Anne's foster father's mother cared for her until she was removed again and taken to a Children's Home.

Anne described the environment of the Children's Home as extremely abusive. Upon her arrival, a staff member told Anne that her name, birthday, and religion were different from that which she had previously understood and known as her own. She complained that she was denigrated for her Aboriginality and told that her family no longer cared about her. Anne was mistreated in a myriad of ways during this time. For example, she was sexually assaulted by a staff member at the Children's Home and subsequently, over the course of her placement on a farm where she was sent to perform domestic work. Anne experienced great difficulty in talking about this abuse, and it took

her some time before she felt comfortable enough to disclose this information to her solicitor. In subsequent meetings with her solicitor, Anne would refute her own allegations.

In addition, there were many inconsistencies in her recollection of events and their chronology. Anne ran away and was taken back to the Children's Home several times. On two or three occasions she was placed elsewhere to work as a domestic labourer, until she was sent back to live at the Children's Home. Anne got into trouble on a regular basis and when she was approximately 16 years of age, Child Welfare authorities intervened, placing her in a training centre for girls. Again, Anne ran away on several occasions. During this time, she became pregnant and gave birth to a daughter whom she would eventually consent to having fostered. From the documentation obtained by Anne's solicitor, it would appear to have been a formal arrangement of which the AWB had full knowledge. However this too is inconsistent with Anne's understanding of what happened at that time.

It was difficult for Anne's solicitor to find anything out about her between the ages of 20 and 40 years because no official files were kept during this period. Her solicitor was able to piece together some information about this time however, from her conversations with Anne. After her daughter was fostered, Anne's life was fairly transient. She became alcoholic and also spent some time in gaol for vagrancy offences. She married twice. Her first husband was abusive and her second marriage was 'strange'. Anne felt as though she could not have relationships with men and found it hard to trust anyone. She saw her daughter intermittently until she was killed in a car accident at 18 years of age.

The reason why Anne decided to pursue a civil claim was because of her desire to provide security for a foster child that was in her care. Nonetheless, Anne found it very distressing to talk about her past. This distress was further compounded by the difficulty and delay her solicitor experienced in obtaining the documentary evidence required for litigation. In addition, once official records were obtained, Anne was forced to confront their content, which was often 'extremely racist' as well as highly critical of her personally. Her own recollection of events could be confused at times. For these reasons, it took some time to prepare Annes affidavit and file a statement of claim. Her solicitor estimated that this preliminary process took between 18 months and two years to complete.

Litigation did not appear to be the way to obtain 'justice' but it was the only way available to Anne. Her solicitor expressed concern that the whole process would prove even more soul-destroying for her client. In particular, Anne's credibility as a witness and the reliability of her evidence would have been fiercely contested in an adversarial forum. Anne herself had no real understanding of the litigation process or what to expect from it. She anticipated any such proceedings to be conducted in much the same way as those during the National Inquiry: thus reflecting a false expectation of the litigation process itself as well as its potential to provide a just outcome for claimants.

Unfortunately, Anne's health deteriorated and the attempt by her solicitor to have her claim expedited accordingly, was unsuccessful. Anne died before her matter was listed for hearing.

Case study 'David'

David was removed from his family's care at a young age, possibly as a baby, and placed in a Children's Home. When he was approximately nine years of age, he was removed again, with several other children, and placed in another Children's Home. Upon their arrival, staff members burned the children's schoolbags and bibles. It was at this time that David first learnt of his Aboriginality and he was subject to much racial vilification as a consequence. David described both physical and sexual abuse at the Children's Home. In addition, at 14 or 15 years of age, he was sent to work as a labourer. He was never paid for this work. He understood that the money was meant to go into a trust fund for him, however he never received any documentation notifying him of this fact. The documents obtained by his solicitor stated that they had been unable to find him.

David experienced much distress when discussing aspects of his childhood. He told his solicitor that he did not 'feel Aboriginal'. He was raised in an environment that was critical of Aboriginal peoples and, as a consequence, he experienced great difficulty identifying with the Indigenous community. The same kinds of delays occurred in relation to this matter as described in the case study of Anne. These were mostly due to the difficulties his solicitor had in obtaining the documentary evidence required for litigation.

Unfortunately, David had a stroke and died while his solicitor was preparing his statement. After his death, David's family chose not to pursue his claim.

6. Statute of Limitations

Statutory limitation periods apply to claims for damages arising from negligence, wrongful imprisonment and breaches of statutory duties. As we noted previously, statutory limitation periods limit the time within which court actions can be taken. They may also apply 'by analogy' to claims for equitable compensation for breach of fiduciary duties (*Williams* 1994: para 509). Generally, legislation confers upon the court a discretion to extend the limitation period if the plaintiff can show that special circumstances exist and that the defendant will not suffer any significant disadvantage by the court granting the extension sought. The plaintiff must rebut the presumption that the defendant's ability to defend the claim has been prejudiced by the delay in the commencement of proceedings.

The statutory time bar has proven to be a significant problem confronting Stolen Generations claimants. Although the courts in *Cubillo* (2000) and *Williams* (1999) deferred making a final decision on the question of limitations until after the substantive issues had been considered, both 'ultimately concluded that there would be "overwhelming prejudice" to the defendant if time limits were waived' (Cornwall 2002:46). As Clarke (2001:225) noted, 'limitations are likely to be the deciding factor in similar cases brought by people long separated Such cases turn on their facts – whether or not witnesses to a particular plaintiff's institutionalisation have died or the records thereof have disappeared, such that a government is unable to defend itself properly'.

As noted previously, in *Williams* (1993) Studdert J declined to make an order under the *Limitation Act 1969* extending the period within which the plaintiff could bring proceedings for damages and equitable compensation against the defendants. His Honour concluded that it was not ‘just and reasonable’ to grant such an order in the circumstances of this case. Studdert J found that he was not satisfied that there was sufficient evidence available to the plaintiff to establish the causes of action pleaded (*Williams* 1993:31). Further, His Honour expressed concern that the extension sought would cause the defendants significant’ prejudice given the lapse of time since the events occurred and the consequent lack of evidence available (*Williams* 1993:35). Studdert J held (*Williams* 1993:36) that:

The effect of the passage of time since the occurrence of the relevant events is such that there would no longer exist an opportunity for the defendants to meet such a case and consequently to have a fair trial.

The New South Wales Court of Appeal subsequently reversed Studdert J’s decision. Kirby P, in the leading judgment, found that the *Limitation Act* does not apply, ‘in its own terms’, to a cause of action for equitable compensation for breach of fiduciary duty. At most, it applies by ‘analogy’ (*Williams* 1994: para 509). His Honour held that Studdert J had erred in his composite consideration of all of the causes of actions. In particular, the plaintiff’s equitable claim for breach of fiduciary duty ‘raises separate and different questions’ than those claims based on tort (*Williams* 1994: para 509). Regard would need to be given to the facts of the case and to this end, more evidence would be required. The fact that the plaintiff’s claim for equitable compensation would thus need to proceed to trial would itself be relevant to the question of what was ‘just and reasonable’ in respect of the causes of action in tort (*Williams* 1994: para 510). The Court of Appeal held that Studdert J’s error vitiated the exercise of his discretion to grant an extension to the limitation period in this case. Kirby P observed (*Williams* 1994: paras 514-15):

I acknowledge the disadvantages, and even the prejudice which the respondents suffer as a result of such a long delay since the events occurred which are now complained of. But if “justice and reasonableness” are the criteria such prejudice must be weighed in scales that also take account of justice to the appellant, an Australian Aboriginal, who invokes the courts of her country. And the reasonableness of permitting her to pursue [with] her claim for breach of fiduciary duty, which requires no extension of time under the Limitation Act, the two causes of action in tort which depend upon evidence largely common to the claim for equitable compensation for breach of fiduciary duty... The law which has often been an instrument of injustice to Aboriginal Australians can also in proper cases, be an instrument of justice in the vindication of their legal rights. It is not just and reasonable in this case to close the doors of the Court in Ms Williams’ face. She should have her chance to prove her case. She might succeed. She might fail. But her cause will have been heard in full. It will then have been determined as our system of law provides to all Australians – Aboriginal and non-Aboriginal – according to law in open Court on its merits).

As Batley (1996:182) noted, the judgment in *Williams* (1994) implies that narrow procedural questions should not prevent the exploration of broader questions of substantive law and justice.

In contrast to the New South Wales Court of Appeals decision in *Williams* (1994), the decision in *Cubillo* turned more than anything else on the ‘tyranny of time’ argument. Indeed, despite all of the other legal issues involved, the limitation period

prescribed by statute was considered by Counsel as the fundamental basis for the defeat of the plaintiffs' claims (Rush 2002:20). Although O'Loughlin J found that the plaintiffs had satisfied the relevant precondition for an extension of time as specified in the *Limitation Act*, His Honour decided not to exercise that discretion in their favour. The primary reason for declining the order sought by the plaintiffs was because of the 'irremediable prejudice' that an extension of time would cause the Commonwealth in the preparation of its defence – and thus, preventing a fair trial (*Cubillo* 2000: para 1421). In particular, O'Loughlin J noted the impact of the 'passage of time' in relation to the lack of documentary and witness testimony available in reaching this conclusion (*Cubillo* 2000: paras 1400, 1404).

It is interesting to contrast again, the passage of the *Johnson* litigation on the issue of limitations. The initial decision declined to extend the limitation period within which Christopher Johnson might commence proceedings against the respondents on the basis that he had not established the requirements of sections 58(2) and 60G of the *Limitations Act 1969*. On appeal, Rolfe J found that the Master had erred in not taking account of the (uncontradicted) evidence that Mr Johnson did not become aware of 'the nature and extent of his injuries or connection between them and the respondents conduct' until 1997 (*Johnson* (2000: para 49):

There is absolutely no doubt that the appellant appreciated that he was being physically mistreated and abused. However ... he is not suing in these proceedings for bodily injuries received in consequence of that conduct, but for the subsequently ascertained psychiatric consequences of it.

The respondents in the *Johnson* matter argued that that there was no duty at common law, no duty pursuant to any relevant statute and no fiduciary duty. Rolfe J found that Johnson had established that an apparently viable cause of action existed – such that there is utility in providing the extension of time sought (*Johnson* 2000: para 86). At this stage, 'I do not see why, if tortious conduct causes a person to develop a psychiatric illness, that person, at least prima facie, is not entitled to recover damages in consequence thereof' (*Johnson* 2000: para 88).

Rolfe J accepted the Master's earlier findings that the respondents would not suffer any significant prejudice in respect of the availability of Department staff or records. In addition, there was no evidence that witnesses, other than the foster mother (who had died) were unavailable. For these reasons, it was within the Master's discretion to find that the respondents would not suffer significant prejudice or be unable to obtain a fair trial. It is important to note that Christopher Johnson was removed in 1973 – some twenty to thirty years after the other Stolen Generations cases referred to in this Discussion Paper.

Finally, time limitations also apply to all victim's compensation schemes in Australia. In NSW, for example, applications for compensation must be lodged within two years after the act of violence. However, as in *Linow*, the tribunal can exercise its discretion to accept late applications. Sexual assault, child abuse and domestic violence are matters where the tribunal would normally grant an extension, unless there is no good reason for the delay.

Statute of Limitations defence and reparations

The statutory limitations periods are likely to particularly disadvantage Aborigines. Historically, they have not been in a position to enforce their legal rights, even where those rights were not denied through legislation. Given that Protection legislation generally regulated a myriad of day-to-day personal affairs, it is not surprising that there has been a lack of litigation until recently. The *Aboriginals Ordinance* under which Lorna Cubillo and Peter Gunner were removed, ‘was by any measure, a remarkable piece of legislation. It intruded into almost every aspect of an Aboriginal person’s life: it restricted movement, employment, marriage, personal associations, the rights of parents and property rights’ (Richards 2000:18). At base, law has been used against Aboriginal persons in Australia as a tool of repressive and finely tuned regulation – it has certainly not encouraged a notion that Aborigines are independent legal subjects capable of using the law for their own protection.

The Stolen Generations litigants who succeed in having the limitation period extended will be selected on criteria such as the availability of records and witnesses, criteria ‘unrelated to the underlying justice of the situation’ (PIAC 2000:16). Such a situation cannot provide a comprehensive solution to the issue and only serves to increase the ‘lottery’ effect of the legal system and its inability to deal either systemically or systematically with these issues.

In addition the court’s decision not to allow an extension of time has been re-interpreted as reflecting on the legitimacy of the claims of the Stolen Generations litigants. The High Court’s denial of leave to appeal in *Cubillo* was hailed as a ‘victory’ for the Federal Government, who ‘welcomed’ the decision which it hoped would bring an end to the issue of compensation for the Stolen Generations (Farrant and Douez 2002:9). The (then) Indigenous Affairs Minister, Phillip Ruddock, was widely quoted as saying that financial compensation was not the way to help children separated from their families (Hansard 2001). Michael Schaeffer, the solicitor who headed the legal team for Mrs Cubillo and Mr Gunner, pointed out that this decision did not mean that the courts had ‘rejected the truth of their shocking story’. He added ‘[f]or John Howard and his Government to hide behind this decision and refuse to adequately compensate members of the stolen generations like Lorna and Peter will only serve to perpetuate a denial of the events which form a part of the history of this country’ (Farrant and Douez 2002:9).

The fact that Commonwealth and State Governments have relied on the statute of limitations by way of defence to applicants’ claims has also come under criticism by numerous commentators (Rush 2002; Flynn and Stanton 2000; Clarke 2001). Governments have argued that they would suffer irreparable prejudice in having to answer claims that arose from events that occurred in the 1940s, and 1950s. In cases like *Cubillo*, the Courts have rejected strike-out applications to summarily dismiss the claims, but ultimately accepted the prejudice argument and ruled matters to be out of time.

Flynn and Stanton (2000) asked whether this approach could be sustained in the interests of national reconciliation? One approach to the applicants’ claims would recognise that sufficient evidence exists for the national interest to be served by having the court make a determination on the best available evidence. As Flynn and Stanton have argued, there is no legal obligation on the Commonwealth (or other Governments)

to rely on the limitation period. These decisions are essentially political and/or policy-driven. For example, the Commonwealth initially attempted to rely on the statute of limitation defence that was available to a claim arising from the 1964 collision between *HMAS Voyager* and *HMAS Melbourne*. Eventually, after three successful cases, and a queue of a further 89 cases, the Commonwealth established a successful mediation process to settle the claims (SLCRC 2000:321).

Because of the difficulties posed by the statute of limitations to the successful litigation of Stolen Generations claims, some practitioners have publicly called for legislative change.¹⁷ There are already examples of amendments in both Western Australia and Victoria to overcome problems arising from statute of limitations under particular circumstances relating to latent injuries (e.g. relating to asbestosis).¹⁸ Rush (2002) noted that, in these instances, prejudice to a defendant is not an issue in relation to an extension of time under either the Western Australian or Victorian provisions. The extension of time for latent injury is automatic. 'In each case the government of the day took the principled position that it would be unreasonable and unfair to deny persons who had suffered injury of which they were not aware the opportunity of bringing an action against those who had negligently caused such an injury' (Rush 2002:21).

7. Limitations of Monetary Compensation

Litigation gives rise to the expectation that individual monetary compensation can provide appropriate redress for the damage suffered by members of the Stolen Generations. It is an individualising approach and does not provide for a more collective answer to the harm suffered by families and communities. Nor does it provide for the broader concept of reparations. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families used the Van Boven principles to focus more widely than monetary compensation and included principles of apology, acknowledgement, guarantees against repetition, reparations and restitution.

Monetary compensation is individually focussed and at most is only one part of an effective reparations program. There is no provision made for those with an interest in the outcome of the case, but who do not fit within the traditional conception of parties to the dispute, to have direct input into the resolution of the matter (Llewellyn 2002:271). These parties might include a range of Aboriginal community-based organisations relating to issues such as mental health, education and family tracing and reunification (eg Link-Up). Community organisations may have a legitimate interest in a satisfactory resolution that is wider than and does not directly coincide with claimants. There has been a broad range of individuals affected by separation: not only those separated but family members, affected communities and the descendants of those forcibly removed.¹⁹ More recently Sir Ronald Wilson has stated that 'there was probably not one Aboriginal family in Australia today which did not bear the scars of the forced removal policies' (*The Australian* 4 April 2000).

Inequitable outcomes

Individual claims will lead to arbitrary and inequitable outcomes (PIAC 2000:18). Success in the litigation process will be determined by success in locating records or

witnesses or in overcoming statutory limitations. Success or failure may be determined by whether one has the 'right' defendant (*Cubillo*) or whether one chooses the 'right' legal forum (*Linow*).

There are also specific difficulties in claiming damages due to economic loss. In *Johnson* there are claims for the loss of his ability to realise scholastic and academic potential and loss of potential for employment. However, the court may be of the view, should the case be successful, that if Christopher Johnson had remained in Wilcannia then his economic potential may not have amounted to much anyway. In this way Aboriginal persons become 'doubly' disadvantaged as the legal process reflects the institutionalised effects of racism in the broader society.

The legal forum will also determine the remedy available and the quantum of damages. For example, Valerie Linow was awarded \$35 000 for a compensable injury related to a violent crime under specific victims of crime legislation. By way of contrast, Justice O'Loughlin's notional assessment of damages in *Cubillo* was \$126 800 and \$144 100, respectively. Inevitably this provides a 'lottery' approach to those who were removed, rather than a considered response based on equity and justice. Some plaintiffs will receive money, some will not, and the amount they receive will likely vary because of a range of factors not necessarily directly related to the harm they incurred.

8. The Cost of Litigation

Litigation also involves enormous monetary costs. The *Cubillo* case, which was funded by ATSIC and defended by the Australian Government Solicitor, provides an example. The Government Solicitor engaged senior counsel, two (sometimes three) junior counsel, a private investigation firm and numerous expert witnesses. The Minister representing the Minister for Aboriginal Affairs told Parliament that the litigation had cost the Commonwealth almost \$8.5 million in legal costs plus \$770 800 spent on private investigation services (Commonwealth of Australia 2001).

The total cost of the litigation (including legal aid funding to the applicants) was estimated by the Senate Legal and Constitutional References Committee (2000:234) to be in the vicinity of \$10 million. Other estimates have placed the total costs between \$15 million to \$20 million (Rush 2002:7).

In contrast to the cost of litigation, the Federal Government committed a total of \$117.6 million between 1997 and 2004 to address the needs of the estimated 20 000 to 25 000 Indigenous persons who were removed under the policies (Cornwall 2002:46). The Government places the number of removed and who might be eligible for compensation at 39 250 (SLCRC 2000:233). Whatever the exact number of potential claimants, the money spent on litigation could have been allocated to programs and services, or other forms of reparations, for members of the Stolen Generations.

The cases have consumed significant resources of Indigenous organisations throughout Australia with thousands of statements collected and hundreds of claims lodged nationally. Again this has meant the allocation of resources which are no longer available for other programs or support. Delays in litigation also affect private legal firms and community legal centres which are engaged in Stolen Generations matters. In

the *Johnson* case for example, the Supreme Court allowed an extension of time under the *Limitations Act* in December 1999. Between then and at the time of writing in early 2004, the matter has not advanced in any significant way. This type of litigation is resource intensive and must be met by the legal firms representing members of the Stolen Generations.

The impact of costs is particularly relevant in the aftermath of *Williams*. Firstly, *Williams* clearly exemplifies the level of commitment required by any organisation that chooses to pursue claims of this nature on behalf of Indigenous persons. Kingsford Legal Centre first started working on this matter as early as 1989. Proceedings were first initiated seeking an extension of time in 1993 and the entire matter concluded, disappointingly, in 2000. The resource intensive nature of pursuing this case, in terms of the energy, time and funds required, was keenly felt – especially for a community legal centre. It is unlikely that a community legal centre or public interest law centre will take on cases of this kind again. The resource disparity between the plaintiffs and defendants is simply too great. In the wake of the decision in *Williams*, it is also unlikely that the Legal Aid Commission would financially support a claim in the future.

In the matter of *Williams* (1999), it is also worth noting that Abadee J ordered Joy Williams, a disabled pensioner, to pay the costs of the defendant (*Williams* 1999: para 1038). Finally, the emotional ‘cost’, or toll on the claimant of such a protracted and difficult process is hard to fathom, certainly where claimants are already suffering from a range of mental and physical illnesses.

9. Failure to Deal with Underlying Issues Relevant to Removal

As noted previously, in the aftermath of the decision in *Kruger* the focus of Stolen Generations claims shifted from challenging the power of the government to enact relevant legislation to the misuse of powers conferred by legislation.²⁰ For this reason, most of the claims litigated since that time have required the claimants to establish, among other matters, the existence of a duty of care as well as a breach of that duty resulting in injury or loss. We have set out elsewhere in this Discussion Paper the particular difficulties experienced by Stolen Generations claimants in fulfilling these legal requirements. These difficulties include:

- establishing a duty of care or trust relationship;
- establishing the appropriate standard of care that should have been provided;
- establishing whether or not claimants were in fact removed by duress or compulsion;
- establishing causation between the actions of the government and harm suffered by the claimant.

As the Public Interest Advocacy Centre (PIAC 2000:24) has noted:

... questions about the validity of individual acts of removal and the duty of care owed to children once in state care are enormously complex and variable. The courts are clearly reluctant to make findings against government officials exercising discretionary child welfare functions many years ago.

The legal claims by members of the Stolen Generations deal with narrow legal issues such as whether a mother's consent technically complied with the law or whether the law authorised Aboriginal children to be wards of the state (Cornwall 2002:45).

The fundamental problem from a broader moral and political perspective is that the claims, framed in this way, do not go to the heart of the issue which is of greatest significance to Aboriginal peoples: the widespread removal of Aboriginal children justified by an overtly racist 'worldview' and the devastating effects of those removals on Aboriginal society generally, and specific communities and individuals in particular.

These problems do not disappear even with the successful use of a particular legal forum such as *Linow* before the Victims Compensation Tribunal. The act of removal and the effects of removal were not addressed there. Rather, what were compensated were injuries from criminal acts subsequent to removal. The broader issue of reparations for racist and, arguably, genocidal policies remain unresolved.

The use of victim compensation tribunals requires a narrow definition of how 'harm' is defined, and the establishment of a causal nexus between the harm and injury. For example, the New South Wales *Victims Compensation Act (1996)* defines eligibility for compensation on the basis that, on the balance of probabilities, an act of violence occurred. The act or conduct must be of a violent nature. There is a Schedule of Compensable Injuries that is used to determine what injuries can be compensated. These narrow definitions operate to limit the eligibility of many members of the Stolen Generations, and further obscure the nature of removals as part of Government policy and practice.

Applications for victims compensation are initially determined by an 'assessor'. The assessor relies on supporting documentation (such as police and hospital reports, counsellors reports and statutory declarations) in reaching a decision. The victim does not appear in person to 'tell her story', although application can be made for oral testimony. In *Linow's* case an application for a hearing was refused. Two further issues flow from this in relation to dealing with Stolen Generations cases. Firstly, documentary evidence of specific violent conduct will be difficult to obtain where Indigenous persons were likely to be under the direct control of the individuals committing the offences, where records have been lost and where a significant period of time has lapsed since the events in question. Secondly, it has been consistently stated by Indigenous persons who were forcibly removed that they should have the choice in whether they present oral testimony or whether their matters should be dealt with on the basis of written documentation. The need for this choice was reflected in the recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.

Undisclosed settlements

The authors are aware of perhaps half-a-dozen recent cases concerning Aboriginal claimants who had been removed by the State where legal action has led to settlement negotiations taking place between the relevant Government authorities and the Indigenous persons who were removed. Because of the confidential nature of settlements, it is hard to ascertain the extent of the practice relating to Stolen Generations matters.

Reaching an agreement between the parties to settle a matter avoids drawn out litigation, and is a personal vindication of the legitimacy of the claims made by the plaintiff. Importantly it also provides monetary compensation for the plaintiff. However, there are also drawbacks.

Firstly, there is no precedent established by the successful resolution of the case. Although the defendants have agreed to settle the matter, the court has not ruled in favour of the plaintiff. There is no case law developed on the successful establishment of the liability of Government for damages arising from the removal of Indigenous persons. The outcome does not advance the situation for Stolen Generations claimants as a group. Secondly, because the resolution of the matter is not publicly disclosed, there is the loss of an opportunity for the plaintiff to speak out about what has happened to him or her. This can be an important loss for individuals who want public recognition of the harm they have suffered.

Thirdly, and related to the previous two points, an undisclosed settlement means there is the loss of a public record of the events. A successful finalisation of the matter in court means that there is a publicly available record supported by the findings of the court as to what occurred. Besides providing for the development of case law and the personal record of events that happened to the plaintiff, this record is important in providing for a public account of broader issues relating to the treatment of Indigenous peoples. This opportunity is lost when an undisclosed out-of-court settlement takes place.

Underlying problem of race-based removal or harms caused by or after removal

It has been suggested that Canadian cases relating to Native Residential Schools have been more successful in court than Australian litigation because the legal challenges in Canada have centred on claims of sexual assault rather than on the underlying assimilationist aims of the residential school system (O'Connor 2000:215).

In discussing *Cubillo*, Van Krieken makes a similar point. He suggests 'that attacking the "whether" of assimilationist policies tends to undermine the strategic capacity to simultaneously deal with the "how" of abusive subsequent treatment' (2001:252). However, we note Indigenous persons have not always been successful when their claims have centred around subsequent abusive treatment, rather than government policy and the act of removal. In the case of *Linow* (albeit in a very different jurisdiction – the VCT), the applicant claimed compensation as a primary victim in relation to a series of sexual assaults that occurred in 1958, when the Aborigines Welfare Board placed her with a family as a domestic worker. Although the VCT Assessor accepted that the applicant suffered from a psychiatric disorder, the Assessor was not satisfied on the balance of probabilities that this injury was caused as a result of the sexual assaults. The Assessor was persuaded by a report prepared by a psychiatrist that there was no clear way of establishing whether the applicant's condition was caused by the sexual assaults *or by prior and later life events*. Thus, in this case dealing with the 'how' of abusive treatment after removal did not help Valerie Linow's initial claim for compensation, because according to the Assessor, her injury may have been caused, *inter alia*, by her previous removal and detention. As noted previously, the Assessor's finding was overturned on appeal.

In *Williams* (1999) the strategy employed did not challenge the actual policy of removal because of the application of the ‘at the time’ standard by the trial judge. Accordingly, the case was argued on the grounds of the ‘how’ of subsequent treatment (to use Van Krieken’s dichotomy), rather than ‘why’ of assimilationist policy. In this way, the ‘moral’ force of her case (her removal as an Aboriginal child and subsequent denigration of her Aboriginality) was overshadowed by counsel’s attempt to squeeze her ‘wrong’ into one recognised by tort law. The strategy was unsuccessful.

10. The Need for Reparations

Many legal practitioners and academics who have been involved with or analysed particular Stolen Generations cases have concluded that ‘litigation is a poor forum for judging the big picture of history’ (O’Connor 2001). Goodstone (2002) and Clarke (2001) have shown how the Stolen Generations claimants labour under extraordinary disadvantage in attempting to assert their legal rights. Van Krieken (2001) questioned whether assimilation is justiciable. Flynn and Stanton (2000) expressed concern over the distinctly non-reconciliatory tactics employed by the Commonwealth in *Cubillo*. The PIAC has spent considerable resources on developing an alternative reparations tribunal approach (PIAC 2000; Cornwall 2002).

The cases presented here show that legal processes have served to reconstruct and obscure the experiences of Aborigines. In *Williams*, *Cubillo* and *Kruger*, Aboriginal Protection and welfare laws are seen as benign in their intent. The reality of entrenched racial discrimination which these laws embodied has been obscured. Legal responsibilities and obligations are narrowly defined and do not coincide with broader questions of responsibility for historical injustices. Indeed, the ‘defence of history’ serves the authorities well. It is worth thinking about the ambiguities inherent in the ‘defence of history’ The ‘defence of history’ has at least two possible meanings in the context of these cases.

One meaning is history as a *legal* defence against the actions sought by the Stolen Generations plaintiffs. This has several components. Firstly, there is the ‘standards of the time’ argument that we cannot judge the past by the standards of the present. Therefore the authorities were acting in what they considered to be the best interests of Indigenous peoples at the time. Second, there are the statutory limitations on bringing the action. Although courts generally have discretion to allow matters which are time barred to proceed in the interests of justice, the courts have not tended to exercise their discretion in favour of Stolen Generations plaintiffs. Third, there is the ‘tide of history’ argument. The loss of records and the loss of witnesses mean that the standards of proof required by the law are unlikely to be met.

The second reading of the ‘defence of history’ is justificatory: in the sense of justifying ‘what happened’. This is a defence of history in a moral rather than legal sense. We are suggesting that history as a legal defence becomes also a moral defence of history. In short, by understanding the ‘standards of the time’ to be the standards imposed through particular governmental policies and practices there is the denial of alternative accounts and understandings. Historical truth becomes the truth of imperial power. History as a process favours the victors: it their records, their accounts, their

motivations which are moulded by law to form the narrative account of what happened and why it happened.

There are profound difficulties in litigating claims that concern Aboriginal child removal policies. Acts of genocide within Australia are not prohibited by specific domestic law; and there is no legal redress for policies, practices or laws which were racially discriminatory prior to 1975 when the *Racial Discrimination Act* was introduced. Government policies are generally non-justiciable and attempts to have the *Aboriginals Ordinance 1918* and subsequent amendments struck down on the basis of constitutional invalidity failed in *Kruger*.

Attempts to argue breach of statutory duty, negligence and breach of guardianship duties have failed. As acknowledged above, even if a breach of duty-of-care is established it is difficult to separate the damage suffered by the plaintiff as a result of the breach from the other impacts of profound disadvantage and racism.

Finally, the legal process has great difficulty in recognising the fundamental imbalance in power and resources between the litigants and the State. The Law Commission of Canada noted that it was confronted by three key facts when it prepared its report on Child Abuse in Canadian Institutions (Law Commission Canada 2000:1):

The majority of children placed in institutions came from the most underprivileged and marginalised groups in society.

A significant power imbalance existed between the children and those in charge of these institutions, one that went well beyond the obvious power imbalance between a child and an adult in authority.

There was little independent monitoring of what went on inside these institutions.

Yet in the Australian context, the courts have preferred to rely on the evidence of those in power.

Blokland has suggested that reparations are also a way out of the impasse created by the view that standards of the time' will apply when determining liability or the constitutional validity of various legislation. A reparations-approach can be based on contemporary human rights standards (Blokland 1997:12):

An alternative approach would be to recognise that successor governments are bound by the responsibility incurred by predecessor governments for gross violations of human rights. This is reinforced by the work of the UN Commission on Human Rights. As a matter of state responsibility, a new government must make reparations. Indeed, at international law, gross violations of human rights occurring in the past have attracted reparations. Further, the work of the UN Commission on Human Rights states that "Reparations may be claimed by the direct victims and, where appropriate, the immediate family and dependents or other persons having a special relationship to the direct victim".

A Reparations-style tribunal will still have to settle some difficult issues, including who is eligible for reparations; how the issue of consent will be dealt with, and what evidence will determine a forcible removal; the assessment of compensatory damages (if they differ from a lump-sum payment); procedural issues, in particular the burden and onus of proof; who would be the respondents (Commonwealth, States, churches)? What appeal mechanisms would be put in place? These are not insurmountable problems, and they have already been considered in some detail, both in the original

Bringing Them Home report and in consequent reports and submissions (HEROC 1997; PIAC 2000; SLCRC 2000; Cornwall 2002).

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- 1 The authors thank Jennifer Clarke, Terry Libesman, Robert Van Krieken and the anonymous AIATSIS reviewers for their helpful comments on an earlier draft. Anna Cody and Michelle Hannan provided advice with the research. Jocelyn Luff worked as a research assistant. The research is part of a larger Australian Research Council-funded project. Any errors or omissions remain the responsibility of the authors.
 - 2 The authors use the term ‘Stolen Generations’ in recognition that this concept is the one generally favoured by Indigenous people who were removed from their families and communities. While it is recognised that the term tends to elide the complexity and diversity of removal, it has a political resonance that captures the relationship between Aboriginal peoples, colonial policy and the practices of welfare, protection and police agencies. The term ‘Stolen Generations’ was not used by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.
 - 3 In this Discussion Paper, conventional book and journal publications and unpublished reports and presentations are referenced in the usual way, with date followed by page number/s: e.g. Cunneen and Grix (2003:15); references to case law have the case name italicized and detailed references are to paragraphs (para) not pages; e.g. Cubillo (2000: para 105) – Editor
 - 4 It was not until 26 August 1999 that the Prime Minister, John Howard, proposed a motion to Parliament entitled the ‘Motion of Reconciliation’: offering a statement of regret rather than a formal apology to Indigenous people (Hansard 1999:9205). It neither specifically mentions the separation of Indigenous children from their families nor acknowledges that the ‘practices of past generations’ were the result of state sanctioned policies and laws. Further discussion concerning the National Inquiry’s recommendation for a national apology can be found in SLCRC (2000:109-142).
 - 5 Negligence and duty of care. Negligence is a failure to take reasonable care to avoid foreseeable harm to other people or property. Basically the principles of negligence law are that the judge must find firstly whether the defendants owed the plaintiffs a duty of care; secondly, whether they breached that duty of care; and, thirdly, whether the injuries were the direct result of that breach of duty of care.

Trespass and wrongful imprisonment. Under tort law a person may be liable for trespass to the person, which includes assault, battery and false imprisonment. False imprisonment occurs when the defendant wrongfully puts a total restraint on the liberty of the plaintiff.

Breach of statutory duty refers to a breach of obligations and duties set out in legislation.

Fiduciary duty arises from a position of trust (such as between a guardian and their wards) and obliges the trustee to act in the interests of and for the benefit of the other person.
 - 6 As we discuss later, a common problem for Stolen Generation litigants is that they must overcome statutory limitation periods. Statutory limitation periods limit the time within which court actions can be taken. For example, in New South Wales a civil action may not be brought after three years from the date on which the action could first have been taken. However, under particular circumstances, there is judicial discretion to extend the limitation period.
 - 7 Damages can be nominal (where no damage has been caused), compensatory (to compensate the injured party for actual loss) or punitive (designed to punish the guilty party). Exemplary damages are punitive in their intent. Aggravated damages are awarded when the conduct of the defendant increases the injury to the claimant.
 - 8 A judgment made during the course of the proceedings, usually at the preliminary stage.

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- 9 Section 122 of the Constitution relates to the power of the Commonwealth to make laws for the government of the territories. It was the power that was relied upon to enact the Aboriginals Ordinance.
 - 10 For a more detailed analysis of this decision see Joseph (1998), Buti (1998), Kennedy and Nance (1997), Byers (1997) and Schaffer (1998).
 - 11 Vicarious liability is the legal liability imposed on one person for the wrong-doing committed by another, usually an employee, but sometimes can also include an agent. An employer is vicariously liable for the wrong-doing of the employee where it was authorised or ratified by the employee, or was committed in the course of the employee's work. O'Loughlin's finding is that the Commonwealth is not vicariously liable because the Director of Native Affairs was exercising an independent statutory function.
 - 12 This interpretation is also in keeping with Canadian authorities, cited with approval by Kirby P in Williams (1994) at 510, 511, such as *KM v HM; Womens Legal Education and Action Fund, Intervener* (1992) 96 DLR (4th) 289. Kirby P also referred to cases, involving compensation for breach of fiduciary duty, which have been held to include 'recompense for the injury suffered to the plaintiffs feelings': *Szarfer v Chodos* (1986) 27 DLR (4th) 388; *McKaskell v Benseman* [1989] 3 NZLR 75.
 - 13 Some members of the Stolen Generations in Victoria have successfully made claims under the criminal injuries compensation schemes for sexual assaults and were awarded approximately \$4,000 each (Cornwall 2002:47). Obviously, not all claims succeed. For example, in 1999 the NSW Victims Compensation Tribunal rejected Judy Stubbs' claim for compensation for removal from her family and subsequent abuse: 'Any way we turn, there is this big brick wall' (quoted by Cunneen and Grix 2003:14).
 - 14 The VCT makes decisions on the basis of documentary evidence and does not normally provide the opportunity for the applicant to appear in person and to make oral submissions.
 - 15 Robert (2002) has drawn interesting parallels with the issue of consent in both stolen generation and rape trials. She argued that 'consent' is used to dismiss the narratives of survivors and to shift legal responsibility away from perpetrators.
 - 16 Libesman and Cunneen (2003) provided a discussion of contemporary removals of Indigenous children through child protection laws and policies.
 - 17 This is currently the focus of intense lobbying in the Northern Territory – especially in the wake of the Court's most recent response to the 'next wave' of litigation. On 12 August 2002, ten test claims were mentioned in the Federal Court. At that time, the Court encouraged the Commonwealth (Australian Government Solicitor) to make summary dismissal claims to dispose of these matters.
 - 18 It is also worth noting that in Ireland the Statute of Limitations (Amendment) Act 2000 extended the limitation period for cases arising from institutional child abuse. The legislation retrospectively extended 'the period within which a person may bring a claim for damages in tort against the perpetrator or someone vicariously or otherwise liable for his or her conduct arising out of child sexual abuse' (Compensation Advisory Committee 2002:51). The amended legislation excludes non-sexual physical abuse. The court still retains the power to dismiss an action where it is in the interests of justice to do so.
 - 19 To the extent that the Canadian example is relevant, claims by descendants have been struck out because they 'have no basis in law'. According to Llewellyn, they provide an example of the inability of litigation to deal with so-called second generation claims. 'These are claims from children of residential school victims who allege that they have suffered harm as a result of their parents experiences' (Llewellyn 2002:271).
 - 20 To a certain extent this shift was also evident in the passage of the Williams matter before the courts from 1993 to 2000. Indeed, Heydon JA commented on the differences between the case presented in earlier proceedings, and the presentation of the case at trial and in the Court of Appeal. He referred to:
 - the focus of the complaint on the treatment of the plaintiff by reason of her Aboriginality was replaced by a focus on the effects of maternal deprivation;
 - the assertion that the plaintiff was a member of the Stolen Generations was removed;

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- criticism of the care and attention she received at Lutanda was replaced, in large measure, by reliance on the good will of the staff at that institution; and
 - the attack on the government policy of assimilation was replaced by reliance on that very policy as supporting the existence of a duty of care.

The Court noted ‘why even greater caution than normal had to be employed in view of different forms taken by succeeding versions of the Statement of Claim, the radical changes in the factual position advocated by her advisers, and the near contradictory contentions they advanced as to why the defendants were liable’ (Cody 2000:165-166).

21 Australian cases and legislation can be found at <www.austlii.edu.au>.