LEGISLATIVE HISTORY RELATING TO THE WELFARE OF ABORIGINAL CHILDREN IN THE NORTHERN TERRITORY

Background

1. At the time of Federation, the Northern Territory was a part of South Australia. The Commonwealth enacted the *Northern Territory (Administration) Act 1910* (Commonwealth Administration Act) which created a regime for the administration of the Northern Territory (Territory) by the Commonwealth (proclaimed to commence on 1 January 1911). The following sections of the Commonwealth Administration Act are of relevance:
   - Section 4(1), which provided for the appointment of an Administrator for the Territory by the Governor-General; and
   - Section 13(1), which gave the Governor-General power to make Ordinances.

2. Until 1947, the powers of the Governor-General under the Commonwealth Administration Act remained substantially the same in relation to the making of Ordinances. The *Northern Territory (Administration) Act 1947* amended the Commonwealth Administration Act to establish a Legislative Council, which in turn had power to make Ordinances. A copy of the *Northern Territory (Administration) Act 1947* is at Attachment A.

*Northern Territory Aboriginals Act 1910*

3. On 7 December 1910, the *Northern Territory Aboriginals Act 1910* was assented to by the Governor of South Australia. This Act provided for the appointment of a Chief Protector of Aboriginals by the Administrator for the Territory. The Administrator for the Territory was appointed by the Governor-General. Section 9 of the Act provided that '[t]he Chief Protector shall be the legal guardian of every aboriginal and half-caste child'.

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2 Paragraph [13] and Exhibit CE-1 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
3 Section 4U of the *Northern Territory (Administration) Act 1947*: note that Ordinances had no effect until assented to by the Administrator (s 4V) and the Governor-General had power to disallow any Ordinance within 6 months of assent (s 4W).
4 Annexure CE-3 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
5 After the Northern Territory became a territory of the Commonwealth in 1911 pursuant to the *Northern Territory Acceptance Act 1910*, the Commonwealth expressly incorporated the *Northern Territory Aboriginals Act 1910* into the *Northern Territory Aboriginals Ordinance 1911* (see s 2).
6 Section 7(1) of the *Northern Territory Aboriginals Act 1910*.
7 See s 4 of the *Northern Territory (Administration) Act 1910*, Annexure CE-1 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
Aboriginals Ordinance 1911

4. After the Northern Territory became a territory of the Commonwealth in 1911, the Commonwealth expressly incorporated the Northern Territory Aboriginals Act 1910 into the Aboriginals Ordinance 1911 (see s 2 of that ordinance). Under s 3(1) of the Aboriginals Ordinance 1911, the Chief Protector was 'entitled at any time to undertake the care, custody or control of any aboriginal or half-caste if in his opinion it was necessary or desirable in the interests of the aboriginal or half-caste for him to do so'.

The Aboriginals Ordinance 1918

5. The Governor-General made the Aboriginals Ordinance 1918 (Aboriginals Ordinance) pursuant to s 13(1) of the Commonwealth Administration Act on 12 June 1918. It came into force the following day. The Aboriginals Ordinance repealed the Northern Territory Aboriginals Ordinance 1911 and also declared that the Northern Territory Aboriginals Act 1910 (which was continued in force by the Northern Territory Acceptance Act 1910) ceased to apply to the Northern Territory.

6. Section 4 of the Aboriginals Ordinance provided for the appointment by the Administrator of a Chief Protector of Aboriginals. The section provided that the Chief Protector was to be 'under the Administrator' and was to be 'responsible for the administration and execution of this Ordinance.'

7. The Chief Protector was given the duty to 'exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud'. In addition, s 7(1) of the Aboriginals Ordinance also relevantly provided:

The Chief Protector shall be the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living, until the child attains the age of eighteen years, except while that child is a State child within the meaning of the Act of the State of South Australia in force in the Northern Territory entitled The State Children Act 1895, or any Act of that State or Ordinance amending or substituted for that Act.

8. The Aboriginals Ordinance also gave the Chief Protector the following powers:

- to certify a person was not an 'Aboriginal' for the purposes of the Ordinance.

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8 Pursuant to the Northern Territory Acceptance Act 1910.
9 Annexure CE-4 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
10 Defined in s 2 of the Northern Territory Aboriginals Act 1910 to mean 'any person who is the offspring of an aboriginal mother and other than an aboriginal father.'
11 Annexure CE-5 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
12 Section 5(1)(f) Aboriginals Ordinance.
13 'State child' under The State Children Act 1895 means 'a "convicted child", "destitute child" or "neglected child" received into or committed to an institution or apprenticed or placed out under the authority of this Act or any Act heretofore in force.'
14 Section 3A Aboriginals Ordinance. This provision was inserted by the Aboriginals Ordinance (No 4) 1936.
to enter premises and 'undertake the care, custody or control of any aboriginal or half-caste if in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody' 15

- to 'cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed and kept within the boundaries of any aboriginal reserve or institution' 16

- to authorise the removal of an aboriginal or half-caste person from one district, reserve or institution to another 17.

9. Section 13(1) of the Aboriginals Ordinance empowered the Administrator to declare any mission, school, home or other privately supported institution to be an 'aboriginal institution for the maintenance, custody, care of aboriginal and half-caste children'. Any such declaration was to name some person as the Superintendent 18 of the aboriginal institution: s 13(2). The Administrator was empowered to revoke any declaration made under s 13(1) pursuant to s 13(3).

10. Following amendments to the Aboriginals Ordinance 1918 in 1939, the title of 'Chief Protector of Aboriginals' was also changed to 'Director of Native Affairs' but the role, and the functions attached to the role, remained the same 19.

The Aboriginals Ordinance (No 2) 1953

11. The Aboriginals Ordinance was amended on 1 October 1953 by the Aboriginals Ordinance (No 2) 1953 (No 2 Ordinance). A copy of the No 2 Ordinance is at Attachment B. The No 2 Ordinance removed all references to 'half-castes' previously found in the Aboriginals Ordinance and substituted a new definition of 'Aboriginal' 20. The new definition was as follows:

(a) a person who is an aboriginal native of Australia...

(b) a person who lives after the manner of, follows, adheres to or adopts the customs of persons described in paragraph (a) of this definition and at least one of whose ancestors was a person described in that paragraph;

(c) a person, being under the age of eighteen years, at least one of whose ancestors was a person described in paragraph (a) of this definition,

and:

15 Section 6(1) Aboriginals Ordinance.
16 Section 16(1) Aboriginals Ordinance. Some exceptions were provided for in s 16(3). Otherwise, refusal to comply was an offence: s 16(2).
17 Section 15(1) Aboriginals Ordinance.
18 Under s 13(6) of the Aboriginals Ordinance, 'every aboriginal and half-caste child for the time being an inmate of any aboriginal institution shall be under the control and supervision of the Superintendent'.
19 See ss 2 and 3 of the Aboriginals Ordinance 1939, and Annexure CE-7 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
20 Sections 3, 5, 7, 8 and Schedule of the 1953 Aboriginals Ordinance.
(i) whose care, custody, or control has been undertaken by the Director under section six of this Ordinance before the date when the Aboriginals Ordinance (No 2) 1953 comes into operation; or

(ii) whom the Director has caused to be kept in a reserve or an aboriginal institution under section sixteen of this Ordinance, before the date when the Aboriginals Ordinance (No 2) 1953 comes into operation; or

(d) ...

12. One consequence of this change was that part-Aboriginal people who formerly were 'Aboriginals' because they were 'half-castes' were now no longer necessarily within the amended definition of 'Aboriginal'. Section 3A was amended to empower the Director of Native Affairs to declare a person to be an Aboriginal for the purposes of the Ordinance. Section 3B required the Director to keep a register of the particulars of every person over whom a declaration was made, including the date of the publication in the Government Gazette.

13. Section 7 of the Aboriginals Ordinance was also repealed by the No 2 Ordinance and replaced with a simpler s 7, providing that 'the Director is the legal guardian of all aboriginals'.

14. The Aboriginals Ordinance (as amended by the No 2 Ordinance) was repealed by the Welfare Ordinance 1953, on 13 May 1957.

The Welfare Ordinance 1953

15. The Welfare Ordinance 1953 (1953 Ordinance) was made pursuant to s 13 of the Commonwealth Administration Act. The Welfare Branch replaced the Native Affairs Branch21 with the commencement of the 1953 Ordinance and at the same time the position of 'Director of Welfare' replaced the 'Director of Native Affairs'22.

16. The Director of Welfare was appointed by the Minister and was responsible, under the Administrator, for the administration of the 1953 Ordinance: s 7(1). The Director's duties were set out in s 8. They included the following:

(a) in relation to wards, to take steps –

(i) to promote their social, economic and political advancement for the purpose of assisting them and their descendants to take their place as members of the community of the Commonwealth

(ii) to arrange as far as is practicable for the education of wards...;

(iii) to promote their physical well being, to inculcate proper habits of hygiene and sanitation and to improve their standards of nutrition and housing;

(iv) to detect, prevent and cure disease...;

(v) to arrange for their vocational training and to obtain suitable employment for them in industrial and other enterprises...;

(vi) to provide such relief and assistance as is necessary or appropriate; and

21 For example, a document titled 'Conspectus of the work of the Welfare Branch of the Northern Territory Administration for the period August 1954 - February 1959' (produced to the Royal Commission and marked 'AG.RDH.01.0021.0159') confirms the Native Affairs Branch was abolished. This document also outlines the original organisation of the Welfare Branch.

22 For example, see s 6 of the 1953 Ordinance (Annexure CE-8 of Exhibit 17-0025 (Statement of Caroline EDWARDS)).
(vii) to exercise a general supervision and care over matters affecting their welfare;

(b) …;

(c) to supervise and regulate the use and management of institutions, other than institutions established by the Commonwealth;

(d) to control the management of institutions established by the Commonwealth;

(e) to supervise and regulate the use and management of reserves;

(f) ….

17. Section 14(1) of the 1953 Ordinance empowered the Administrator to:

... declare a person to be a ward if that person, by reason of –

(a) his manner of living;

(b) his inability, without assistance, adequately to manage his own affairs;

(c) his standard of social habit and behaviour; and

(d) his personal associations, stands in need of such special care or assistance as is provided for by this Ordinance.

18. Section 17 of the 1953 Ordinance conferred powers on the Director in relation to wards:

(1) Where the Director considers that it is in the best interests of a ward, he may –

(a) take the ward into his custody;

(b) authorize a person to take the ward into custody on behalf of the Director;

(c) order that the ward be removed to, and kept within, a reserve or institution;

(d) order that the ward be kept within a reserve or institution; and

(e) order that the ward be removed from one reserve or institution to another reserve or institution.

(2) The Director shall not exercise a power under the last proceeding sub-section if by so doing-

(a) a child under, or appearing to be under, the age of fourteen years would be removed from his parents, or

(b) a parent would be removed from his children,

unless the Administrator has, in writing, authorized the Director so to do.

19. The expression ‘ward’ was defined in s 6 to mean a person in respect of whom a declaration under s 14 was in operation. Section 14 was not in terms confined to Aboriginals, but that was its effect. In response to concerns among non-Indigenous Territorians that they could be

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Cubillo v Commonwealth (2000) 103 FCR 1; [2000] FCA 1084 (Cubillo) at [67]; Namatjira v Raabe (1959) 100 CLR 664, at 667. As an illustration of how this power was used, the Administrator declared some 15,000 people (both adults and children) to be wards under 14 of the 1953 Ordinance on 13 May 1957 (see Cubillo at [71]; see also the Register of Wards, Northern Territory Gazette, 19B, 13 May 1957). This included a blanket gazettal of wardship of all Aborigines of full descent. The 1953 Ordinance proceeded on the assumption that Aboriginal people of mixed descent had been assimilated, although they could be the subject of individual declarations. (See further: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. Sydney, April 1997, Human Rights and Equal
subject to wardship arrangements, the 1953 Ordinance was amended to make clear that it was only designed to include Aboriginal people. This was done by specifying that people with voting rights could not be made wards. The 1953 Ordinance effectively excluded nearly everyone except Aboriginal people. Non-Indigenous children were covered under the Child Welfare Ordinance 1958 (which permitted their removal only on a children’s court finding of neglect or destitution\textsuperscript{24}).

20. Section 24 of the 1953 Ordinance provided that ‘subject to this Ordinance, the Director is the guardian of the person and the estate of a ward as if that ward were an infant and the Director were the guardian of that infant for all purposes’\textsuperscript{25}. Declarations of wardship could be made under s 14 in respect of both adults and children.

21. Section 20 of the 1953 Ordinance provided that, where an order had been made under s 17, a ward shall not leave, or attempt to leave, a reserve or institution except with the permission of the Director. Permission could be given by the Director or a welfare officer in writing to move a ward\textsuperscript{26}. A superintendent of an institution could remove a ward for ‘the purposes of the institution’ to a place in the Territory unless the Administrator served a notice requiring the superintendent not to remove a particular ward\textsuperscript{27}. The power of the Director to ensure individuals were kept within a reserve or institution in the 1953 Ordinance was framed in such a way as to apply only to wards, rather than ‘any aboriginal or half-caste’ (as was the case in s 16(1) of the Aboriginals Ordinance) but having regard to paragraph 17 above, it may have been to a similar effect.

22. The Director of Welfare and Assistant Director were also supported by a Chief Welfare Officer, whose operational responsibilities included conducting overall reviews of the activities and achievements of settlements and missions. The Chief Welfare Officer was supported in this role by Welfare Officers\textsuperscript{28}.

23. The Second Reading Speech for the Welfare Bill 1953 made clear the intention that the Director be able to ‘delegate all or any of his functions, and the Administrator will have the power to appoint such Welfare Officers as are necessary for the carrying out of the Ordinance. He is also empowered to appoint superintendents of reserves and institutions and to declare districts\textsuperscript{29}. The Director’s functions included maintaining a ‘Register of wards’ (s 16(1)).


\textsuperscript{25} Ibid. See also the discussion in paragraph 31 regarding the definition of ‘state child’ under the Child Welfare Ordinance.

\textsuperscript{26} Some limitations on the scope of guardianship, particularly relating to commencement of proceedings, existed from time to time within this s 24.

\textsuperscript{27} See s 21 of the 1953 Ordinance (Annexure CE-8 of Exhibit 17-0025 (Statement of Caroline EDWARDS)).

\textsuperscript{28} Section 23(2) of the 1953 Ordinance (Annexure CE-8 of Exhibit 17-0025 (Statement of Caroline EDWARDS)).

\textsuperscript{29} Paragraph [25] of Exhibit 17-0025 (Statement of Caroline EDWARDS).
24. The 1953 Ordinance was repealed by s 4 of the Social Welfare Ordinance 1964 (1964 Ordinance)\textsuperscript{30}. The 1964 Ordinance was made pursuant to s 13 of the Commonwealth Administration Act.

25. Section 8(1) of the 1964 Ordinance provided for the appointment of a Director of Social Welfare.

26. The 1964 Ordinance contained no reference to ‘wards’\textsuperscript{31} but under s 10, the Director of Social Welfare had a number of duties, as follows:

(a) in relation to persons who in the opinion of the Director are socially or economically in need of assistance, to provide, upon such conditions as he thinks fit, such relief from poverty or hunger or both, and such other assistance, as may in the opinion of the Director be necessary or appropriate and, in particular –

(i) to arrange as far as practicable for their education, including vocational training
(ii) to promote their physical well-being;
(iii) to inculcate in them proper habits of hygiene and sanitation;
(iv) to improve their standards of nutrition and housing;
(v) to assist them to obtain suitable employment;
(vi) to exercise a general care in matters affecting their welfare; and
(vii) to take... such steps as in the opinion of the Director are necessary or appropriate to ensure the establishment on reserves of facilities and staff for safeguarding and improving the health of any such persons who are living on reserves

(b) to supervise and regulate the use and management of reserves.

27. The 1964 Ordinance also removed any reference to ‘superintendents’, ‘institutions’, and in particular the 1953 Ordinance obligations to ‘supervise and regulate the use and management of institutions’ and ‘to control the management of institutions established by the Commonwealth’.

28. The Commonwealth has been unable to identify any transitional provisions to the 1964 Ordinance. Subject to the discussion of the Child Welfare Ordinance 1958 below, it appears that once the 1953 Ordinance was repealed, any declarations of wardship made under s 14 were no longer in force.

29. After the commencement of the 1964 Ordinance, Aboriginal children were only liable to removal under the Child Welfare Ordinance 1958 (Child Welfare Ordinance), and subject to its provisions. While on its terms this ordinance applied equally to Aboriginal and non-Aboriginal children, it has been suggested that Aboriginal children were more particularly

\textsuperscript{30} Exhibit CE-9 of Exhibit 17-0025 (Statement of Caroline EDWARDS).

\textsuperscript{31} This change was expressly acknowledged in the Second Reading Speech to the Social Welfare Bill (see Commonwealth Standing Orders Committee Report, Social Welfare Bill, 19 February 1964, 1513-1515 (Second Reading Speech – Mr Giese, Director of Welfare).
susceptible to removal under it. A copy of the Child Welfare Ordinance is at Attachment C. The Child Welfare Ordinance was also made pursuant to s 13 of the Commonwealth Administration Act and commenced on 2 February 1959.

30. The Child Welfare Ordinance replaced the *State Children’s Act 1895* (a South Australian Act).

31. Section 5 of the Child Welfare Ordinance included the following definitions:

- ‘Child’ means a boy or girl under the age of eighteen years (or apparently under the age of eighteen years);

- ‘State child’ means a child –

  (a) Committed to the care of the Director or sent to an institution, in accordance with an order of a court having jurisdiction to do so under this Ordinance;

  (b) Declared to be a State child under sub-section (2) of section thirty-six of this Ordinance; or

  (c) Committed directly to the control and custody of an authorized body, received into or committed to an institution or apprenticed or placed out under the authority of an Ordinance or State Act in force immediately before the commencement of this Ordinance, for a period which has not expired;

- ‘Institution’ means a mission station, reformatory, orphanage, school, home or other establishment [approved or established for the purposes of Child Welfare Ordinance]

- ‘Ward’ means a person in respect of whom a declaration, made under section 14 of the Welfare Ordinance 1953-1957, is in operation.

32. Section 6(1) of the Child Welfare Ordinance provided for the appointment of a Director of Child Welfare by the Minister.

33. Pursuant to s 7, the Director:

  (a) is the guardian, to the exclusion of the parent or other guardian, of every State child; and

  (b) is responsible for the care, management and control of every State child and of the property of every State child.

34. On one view, the effect of s 5(c) with s 7 was that any child who was a ward of the Director of Welfare under the 1953 Ordinance on 2 February 1959 became a State child under the Child Welfare Ordinance on that date. ‘Authorised body’ is not defined in the Child Welfare Ordinance so it is difficult to know with certainty whether the Director of Welfare under the 1953 Ordinance was considered an ‘authorised body’ for the purposes of the definition of State

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child. Curiously, while 'ward' is defined, that term is not actually used in the 1964 Ordinance. It may be that the intention was to include all 'wards' under the 1953 Ordinance as 'State children' under the Child Welfare Ordinance, although this was not done in those terms.

35. From the documents available to the Commonwealth it appears that this was the view that was taken in practice. Document 20 in the Royal Commission's tender bundle is a letter dated 30 September 1963 to the Superintendent of the Retta Dixon Home from the Welfare Branch. It deals with the discharge of children in the Retta Dixon Home who, upon turning 18, 'cease to be State Children'. It is signed by Mr Giese in his capacity as Director of Child Welfare. This would indicate that, by 1963 at least, the Commonwealth operated on the understanding that (at least some) children in the Home were State children under the guardianship of the Director of Child Welfare.

36. It is worth noting at this point that the 1964 Ordinance, which repealed the 1953 Ordinance, contained no transitional provisions for wards under the 1953 Ordinance. The explanation for this may be that it was understood that it was unnecessary to include such provisions because those children had become State children under the Child Welfare Ordinance when that ordinance took effect. While this is not directly apparent from any material the Commonwealth has been able to obtain, it may explain what otherwise would seem a significant omission from the 1964 Ordinance.

37. The process for removal of children under the Child Welfare Ordinance was different to the process under the 1953 Ordinance. Section 31 provided that 'a welfare officer, police officer or person authorized in writing by the Administrator, ... may without a warrant, take into custody a child appearing or suspected by him to be a destitute, neglected, incorrigible, or uncontrollable child.' Section 32 permitted a child taken into custody under s 31 to be placed in an institution pending a hearing by the Children's Court. Section 33 of the Child Welfare Ordinance then required the Director to ensure that the child was brought before the Children's Court within 14 days or otherwise released.

Administrative responsibility for social welfare within the Northern Territory

38. Under the Commonwealth Administration Act, the Commonwealth had responsibility for the administration of the Territory until self-government in 1978. Responsibility for the social welfare aspects of Aboriginal affairs in the Northern Territory were undertaken by:

- the Native Affairs Branch, Northern Territory Administration of the former Department of the Interior (between 1939 and 1955)

- the Welfare Branch, Northern Territory Administration (between 1955 and 1970, noting it appears Mr Giese was also the Director of Child Welfare)

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33 Exhibit 17-6.
34 For those children who on 2 February 1959 were in an institution declared for the purposes of the Child Welfare Ordinance, it would seem that they at least became State children. The Commonwealth has been unable to identify any document declaring the Retta Dixon Home an institution for the purposes of the Child Welfare Ordinance. However if that occurred this would be an alternative explanation for the children at the Home being 'State children'.
35 See Northern Territory (Self-Government) Act 1978, annexure CE-2 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
36 For example, see paragraphs 20-21 of Exhibit 17-0025 (Statement of Caroline EDWARDS).
• the Welfare Division, Northern Territory Administration (between 1970 and 1972).

39. From 19 December 1972, as part of major administrative changes, the then Commonwealth government created the Department of the Northern Territory (which took over many functions of the Northern Territory Administration), as well as the Department of Aboriginal Affairs. The Department of the Northern Territory was also responsible for the overall administration of the Northern Territory of Australia and the Territory of Ashmore and Cartier Islands.

40. The Administrative Arrangements order of 19 December 1972 (Attachment D) stated that the Department of Aboriginal Affairs was to deal with the following:

• matters related to the Aboriginal people of Australia

• the development and administration of national policies for the advancement and welfare of the Aboriginal people, including the administration of welfare activities in the Territories, and

• special laws for the Aboriginal people.

41. On 25 February 1974, social welfare responsibilities and related staff in the Territory passed from the Department of Aboriginal Affairs to the Department of the Northern Territory. A media release by the Minister which announced this change on 22 February 1974 is attached at Attachment E. Some aspects of social welfare in relation to Aboriginal people remained with the Department of Aboriginal Affairs. However, these appear to have related mainly to providing essential services to Aboriginal communities.

42. The Department of Aboriginal Affairs and Department of the Northern Territory existed until Northern Territory self-government in 1978, at which time the National Archives of Australia advises that the then Commonwealth Department of the Northern Territory indicated it intended transferring active departmental registry files to the Territory with the functions that were being transferred. This would have included files relating to State children.

Arrangements for the welfare of children on self-government

43. Section 57 of the Northern Territory (Self-Government) Act 1978 (Cth) (Self-Government Act) provided for the continuation of all ‘existing laws’ within the Northern Territory on self-government unless expressly repealed or altered by another enactment.

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37 For example, see agency number CA 2836 on http://recordsearch.naa.gov.au.

38 The Department of the Northern Territory [I] was replaced by the Department of Northern Australia on 6 June 1975. This Department was in turn replaced by the Department of the Northern Territory [II] on 20 December 1975. Responsibility for social welfare was held by all three departments in turn, from 25 February 1974 until 1 July 1978 when the responsibility was transferred to the Northern Territory Government. Further information available by searching agency numbers CA 1484, CA 1958 and CA 1889 on http://recordsearch.naa.gov.au.

39 This is broadly supported by the correspondence between the Australian Archives and the Department of Prime Minister and Cabinet dated 12 May 1976, at Attachment F.

40 Section 57(3) makes clear ‘existing laws of the Territory’ includes any law in force in the Territory immediately before the commencing date of the Northern Territory (Self-Government) Act 1978, or
44. Prior to the commencement of self-government, on 15 June 1978 the Northern Territory Legislative Assembly resolved to hold a Board of Inquiry into the Welfare Needs of the Northern Territory. On 29 August 1979, pursuant to s 4A of the Inquiries Act, the Board presented its Report (covering a wide range of welfare matters) to the Administrator of the Northern Territory. In its report, the Board noted the motion had been put ‘in anticipation of the Territory Government taking over State-like responsibilities for welfare’.

45. On 1 July 1978, the Northern Territory Department of Community Development was established. The Department was administered by the Northern Territory Minister for Community Development. A copy of the relevant Northern Territory Government Gazette outlining the Administrative Arrangements from 1 July 1978 can be found at Attachment G. In particular, it appears that from the time of creation, the Minister for Community Development and his Department were responsible for the social welfare function and for administering both the Child Welfare Ordinance and Social Welfare Ordinance. These arrangements also appear to be broadly consistent with the document at Attachment H, (dated 16 August 1979), which was provided to the Royal Commission by the legal representative for one of the former residents of the Retta Dixon Home. The Territory’s responsibility for welfare matters is further supported by a letter from the Territory’s Chief Minister to the Prime Minister dated 13 November 1978 (at Attachment I), which indicates the Territory had extended welfare services to remote areas of the Territory and had ‘initiated programmes to encourage Aboriginal communities to participate in the delivery of their own welfare services.’ Similarly, the Regulations under the Northern Territory (Self-Government) Act 1978 (at Attachment J) confirm the relevant Minister of the Territory was granted executive authority under s 35 of the Self-Government Act in respect of ‘Child, family and social welfare’.

46. The Child Welfare Ordinance was ultimately repealed by s 3 of the Community Welfare Act 1983 (NT), with the fundamental intention of the latter Act to be to ‘provide for the protection and care of children and the promotion of family welfare, and for other purposes.’ The Second Reading Speech further indicated the purpose of the Community Welfare Act 1983 was to ‘support the institution of the family in relation to its responsibility for the care of children. In keeping with this aim, the bill has restricted severely the circumstances in which the state may interfere in the care of children by their families’. A copy of the Community Welfare Act 1983 is at Attachment K.

47. Aside from the welfare functions described above, the only Aboriginal Affairs specific function which was transferred to the Territory government by the Department of Aboriginal Affairs was the provision of essential services to Aboriginal communities. This involved the transfer of financing of programs for the provision and maintenance of general services to Aboriginals.

an Ordinance or an instrument under an Ordinance, in force immediately before the commencing date or made and assented to but not in force before that date.

41 Board of Inquiry into the Welfare Needs of the Northern Territory Community & Martin, B. F & Northern Territory. Dept. of Community Development 1979, A report of the Board of Inquiry into the Welfare Needs of the Northern Territory Community, August 29, 1979, [Dept. of Community Development], [Darwin].


43 See Attachment G, at page 6.

44 See also the speech by the then Commonwealth Minister for the Northern Territory, Evan Adermann, to the House of Representatives on 14 September 1977, at Attachment M.

45 Northern Territory, Parliamentary Debates House of Representatives, 1 September 1983, 1025 (Second Reading Speech - Mr Tuxworth, Community Development)).
These functions were to be transferred in 1978. However the Department of Aboriginal Affairs continued to administer aspects of them until 1 February 1980 when the Territory assumed control over the finances. The Department of Aboriginal Affairs continued acting on an agency basis until the Northern Territory Department of Community Development took over the direct administration of these programs on 30 June 1980 (see extracts from the Department of Aboriginal Affairs Annual Reports of 1978-79\(^46\) and 1979-80\(^47\) at Attachment L). The National Archives of Australia also advises that a review of the relevant Department of Aboriginal Affairs administrative structure files and duties statements indicate that these functions did not include duties that relate to social work, case management or guardianship.

48. A summary of the legislative history described above can be found at Attachment N.

49. Further information regarding the transfer or records on self-government can be found at Attachment O.

Application to children at the Retta Dixon Home

50. The Aborigines Inland Mission established the Retta Dixon Home (RDH) shortly after May 1946 on Bagot Aboriginal Reserve in Darwin\(^46\).

51. RDH was declared an Aboriginal institution under the Aboriginals Ordinance and gazetted as a home for part-Aboriginal children on 17 December 1947. Miss Amelia Shankelton was appointed as the founding Superintendent of RDH on the same date by the Administrator of the Northern Territory\(^46\). The Commonwealth has reviewed Northern Territory Gazette index entries between 1953 and 1964 (i.e. following the passage of the 1953 Ordinance) but no further notices have been located which declare RDH an 'institution' under the later ordinances. The Commonwealth is not aware of anything to suggest the 17 December 1947 declaration did not continue following the repeal of the Aboriginals Ordinance.

52. RDH accommodated children who were forcibly removed from their families. However, it also included children who were voluntarily committed to the Home by their parents\(^50\). The statutory history is complex and each individual's case would need to be considered in order to give an accurate account of their relationship to the Commonwealth during their time at RDH. Many children would have fallen under one or more of the wardship/guardianship/State child arrangements of the relevant Ordinances described above, depending on their particular circumstances.

Powers and duties relating to institutions and reserves

53. Commencing with the Aboriginals Ordinance 1911, and running through to the commencement of the 1964 Ordinance, Commonwealth officials had powers to:

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\(^48\) [513] of Cubillo
\(^49\) [514] of Cubillo
• declare a parcel of land to be a reserve
• declare aboriginal institutions
• appoint superintendents to those reserves and institutions
• control entry and exit on reserves and institutions, including in relation to non-Aboriginal people.

Commonwealth officers had duties, variously described, in relation to overseeing the use and management of reserves. The 1953 Ordinance contained similar duties in relation to aboriginal institutions, depending on whether the institution was established by the Commonwealth. Under s 8 the Director of Welfare's duties included:

- ‘supervising and regulating the use and management of institutions not established by the Commonwealth’
- ‘control the management of institutions established by the Commonwealth’.

The 1964 Ordinance continued in effect past declarations of reserves and continued the Director’s powers over entry onto reserves. However it did not include a power to declare new reserves, and made no provision in respect of institutions.

Relevance to Retta Dixon Home

The Commonwealth understands that RDH was at all times situated within the Bagot Aboriginal reserve, a declared reserve under the various relevant ordinances. It was also an ‘institution’ for the purposes of the Aboriginals Ordinance and the 1953 Ordinance (in the latter case falling into the class of institutions not established by the Commonwealth, having been established by the Aborigines Inland Mission).

The documents produced to the Royal Commission by the Commonwealth and included in the tender bundle indicate that the RDH (and others like it) were intended to operate with a significant degree of autonomy. It is evident that there was a climate of trust in relation to

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51. Section 13 of the *Northern Territory Aboriginals Act 1910* [recalling that this Act was incorporated into the *Aboriginals Ordinances 1911* by s 2 of the Ordinance]; s 10 *Aboriginals Ordinance*.
52. This power first emerges clearly in s 13 of the *Aboriginals Ordinance* [of 1918]. Prior to that, ‘aboriginal institution’ was defined as an institution for the benefit, care or protection of the aboriginal or half-caste inhabitants of the Northern Territory – s 2 *Northern Territory Aboriginals Act 1910*. See then s 40 *1953 Ordinance*.
53. Section 14 *Northern Territory Aboriginals Act 1910* (reserves only); ss 12 (reserves) and 13 (institutions) *Aboriginals Ordinance*; s 12 *1953 Ordinance* (reserves and institutions).
54. Section 16 of the *Northern Territory Aboriginals Act 1910*; s 7 *1911 Ordinance*; ss 16 and 19 *Aboriginals Ordinance*; ss 44-49 *1953 Ordinance*.
55. Section 5(1)(e) *Aboriginals Ordinance* – ‘manage and regulate the use of all reserves for aboriginals’; s 8(e) *1953 Ordinance* – ‘supervise and regulate the use and management of reserves’; s10(b) *1964 Ordinance* – as per *1953 Ordinance*.
56. Section 8(c) and (d). See also s 8(e) – ‘supervise and regulate the use and management of reserves’.
57. Section 6.
58. Sections 17-18.
religious organisations operating institutions at the time. It was assumed, for example, that in light of their Christian ties and benevolent purposes, that they would attract the right kind of staff\textsuperscript{59}.

58. The Commonwealth did not have a role in staffing decisions\textsuperscript{60} other than in relation to the appointment of the Superintendent. The Commonwealth did, on at least one occasion, utilise its powers in respect of entry onto reserves to effectively exclude staff at RDH. This occurred in the case of a Mr Matthews who was observed to have physically assaulted children\textsuperscript{61}.

59. The day-to-day control and administration of the various institutions, including RDH, remained with the religious organisations, with the Commonwealth taking a supervisory role via the ordinances described above\textsuperscript{62}. The relationship, at least in respect of RDH, fell short of the circumstances required to enliven any agency relationship between the Commonwealth and the Home or AIM, or a situation of vicarious liability on the part of the Commonwealth\textsuperscript{63}.

\textsuperscript{59} Edwards annexure CE-14 at [9]; Ex 17-6 doc 11 at [6].
\textsuperscript{60} See \textit{Cubillo} at [330] and [344]. See from [322] of that judgement more generally for discussion of the relationship between the Commonwealth and homes like the Retta Dixon Home.
\textsuperscript{61} See the tender bundle, exhibit 17-6, at documents 7-10. See also \textit{Cubillo} at [325], [332].
\textsuperscript{62} Edwards annexure CE-14 at [2], Ex 17-6 doc 11 at [3], doc 12 at [4]. See also \textit{Cubillo} at [335]-[338].
\textsuperscript{63} See \textit{Cubillo} at [1141]-[1142].