

**Law and governance in Australian Aboriginal communities: liberal and neo-liberal
political reason**

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Abstract

This paper examines Aboriginal governance in Australia in the 1890s, at a time when the mission station was the main instrument used to manage certain categories of Aboriginal person. The paper compares these arrangements with aspects of current practices of the Howard conservative government that deploys techniques such as ‘Shared Responsibility Agreements’ in order to govern Aboriginal communities. These forms of governance are compared and contrasted in terms of their attachment to liberalism, understood as a distinct form of political reason that is concerned with the practical implications of the belief that members of the population are endowed with, or capable of acquiring, a capacity for autonomous, self-directing activity. Finally, the paper draws connections between liberal and neo-liberal political reason on the one hand, and Aboriginal peoples’ historical relations with the criminal justice system

Introduction

The effects of social exclusion on criminalizing Aboriginal people in Australia has become a major focus of inquiry following the recommendations of the 1991 *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (Australia, 1991). The *Report* contained 339 recommendations resulting from an inquiry into the deaths in custody of 99 Indigenous Australians between January 1980 and May 1989. The *Royal Commission* found the underlying issues associated with these deaths included socio-economic, historical, cultural and justice factors. It concluded that the high rate of Aboriginal deaths in prisons and police lock-ups stemmed from the general over-representation of Aboriginal people in contact with the criminal justice system. This over-representation is continuing nationwide today. Koorie people in Victoria are six times as likely to be arrested as non-Koories; they are 13 times as likely to be imprisoned; and Indigenous women are 15 times more likely to be imprisoned than their non-Indigenous counterparts (Victoria, 2004). The State Government of Victoria’s *Justice*

Statement reports that the Koorie community has experienced endemic disadvantage as a result of dispossession, the removal of children from their families, and discriminatory attitudes. Koorie people are also significantly below the general population on most socio-economic and health indicators (Victoria, 2004, p. 59). The results of these commissions and inquiries have drawn attention to the long-standing connections between social disadvantage and the criminalizing of Australian indigenous peoples.

The Victorian Aboriginal Justice Agreement is one of the strategies outlined in the *Justice Statement* of the Victorian Government designed to protect human rights and address disadvantage. The *Statement* affirms that the justice system ‘... operates to curtail the excessive abuse of power and provides a shield for those who are most vulnerable in our community. These initiatives will enhance protection of human rights and address the effects of poverty, prejudice and other forms of disadvantage’ (Victoria, 2004, p. 14). On promoting human rights and reducing systemic discrimination, the government proposes to

(E)stablish a process of discussion and consultation with the Victorian community on how human rights and obligations can be best promoted and protected in Victoria, including the examination of options such as a charter of human rights and responsibilities, new approaches to citizenship and to modernizing anti-discrimination law, reducing systemic discrimination, and strategies to promote attitudinal change (Victoria, 2004, p. 14).

Rather than the model of a Bill of Rights, the *Statement* favors the Statutory Charter of Rights model adopted in the United Kingdom and New Zealand that allows Parliaments to retain a power to amend or repeal aspects of the Bill of Rights legislation. It acknowledges that common law does not explicitly protect human rights, and proposes to conduct a community discussion that could lead to formulating an appropriate instrument to protect human rights. The *Statement* cites the opinion of the Victorian Equal Opportunity Commission of Victoria that discrimination is likely to persist if it continues to be addressed on an individual case-by-case basis (Victoria, 2004, p. 56).

In the case of children's rights, the United Nations Convention on the Rights of the Child gave a focus on the 'child's best interests' (United Nations, 1989),¹ but the notion has become inherently controversial because of the problem of who defines these interests. The idea of the child's best interests as an overriding goal for criminal justice has come to be associated with the removal of the rights of children, rather than with their augmentation (Naffine, 1992, p. 77). Historically, it is the state and its instrumentalities that have sought to define the child's best interests, leading to abuses as a consequence of either the zealous pursuit of philanthropy or the responses of children's court judges and magistrates to populist calls for law and order. Histories of children's rights also draw attention to their contingent nature, that children have been constructed as the bearers of personal rights in virtue of modern psychological and child-rearing theories, rather than rights existing as eternal characteristics of humanness. As Minson argues, such an observation should not be interpreted as an attack on Enlightenment values but rather as a warning not to blind ourselves to the strategic purposes for which children's rights were established – which, in the case of the 19th century European childrearing movement, was for the strategic purpose of constructing 'normal' docile families (Minson, 1985, pp. 207-8).

In the meantime the Federal Government, which has constitutional powers in relation to Australian Aboriginal communities, has introduced sweeping changes to the conduct of Aboriginal employment and welfare policies. These include a system of 'Shared Responsibility Agreements' that are applied only to indigenous Australians, and which will make the Commonwealth provision of services dependent on Aboriginal people's compliance with a range of 'behavioural changes'. Some Aboriginal and non-Aboriginal people have argued in support of the Agreements, on the grounds that peoples' health and housing conditions, particularly in rural communities, are so desperate that behavioral changes are necessary and urgent. At present, only 30 percent of indigenous people live to 65 years compared with 87 percent of non-indigenous Australians. The world's highest rate of the eye disease trachoma occurs among Australia's indigenous people, and Australia is the only developed country where the blinding condition remains (Taylor, 2001). According to its critics, however, the government requires Aboriginal people to

comply with standards such as regular school attendance and daily bathing of their children in order to receive an entitlement to basic services and welfare payments. The Agreements have been called discriminatory and paternalistic because similar conditions on service provision are not placed on other Australians. The Federal Opposition has argued that Shared Responsibility Agreements will be imposed on people who are 'not in a position to withstand bureaucratic coercion ... they are not about respect, reciprocity or mutual action ...

Australia is the only colonizing country not to have apologized to the indigenous people who were dispossessed. Many indigenous people still suffer directly as a result of that dispossession. Now our Government, on top of its refusal to say sorry, wants to humiliate its indigenous citizens by denying them services unless they conform to behavioural standards that many, because of their disadvantage, cannot possibly meet (Senator Kim Carr, cited in *The Age*, 2/12/04, p. 17).

Aboriginal leaders Noel Pearson and Patrick Dodson have warned that the 'carrot and stick' approach of Federal bureaucrats who developed the agreements could be counter-productive, in that they trivialized the ethical principles of 'mutual obligation'. An instance in one remote Aboriginal community in the Kimberley involved a community agreeing to wash their children's faces and send them to school in return for the installation of a petrol bowser. Noel Pearson commented that 'we've always got to be aiming for the normal situation ... (W)hen you start rewarding parents to do something which should come naturally, that is not normal' (cited in *The Age* 15/12/04, p.1). Dodson argued that the agreement 'smacked of the old days, when superintendents ran Aboriginal missions (*The Age* 15/12/04, p.1).

The purpose of this paper is to contribute to the discussion set up in the Victorian government *Justice Statement* on ways to address discrimination and to assist in formulating instruments to protect human rights for Aboriginal people in Australia. The paper outlines the terms in which Aboriginal people in Australia were criminalised, drawing on historical records of the period of colonization in the late 19th century, when the superintendents did indeed run the missions, and when Aboriginal people were being categorized and separated according to scientific conceptions of racial differences. The

paper focuses on the practices of bureaucrats and superintendents, who in the main sought to define Aboriginal non-compliance with their own 'protection' as criminal behaviour. Although these techniques and practices were circumscribed in legislation, it was the prerogative available to administrators and managers that had the most direct consequences in the everyday lives of Aboriginal people. For example, charity workers and philanthropic organisations were given powers to remove both indigenous and non-indigenous children from foster care for displaying 'depraved habits' or 'serious misconduct' and place them in reformatories or industrial schools for indeterminate periods; in these cases, the institutionalizing and criminalizing of Aboriginal children was accomplished through regular administrative fiat, as children could simply be sent to a reformatory school at the discretion of a Minister, on advice from a bureaucrat, without any court hearing or disposition.

In addition, the paper argues that social processes of discrimination and criminalisation were shaped by, and also shaped, the way in which Aboriginal people came to be known. In the final section of the paper, processes shaping subjectivity and identity are discussed in the context of the history of liberal political reasoning and the extent of powers that were given over to the white bureaucracy controlling Aboriginal affairs. The most significant historical continuity between liberal and neo-liberal techniques of governing is the failure of European ruling elites to acknowledge the historical underpinnings of Aboriginal disadvantage in dispossession and assimilationist policies.

Removal practices

In Victoria, a central Board for the Protection of Aborigines was established in 1860, based on an earlier Protectorate formed in 1838, to act as guardian and protector of indigenous people in the colony. From the 1860s a Royal Commission was appointed to investigate increasing rates of Aboriginal mortality as well as allegations of mismanagement at the mission stations. A new *Aborigines Protection Act* in 1886 gave the Board new powers to define what is 'an Aborigine', and those subsequently classified as 'half-caste' were increasing in number and incurring added expenditure. (Victoria, 1886).² Three major events taking place in this period are relevant here: the takeover of

land and the spread of European settlement continued through the colony; at the same time, rates of morbidity and mortality among Aborigines increased and the costs of maintaining mission stations rose; and it was agreed by the government to 'merge' people of mixed descent, or 'half-castes', with the white population. The *Act* of 1886 reversed the definition of 'Aboriginal' so that those people who were 'part-Aboriginal' became officially defined as 'white'. It put in place regulations forbidding half-caste people access to the mission stations and their families. The Board attempted to enforce the merging of the Aborigines with the white population by simply declaring that all part-Aborigines under the age of thirty-four were now prohibited from the mission stations that had been reserved for the use of Aborigines. Children were removed from their parents on the missions when they were old enough to work, and under the authority of the Protection Board were sent out to service following a period of training, or for adoption with non-Aboriginal families. Older people were given three years to find work and accommodation.

The Board was well aware of the effects of the removal on those subject to it, and also that its actions were constrained by notions that we would normally associate with liberal democratic rule. It observed that Aborigines were a 'free people' ... (ref and quote) The Board also recognised that cases of hardship would arise when this population of Aboriginal people was compelled to leave the reserves in 1890, although it also determined that each individual case of hardship would be dealt with on its merits. For this reason, and also because of opinion at the time that the Act may in fact be flawed and that the Board may be acting in an uncertain legal framework, the Secretary wrote to the Minister of Lands suggesting that 'half-castes' turned off the missions could be given preference in obtaining land (Pepper, 1980). Certainly the administrators of Aborigines from the 1890s in Victoria understood that they should use 'inducement' rather than direct coercion in carrying out their policies (Report of JH Stahle, 7/7/1890). But *The Aborigines Protection Act* (1886) gave the Aborigines Board 'full power and authority to act in the execution of this Act' (Victoria, 1886 s. 5). According to the 1948 *Geneva Convention on the Punishment of the Crime of Genocide*, acts of 'forcibly transferring children of the group to another group' with the 'intent to destroy, in whole or part, a

national, ethnical, racial or religious group' are acts of genocide and punishable by law, as also are acts of conspiracy to commit genocide. (United Nations, 1948).³

In this vein, initial attempts at 'merging' of the half-caste Aboriginal population were made by trying to amalgamate or close the mission stations that under earlier legislation had housed the 'full-blood' Aboriginal population. This was done on the understanding that these Aborigines would eventually die out. Every year the numbers of 'mixed blood' on the stations would reduce, and as the Superintendent at Lake Condah mission expressed it '... as the blacks will ere long die out ... the whole question would be solved' (Pepper, 1980, p 32). Moreover, the Superintendent at Lake Condah in 1884 urged the Board not to waste time getting the *Aborigines Act* amended so that young half-castes growing up on the reserves could be apprenticed to the settlers as soon as they reached the school leaving age. Thus the new policy continued the practice of drawing on indigenous people as a source of labour in the young colony, but it also hastened the breakdown of the economic viability of the mission stations by removing potential labour power from the missions and their families. The Aborigines Board reported throughout this period on the plan for the remaining missions of 'carrying out the policy of the Board by sending out to service, all the young half-castes, thus depriving the station of labour' (Annual Report, 29/3/1890). 'Merging' ensured there would be a ready supply of young cheap labour for the white settlers, starving the missions of labour needed for their own enterprises such as farming and agriculture, and ensuring that these children would sever all connections with their Aboriginal parents and families and become part of a mainstream white Australian population. By 1892, however, the Board was becoming impatient that much work still remained to be done:

merging the Half Castes with the general population, amalgamating stations and closing those that time may show are no longer required, and the Board is of the opinion this it will be a wise step; resulting in a saving of money to the State (Annual Report of the Board for the Protection of Aborigines, 14.1.1892).

The mission superintendents understood that the matter of separation would be administered by inducement rather than coercion. But it is clear from the records of the Aborigines Board that the methods of removal involved covert actions by administrators and mission authorities, usually involving a withholding or withdrawing of material resources such as farm equipment or educational resources from the missions so that people would be forced to move to another mission station and that certain categories of people would be separated from their communities. At Framlingham mission in the west of the state, resources were starved in the face of considerable opposition from residents as a lever to move people to the Lake Condah mission. The plan to engineer a shift in populations by these means was openly spoken about in the Annual Reports:

As I am authorised to take the bullocks and wagon down from Framlingham to Condah it will be an inducement for these families to get their belongings down here ... If they see the bullocks and wagons as well as all the implements on the station being removed it will induce them to an early start for Condah. I would therefore recommend to send the cattle to Lake Tyers or sell them as soon as possible (Annual Report, 7.7.1890).

The Secretary of the Board, J H Stahle, regretted that the plan to move the people from Framlingham to Condah did not appear to be working, but he was determined to move them. He described the tactics required in the following terms: Aborigines were happy about a fenced-off area of 500 acres for farming; but ultimately this project would fail because Aboriginal people were lazy and they did not understand the concept of leadership:

(B)lacks are never fond of working, and when they have no head over them & one of them assumes the leadership they will not pull together for they will not recognise one of themselves as a proper leader, hence when the one who has been particularly energetic in getting the 500 acres finds that all the work is to be left to him he will realise that matters are not so comfortable as he thought they would be & probably make up his mind to move elsewhere' (Annual Report, 29.10.1890).

Success in the mind's eye of the colonial administrator was the carving up of the population into 'full bloods' and 'half-casts' and their appropriate institutional placement, but the Aborigines persisted in their opposition to being moved from Framlingham.

So the Aborigines Board attempted another form of leverage to get people to move to another mission, this time focusing on their children in school. Closing the school at Framlingham, Stahle wrote,

would bring about an early solution to the question at issue at Framlingham ... I desire to say again that I believe the closing of the school at an early date will lessen to a great extent the opposition now carried on at Framlingham with regard to the breaking up of that Station' (Annual Report 1.7.1890; 7.7.1890).

When the Board ordered the mission school to be closed down, the dozen or so children from Framlingham started attending the local Hopkins Falls State School. Immediately, parents of the white children at Hopkins Falls removed their children. The school Board of Advice wrote to the Aborigines Protection Board saying they had tried to take steps to 'remove the prejudice', but 'the strike' had continued. The Aborigines Board urged the local Education Board to keep the local school open, otherwise there would be an inducement for the Aboriginal people to go back to Framlingham:

Inasmuch as the law directs that the half castes shall be merged with the White Population and as there are so very few Black children on Framlingham the Board cannot establish a school for the small number ... Taking all the present circumstances into consideration I would recommend that the board open the school again or to get defined instruction from the Government or Parliament of how to act in so difficult a matter. As matters now stand it seems very much needed to have a fixed and definite plan to go by, as otherwise the trouble will increase and more blacks or half-castes will be induced to go to Framlingham (Annual Report, 19.11.1890).

Yet another method for 'inducing' a closing of the mission was curtailing rations. The Board believed that requiring families to go into the store in town to pick up their own rations would 'bring them more than anything else, to a speedy decision, to go either to

Condah, or to some other station' (Annual Report, 6.5.1890). But now the problem for the Aborigines Board was the 'trouble' caused by half-caste men hanging around the missions when they were supposed to be 'merging', and drawing on the rations of their full-blood relatives on the mission stations. The Board reported the ongoing problem of the young half-caste men 'ready to take advantage' of anyone receiving rations (Annual Report, 16.7.1890). Under the *Act*, rations for half-castes were stopped immediately they reached the lawful age, but the Aborigines Board knew that they were drawing on the rations of their families living on the mission and that this was a disincentive to moving them on.

We found that those who could not make their rations last were those [crossed out and replaced by the word] *families* who had friends and visitors. Half caste people who have no business on the Station. Only three pounds of meat has been given to these people per week as it was thought best they should to some extent rely on their own rations (Annual Report, no date, early 1890s).

The Board's records show that trouble-making is consistently depicted as activities which put at risk the Government's aim of reducing the size of the missions, and that access to rations explained the failure of the scheme to move Aborigines off the mission while also underpinning a criminalizing of the 'young half-caste'. The Board wanted 'our young half-caste people' to persevere in making a living, 'otherwise they would just return to the mission'. On the other hand there were instances of Aboriginal men, wanting to marry 'girls of mixed blood', who were forced to run away from the missions because such unions were not allowed for under the Act. In such cases the men ran away from the mission and were 'forced to immorality and take to their old way of inducing girls to go with them and thus they live together without being married at all' (Annual Report, 13.10.1890).

Any thwarting of the law drawn attention to in these reports concerned the constant attempts at challenging the regulation that deemed 'full-bloods' the only legitimate recipients of rations. It was also clear to the Board that children and young girls from other colonies were also being supported by the Board by moving onto the missions and drawing on rations. Indeed, the trouble-making involved in willful sharing of resources

demonstrates a racialised disparity with the white lawbreakers. Compared with the European policies of building support for the norms of family life, Aboriginal getting-together with family and sharing resources was instead criminalized by those that administered the Act. Indeed, resistance to the official definition of ‘Aboriginal’ was an offence. The ‘offence’ of sharing rations was formalized in a new *Aborigines Act* 1890 forbidding any person to ‘take whether by purchase or otherwise any goods or chattels issued or distributed to any aborigine [as defined under the *Act*]’, with a penalty on conviction not exceeding twenty pounds or in default imprisonment for not less than one month nor more than three months (Victoria, 1890 s. 13).

Racialised disparities of child support

At the turn of the 20th century, all white children under the care of the Department of Neglected Children and Reformatory Schools, in foster homes or placed ‘in service’, were subject to a *de facto* indeterminate sentencing in the form of a transfer to a reformatory at the discretion of the Minister, by-passing any court appearance. Both offending and neglected children reported to the Department as exhibiting ‘depraved habits’ and ‘serious misconduct’ were subject to transfer to a reformatory for an indeterminate period, usually until eighteen years of age. But from 1900 the provisions affecting non-indigenous children were also applied to indigenous children. Initially under its Act the Aborigines Board was able to transfer children described as ‘half-caste orphans’ to the Department to be managed. (In light of the previous discussion, the description in Department files of children as ‘orphans’ may be a euphemism for children who were the victims of government child-removal policies). But from 1900 this provision to transfer children to reformatories was extended to ‘all suitable Aboriginal children whether orphans or otherwise ... in order that they may have the advantages of being dealt with in the same way as other wards of the State’ (Victoria, 1901). Children sent out to foster care or into ‘service’ could be transferred to a reformatory on the basis of reports about their behaviour by their guardians, in a system administered by the Department of Neglected Children. So the racialised disparity of criminalizing Aboriginal people who were found to be breaking the provisions of the Act, by attempting to draw rations and support from their families on the mission, was

accompanied by another provision that allowed those same children who had been separated from their parents and sent into foster care or into 'service' to be institutionalized for an indefinite period, without any appearance before a court.

In general Aboriginal children separated from their parents were sent out to service, and only in exceptional cases were they sent to children's homes. Among the exceptions were children sent to Bayswater Home outside of Melbourne. Here was a boy of 15 who had been maintained by Board funds for 5 years, and although having attended school was unable to read and write. The Board on advice from the Superintendent recommended that the boy be returned to Lake Tyers mission. In other words, the destination for a child unable to learn was back to the mission, where 'the blacks will ere long die out'. Another Protection Board expedition to a neighbourhood called Arcadia again found orphan children who had become sickly. A 'little black boy Isaac' had been brought to the mission at Coranderrk, and a 'little halfcaste girl' was to be brought to the Infants home at Royal Park, but has since died' (Correspondence 4.6.1890). These are instances of a disparity of thinking around the term 'neglect', if we compare them with practices affecting white children. Although both indigenous and non-indigenous were subject to arbitrary powers of confinement if they displayed 'depraved habits' or 'serious misconduct', a disparity applied in the judgment about who should and who should not be entitled to reside on the mission. Again, these administrative decisions were underpinned by changes to legislation in the 1890 *Act* making it an offence to 'harbor any aborigine ... unless such aborigine shall from illness or from the result of accident or other cause be in urgent need of succour' (Victoria, 1890 s.13). A certificate was required to enter the mission, and being on the mission without the correct papers was an offence under the Act.

In a letter to Hagenauer in 1890, J H Stahle asked for certificates that would allow a number of sick children to be returned to the mission station:

The reasons why I ask for permission for the above to reside on the station are as follows ... Sarah Mullett is the eldest daughter of Mrs Mullett, a widow who has 6 children to bring up. During this time she needs Sarah to help her at home but

apart from this the girl is consumptive, her father and three of her sisters having already succumbed to that disease ... Euphamia McDonald is subject to cateleptic fits and is totally unfit for going out into service ... Lizzie Green has been given my special charge by her dying father and she is such a simple nature that it would not do to let her go out into the world ... (Correspondence from Stahle to Hagenauer, 13 October 1890).⁴

Again, in 1892, Hagenauer reported to the Board that on his visit to Framlingham to distribute clothes and blankets, a half-caste woman who was ill had a daughter to attend to her and a 'consumptive' 17 year old son, all of whom had been given clothes 'as under the present circumstances they could not go out into service' (Correspondence from Hagenauer to the Vice Chairman, Board of Protection to Aborigines, 31 May 1892). On the other hand, signs of health and robustness became triggers for intervention and for a claim to more material resources so that the children could be clothed in sufficient respectability and presentability:

When forwarding the form with the measurements for the prints for the Native women I left out Johanna Austin aged 14 years will you kindly send her a light print dress to fit a girl of 16 years as she is a big girl well grown and stout as I am trying to get her a situation which I think I will as she is a good girl and well conducted and she would look respectable and well as she has a nice bearing with her and oblige (Correspondence from W. Johnstone at Secretary, BPA, 22 December 1915).

Two quite distinct legislative and administrative yardsticks were used for intervening in the lives of white and half-caste children. For the child-savers and philanthropists who had in their sights the feeble body of the white child in need, deprivation, poor health and pitiful circumstances were the signs that justified intervention (cite Act in Victoria). These children became the object of reform and protection, holding them in special homes until strong enough to be sent to a 'good country home' (Victorian Childrens Aid Society, 1893-4). In the case of the half-caste Aboriginal population under the gaze of 'protection', quite the opposite occurred. Deprivation and poor health were used as signals for non-intervention - they were signs that the children should be considered

exceptions to the rule of intervention and removal, and instead returned to the mission. In contrast to white children, neglect and distress amongst the Aboriginal children was the signal that they should not be intervened upon.

In the decades following the legislation and the regulatory administrative environment that was build upon it, the consequences of the processes of ‘need interpretation’ differentially applied to indigenous and non-indigenous populations was becoming clear. To cite a common yet materialist example in the history of the child-savers efforts to save the ‘bare-foot urchin’ through the auspices of the ‘good country home’, a minimum requirement in the positive eugenic strategy to save the white child was shoes. Not so the Aboriginal child on the mission:

Hats are unnecessary – a cap for each man should be sufficient. Boots are absolutely not required except by the working men [underlined in pencil]. The women & children do not require boots and take no care of them. The Boots being very poor quality they only last a few weeks. If the women would be a little diligent & make baskets etc they could procure all the clothes they want. The very fact that the Govt. supplies every thing makes them careless and indolent (18/2/1916. Underlining in original).

In concluding, it is important to note that the disparity in interpreting the needs of the black compared with the white child is not visible only to the 21st century eye. When a visitor reports on the population at Lake Tyers mission in 1918 - not from the Protection Board but this time from the Lands Department - he is shocked by what he sees:

I cannot conclude without remarking on the emaciated appearance of some of the children and youths in the existing settlement evidently suffering from tuberculosis. I believe the exposed position of the houses and the sea air is injurious to them in Winter and they seem in need of a change to the hills, in fact a change in home for some of the suffering should be retained elsewhere, but this would be a matter for the consideration of your medical adviser (May 16, 1918).

Liberal forms of governing Indigenous populations

I have provided a brief overview the invention of the ‘half-caste’ Aborigine in colonial government legislation, the separation of this population (particularly children and young persons) from the Aborigines housed on the missions (often referred to in government reports as ‘full Blacks’), and the methods adopted by legislators and administrators to know and categorize Aboriginal people for the purpose of governing them, in order to sketch out the underpinnings of a late 19th century criminalizing of Australian Aborigines. The account shows that the emphasis of the governors was on techniques of power that use ‘inducement’ rather than direct coercion of the population, although it is clear from the records of the administrators that manipulation and deception were key elements in the methods used to try to close missions and move the inhabitants to other missions to save money and provide a cheap readily-available source of labour. As well as the covert nature of administrative practices, a noteworthy feature of its apparatus was the strongly authoritarian forms of power set in place to manage Aboriginal people. Evidence from the archival records in Victoria shows that the removal from the mission and attempted ‘merging’ with the White European Australian population led quickly to a criminalizing of that part of the population. Aboriginal children and young people who found themselves removed from their families and communities once they had been legislatively declared ‘non-Aboriginal’ were described as ‘hanging around’ and branded as ‘trouble-makers’ when they attempted to enter the missions, draw on their community’s and family’s rations, attend the mission schools, and otherwise resist the demands of administrators to relinquish their Aboriginal identity. These activities were made offences in the 1890 revision of the *Aborigines Act*. There is evidence of a clear disparity between on the one hand a ‘normal’ white family life, and the aberrant, and later unlawful, attempts to sustain indigenous family and community on the other.

One of the current responses to the history of forcible removal is to see these relations of power as exceptional, illiberal and despotic when compared to the present (Bessant, 2004). Yet there are a number of ways in which authoritarian forms of government can be seen as a characteristic feature of the history of liberal political reason. In the literature on government associated with the work of Michel Foucault, liberalism is

understood as a distinct form of political reason that is concerned with the practical implications of the belief that members of the population are endowed with, or capable of acquiring, a capacity for autonomous, self-directing activity. Liberalism understands the social milieu as involving not only government regulation but also the self-regulating processes of interaction between individuals capable of agency (Hindess, 2001). The Foucaultian study of liberal government understands the main implication of the belief in self-directing individuals to be that government should make use of this capacity, and therefore has focused on the ways in which individual liberty has been recruited for governmental purposes. But how has liberal political reason dealt with those in whom the capacity for self-government is thought to be insufficiently developed? The first type of response – here, Hindess draws on John Locke’s discussion of what should be done about the native inhabitants of North America – is to suggest that some people are so far from acquiring the capacity for self-government that ‘they should simply be cleared out of the way’ (2001, p. 101). Second is the view that capacities for self-government can be developed only through the compulsory imposition of extended periods of discipline, a view most influential in the history of authoritarian versions of the welfare state and in the history of colonial administration. A third view is that many lack the capacities required for autonomous action for ‘external reasons’ such as ill-health, poverty, lack of education and so on, and that the role of government should be to build up these capacities by establishing a supportive environment. Hindess suggests that in western societies before the middle of the 20th century the vast majority of people were thought to belong to the second category:

the category of those who would benefit from being subjected to authoritarian rule: the subject peoples of Western imperial rule and, throughout the nineteenth and early twentieth centuries, substantial groups in Western societies themselves. In spite of liberalism’s undoubted commitment to liberty, only a minority were actually governed as free individuals. Another minority – whose size is, for obvious reasons, difficult to estimate - consisted of those who were more or less successfully cleared out of the way (Hindess, 2001, p. 101).

In the period under review, the scientific view of the superiority and inferiority of races had become prominent in some quarters as a rationale for the clearing away of those referred to as the 'full bloods'. Although Hindess points out that this view did not necessarily imply that inferior races should be extinguished, it did suggest that 'where they stand in the way of progress, their removal would not be entirely gratuitous' (Hindess, 2001, p. 103). This view contrasted with the early 19th century view of ethnographers that Australian indigenous people were not so much fundamentally different from their European counterparts as '... less civilized than them ...

If they lacked the sophistication of the new arrivals, it was not because they were different in their underlying capacities, but because their ascent up the scale of civilization had been barred by the limitations of their environment (Muldoon, 1999, cited in Hindess, p. 103).

On this earlier view Aboriginal people could be thought of as improvable, but the later 19th century theory of racial differences was reflected in the oft-quoted view of the managers of the stations that their 'full blood' populations would 'die out'. The invention of the category of 'half-caste', which underpinned the removal of a section of the population from the missions, meant that the mission became, in effect, an institution in which to die. This function was reaffirmed by the practice of transferring younger yet sickly half-caste people to the mission. The policies of the period thus revealed an ambiguous aspect of the handling of the half-caste: Aboriginality was denied to the fit and ready-for-work half-caste but was reaffirmed in the case of the sick and feeble-minded who were sent back to the mission. The positive eugenic policy of building up the health and vitality of the sickly white child contrasted starkly with the negative eugenic strategy of returning the sickly half-caste to the mission and restoring his or her Aboriginal identity (McCallum, 1983). The 'flexibility' of this identification of Aboriginality, or subject-formation, was an essential tool in the administrative hardware.

It may be worthwhile considering this ambiguity in the context of the more long-standing ambiguity in the way in which liberalism has seen individual autonomy. As Hindess (1996) explains, in some contexts liberalism understands individual autonomy as essentially human and therefore as a given reality to which government has to adapt, and

in other contexts as an artefact, the product of previous actions of government or of conditions that have been set up to promote the capacity for autonomous action on the part of individuals. Similarly, 'spontaneous' orders in which individuals interact with each other (such as the 'free market') may be treated as realities to which governments must adapt, while on other occasions may be treated as artefacts capable of being acted upon by government to transform them into more satisfactory orders (Hindess, 2000, p. 77). In its encounters with the problem of governing late 19th century indigenous populations in Australia, liberal political reason fabricated a certain flexibility in relation to the problem of person-formation that allowed government to regard 'full-bloods' as part of a natural rather than specifically 'human' order, that must simply be left alone to work through its own internal, immutable logic, while at the same time opening up the possibilities of transforming 'half-castes' as persons capable of achieving such a state of autonomy as would permit their 'free' participation in the labour market. In the kind of taxonomy averred to in the allocation of bodies to different institutional sites (the mission station, the foster home, 'in service') the 'half-caste' seems to qualify as essentially 'human', inasmuch as he or she is ready for self-governing, or at least capable of achieving this standing through the imposition of more or less extended periods of discipline.

We will recall that the superintendents of the missions understood their subjects to be 'free' in the sense that administrative techniques would deploy inducement rather than coercion. So once legislation had laid down the parameters of Aboriginal participation in the community (and indeed whether persons could be considered, and could consider themselves 'Aboriginal'), a person was free to compete in the labour force and take part in aspects of the settler society. Of course, those persons defined as Aboriginal (the 'full-bloods') had an entitlement to rations but only on the basis of work performed on the mission station - an arrangement reminiscent of the English poorhouse and later extended to the non-indigenous population with the introduction of unemployment relief. The 'half-caste', now removed from the mission and from their family and community, was 'obliged' to be free to choose to work for wages and to merge with the white population. A similar kind of freedom is identified by Australian Aboriginal leaders Noel

Pearson and Patrick Dodson in their critique of the modern liberal notion of ‘mutual obligation’ and ‘Shared Responsibility Agreements’: parents in regional and remote Aboriginal communities would be rewarded with fuel bowsers for choosing to regularly bathe their children and send them to school. A remote community will set about ruling itself ‘at a distance’ by voluntarily committing to a hygiene regime that is aligned with the will of central rulers. Pearson and Dodson point out that such schemes rewarded people ‘for behaviour that ought to be natural’, and that the Howard government needed to give more thought to the notion of shared responsibility agreements (*The Age*, 15/12/2004, p.1).

It would appear, then, that the government of Aboriginal populations under ‘advanced liberalism’ (Rose, 1996) presupposes that Aboriginal persons will in effect *allocate themselves* into categories - those who are able to govern themselves, and those who are not - on the basis of their decision whether or not to accept ‘responsibility’ for face-washing and other forms of discipline. Earlier modes of liberal rule that required persons to be detained in closed encampments (the mission station idea is now practiced, for the most part, for non-white, non-citizens seeking asylum in Australia) might be considered in modern liberal political reason as a superfluous and uneconomical use of power. Aborigines would be free to choose whether to be ‘responsible’ in carrying out programs of reform as a preparation for being able to govern themselves, or to choose an irresponsible alternative. The ‘responsibilisation’ of Aboriginal Australia is now a task of the criminal justice system, which regularly and systematically detains Aboriginal people in jails throughout the country for offences that can be traced in large part to the attempted destruction, over time, of family, community, culture, language, and memory.

Forms of Aboriginal governance, and resistance to liberal governance by Aboriginal communities, have the potential to modify and destabilize programs in criminal justice and related health fields, such as petrol-sniffing and family violence (O’Malley, 1996). And it is important in the record of historical relations to account for the resistance to governmental rule, such as the successful resistance to attempts to move the community at Framlingham. But by enrolling freedom as a tool of government, the neo-liberal

framework also attempts to foreclose on the logics of both individual and social resistance. The freedom to choose face-washing is merely one of the freedoms to practice responsibility: no reasonable complaint could be brought to bear in respect of an individual deprived of liberty, livelihood or health as a consequence of that person freely choosing not to fulfill their part of the social contract. But the question in liberal political reason turns on how self-government in Aboriginal communities is able to be thought, and whether the terms and conditions of individual and community self-governing are given by dominant imperial powers or by the construction of ‘therapies of freedom’ defined by Aboriginal communities themselves (McGillivray, 2002, p. 47). The problem of the rights of the child has a special place within practices of Aboriginal self-governing. For it is Aboriginal connections to a ‘generative culture’, as distinct from policies of assimilation or the more recent paternalist state projects such as ‘mutual obligation’, that new spaces to practice freedom can be found.

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¹ Article 3 (1) states: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

² Victoria. *The Aborigines Protection Act* 1886. An Act to amend an Act intituled "*An Act to provide of the Protection and Management of the Aboriginal Natives of Victoria*", Victorian Government Gazette, 10 December 1886. s.4 The following persons shall be deemed to be aboriginals within the meaning of the Principal Act:-

(1) Every aboriginal native of Victoria.

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- (2) Every half-caste who habitually associating and living with an aboriginal within the meaning of this section has prior to the date of the coming into operation of this Act completed the thirty-fourth year of his or her age
 - (3) Every female half-caste who has prior to the date aforesaid been married to an aboriginal within the meaning of this section and is at the date aforesaid living with such aboriginal
 - (4) Every infant unable to earn his or her own living, the child of an aboriginal within the meaning of this section, living with such aboriginal'
 - (5) Any half-caste other than is hereinbefore specified who for the time being holds a licence in writing from the Board under regulations to be made in that behalf to reside upon any place prescribed as a place where any aboriginal or any tribe of aboriginals may reside Victoria. *Aborigines Protection Act 1886* s. 4

³ United Nations. General Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Article 2 : In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.