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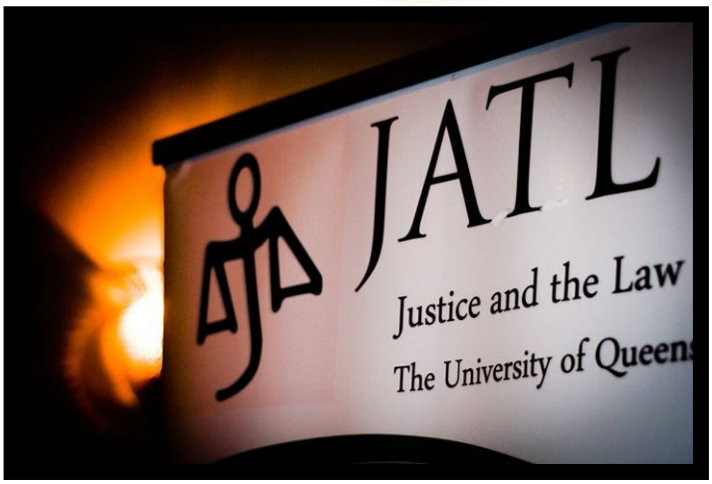

Welcome to the last ever published edition of Themis. Given the way that Themis has evolved over the years in focusing more on student made material, the JATL team decided that its new role would be better served as an online blog. As such, the functioning of Themis has now been absorbed into what is now known as 'Pandora's Blog', which will feature flowing content rather than four fixed publication dates each year. The JATL team would like to welcome Balawyn Jones and Jocelyn Bosse into their new roles as managers of this blog, as well as Shane Montgomery as president for 2015 and all of our other new executive members. As for myself, this is my last year on the JATL executive and I would like to congratulate the entire team on all of our successes in 2014 and to thank them for their support in the running of Themis this year. May 2015 herald a new year of success and progress.

The final edition of Themis is based on indigenous legal issues. If you were paying attention to our previous federal election, you could be perhaps forgiven for wondering if indigenous issues are still important today. With issues like climate change, immigration and the economy stealing the stage, indigenous issues, legal and otherwise, seemed to be sidelined. This is difficult to comprehend, given that indigenous groups remain the most disadvantaged within Australia. Your average Australian may be surprised by just how dire issues faced by indigenous communities actually are. For example, many indigenous Australians even today are faced with health, education and employment standards among many others not only severely worse than non-indigenous Australians, but also comparable to third-world conditions (source).

(*continued…*)

FOREWORD

This edition of Themis develops in particular the legal challenges faced by indigenous Australians in 'Stolen Generations litigation', whereby members of Australia's stolen generation seek compensation through the courts for the atrocities committed against them by the Australian government in the past. These submissions were made by Kelly Staunton and Alasdair McCallum, and were written as final research essays for the subject LAWS5135: Law of Indigenous People held in 2014, and have been used with permission from the University and subject coordinator Associate Professor Margaret Stephenson. We would like to thank the students for their submissions, as well as commend them for their outstanding contribution to scholarship on indigenous legal issues. As is highlighted in both articles, members of the stolen generation still face significant if not insurmountable legal hurdles due to complex legal problems both in equity and the law of evidence. These problems, among others, serve as examples of the Australian government's inability to truly embody the sentiment of reports such as the 1997 *Bringing Them Home* report and Kevin Rudd's 2008 apology to the indigenous community for the Australian government's past wrongdoings, as is further discussed in both submissions. As both of these submissions highlight, there is still much more work to done on indigenous legal issues in Australia.

Our final submission in this edition is a testimonial from Elizabeth Emmett from her time interning at the Aurora Native Title Internship Program in summer 2014. Her submission gives valuable insight into how students can be involved in working with indigenous legal issues. More information about internship opportunities and the work of the Aurora Project can be found here.

Finally, from the entire JATL team of 2014/2015 we hope you have had a happy holiday period, and we hope to see you in 2015. Keep an eye on our Facebook page and newly renovated website for more information about our upcoming events and other internship and work opportunities.

Sean Goodwin
Themis Edition 2014

FOREWORD

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The first and second submissions included within this edition are course papers from the course 'LAWS5135: Law and Indigenous Peoples' offered Semester 1 2014, and have been used with permissions from the authors and course convenor. All intellectual property rights remain with the authors.

NEW

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EQUITY ISOLATIONISM, THE STOLEN GENERATIONS AND CANADIAN RESIDENTIAL SCHOOLS: A COMPARATIVE ESSAY

By Alasdair McCallum

THE AUSTRALIAN POSITION: EQUITY ISOLATIONISM?

Australia has long followed a restrictive and cautious path on the issue of equity. Michael Kirby's influential 2008 essay, 'Equity's Australian Isolationism', (1) called upon Australian jurists to maintain the relevance of equity by developing it alongside changing times and conditions. (2) In doing so, he thrust the issues around Australia's position on equity into the spotlight. Kirby's essay was critical of the High Court's decision in *Breen v Williams,* (3) which stands as a definitive statement of Australia's conservative position on equity. *Breen* restricted fiduciary obligations to proscriptive duties to avoid causing harm, which has attracted criticism on doctrinal grounds (4) but has also drawn vocal support. (5) Arguably, the policy consideration of preventing widespread litigation justifies a conservative position on equity (6) and non-economic interests are better protected through other legal mechanisms. (7) Justice Keane's riposte to Kirby was particularly dismissive of the contention that Australia's rejection of fiduciary duties to Aboriginal people was an expression of its 'equity isolationism'. (8) This essay will contrast the conservative Australian position on equity with the more liberal position in Canada, considering cases of indigenous child removal. In Canada, the categories of presumed fiduciary relationship have been expanded to encompass doctor-patient (9) and parent-child (10) relationships. Nonetheless, judges in Canada have been reluctant on occasion to find that the Crown can owe prescriptive fiduciary duties. (11)

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(1) Michael Kirby, 'Equity's Australian Isolationism,' W.A. Lee Equity Lecture, Queensland University of Technology, Brisbane, 19 November 2008.
(2) Ibid 445.
(3) (1996) 186 CLR 71.
(4) Leon Firios, 'Precluding Prescriptive Duties in Fiduciary Relationships: The Problems with the Proscriptive Delineation' (2012) 40 *Australian Business Law Review* 166.
(5) Darryn Jensen, 'Prescription and Proscription in Fiduciary Obligations' (2010) 21(2) *King's Law Journal* 333, 354.
(6) P.A. Keane, 'The 2009 W.A. Lee Lecture in Equity: The Conscience of Equity' (2010) 84 ALK 92, 120.
(7) Malcolm Cope, 'A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust' (2005) W.A. Lee Equity Lecture, Queensland University of Technology, Brisbane, 27 October 2005, 153.
(8) Above n6, 124.
(9) Norberg v Wynrib [5^{33}6] 6 SCR 66^{0}.
(10) M(K) v M(H) [5^{33}6] 7 SCR ^{0}.
(11) A(C) v Critchley (5^{332}) 5^{00} DLR (8th) 475.

Furthermore, Canadian residential school cases have not followed a consistent judicial approach. Julie Cassidy has identified three legal barriers in Australian equity law to recognising fiduciary duties towards the Stolen Generation: the requirement that economic loss be present, the position that fiduciary obligations must be proscriptive rather than prescriptive, and the position that a fiduciary duty will not exist if the matter can be compensated through contract or tort. (12) The presence of these barriers has precluded any finding of breach of a fiduciary duty owed towards victims of the Stolen Generation.

THE AUSTRALIAN POSITION – NO FIDUCIARY DUTY?

The Australian courts have declined to follow the position taken in Canadian cases and have limited the scope of fiduciary duties to instances of economic loss. (13) The decision in *Breen v Williams* (14) limited fiduciary obligations based on a prescriptive-proscriptive delineation while warning against 'abrupt or arbitrary change' in judicial decision-making on the basis of policy considerations. (15) However, the legal reasoning behind the restriction of fiduciary duties to economic loss deserves scrutiny. Cassidy has argued that the Australian position is a case of the 'tail wagging the dog,' with the consequences and nature of the breach being examined in order to determine the duty that is owed. (16) She is correct in her observation that the core of a fiduciary duty is an undertaking to act in another's interests in a 'practical or legal sense', (17) and that the presence of a fiduciary duty should not depend on the nature of the breach. Two potential rationales have been raised to justify the existence of a fiduciary duty owed to Australian Aborigines: the inalienability of native title, and the historical relationship between the Crown and indigenous people. (18) The case of *Mabo v Queensland (no 2)* (19) extensively discussed the issue of fiduciary duties owed to indigenous people. Justice Toohey found that the Crown owed the Merriam people a fiduciary duty based on the inalienable nature of native title, but the rest of the court did not join him. (20)

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(12) Julie Cassidy, 'The Stolen Generation: Canadian and Australian Approaches to Fiduciary Duties' (2003) 2 *Ottawa Law Review* 175, 185, 188, 203.
(13) Paramasivam v Flynn [$5^{3}3^{2}$] FCA 5^{1} 55.
(14) [1996] 186 CLR 71.
(15) [1996] 186 CLR 71, 101.
(16) Cassidy, above n12, 191.
(17) Hospital Products v United States Surgical Corporation ($5^{3}2$ 8) 59^{0} CLR 85.
(18) Julie Cassidy, 'The Best Interests of the Child? The Stolen Generations in Canada and Australia' (2006) 15(1) *Griffith Law Review* 882.
(19) (1992) 175 CLR 1.
(20) (1992) 175 CLR 1, 203.

A further problem in cases relating to the Stolen Generation is the vast delays involved. Although statutory time limits do not apply in regards to equitable actions, the defence of delay (or laches) can still be pleaded. This was an issue in *Williams v The Minister (no 8)*, and unsurprisingly prejudices many indigenous claimants, whose cases are often based on childhood experiences and oral testimony. (21) While the Canadian government rarely utilizes the defence of delay, in Australia the government has employed it with 'great vigour'. (22) In *Cubillo*, it was found that the Commonwealth had been 'grossly prejudiced' by the delay in bringing about claims. (23) The lengthy delays involved represent another formidable hurdle to Stolen Generations claims.

STOLEN GENERATION CASES

The experience of Stolen Generations claimants regarding fiduciary duties has veered from judicial ambivalence to outright rejection. One of the earliest cases to deal with the removal of Aboriginal children was *Williams v Minister, Aboriginal Land Rights Act 7549 (No 7), (24) (No 2) (25) and (No 3)*. (6^{0})The plaintiff, who had been removed from a 'supportive' biological family, (27) sought damages for negligence, breach of fiduciary and statutory duty and trespass. At first instance Justice Kirby, then a member of the NSW Supreme Court, applied the Canadian decision of *M(K) v M(H)* (6^{2}) and found a breach of ^{D}iduciary duty despite a lack of non-economic loss. (29) Nonetheless, Justice Abadee of the NSW Supreme Court rejected Kirby's finding and concluded that economic loss was a precursor for a finding of a fiduciary obligation. (30) Abadee's findings were upheld on appeal. (31) The decision has been criticised as being based on a 'floodgates' concern about increasing volumes of litigation, rather than solid legal reasoning. (32)

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(21) Karen McMahon, 'Set-back for Stolen Generation: Williams v The Minister, Aboriginal Land Rights Act & Anor' [1999] 4(24) *Indigenous Law Bulletin* 11.
(22) Julie Cassidy, 'The Stolen Generations – Canada and Australia: The Legacy of Assimilation' 11(1) *Deakin Law Review* 132, 176.
(23) *Cubillo v The Commonwealth* [6444] FCA 54^{2} 8, 55$^{0\,2}$.
(24) (1994) 35 NSWLR 497.
(25) [1999] NSWSC 843.
(26) [2000] Aust Torts Rep 64, 136.
(27) *Williams v Minister, Aboriginal Land Rights Act 1983 (No 1)* (5$^{3\,3}$8) 79 NSWLR 8$^{3\,1}$, 946.
(28) (1992) 96 DLR (4th) 289.
(29) *Williams v Minister, Aboriginal Land Rights Act 1983 (No 1)* (5$^{3\,3}$8) 79 NSWLR 8$^{3\,1}$, 955.
(30) *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)* [5$^{3\,3\,3}$] NSWSC ^{2}87, 958.
(31) *Williams v Minister, Aboriginal Land Rights Act 1983 (No 3)* [6444] Aust Torts Rep ^{0}8, 57^{0}.
(32) Above n20.

FROM CUBILLO TO TREVORROW

The case of *Cubillo v Commonwealth* (33) was a seminal test case for victims of the Stolen Generation, but did not result in a finding of a fiduciary duty. Justice O'Loughlin followed the conservative position that the plaintiffs could not be owed a fiduciary duty in the absence of economic harm. (34) He also rejected the plaintiff's contention that a claim for breach of fiduciary duty could coexist with a claim in tort or contract. (35) The decision was a strident rejection of the more liberal Canadian jurisprudence. The case of *SA v Lampard-Trevorrow* (7^0) upheld a claim against the State for negligence and misfeasance in public office, and was the first successful Stolen Generations compensation claim. Nonetheless, the court was unprepared to find that there had been a breach of a fiduciary duty. Applying the restrictive standard from *Breen*, the court found that the State did not owe any prescriptive obligation to make inquiries about Bruce Trevorrow's wellbeing, and that the simultaneous claim for negligence precluded a finding of a fiduciary duty. (37)

COLLARD V WESTERN AUSTRALIA [2013] WAC 455

The Collard case went further than previous decisions in emphatically rejecting the notion that a fiduciary duty is owed to victims of child removal. The court considered Canadian authority extensively, but was not prepared to apply it in an Australian context. The court noted that the fiduciary duty towards indigenous people in Canada was unique to Canada's 'historical and constitutional context', (38) and was based on the presence of such duties in legislation like the *Constitution Act 1982*. (39) The court found that in contrast to Canada, there was no undertaking on the part of the Australian government towards indigenous people that would create a general fiduciary duty. (40) Notably, the decision approvingly quoted Kirby's advocacy of caution in applying fiduciary duties from other jurisdictions because of unique 'historical and constitutional developments'. (41) Despite Kirby's disapproval of the conservative Australian position, he has noted that the source of the fiduciary duty in *Mabo* was the alienability of native title by the Crown (42) rather than the historical relationship between the Crown and indigenous people. (43)

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(33) *Cubillo v The Commonwealth* [6444] FCA 54^2 8.
(34) *Cubillo v The Commonwealth* [6444] FCA 54^2 8, 574^1.
(35) *Cubillo v The Commonwealth* [6444] FCA 54^2 8, 574^1.
(36) [2010] SASC 56.
(37) *South Australia v Lampard-Trevorrow* [6454] SASC 9^0, 776, 786.
(38) *Collard v Western Australia* [6457] WAC 899, 5589.
(39) S35 *Constitution Act 7548* (Canada).
(40) *Collard v Western Australia* [6457] WAC 899, 55^1 4.
(41) *Collard v Western Australia* [6457] WAC 899, 5844.
(42) *Thorpe v Commonwealth (no 3)* [$5^{3\,3\,1}$] HCA 65, 559.
(43) Larissa Behrendt, 'Responsibility in Governance: Implied Rights, Fiduciary Obligation and Indigenous Peo-

This demonstrates that even liberal Australian jurists are reluctant to apply Canadian equity authority, especially concerning indigenous people. The Australian courts have shown no desire to recognise a fiduciary duty towards indigenous people, and with members of the Stolen Generation growing older this hurdle will only become more difficult to overcome in the future.

THE CANADIAN POSITION

Australia's conservative position on equity and fiduciary duties can be contrasted with the relatively liberal approach taken in Canada. Canadian courts have extended fiduciary duties to cover 'vital non-legal or practical interests' (44) in addition to economic loss. Canadian courts have found two separate sources of a fiduciary duty owed by the Crown towards indigenous people. *Guerin v The Queen* (45) based its finding of a fiduciary duty owed by the Canadian Crown on the inalienability of Aboriginal land and 'constitutional arrangements particular to Canada', (46) which Justice Keane has interpreted as precluding the possibility that the Canadian position might apply in Australia. (47) Nonetheless, a more general fiduciary relationship between the state and indigenous people has been based on the 'guardianship principle' derived from the historical relationship between the two parties. (48) However patriarchal the rhetoric of 'guardianship' between indigenous people and the Crown might sound, (49) this has been the duty pleaded by most Australian and Canadian claimants. The decision in *R v Sparrow* (50) found that a general fiduciary relationship existed between the Crown and indigenous people irrespective of rights to land. The basis of this fiduciary relationship was said to be the 'nature of Indian title, and the historic powers and responsibility assumed by the Crown', (51) and therefore expanded on the limited fiduciary duty based on Native Title in *Guerin v The Queen*. (52) The Canadian government has also been found to have a duty to consult with indigenous people, including duties to carry out substantive discussions with Aboriginal representatives and seek their views on policy matters that affect their interests. (53)

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(44) *Frame v Smith* [5[3 2 1]] SCR [3 3].
(45) [1984] 2 SCR 335, 376. 379-380.
(46) *Guerin v The Queen* [5[3 2]8] 6 SCR 779,
(47) Above n6, 124.
(48) Lisa Di Marco, 'A Critique and Analysis of the Fiduciary Concept in Mabo v Queensland' [1994] 19 *Melbourne University Law Review* 868, 883.
(49) Leslie Thielen-Wilson, 'White Terror, Canada's Indian Residential Schools and the Colonial Present: From Law Towards a Pedagogy of Recognition' PhD Thesis (University of Toronto, 2012) 293.
(50) [1990] 3 CNLR 160.
(51) *R v Sparrow* [5[3 3]4] 7 CNLR 5[0]4, 5[2]4.
(52) (1984) 13 DLR (4th) 321.
(53) *R v Jack* (5[3 3]9) 5[0] BCLR (7d) 645 CA.

A difficulty remains in applying the ruling in *R v Sparrow* to the Australian context because of the lack of recognition of Australian Aborigines in the Constitution. (54) As noted by Justice Kirby, this lack of constitutional recognition may preclude the principle in *R v Sparrow* from applying in Australia. (55)

RESIDENTIAL SCHOOL CASES

The comparatively liberal Canadian position on equity has not produced a consistent line of authority in residential schools cases. Although proprietary interests of indigenous Canadians will come within the ambit of a fiduciary duty, (56) this duty does not necessarily extend to the obligations of the Crown to protect Aboriginal children. The case of *Mowatt* (57) concerned multiple cases of sexual abuse in a residential school operated by the state of Canada and the Anglican Church. The court did not find that a quality of dishonesty was required before a fiduciary duty would be breached. (58) The court also found that the guardianship role that the state had by virtue of legislation gave rise to a fiduciary duty, but did not find that the state had breached this duty. (59) However, the Anglican Church was found liable both in tort and for breach of fiduciary duty. (60) However, the case of *Blackwater v Plint (No 8)*, (61) may have raised the threshold somewhat, or may simply demonstrate the inconsistency of the Canadian approach. It appears that in order to breach a fiduciary duty of this nature, the State must act in a way that amounts to a 'betrayal of trust or loyalty'. (62) Naturally, finding a positive instance of a 'betrayal' of this kind is a formidable threshold for claimants to overcome. Although a fiduciary duty was established in *Blackwater*, the court declined to recognise a breach on the basis that 'dishonesty or intentional disloyalty' was needed to establish such a claim. (63) The court refused to rule on the broader principle of whether a general fiduciary duty was owed to residential school children. (64) While Cassidy has focused her criticism of the Australian position on the failure to apply Canadian precedent, this ignores the reality that the broader scope of Canadian fiduciary doctrine has failed to produce consistent results.

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(54) Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16(1) *UNSW Law Journal* 70, 92.
(55) Larissa Behrendt, 'Bargaining on More than Good Will: Recognising a Fidcuiary Obligation in Native Tite' in Lisa Strelein ed, *Land, Rights, Laws: Issues of Native Title* (Australian Institute of ATSI Studies, 1999) 8.
(56) J. Timothy and S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Indigenous Peoples* (LexisNexis, 2008) 190-191.
(57) [1999] 11 WWR 301.
(58) *Mowatt* [5$^{3\,3\,3}$] 55 WWR 745, 798-358.
(59) *Mowatt* 356.
(60) *Mowatt* 357.
(61) (2001) 93 BCLR (3d) 228.
(62) *K.L.B v British Columbia* [6447] 6 S.C.R 847, 897.
(63) *Blackwater v Plint (No 2)* (6445)^{3}7 BCLR (7d) 66^{2}, 67^{1}.
(64) *Blackwater v Plint (No 2)* (6445)^{3}7 BCLR (7d) 66^{2}, ^{0}7.

Given the discretionary nature of equity, it is perhaps inevitable that the findings of fiduciary duty and breach thereof will differ from case to case. (65) Actions for breach of fiduciary have rarely proved an adequate source of compensation for indigenous claimants, and a widening of the doctrine of fiduciary duty is unlikely in itself to lead to more successful claims. (66) While a greater recognition of fiduciary duties towards indigenous people in Australia would be a positive step, it would not result in the redress that indigenous claimants have been seeking.

CONCLUSION

Canada's relatively liberal position on equity and fiduciary duties has failed to produce a uniform judicial response to residential schools litigation. Although Australia remains uniquely conservative in relation to equity, decisions like *Westpac v Bell (no 9)*, (67) which held that directors owe prescriptive duties to their companies, offer hope that Australian equity orthodoxy is being challenged. While Justice Kirby is correct in his observations about Australia's 'isolationist' equity jurisprudence, more than a shift judicial opinion will be required to properly compensate the victims of the Stolen Generation. The Canadian experience demonstrates that litigation is rarely an effective means of redress for victims of child removal. Similarly, the Australian litigation process was not crafted with indigenous people in mind and is expensive, time-consuming and arguably ill equipped to assess indigenous legal issues. (68) To its credit, Canada has largely supplanted the litigation process for victims of residential schooling through the imposition of a statewide compensation scheme. The $3 billion Indian Residential Schools Settlement Agreement came into effect in 2007 and has taken most residential school claims out of the courts. (69) Ireland has also implemented a similar compensation scheme for victims of abuse at Church-run institutions. (70) Tasmania has followed suit in establishing a compensation scheme for removed children, (71) but other Australian states and territories have not followed its example. An expanded doctrine of fiduciary doctrine in Australia would only go so far in compensating indigenous victims of child removal. Until a scheme that draws from the Canadian model is implemented to supplant the lengthy and ineffective process of litigation, justice for the victims of the Stolen Generations looks as far away as ever.

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(65) Peter W. Hutchins, David Schulze and Carol Hilling, 'When Do Fiduciary Obligations to Aboriginal People Arise?' (1995) 59 *Saskatchewan Law Review* 97, 107.
(66) Dale Cunningham, Allyson Jeffs, and Michael Solowan, 'Canada's Policy of Cultural Colonisation', in Catherine Bell and Val Napoleon (eds), *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (University of British Columbia Press, 2008) 442, 457.
(67) [2012] WASCA 157.
(68) Elena Marchetii and Janet Ransley, 'Unconscious Racism: Scrutinising Judicial Reasoning in 'Stolen Generation' Cases' (2005) 14(4) *Social and Legal Studies* 533, 549.
(69) Linda Popic, 'Compensating Canada's Stolen Generations' (December/January 2008) 7(2) *Indigenous Law Bulletin* 14, 15.
(70) Chris Cunneen, 'Legal and Political Responses to the Stolen Generation: Lessons from Ireland,' (2003) 5(27) *Indigenous Law Bulletin* 14, 17.
(71) *Stolen Generations of Aboriginal Children Act 2006* (Tas).

Overcoming evidentiary obstacles in Stolen Generations litigation

INTRODUCTION

The lack of successful litigation by victims of the Stolen Generations should be a matter of significant concern for the Australian government. Thus far only five claims have been brought for compensation, of which only one, *Trevorrow v South Australia*, has been successful. (1) The lack and failure of claims so far contradicts the government's assumption of responsibility for wrongdoing through Aboriginal relocation(2) and the policy of reconciliation Australia has since pursued.(3) The lack of attempted or successful litigation can be attributed to a number of factors including socio-economic,(4) legal,(5) and factual issues,(6) but where litigation has been commenced, the most important impediment often relates to the passage of time and associated issues of procedure and evidence.(7) It will be argued here that these issues of evidence and procedure could be overcome by the recognition of a limited fiduciary duty between state governments and forcibly removed children, and that this recognition would be more consistent with the Australian government's stated position of responsibility and regret over the Stolen Generations.

EX GRATIA COMPENSATION

It must first be acknowledged that *ex gratia* payment schemes have been set up by some Australian states to provide limited compensation to victims of child removal programs.(8) While these schemes do not face the evidential and procedural issues of court action, they are both time and cost limited and require a waiver of further legal rights.(9) They also fail to recognise the special loss inherent in separating Aboriginal children from their culture,(10) since they are intended for access by all victims of forced child removals.(11)

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(1) *Kruger v Cth* ($5^{3}3^{1}$) 58^{0} ALR 56^{0};*Williams v Minister, Aboriginal Land Rights Act 1983* [6444] NSWCA 699; *Cubillo v Cth [No 2]* (6444) $5^{1}8$ ALR 97; *Trevorrow v SA (No 1)* [2007] SASC 285; *Collard v Western Australia* [2013] WASC 455 (20 December 2013).
(2) Prime Minister Kevin Rudd MP, 'Apology to Australia's Indigenous Peoples' (Speech delivered at the House of Representatives, Canberra, 13 February 2008); Alexander Reilly 'How Sorry Are We?' (2009) 34(2) *Alternative Law Journal* 97.
(3) Australian Government, *Reconciliation* (9 August 2013), Australia.gov.au <http://australia.gov.au/about-australia/australian-story/reconciliation>.
(4) See Randall Kune, 'The Stolen Generations in Court' (2011) 30 *University of Tasmania Law Review* 32, 47.
(5) Ibid 37-43.
(6) Ibid 43-46.
(7) *Kruger v Cth ('Kruger'); Bray v Cth* ($5^{3}3^{1}$) 58^{0} ALR 56^{0}; *Williams v Minister, Aboriginal Land Rights Act 1983* [6444] NSWCA 699 *('Williams'); Cubillo v Cth [No 2]* (6444) $5^{1}8$ ALR 3^{1}, [778] *('Cubillo').*
(8) See Senate Legal and Constitutional Affairs References Committee, 'Review of Government Compensation Payments' *Commonwealth of Australia* Dec 6454, Appendix 5.
(9) Ibid Appendix 1.
(10) *Trevorrow v SA (No 5)* [644^{1}] SASC $6^{2}9$, [5444], [5494], [$55^{2}6$], [$55^{3}7$] *('Trevorrow'); Cubillo* (6444) $5^{1}8$ ALR 3^{1}, [594^{0}].
(11) *Compensation Review,* above n 57, Chapter 6.

In comparison, the Common Experience Payment ('CEP') class-action settlement in Canada drew on over $1.9 billion in funds contributed by the Anglican Church and the Canadian government, is open to specifically Indian victims of the Residential Schools program and has made awards of up to $275,000 based on recognised individual experience.(12) The CEP settlement also provided funding for indigenous facilities, reconciliation projects and education credits.(13) The benefits of the settlement confirm the existence of a stronger cause of action in Canada, while in Australia there remains no judicial motivation for state governments to make *ex gratia* or extra-judicial compromises in favour of Aboriginal applicants.

FIDUCIARY DUTIES IN AUSTRALIA

The lack of impetus is partly because Australian courts, unlike those in Canada, have repeatedly denied the existence of a fiduciary relationship between state governments and members of the Stolen Generations.(14) Fiduciary duties in Australia are narrower than those recognised in other common law countries,(15) being limited to proscriptive requirements affecting economic interests.(16) However, it is not necessary that the nature of the fiduciary duty be dramatically changed or extended for the purposes of benefiting Stolen Generations plaintiffs.

In *Collard v Western Australia* it was held that there is no general fiduciary duty owed by the Australian government to all Australian Aborigines.(17) However, a fiduciary relationship may be recognised between individual members of the Stolen Generations and the States.(18) The ordinary operation of state legislation authorising relocation of members of the Stolen Generations was to confer guardianship of Aboriginal minors on an executive state department.(19) The relationship between guardian and ward is a recognised category of fiduciary relationship in Australia, so relevant executive departments owed inchoate duties upon enactment of the statutes, which crystallised into fiduciary duties with any exercise of the guardianship powers granted.(20)

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(12) Official Court Website 'The Indian Residential schools settlement has been approved: Detailed Notice' *National Administration Committee* ¬http://www.residentialschoolsettlement.ca/detailed@otice.pdf" 66 May 6458.
(13) Ibid.
(14) *Cubillo* 5[1]8 ALR [3 1]; *Lampard-Trevorrow* [6454] SASC 9[0]; *Collard* [6457] WASC 899 (64 December 6457); *Williams* [6444] NSWCA 699
(15) *Clay v Clay* (6445) 646 CLR 854; *Geurin v R* (5[3 2]8) 57 CLR (8th) 321; *R v Sparrow* (5[3 3]4) [1]4 DLR (8th) 385 *('Sparrow')*; *M (K) v M(H)* (1992) 96 CLR (4th) 289.
(16) *Breen v Williams* (5[3 3 0]) 57[2] ALR 69[3], 6[2].
(17) *Collard* [6457] WASC 899 (64 December 6457), [55[2] 4].
(18) *Trevorrow* [644[1]] SASC 6[2] 9.
(19) *Aboriginals Preservation and Protection Act 1939* (Qld); *Aborigines and Torres Strait Islanders Act 1965* (Qld); *Northern Territory Aboriginals Act 1910; Northern Territory Aboriginals Ordinance 1911; Aborigines Ordinance 1918* (NT); *Aborigines Protection Act 1909* (NSW); *Infants Welfare Act 1935* (Tas); *Aborigines Act 1905* (WA); *Native Administration Act 1936* (WA); *Child Welfare Act 1947 (WA); State Children's Act 1895* (SA); *Aborigines Act 1911* (SA); *Aborigines (Training of Children) Act 1923* (SA); *Aborigines Act 1934* (SA).
(20) *Hospital Products Ltd v United States Surgical Corporation* (5[3 2]8) 99 ALR 85[1], 8[2 2].

Although guardianship was not conferred on the State itself, executive bodies such as the Aborigines Protection Board in South Australia were an emanation of the State, and the nature of the powers meant the State was subject to a non-delegable duty and responsibility for the actions of the department.(21) Thus the relationship between the State and a member of the Stolen Generations could potentially be enforced as fiduciary.(22)

The exact content of a particular fiduciary duty will depend on the relationship between the parties,(23) and in this case is one arising pursuant to statute.(24) Fiduciary duties must accommodate themselves to the terms of statutes;(25) but nothing in the relevant child removal statutes precludes responsibility for protecting the existing and future economic prospects of beneficiary wards.(26) In Canada, duties relating to the ward-guardian relationship are explicitly prescriptive, requiring the fiduciary to protect the ward from physical injury.(27) It is not suggested that the duty in Australia needs to be extended to positive non-economic interests, since those interests are already protected by common law torts such as battery, false imprisonment, and negligence.(28) The failure to protect the beneficiary's economic and proprietary interests in the form of a possible "chose in action" is the relevant breach,(29) and the recognition of this limited duty is sufficient to justify an extension of common law limitation period and the rebalancing of the evidentiary burden as it relates to prejudice.

CONSEQUENCES OF RECOGNISING A FIDUCIARY DUTY

Extending Limitation periods

Limitation periods or laches have been in issue in all Stolen Generations litigation.(30) There is judicial discretion to extend a limitation period in particular circumstances, such as if the delay has been caused by some conduct of the defendant.(31)

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(21) *Lampard-Trevorrow* [6454] SASC 9[0], [544[0]].
(22) *Trevorrow* [644[1]] SASC 6[2] 9, [544[0]].
(23) *Trevorrow* [644[1]] SASC 6[2] 9, [894], [[3 3 0]]; *Clay v Clay* (6445) 646 CLR 854, [84].
(24) Child removal legislation, above n 28.
(25) *Trevorrow* [644[1]] SASC 6[2] 9, [[3 3] 9].
(26) Child removal legislation, above n 28.
(27) *M (K) v M(H)* (5[3 3] 6) [3 0] CLR (8th) 6[2 3], [[1 3]].
(28)*Lampard-Trevorrow* [6454] SASC 9[0], [769].
(29) *Trevorrow* [644[1]] SASC 6[2] 9, [5445]; *Collard* [6457] WASC 899 (64 December 6457), [55[3 3]].
(30) *Lampard-Trevorrow* [6454] SASC 9[0]; *Collard* [6457] WASC 899 (64 December 6457); *Cubillo* (6444) 5[1] 8 ALR [3 1]; *Williams* [6444] NSWCA 255.
(31) *Trevorrow* [644[1]] SASC 6[2] 9, [[3] 77].

In *Bennett v Minister of Community Welfare* it was recognised that the fiduciary duty of a guardian may extend to asserting legal rights on behalf of the ward, by providing them access to independent legal advice in respect of a possible breach by the guardian.(32) This apparently positive obligation may in fact be construed as the practical manifestation of the proscriptive duty to avoid conflicts of interest by acting in the utmost good faith.(33) In *Trevorrow*, it was interpreted as requiring the government to provide Trevorrow with independent legal advice when he reached the age of majority, and with information about the circumstances of his removal, especially its illegality.(34) Had the government done so, Trevorrow would have been immediately able to pursue a legal action against the state, and he would not have encountered the procedural issues he in fact faced.

In both *Bennett* and *Trevorrow*, the government was aware, or should have been aware, that they were in breach of duty at the time that the loss occurred. In *Bennett*, there was clear negligence in that the plaintiff had not been instructed or supervised in the operation of dangerous machinery that lacked a safety guard.(35) In *Trevorrow*, the Aborigines Protection Board in South Australia had been informed by the Attorney-General that they did not have the authority to remove aboriginal children from their parents.(36) In both cases, the failure of the government to inform the plaintiffs of their rights led to an extension of the statutory limitation period on the basis that it would be unjust for the government to benefit from a delay that it had caused in the course of breaching its fiduciary duties.(37)

It is arguable based on evidence presented in the *Bringing Them Home Report* that the removal of Indigenous children from their parents was known to be detrimental and unsafe.(38) The acknowledgement of the "deliberate, calculated policies" of removal and eradication recognises an illegitimate, if not illegal purpose in the removal of children,(39) and there is extensive evidence in the few cases that have been brought about poor standards of treatment.(40)

(32) (1992) 107 ALR 617.
(33) *Collard* [6457] WASC 899 (64 December 6457), [5946].
(34) (34) [2007] SASC 285, [1002].
(35) *Bennett v Minister of Community Welfare* ($5^{3\,3}$ 6) 54^{1} ALR $^{0}5^{1}$, $^{0}5^{2}$ *('Bennett').*
(36) *Trevorrow* [644^{1}] SASC 6^{2} 9, [84].
(37) *Bennett* ($5^{3\,3}$ 6) 54^{1} ALR $^{0}5^{1}$, ^{0}66; *Trevorrow* [644^{1}] SASC 6^{2} 9, [$^{3}4^{1}$]-[911].
(38) Human Rights and Equal Opportunity Commission 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' *Commonwealth of Australia* (1997), 79, 88, 103, 114.
(39) *Apology*, above n 5.
(40) *Bringing them Home,* above n 8^{3}.

The *Bringing them Home* report indicates that physical, sexual and mental abuse were widespread,(41) and the ordinary manner of removal and treatment of aboriginal children was in breach of common law duties of care as well as torts protecting personal integrity. Numerous journalists, politicians and bureaucrats expressed concern at the time about the treatment of removed children in care, and about the policy of removal as a whole.(42) It would be difficult, in the face of this evidence, to maintain that the government was not aware of possible breaches or that the standard of care did not require them to investigate. The duty to provide legal advice and access to relevant records was therefore a duty that arose in respect of every member of the Stolen Generations.

Since the information needed to investigate the possibility of action is held almost exclusively by the government,(43) it would be difficult to impossible for plaintiffs to proceed with court action without government cooperation. The possession of documents and information with the potential to dramatically alter beneficiaries' economic and proprietary rights places the government in a fiduciary position necessitating full disclosure to avoid a conflict of interest. Breach of this duty may be remedied by the extension of the limitation period, allowing the beneficiary to recover the benefit lost by the breach.(44)

A second consequence of recognising the fiduciary duty is the correction of the evidential injustice between plaintiffs and the government in Stolen Generations cases. Prejudice through lapse of time is a valid and practical defence in many cases where the relevant events took place four to five decades ago.(45) However, it is contradictory that the Australian and State governments have acknowledged wrongdoing in respect of the Stolen Generations,(46) but retain the benefit of the fact that they have lost the relevant records. Ordinarily no inference is drawn against a party where evidence has simply gone missing over time, the loss instead constituting a complete defence to the action.(47) It is not prima facie negligent for a state to misplace 50-year-old records, and it is not the responsibility of the state to ensure that witnesses retain their recollections of events.

(41) Ibid; *Kruger* (1997) 146 ALR 126.
(42) *Bringing them Home*, above n 49.
(43) Department of Families 'Missing Pieces: Information to Assist former residents of children's institutions to access records' *State of Queensland* (2001), 3-6, 28.
(44) *Trevorrow* [2007] SASC 285.
(45) *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465.
(46) *Apology*, above n 1.
(47) *Cubillo* (2000) 174 ALR 97.

However, it is unjust for the government, having made an acknowledgement of wrongdoing, to continue to rely on a lack of evidence to defend claims of negligence and avoid financial consequences for their actions. In *Cubillo*, it was held that

> *so much time has passed, so many people have died, so many documents are missing that it is not now possible to know what motivated the Director of Native Affairs to participate in the removal and detention of [Mrs Cubillo] and the children from Phillip Creek*. (48)

That lack of evidence made it impossible for the plaintiffs to prove that their removal from their home had been carried out without the consent of their mother, and was the principal reason for the dismissal of the action.(49)

The imposition of a fiduciary duty would entitle the plaintiff in lost evidence cases like *Cubillo* to sue for breach in equity on the basis that the state has failed to protect their economic interests. This would correct the imbalance between plaintiffs who make a plausible claim for serious abuse, and governments that attempt to defend that claim on the basis that it cannot be proven because they have misplaced the evidence.

CONCLUSION

State governments are entitled to defend Stolen Generations claims to the full extent permitted by law. However, it is suggested that the nature of the relationship between members of the Stolen Generations and the state should be recognised as fiduciary in nature, removing the defences of prejudice and delay for defendant governments and requiring them to accept legal responsibility for their wrongdoing, congruent with the symbolic responsibility taken in the Apology.

(48) Ibid [334].
(49) Ibid.

SUBMISSIONS—Testimonials

Aurora - Summer 2013/14 Testimonial
By Elizabeth Emmett

During the last summer holidays I was fortunate enough to be chosen to participate in The Aurora Native Title Internship Program. For 6 weeks I interned at Jumbunna Indigenous House of Learning UTS in the Research Unit, which is headed by the well-known Indigenous academic and writer Professor Larissa Behrendt. The research undertaken at Jumbunna is very diverse, and relates to matters of importance to Indigenous people, their families and their communities.

During the placement I worked closely with my supervisor, a senior researcher and solicitor. From the very first day I was given interesting and engaging research tasks, most of which related to Indigenous affairs and the criminal justice system. In addition, I helped draft a Brief to Advise for a case that my supervisor was working on. Due to the nature of the Brief it ended up being very long, and it was a great opportunity to use our research in a practical way.

Some other highlights of the internship included researching the NSW consorting laws and writing a submission to the NSW Ombudsman in response to the Consorting Issues Paper; writing a newspaper article about the use of the consorting laws by NSW police; and researching the mandatory sentencing laws about to be introduced into NSW. I was also involved in researching the liability of FaCS and the NSW police in relation to the removal of children.

While working at Jumbunna I gained a greater understanding of the challenges still faced by Indigenous people in our legal system, and particularly in our criminal justice system. Throughout the internship I was constantly inspired by the passion and dedication of my supervisor and the other researchers, and it was always interesting to hear about what the others were working on. The experience was invaluable, and I would highly recommend an Aurora internship, and especially a placement at Jumbunna, to anyone interested in Indigenous affairs and social justice.

The Aurora Native Title Internship Program is a fantastic opportunity for law students and graduates interested in gaining some experience in the areas of Indigenous affairs, social justice, and native title. Through The Aurora Native Titlte Internship Program, students and graduates are placed at a host organisation where they intern for six weeks during either their winter or summer break. For more information visit the Aurora Project website at www.auroraproject.com.au