The stolen generations in the aftermath of *Kruger, Bray v The Commonwealth*

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In October 1996, landmark legal proceedings were commenced in the Northern Territory by members of the 'Stolen Generations', when lawyers acting on their behalf filed in excess of 550 claims for common law damages in the Darwin Registry of the High Court of Australia. The claimants had been removed from their community and institutionalised when living as children in the Northern Territory. Claims were also filed on behalf of a number of mothers of children removed without consent. The removals and detentions were carried out by officers of the Commonwealth of Australia under the direction of the Chief Protector of Aboriginals in the Northern Territory and pursuant to the *Aboriginals Ordinance* 1918-1957 (NT) ("the Ordinance").

The writs pleaded causes of action in tort, alleging inter alia breach of duty of care, breach of statutory duty and breach of fiduciary duty, and sought declaratory relief and compensatory damages for personal injury. In addition, aggravated and exemplary damages were sought on the basis that, in removing and detaining the plaintiffs, the Commonwealth of Australia through its officers, acted with contumelious disregard for, and a wanton and reckless indifference to, their welfare and rights.

The constitutional challenge

This was not the first occasion upon which the actions of the Chief Protector and his officers in implementing a policy of removal and detention of children of mixed aboriginal and white parentage, had been the subject of claims before the courts. In February 1996, legal argument concluded before the High Court of Australia in the cases of *Kruger v The Commonwealth of Australia* and *Bray v The Commonwealth of Australia*.(1) Alec Kruger, George Bray and seven other members of the 'Stolen Generations', had commenced legal proceedings in 1995, in which they challenged the constitutional validity of the Ordinance. All but one of the plaintiffs had been removed from their community when they were children and detained with little or no contact with their mother or family. One plaintiff was the mother of a child who, without her consent suffered the same fate. The removals had taken place in the Northern Territory over a period of years beginning in approximately 1925 and extending to approximately 1949.

Alec Kruger's story was typical of experiences shared by all the claimants. Born in Katherine, NT in 1924, to an Aboriginal mother and a white father, Alec was taken away at three years of age and placed in a succession of institutions including the Kahlin half-caste home in Darwin, and the Bungalow in Alice Springs. At 11 years of age Alec left to work under supervision at a cattle station until joining the Australian Army during World War II. Alec was eventually reunited with his mother some twenty years after his removal. Essentially, the plaintiff's case was that the Northern Territory Ordinances under which they had been removed and detained were invalid as they purported to confer judicial power of the Commonwealth other than in accordance with Ch III of the Australian Constitution and also to empower the Chief Protector of Aboriginals to act in ways which infringed certain rights and freedoms either implied or guaranteed under the Australian Constitution.

The Ordinance was enacted pursuant to S.13 (1) of the *Northern Territory (Administration) Act* 1910 (Cth) which relied for its validity upon power conferred on the Commonwealth by S 122 of the Australian Constitution. S 122 provides that:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit

In *Kruger* and *Bray*, the plaintiffs argued that the Ordinance was outside the scope of S.122 and therefore invalid. It was submitted that the Ordinance was not a law for the government of the Northern Territory, as its only purpose was *"the arbitrary executive detention of Aboriginal citizens and the cultural and physical extinguishment or disintegration of that racial minority"*(2). To be within power, a law made pursuant to S.122 *"must be 'for the government' of the territory in some meaningful sense"*.(3) Alternatively, as the Chief Protector was empowered pursuant to S.16 of the Ordinance, to detain aboriginal or half caste children within a reserve or aboriginal institution, he was vested with a power properly described as a judicial power. The argument was that if Ch III of the Constitution was applicable to a territory, the power to authorise detention in custody was a judicial power and such power, cannot be conferred upon an officer of the Commonwealth, but only upon courts constituted in accordance with Ch III.

It was further submitted by the plaintiffs that if Ch III does not apply to a territory, the doctrine of separation of powers prevents powers of detention being conferred upon the executive without access to the due process of law.

The remaining arguments advanced by the plaintiffs alleged that the Ordinance was contrary to S.116 of the Constitution in that it prohibited the free exercise of

religion and contrary to certain implied constitutional rights and freedoms: the right to freedom of movement and association, the right and/or guarantee of equality under the law, and the freedom from laws authorising genocide or providing for the destruction of a racial group.

On the question of damages, the plaintiffs submitted that a breach of these implied rights, guarantees, immunities and freedoms gave rise to a right of action for damages. The tort relied upon by the plaintiffs was that of wrongful imprisonment and deprivation of liberty but significantly causes of action in tort leading to judicial assessment of the claimants personal injuries and entitlement to monetary compensation were not pleaded.

The decision in *Kruger* and *Bray*

The High Court of Australia handed down its decision in the cases of *Kruger* and *Bray* on 31 July 1997. In essence, the Court rejected the plaintiffs' claims, and although it is not the aim of this paper to provide a detailed analysis of the reasons advanced by the members of the Court for so doing, it is appropriate nevertheless to refer to some of them.

The Court comprised Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow J. Apart from Gummow J, who did not express a view, the Court held that the Ordinance was within power in so far as S.122 was concerned, as there was a sufficient nexus or connection between it and the Territory. In rejecting the plaintiffs' contention that S.122 was subject to implied constitutional rights and guarantees of equality under the law, Brennan CJ reaffirmed the accepted doctrine of the relationship between Ch.III and S.122 of the Constitution as stated by the Privy Council in *Attorney-General of the Commonwealth v The Queen* (the Boilermakers' Case (PC)) (4) to the effect that Ch.III is regarded *"as exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part"*.(5) Dawson J, with McHugh J. concurring also found the Commonwealth Parliament is, *"with respect to the territories, a completely sovereign legislature"*.(6)

Accordingly, Brennan CJ, Dawson and McHugh JJ found that the doctrine of separation of powers does not apply in the Northern Territory. Toohey, Gaudron and Gummow JJ concluded that the powers of removal conferred on the Chief Protector under the Ordinance were necessary for the welfare and protection of persons, and were therefore not judicial in character, and accordingly it was unnecessary to decide whether the doctrine operated to specifically confine S.122.

The Court also found it unnecessary to decide whether an implied right to freedom from genocide applies to confine S.122. It held that in authorising the removal and detention of Aboriginal or half-caste children, the Ordinance did not authorise acts of 'genocide' as defined in Art. II of the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide.

The majority decision of the Court rejected the plaintiffs' contention that the scope of S.122 is restricted by any implied constitutional right to freedom of movement and association. However Toohey J, with whom Gaudron J concurred, found that the legislative power conferred by S.122 is confined by the freedom of movement and association implied in the constitution for the purposes of political communication. Toohey J found that *"the relevant provisions of the Ordinance must not be disproportionate to what was reasonably necessary for the protection and preservation of the Aboriginal people of the Northern Territory"*. (7)

The majority decision of the Court rejected the plaintiffs' contention that the Ordinance was a law prohibiting the free exercise of religion and thus infringed S.116 of the Constitution. Toohey J noted that S.116 *"is directed to the making of law. It is not dealing with the administration of a law"* (8) and in rejecting the plaintiffs' contention under this heading in the manner in which it had come before the Court, observed that:

> *It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence.* (9)

Finally, the Court rejected the plaintiff's submission that a right of action in damages arose by virtue of any breach of the implied rights and freedoms relied upon. In the majority decision of the Court, Brennan CJ stated that the Constitution *"reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes of action enforceable by awards of damages are created by the common law ... supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions"*. (10)

Implications and future directions

When looking at the impact of the decision of *Kruger* and *Bray* upon the damages claims filed on behalf of the Stolen Generations in October 1996, the differences in the nature of the legal challenges mounted in each instance become significant. In *Kruger* and *Bray*, the challenge was to the constitutional validity of the Ordinance only. As Brennan CJ noted *"Revelation of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation, but the susceptibility of a power to its misuse is not an indicium of its invalidity"*.(11) Similarly, Toohey J also noted *"it is the validity of the Ordinance the plaintiffs challenge and which is the basis of their claim for damages, not the exercise of power under the enactment accepted as valid"*.(12)

On the other hand, the damages claims raise numerous causes of action founded in tort and allege breaches of duties arising under each of them. The possibility of these actions was noted by the Court in *Kruger* when Justice Gaudron stated *"... subject to a consideration of the existence of a time bar, if acts were committed with the intention of destroying the plaintiffs' racial group, they may be the subject of an action for damages whether or not the Ordinance was valid"* (13). In the aftermath of *Kruger* and *Bray*, these claims now proceed on the basis of six separate and distinct causes of action raised by the plaintiffs. These are wrongful imprisonment due to unlawful conduct, unlawful/ultra vires conduct, breach of duty of guardian, breach of statutory duty, breach of fiduciary duty and breach of duty of care. Particulars of breaches alleged against the Commonwealth and its Officers include the following:-

- Failing to have regard to, and to act in, the best interest of the plaintiff by failing to take into account his/her ▶

individual circumstances and in particular his/her relationship with his/her mother, family and community
- Failing to have any or any proper system to enable the plaintiff and his/her mother to maintain contact with each other following the removal and detention of the plaintiff
- Further permitting the institution in which the plaintiff was detained to maltreat him/her and to treat him/her in a cruel, demeaning and degrading manner
- Failing to make reasonable attempts to ensure that the plaintiff would enjoy equal opportunity compared to non-aboriginal and non half-caste children in the society which the defendant intended the plaintiff to become a part of being the non-aboriginal community of Australia
- Failing to have any proper regard for prevailing domestic and international principles concerning the advancement and protection of human rights in the discharge of the Director's rights and obligations

To establish these breaches of duty and the injuries caused by them, extensive evidence will undoubtedly be called by the plaintiffs at the trial of their actions. This evidence will detail the circumstances surrounding individual takings and detentions, and the effect these experiences have had both physically and psychologically. Expert evidence defining the nature and extent of the plaintiffs' injuries will be called as well as anthropological evidence explaining the loss of cultural standing and fulfilment within the plaintiffs' indigenous community. Such a head of damage has received judicial recognition as relevant when assessing general damages for loss of enjoyment or amenities of life (14).

Such evidential matters were not considered by the court in *Kruger*. In fact, the Court refused to consider them: "... *the plaintiffs sought to supply a factual substratum showing the intention of the Commonwealth to commit 'genocide'. Issues of fact are presented. They are not assumed, before trial, in the proceedings presently before the Full Court*" (15). Whilst the niceties of constitutional law may prevent assessment of the gritty reality behind the Commonwealth practice of child removal and detention, no doubt the trial of fact in the Stolen Generations common law claims will reveal the shocking effect of such a practice on innocent Australian children, their families and communities. So be it. ■

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Footnotes:

(1) (1997) 71 ALJR 991
(2) As noted by Dawson J at 1007
(3) Per Toohey J at 1021
(4) (1957) 95 CLR 529
(5) (1957) 95 CLR 529 at 545
(6) Per Dawson J at 1008
(7) Per Toohey J at 1029
(8) Per Toohey J at 1025
(9) Per Toohey J at 1025
(10) Per Brennan CJ at 1003
(11) Per Brennan CJ at 997
(12) Per Toohey J at 1020
(13) Per Gaudron J at 1037
(14) *Napaluma v Baker* (1982) 29 SASR 192
(15) Per Gummow J at 1066

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