Stolen generations LITIGATION in NSW

By Maithri Panagoda

In the late 19th century, various welfare laws were enacted in New South Wales (NSW) based on a government policy of assimilation. The *Aborigines Protection Act* 1909 (NSW) gave broad legal powers to the Aborigines Protection Board (renamed the Aborigines Welfare Board in 1940). This legislation allowed for the removal of Aboriginal children from their natural family and environment.

The underlying objective was to eliminate the Aboriginal 'race' by removing Aboriginal children from their families, culture and traditional land, and forcing them to assimilate into white society.[1] These policies caused significant harm to most of the children involved: they suffered physical and emotional abuse while institutionalised and lacked a sense of belonging to a family. As adults, many of them face problems with drugs and alcohol, depression, ill-health and they struggle to sustain long-lasting relationships.

This article aims to deal with some of the key issues relevant to potential claims for damages by members of the Stolen Generations.

LEGISLATIVE FRAMEWORK

Apart from the principles of common law, the following pieces of legislation provide the framework within which claims can be considered:

- *Aborigines Protection Act* 1909 (NSW);
- *Aboriginal Protection (Amendment) Act No. 12* 1940 (NSW);
- *Child Welfare Act* 1939 (NSW);
- *Limitation Act* 1969 (NSW);
- *Racial Discrimination Act* 1975 (Cth);
- *Victims' Compensation Act* 1996 (NSW);
- *Victims' Support and Rehabilitation Act* 1996 (NSW);
- *Children (Care & Protection) Act* 1987 (NSW); and
- *Community Welfare Act* 1987 (NSW).

Since the late 1990s, a number of litigants have sought legal redress for the traumatic experiences they endured as a result of the forced removal and assimilation policies operating between 1909 and the early 1970s, and the ongoing adverse effects that these traumatic events have had on their adult life. The claims have mostly been dealt with in state courts. There have been only two cases involving the Commonwealth – *Williams v The Minister of Aboriginal Land Rights Act and New South Wales*,[2] and *Kruger v Commonwealth*.[3]

KEY CASES

There have only been a handful of plaintiffs (and lawyers) who have been prepared to litigate their claims. The cases that follow sought to establish civil liability through a variety of causes of action.

Williams v The Minister of Aboriginal Land Rights Act 1983 and New South Wales [2000] NSWCA 255

This was the first case brought by an indigenous person in Australia seeking a remedy for losses suffered as a result of state-sanctioned policies. At four weeks old, Joy Williams was removed from her family and placed in the Aboriginal Children's Home in Bomaderry, NSW. She was subsequently transferred to Lutanda Children's Home in Wentworth Falls when she was four years old. Lutanda was primarily a home

for white children and the plaintiff alleged that she was inadequately cared for and treated more harshly than the other children. Williams unsuccessfully sought damages for negligence, wrongful imprisonment, breach of fiduciary duty, and breach of statutory duty.

Kruger v Commonwealth (1997) 190 CLR 1

Alec Kruger and eight other plaintiffs unsuccessfully sought to challenge the constitutional validity of the *Aboriginal Ordinance* 1918 (NT) in the High Court on a number of bases, including its conferral of a judicial power on the Chief Protector of Aborigines who was a non-judicial official. The plaintiffs also contended that the Ordinance violated s116 of the Constitution which provides express protection of freedom of religion. However, this argument was rejected on the basis that the Ordinance did not have the purpose of restricting the practise of religion.

Johnson v Department of Community Services [2000] Aust Torts Reports

In 1973, at the age of four, Chris Johnson was removed from his family in Wilcannia, NSW. Chris was placed in foster care and various institutions where he experienced significant physical, verbal and sexual abuse. Rolfe J held that the limitation period did not begin until the plaintiff acquired knowledge of material facts which could constitute a cause of action. His Honour also recognised that the Department of Community Services owed a fiduciary duty to the plaintiff. After gathering extensive evidence in Wilcannia, this case settled prior to hearing with terms not to be disclosed.

Cubillo v Commonwealth [2000] FCA 1084

This case examined the removal of Lorna Cubillo and Peter Gunner. Lorna Cubillo was eight years old when she was taken from the Phillip Creek Native Settlement, where she was living and attending school. She was taken to Retta Dixon Home in Darwin, where she received corporal punishment and on at least one occasion was viciously assaulted by a missionary worker.

Peter Gunner was seven years old when he was removed from a native camp in central Australia and taken to St Mary's Church of England Hostel in Alice Springs. Evidence of his mother's consent was given in the form of a thumb print on a consent form. However, there is no way of knowing whether she understood the contents of that document.

While accepting that both plaintiffs suffered 'intense grief' due to their removal and abuse at the institutions in which they were placed, the court found that Mr Gunner's mother had authorised his removal and there was insufficient evidence to determine whether Ms Cubillo had been wrongfully removed. Their claims of wrongful imprisonment, deprivation of liberty, negligence, breach of statutory duty and breach of fiduciary duty were unsuccessful.

TREVORROW v STATE OF SOUTH AUSTRALIA (No. 5) [2007] SASC 285

In late 1957, Bruce Trevorrow was a young child living with his family in a remote community in South Australia. On Christmas Day, at the age of 13 months, he was admitted to hospital for treatment of gastroenteritis. After he recovered, the SA Aborigines Protection Board removed him from hospital and placed him with a white foster family. This action was taken without the knowledge of his family and without statutory authority. Bruce remained with the foster family for 10 years during which time he had no contact with his own family. The Board refused to tell his parents where he was or allow them to see him. Further, the Board lied to Bruce's family by telling them that he remained sick and required ongoing medical treatment. After 10 years of foster care, Bruce was finally returned to his mother. Sadly, by this time his father had passed away.

The basis upon which this removal was made included allegations of neglect, an alcoholic father and an absent mother, all of which were found to be untrue.

As a consequence of his removal, Bruce Trevorrow suffered psychiatric illness which impaired his ability to cope with day-to-day life. He was awarded $450,000 compensation for injuries and losses he suffered from being separated from his parents as a baby, and as damages for his unlawful removal. He was also awarded $75,000 in exemplary damages. An appeal by the state of South Australia was unsuccessful. Regrettably, Mr Trevorrow died before the appeal had been determined.

Boreham v State of New South Wales (unreported)

In 1952, the plaintiff was removed from her Aboriginal family at approximately 11 years of age and was later transferred to Cootamundra Girls Home where she remained until 1954. She was subsequently placed in a foster family and remained there for approximately 18 months before being returned to Cootamundra. She suffered sexual assault, depression and anxiety. She was finally able to return to her own family in 1957. The claim settled at mediation. A written apology from the New South Wales Minister for Aboriginal Affairs formed a part of the settlement.

CAUSES OF ACTION

Breach of statutory duty

Under s3 of the *Aborigines Protection Act* (the Act) the NSW government had jurisdiction only over Aboriginals who were full-blooded or half-caste. In many instances, Aboriginal children who did not fit that definition were nevertheless seized from their families.

The Act expressly provided that the Aboriginal Protection Board was the relevant state authority entrusted with the responsibility of protecting Aboriginal people generally. It was also under a statutory duty to exercise general supervision and care of all Aboriginal children and over all matters concerning their interest and welfare, and to protect them against 'injustice, imposition and fraud'.

The Act also expressly required the Board to make due inquiry to satisfy itself that the removal of the child was in the moral or physical interests of the child.

It is clear from the available evidence that, on a number of occasions, officials acted in contravention of the relevant Act. >>

For instance, in *Trevorrow*, Gray J found that the plaintiff's removal and subsequent placement in foster care was unlawful under the relevant South Australian Aboriginal Protection legislation at the time. It was established at trial that the members of the Aboriginal Protection Board were aware that removing the plaintiff, without adequate inquiry into the suitability of his home environment and without the knowledge or consent of his parents, contravened the relevant Act.

Breach of general duty of care at common law

For a duty of care to be recognised, any future litigants will need to negotiate the divergent judgments in *Williams* and *Trevorrow*.

The older NSW case of *Williams* can be distinguished, as the trial judge in the first instance found that the plaintiff was not a member of the Stolen Generations. Further, the plaintiff experienced significant evidentiary difficulties, with many of her claims changing as the trial progressed.[4] The court ultimately found that she had been voluntarily relinquished by her mother.[5]

In *Williams*, the claim advanced by the plaintiff was that her removal breached a duty of care to facilitate the bond between the plaintiff and her mother, which resulted in maternal deprivation, etc. It appears that the court was reluctant to base a significant expansion of the state's general duty of care upon facts about which there was some evidentiary uncertainty.

The judgment also cited several policy reasons for refusing to recognise a duty of care in the situation advanced by the plaintiff. For example, it was considered inappropriate to seek to impose on the state a legal duty of care for harm caused by it, where a natural parent would not be liable for such harm.[6] Future litigants could contend that the natural bond of love and affection encourages the parent to extend a high level of care toward their children, ultimately protecting them. Since the state has no such emotional attachment to the wards in their care, it would not be appropriate to protect them with a common law duty (as opposed to a statutory duty). Furthermore, there was concern that the scope of the duty would be too broad and could not be properly defined.

Trevorrow applied the salient features test to ascertain that the state did owe a duty of care to the children removed from their families. The court found that recognising a duty of care towards the Stolen Generations did not undermine statutory intent by exposing the government to indeterminate liability.[7] Also, considering the power and influence of the state in contrast to the vulnerability of the children, it was appropriate that the state be subject to such a duty of care. Gray J considered it 'readily and reasonably foreseeable'[8] that removing children from their families would increase the risk of harm, whether physical or psychological. The court concluded that the state owed a duty of care upon the removal of children and that the duty continued while the children were in foster care.

In *Williams*, the court held that clear statutory language was necessary to indicate a legislative intention to create a wider duty of care – for example, to facilitate the bond between mother and daughter. The court rejected the argument that a breach of a statutory duty could give rise to such a claim for damages. To suggest otherwise could 'involve the court in an act of judicial legislation and not of legislature construction [sic]'.[9]

In contrast, *Trevorrow* adopted a more expansive view. It found that as long as there was no denial of the duty of care, whether express or implied, its existence could be inferred by the court. The judgment referred to *SB v New South Wales*[10] in declaring a 'greater willingness to recognise such a duty in the context of [a] statutory scheme which invest public bodies with responsibilities for children'.[11]

It should be noted that the common law has, for over a century, recognised that a public authority may be subject to a duty of care in the exercise of its statutory powers.

False imprisonment

False imprisonment arises in circumstances where the liberty of a person is restrained without lawful justification. Deprivation of liberty and, arguably, false imprisonment, often occurred when Aboriginal children were placed into homes without proper compliance with the relevant empowering Act. At first instance, wrongful imprisonment was recognised in *Trevorrow,* which found that the state bore the onus to prove the removal was lawful. However, on appeal, the Full Court rejected the finding of wrongful detention while upholding the breach of duty of care by the state.[12]

Future litigants must determine whether consent was given (or required) for their removal and how the issue of consent may affect a claim of wrongful imprisonment. In *Cubillo,* the courts found that the mother's thumbprint on the form indicated consent for her child to be removed. This judgment assumes that the mother was informed of the consequences of affirming the document, which is questionable when, at the time, Aboriginal individuals were considered incapable of making their own decisions.[13] *Cubillo* also reflects the presumption of regularity, which assumes that all official documents are genuine unless contrary evidence is presented. While it was unlikely that Cubillo's mother understood the meaning of the document, there was no evidence to support this assertion. Thus, the court was compelled to accept the validity of the removal certificate.

MISFEASANCE IN PUBLIC OFFICE

In many situations, the Aborigines Protection Board failed to meet the essential requirements for exercising its power under the empowering Act. This often involved a failure to make due inquiries and to satisfy itself that removal was in the interests of a child's moral and physical welfare.

Trevorrow was the first case in which a Stolen Generations litigant raised misfeasance in public office as a cause of action. Gray J referred to *Sanders v Snell*,[14] where public officials are 'liable for injuries that are caused by acts which, at the time, they knew to be unlawful and involved a foreseeable risk of harm'.[15] It was found that the Crown Solicitor had notified Ministers and officers that continuing to remove Aboriginal children was unlawful. Therefore, it was reasonably

foreseeable at the time of separation that the child faced a risk of harm from the separation.[16]

COURT PROCEEDINGS

Proceedings may be instituted against the state of NSW under s5 of the *Crown Proceedings Act* 1988 (NSW) or, alternatively, s50 of the *Aboriginal Land Rights Act* 1983 (NSW). The state is vicariously liable for the acts and omissions of departmental officers undertaken in the general course of their duties where their conduct involved a breach of duty.

DAMAGES

In *Trevorrow*, Gray J recognised that 'the plaintiff often experienced distress after removal and later short- and long-term disabilities, manifested through childhood and adult life'.[17] Due to their removal and treatment at the Homes, many members of the Stolen Generations suffer depression and anxiety. In some cases, there has been sexual assault and varying degrees of physical assault. Consequent disabilities, past and continuing, often include stress and anxiety, depression, loss of self-esteem, inability to obtain or hold down employment and a disruption to family life. Some plaintiffs have developed drug and alcohol addiction; some have served lengthy gaol terms.

In many cases, the plaintiff experienced a failure to develop an indigenous cultural identity and was unable to rejoin his or her community or participate in cultural activities. This caused considerable distress, contributing to depression and other forms of mental illness.

AGGRAVATED AND EXEMPLARY DAMAGES

Aggravated and exemplary damages may be claimed where there is evidence that government authorities acted with a conscious and contumelious disregard for the welfare and rights of the children and/or with wanton, cruel and reckless indifference to their rights and welfare.

In *Trevorrow*, Gray J held that the state's conduct in relation to the plaintiff was 'conscious, voluntary and deliberate'[18] and demonstrated an intentional disregard for the plaintiff's rights, warranting an award of exemplary damages. The removal had been carried out without legal authority, and no investigation had been conducted as to whether the plaintiff had in fact been neglected by his family.

STATUTORY LIMITATIONS

The time bar imposed by statute of limitation legislation has been a considerable obstacle for Stolen Generations litigants, but it need not be an insurmountable hurdle.

In NSW, prior to 1 September 1990, the limitation period was six years from the date on which the cause of action accrued. The *Limitation Act* 1969 (NSW) confers upon the court a discretion to extend the limitation period if the plaintiff can show that special circumstances exist and that the defendant will not suffer any significant disadvantage by the court granting the extension sought. The plaintiff must rebut the presumption that the defendant's ability to defend the claim has been prejudiced by the delay.

When determining the limitation period, the date of discoverability is crucial. Under s50D of the *Limitation Act* 1969 (NSW), an action is discoverable by a person on the first date that the person knew or ought to have known each of the following facts:

1. the fact that the injury or death concerned has occurred;
2. the fact that the injury or death was caused by the fault of the defendant; and
3. in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.[19]

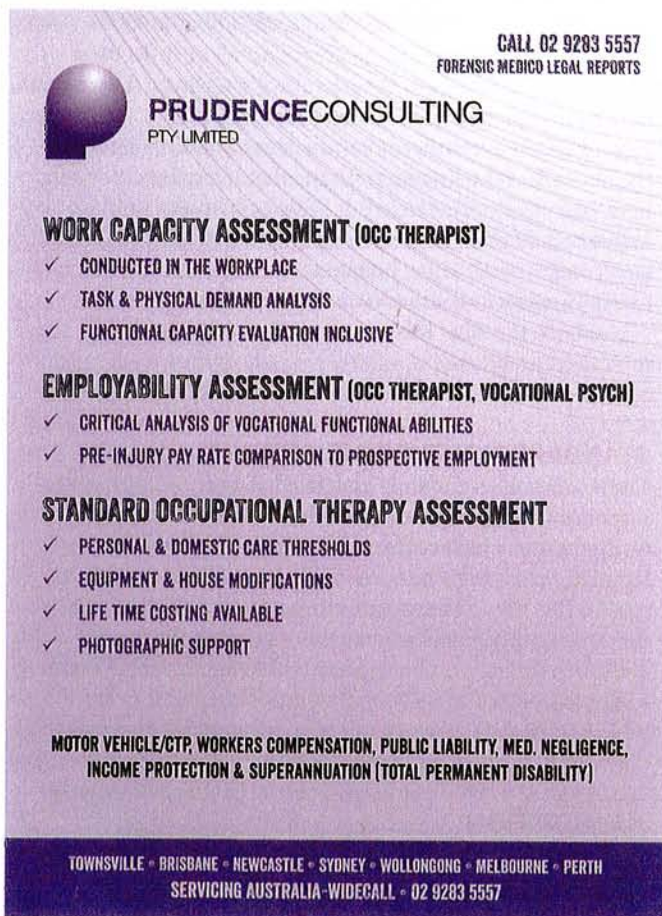
Although s51 imposes a maximum 30-year limit on limitation periods, it does not apply where the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time (s60F).[20]

Section 58 of the Act empowers the court to extend the limitation period so that it expires at the end of one year after the date on which 'material facts of a decisive character relating to the cause of action' became known to the plaintiff.

The case law provides significant guidance on how these competing sections could be interpreted amidst the realities of Stolen Generations litigation.

In *Cubillo,* the trial judge refused to extend the limitation period on the grounds that the Commonwealth would suffer irreparable prejudice due to the unavailability of witnesses and the loss or destruction of documents. The trial judge's decision was upheld on appeal.

In *Trevorrow*, the Full Court noted that the prejudice to >>



the state included the fact that witnesses and documents were missing and that a number of witnesses no longer had a memory of the relevant event. However, the Full Court upheld the trial judge's decision to extend time on the basis of three further factors:

(i) that the plaintiff was unable to protect himself from the consequences of the state's breach of duty;
(ii) that it was not until the 'Bringing Them Home' Inquiry in 1997 that there was a change of policy and some prospect of an Aboriginal child challenging his or her treatment by the authorities; and
(iii) that there was a public interest in a person such as the plaintiff being able to have his claims decided by a court.

Further, Kirby P observed in *Williams:*

"I acknowledge the disadvantages, and even the prejudice which the respondents suffer as a result of such a long delay...but if 'justice and reasonableness' are the criteria, such prejudice must be weighed in scales that also take account of justice to the appellant."[21]

Courts interpret the legislation assuming that narrow procedural questions should not prevent the exploration of broader questions of substantive law and justice. Thus, in *Johnson*, Rolfe J extended the limitation period because Mr Johnson had not become aware of *'the nature of his injuries or connection between them and the respondent's conduct'* until 1997.[22]

PRACTICAL CONSIDERATIONS

Litigants face significant practical challenges that affect their ability to have their evidence accepted in court. In most cases, key witnesses are now deceased and those who remain may have difficulty in accurately recalling events, due to the passing of time. Furthermore, the length of time between the abuse and the litigation means that official records may have been lost or destroyed. It is also extremely unlikely that incidences of abuse and severe punishment were recorded by government staff. Thus, litigants are reliant to a considerable extent on eyewitness accounts to prove their claims.

Similarly, the state is likely to claim, with some force, that their defence has been unfairly prejudiced due to the death of witnesses and the loss of government records.

STANDARDS OF THE TIME DEFENCE

The 'standards of the time' defence has been a common response to litigation. It argues that the government of the time genuinely believed that removing children from their families was in their best interests. *Trevorrow* was a landmark case in this area as it recognised that, in South Australia, there was a significant awareness of attachment theory and the harm caused by rupturing the mother-child bond. It was therefore foreseeable that removing children from their families would create a great risk of harm and was not necessarily in their best interests.[23]

JURISDICTION

Since each state developed its own policies and legislative framework for the removal of Aboriginal children, litigants usually bring their actions in state courts. This could potentially lead to varying decisions across Australia. Alternatively, the relative lack of precedents in each state may mean that courts find judgments from other jurisdictions more persuasive. However, the paucity of case law in this area increases the uncertainty faced by potential litigants.

CONCLUSION

It is undeniable that the policies of past governments to forcibly remove Aboriginal children from their families, traditional lands and cultures have had devastating effects on those individuals as well as their communities.

Members of the Stolen Generations often make the comment that no amount of monetary compensation would be adequate to redress what they have been through. While compensation and public recognition of the abuse may contribute to the victim's recovery to some degree, as Atkinson J notes, 'there is no way to amend the loss of childhood, the loss of family connections and the loss of self identity'.[24]

Stolen Generations litigation is complex and challenging from a plaintiff's point of view. It requires a great deal of dedication and empathy. Some litigants have understandably built up anger and distrust of the system that let them down in the first place. Some form of monetary compensation, even in the twilight of their lives, would provide a degree of relief and redress. It is strongly suggested that a repatriation-style tribunal would be the most cost-effective way of addressing this important issues, which will continue to be the 'inconvenient truth' in the history of the Australian nation. ■

Notes: 1 HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families*, Sydney, (April 1997) p26. **2** Williams: [2000] NSWCA 255. **3** Kruger: (1997) 190 CLR 1. **4** *Williams v The Minister of Aboriginal Land Rights Act* 1983 *and New South Wales* [2000] NSWCA 255 per Heydon JA at [51]. **5** *Ibid*, at [8]. **6** *Ibid*, at [160]. **7** *Trevorrow v State of South Australia* (No. 5) [2007] SASC 285 as per Gray J at [1044]. **8** *Ibid*, at [1046]. **9** *Williams v The Minister, Aboriginal Land Rights Act* 1983 *and* Anor [1999] NSWSC 843 as per Abadee J at [684]. **10** [2004] VSC 514; (2004) 13 VR 527. **11** *Trevorrow v State of South Australia* (No. 5) [2007] SASC 285 as per Gray J at [1031]. **12** *State of South Australia v Lampard-Trevorrow* [2010] SASC 56. **13** Roslyn Atkinson, 'Denial and Loss: The Removal of Indigenous Australian Children from their Families and Future' (2005) 5 *Queensland University of Technology Law and Justice Journal* 1, 81. **14** [1998] HCA 64; (1998) 196 CLR 329. **15** *Trevorrow v State of South Australia* (No. 5) [2007] SASC 285 as per Gray J at [977]. **16** *Ibid*, at [1133]. **17** *Ibid*, at [1170]. **18** *Ibid*, at [1215]. **19** *Limitation Act* 1969 (NSW), s50D. **20** *Ibid*, s50F. **21** *Williams v The Minister of Aboriginal Land Rights Act* 1983 *and New South Wales* (1994) 35 NSWLR 497. **22** *Johnson v Department of Community Services* [2000] Aust Torts Reports. **23** *Trevorrow v State of South Australia* (No. 5) [2007] SASC 285 as per Gray J at [855]. **24** Roslyn Atkinson, see note 13 above, 87.

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