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The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations

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'I would like the child to be recovered if no great expense is to be incurred; otherwise the prestige of the Department is likely to suffer.'[1]

'Possession of the children indicated ownership of the future.'[2]

I INTRODUCTION

This article examines reasons for lack of widespread successful litigation by members of the Stolen Generations. The term 'Stolen Generations' refers to Indigenous Australian children forcibly removed from their families and culture by Australian governments for racial reasons from the late 1800s to the 1970s.[3] Although there is continuing debate about the number of Aboriginal children removed,[4] there is no doubt that officials forcibly removed many thousands of Aboriginal children from their parents during this time.[5]

In its 1997 report from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Bringing Them Home, the Australian Human Rights and Equal Opportunity Commission (HEROC) declared these removals to be immoral, and in some circumstances, illegal:

> The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.[6]

The Commission noted further that, although child removal may have been legally authorised, it was discriminatory and genocidal nonetheless:

> The Inquiry has found that the removal of Indigenous children by compulsion, duress or undue influence was usually authorised by law, but that those laws violated fundamental common law rights which Indigenous Australians should have enjoyed equally with all other Australians.[7]

Keith Windschuttle takes a contrary position in *The Fabrication of Aboriginal History Volume 3: The Stolen Generations 1881–2008*:

> My conclusion is that not only is the charge of genocide unwarranted, but so is the term 'Stolen Generations'. Aboriginal children were never removed from their families in order to put an end to Aboriginality or, indeed, to serve any improper government policy or program. The small numbers of Aboriginal child removals in the twentieth century were almost all based on traditional grounds of child welfare.[8]

He claims that lack of widespread successful litigation by members of the Stolen Generations supports this conclusion. Put simply, he says that '[i]f the Stolen Generations story were true, its members should have had many victories in the courts by now'.[9]

Although Windschuttle's argument is unrealistic and illogical, the nature and extent of many of the impediments and disincentives facing Stolen Generations litigants are at best speculative, and warrant further analysis and empirical research. This analysis and research is urgently needed as, given the lower life expectancy of Aboriginal Australians compared to non-Indigenous Australians, many of the people concerned are nearing the end of their life.

The debate about the existence and extent of the Stolen Generations raises broader concerns about the potential lack of access to justice both for child victims of wrongful removal and for Aboriginal Australians generally. The debate also highlights the inability of the legal system to provide justice for Indigenous and non-Indigenous Australian children who have been the victims of systemic wrongdoing.

II WINDSCHUTTLE'S CONTENTIONS

Windschuttle notes that proponents of the Stolen Generations allege that between 50,000 and 100,000 children were removed.[10] This range, Windschuttle says, is the pool of possible Stolen Generations litigants. He later concludes, contrary to this figure, that the estimate is 8,250.[11] Whatever the number, Windschuttle fails to recognise that not all members of the Stolen Generations are potential litigants. Some have died. Some will be incapacitated by age, illness or disability. Others will be ignorant of their membership of the Stolen Generations.[12] They may not know they were taken, or why, and may not suspect that they have Aboriginal heritage. Such people must be excluded from the pool of potential litigants.

Windschuttle accepts that Stolen Generations litigants face some potential disincentives and impediments, but pays these little attention. Instead, he makes a speculative value judgment that the financial incentive to sue would outweigh any disincentives. He refers to the compensation award for the only successful Stolen Generations litigant, Bruce Trevorrow, in 2007 for the sum of $525,000 plus $250,000 interest,[13] and writes that '[w]hile it is true that legal action is a daunting process and can take years to deliver a result, with such potential compensation at stake the effort would obviously be worth it for genuine cases'.[14] This is particularly so, he continues, given the massive pool of potential litigants, and the length of time (over 25 years) that these potential litigants and lawyers have 'had a grievance about the issue'.[15] Windschuttle acknowledges the concern about the existence of entrenched racist and ethnocentric thinking within the legal system, but concludes that this argument is 'hard to believe'[16] in light of the pro-Indigenous decisions of the High Court in *Mabo*[17] and *Wik*.[18]

As a whole, Windschuttle's argument is illogical and unrealistic. He claims that a moral and social wrong (the forcible removal of Aboriginal children from their families for racial reasons) did not take place because there has not been widespread recognition through successful litigation that these wrongs were also compensable *legal* wrongs. His argument is illogical because it seeks to use lack of proof of legal wrongdoing as evidence to prove that no social or moral wrongdoing occurred. *Bringing Them Home*[19] and former Prime Minister Kevin Rudd in his apology to the Stolen Generations recognised the social or moral wrong.[20] The moral

wrongdoing lies in the racism of the laws, policies and practices of removal, in the different way in which Aboriginal children were dealt with from non-Aboriginal children,[21] in the assumption that white child-rearing practices were superior to those of Aboriginal people,[22] and in the destruction of identity and culture of the stolen children placed with non-Indigenous carers.[23]

Windschuttle's argument is also unrealistic. Litigation is a poor judge of history. Lack of successful litigation should not be seen as proof of broad historical truth. More specifically, court decisions do not reflect the 'general patterns, causes and consequences' that make up history.[24] The reasons for this have much to do with the nature of the adversarial system of trial.

Litigants who bring proceedings have the onus of proving their accusation to the requisite standard of proof, which in civil jurisdictions across Australia is on the balance of probabilities. It is not 'a search for the truth by any means'.[25] Trials are conducted according to rules of procedure and evidence, in the context of the test of relevance framed by the causes of action pleaded. If an applicant's case fails, it can mean that the conduct complained of was not in breach of the law. However, it can also mean that they failed to meet the standard of proof.

Cases are decided on the basis of evidence presented (or agreed to) by the parties. It is for the parties to present the evidence which supports their case. If a party does not present sufficient evidence to prove their case on balance, or effectively argue relevant issues in dispute, they will lose. This does not mean that the events alleged did not take place, although that is the legal effect of the court's judgment.[26] The facts to be proved must be those relevant to the cause of action pleaded, and not evidence more broadly relevant to the background of Australian Indigenous policy and practice.[27]

III IMPEDIMENTS AND DISINCENTIVES TO LITIGATION

Arguments by some vocal proponents and opponents of the Stolen Generations have been polarised, often unbalanced,[28] and the evidence sometimes obfuscated by moralistic and emotional language, and sweeping generalisations. In the following section, the author does not intend to prove or disprove the existence of the Stolen Generations, engage in a linguistic debate about the words 'stolen' or 'generations',[29] or enter the 'history wars'[30] but attempts to take a balanced view of the debate.

A Legal Impediments

In *Kruger v The Commonwealth*,[31] the nine Aboriginal litigants asserted the constitutional invalidity of legislation which purportedly authorised the removal of eight of them as children, and removal of the child of one of them.[32] They also argued that a cause of action existed entitling them to damages for breach of express and implied constitutional rights. However, the High Court accepted the constitutional validity of the Northern Territory's *Aboriginals Ordinance 1918*,[33] because it was within Commonwealth law-making power under s 122 of the *Constitution*;[34] it did not breach the separation of powers' doctrine;[35] it did not breach the right to freedom of religion in s 116 of the *Constitution*;[36] and, it did not breach any implied right to freedom of movement and association[37] or equality[38] that might exist. The Court also held that breach of a constitutional right does not give rise to a novel cause of action in damages outside tort or contract.[39]

The High Court also rejected claims that the *Ordinance* was enacted for the purpose of genocide or was intended to destroy a racial group, but held on the contrary that it was beneficial in intent.[40] However, a majority did not consider whether the *Constitution* would otherwise limit genocidal legislation,[41] leaving this possibility open to future litigation. The decision also left open the possibility of damages for *misuse* of that or

similar power.[42] The Chief Justice emphasised that misuse must be judged by the standards of the day and not contemporary standards.[43] The difficulty became to prove that removal was without authority on the grounds of being unreasonable by the standards of the time.[44] That was argued in *Cubillo v The Commonwealth*.[45] It did not succeed.[46]

The Federal Court in *Cubillo* considered the same legislation as *Kruger*, but the applicants, Lorna Cubillo and Peter Gunner, claimed that, by their removal, the Commonwealth (vicariously through its agent, the Director of Native Affairs) committed the torts of negligence, false imprisonment, and breach of statutory duty, as well as breaching its fiduciary duties to the applicants. The statute of limitations was the primary reason for the applicants' lack of success. The Court in *Cubillo* was not satisfied that it was just and reasonable to extend the limitations period, owing to the prejudice which the defendant would suffer from the delay.[47] However, the Court allowed the trial to proceed on the basis that a formal finding about the extension application would be made at its conclusion.[48] For this reason, O'Loughlin J was able to make formal findings about whether or not the causes of action were proven. In so doing, his Honour determined that there was no policy or practice of indiscriminate removal[49] and no genocidal intent[50] either in the legislation or in its administration by the Director of Native Affairs and others:

> The evidence showed that there were people in the 1940s and 1950s who cared for the Aboriginal people. Those people thought that they were acting in the best interests of the child. Subsequent events have shown that they were wrong. However, it is possible that they were acting pursuant to statutory powers or, perhaps in these two claims, it would be more accurate to say that the applicants have not proved that they acted beyond their powers.[51]

In relation to Lorna Cubillo, the Court found that she had a prima facie case against the Director of Native Affairs for wrongful imprisonment, but that the Commonwealth was not vicariously liable.[52] Even if leave to proceed out of time were granted, her action would fail as she had not sued the proper defendant. Peter Gunner's mother Topsy was found to have consented to his removal, and hence no claim in trespass or wrongful imprisonment could succeed.[53] Neither Lorna Cubillo nor Peter Gunner could establish a breach of statutory duty.[54] The Commonwealth owed no common law duty of care in negligence to either applicant.[55] The Court found that the Director did not owe a duty of care at the time of removal, unless the removal was beyond power (which in this case it was not).[56] The Court decided that a duty of care did arise once the power was exercised to ensure their safety and well being.[57] In Lorna Cubillo's case, the duty was not breached, but in Peter Gunner's it was.[58] However, the duty was owed by the Director, who had not been sued, and the Commonwealth was not vicariously liable.[59] As such, both negligence actions failed.

In New South Wales, Joy Williams was granted leave to proceed out of time,[60] but was unsuccessful in her substantive claims in 1999.[61] Guardianship was not transferred from her mother to the Aboriginal Welfare Board under the *Aborigines Protection Act 1909* (NSW), though she did become a 'ward' under the Act. Her claim in trespass failed, as it was conceded that her mother had consented to her placement in care,[62] and it was done in accordance with the Board's statutory powers.[63] There was no actionable statutory duty owed to her[64] because '[t]he provisions of the Act were not intended to confer a right of action in tort having reference to the nature, scope and terms of the child-welfare legislation'.[65] His Honour held that no fiduciary duty arose, but that if it did, it also was not breached in the circumstances, nor would the alleged loss have been caused by the purported breach.[66] No duty of care existed,[67] and hence the plaintiff's claim in negligence failed. In the alternative, the Court found that if there was such a duty it was not breached,[68] and at any rate

the loss was not caused by any purported breach.[69] One of the reasons for the Court's refusal to create a new category of duty of care was the risk that in doing so, it would start a flood of litigation by those psychologically injured whilst in Government care.[70] Another policy reason was that the State should be in no different position concerning its duty to children in its care than should parents.[71]

Claim for compensation for breach of fiduciary duty were made,[72] and failed, in *Williams*,[73] *Cubillo*,[74] and *State of South Australia v Lampard-Trevorrow*,[75] primarily on the ground that the removal of children into State care did not create a fiduciary duty of the type where breaches of a non-economic character can sound in damages.[76]

Claims in negligence are not foreclosed, as Rolfe J concluded in an extension of time application in *Johnston,* [77] particularly given the confused state of the law of negligence in relation to when a novel duty of care will be created.[78] This is emphasised by *State of South Australia v Lampard-Treverrow*,[79] in which the South Australian Full Court allowed the award of compensation for negligence and misfeasance in public office. That case was an appeal by the State of South Australia from the decision of Gray J in *Trevorrow v South Australia (No. 5)*.[80] Around Christmas 1957, the plaintiff, Bruce Trevorrow, aged 1, was taken to hospital with gastroenteritis but recovered quickly. He was removed from hospital by the Aborigines Department on 6 January 1958 and fostered to Mr and Mrs Davies, who were inexperienced foster parents. His birth mother was not informed, and did not consent. The *Aborigines Act* gave some removal powers but in 1949, the Crown Solicitor had provided formal advice to the Attorney-General that s 7 of the *Aborigines Act 1934–1939* did not authorise the forced removal of Aboriginal children from their parents.[81] This advice was distributed to members of the Cabinet and the Aborigines Protection Board (APB). The advice was confirmed in 1954.[82]

The plaintiff, as he presented before the Court, suffered from serious depression and alcohol abuse, which led to lost earning capacity and continued mental illness. He was employed in sheltered work, his marriage was punctuated by domestic violence, he never felt close to his children and he never identified with his indigenous culture.[83]

The Full Court of the South Australian Supreme Court affirmed some findings of the trial judge, but reversed others.[84] The Full Court affirmed that the APB or alternatively the Aborigines Department Secretary were liable for the tort of misfeasance in public office for removing Bruce without consent, because they knew it was beyond power and the harm was foreseeable.[85] The Crown was vicariously liable.[86] The APB also owed the plaintiff a duty of care to avoid causing injury by removing him from the care of, and from contact with, his mother.[87] Unlike the decision in *Cubillo*, the Full Court held that the duty was owed whether or not the APB had statutory authority to act.[88] The Court distinguished the duty of actual parents from those of bodies such as the APB,[89] and rejected arguments that such a duty would produce a potentially chilling effect on child protection decision-making.[90]

On the other hand, the Full Court reversed the trial judge's findings in two major respects. First, there was no false imprisonment given the circumstances of a family caring for a child.[91] Second, although a fiduciary duty was possible, it not owed here.[92] The trial judge's assessment of causation and the damages award went unchallenged,[93] but the precedent value of the case lies in its expansion of the duty of care by the APB, and the enunciation of the principles of misfeasance in public office. In analogous cases, other Stolen Generations litigants may face similar success. Much depends on the state of knowledge of the effects of removal at the time of removal.[94]

Some authors identify unconscious racism in the judicial process.[95] Robert Manne claims that O'Loughlin J did not properly interpret the historical data on the policy of removals, due to his unconscious racism:

> Justice O'Loughlin is right when he argued that those who separated the children from their mothers, families and communities thought they were acting 'in the best interests of the child.' What he does not see is how profoundly their conception of what was in the best interests of the 'half-caste' child was determined by racist assumptions of an unquestioned kind.[96]

The failed tortious and equitable claims are a challenge to the judiciary to 'develop the principles of torts and equity in a way which can acknowledge liability for the specific harms which arose as a result of Australia's assimilationist history'.[97] There is hope that Australian jurisprudence can liberate itself of legal assumptions and concepts derived from English law concepts, which are devoid of the historical reality unique to the Australian colonial settler context.[98]

Others have questioned the 'redemptive' role of the legal system.[99] While the charge of racial discrimination might be justifiable,[100] the behaviour, from a moral as well as legal point of view, must be judged by the standards of the time. For similar reasons, the charge of genocide cannot be sustained on the grounds that it was not a common law offence at the time of the removals.[101] Even in *Trevorrow*, where misfeasance in public office was found proven, the Court accepted the beneficial intent of law makers and administrators, albeit misguided when judged by current standards.

B Evidentiary Impediments

The *Bringing Them Home* Inquiry has been criticised as one-sided, because the testimony given of removals and treatment in care was not subjected to thorough analysis and testing in cross examination.[102] Nor was it the subject of rebuttal or argument by those accused of wrongdoing. In fact, no testimony was sought from those who established or implemented the allegedly genocidal and discriminatory laws and policies,[103] even though the Commission clearly had the power to compel witness attendance and the production of documents.[104] No recommendations were made concerning the further investigation or indicting of any of those policy makers, legislators or administrators with criminal charges. The Inquiry was used as a chance for those people who were removed and mistreated to voice their experience, and thereby express their grief and loss. To conduct the Inquiry in this manner was a deliberate decision, based on what the Commissioners believed to be the most effective use of the allocated resources.[105] Despite these asserted deficits, there can be little doubt that the consequences of removal and experiences of those witnesses occurred as described.[106] Their suffering included loss of identity, loss of culture, physical, sexual and emotional abuse, and subsequent psychological hardships, psychiatric injury and long-term mental illness, with ensuing personal and financial loss. In many cases, the abuse was systemic, and the children were either no better off in care[107] or worse off, as *Trevorrow* demonstrates.

However, with delay between the removal, abuse and litigation, any plaintiff would have difficulty satisfying the burden of proof. One reason is the intervening death or disappearance of witnesses, or the fading of their memory. Another is lack of documentary evidence. While many Aboriginal children were taken without documents to support or explain the removal,[108] lack of records is not unique to Aboriginal children.[109]

On one view, if the Government policies and practices were overtly racist and genocidal, one would expect some written evidence. Otherwise, the allegation of racism would be mere speculation. This view was put aside by O'Loughlin J who stated:

> [T]he evidence does not deny the existence of the stolen generation and there was some evidence that some part Aboriginal children were taken into institutions against the wishes of their parents. However, I am limited to making findings on the evidence that was presented to this Court in these proceedings; that evidence does not support a finding that there was any policy of removal of part-Aboriginal children such as that alleged by the applicants; and if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants.[110]

Any record will usually support the institutional view. Racist reasoning is not usually stated explicitly to support racist decision-making,[111] and government records will most likely include 'best interest' reasons for removal instead.[112] Atop these difficulties is the presumption of regularity of official documents, which was fatal to much of the claims in *Cubillo*.[113] This evidentiary presumption operates to allow the court to presume the correctness of official documentation in the absence of evidence to the contrary.

In the cases of *Williams* and of Peter Gunner in *Cubillo*, the Courts' finding of the validity of parental consent undid several potential causes of action, namely trespass and false imprisonment. In *Cubillo*, O'Loughlin J assumed, in accepting evidence of Peter Gunner's mother's thumb print as being consent to his removal, that 'it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as Topsy the meaning and effect of the document'.[114]

Such assumptions[115] ignore the 'social and historical context of removal', that Aboriginal Australians were treated as incompetent decision makers:

> In each state, the relevant Acts created systems that controlled all aspects of Indigenous Australians' lives. There was a presumption therefore that Indigenous Australians were incompetent to make decisions about their lives. Yet it was held that an otherwise incompetent person could consent to the State having custody of his or her child.[116]

Oral tradition is the primary historical method in indigenous cultures. While some commentators say courts have shown a preference for written evidence, which is 'an essential part of imperial culture',[117] this criticism ignores the oral nature of evidence traditionally given at common law trials.[118] A more legitimate concern is the possible misunderstandings from difference in language, culture and communication between Aboriginal witnesses and members of the dominant culture and its legal system.[119] This is a matter of genuine potential injustice, and must be explored further using linguistic and sociological analysis of the evidence given in the Stolen Generations cases.[120]

C Procedural Impediments

The main procedural impediment to successful litigation by members of the Stolen Generations is the statute of limitations.[121] Where the time limit has expired, and the defence relies on the statute of limitations, legislation allows for an extension of time if it is just and reasonable to do so.[122] Relevant factors will include the reason for the delay (including the extent to which the defendant contributed to the delay), prejudice suffered by the defendant owing to the delay, and the nature of the injury suffered and the alleged conduct said to have caused it. Even a legitimate and understandable explanation for delay cannot overcome unjust prejudice to the defendant if the delay is long enough.[123]

Explaining the delay in commencing proceedings proves difficult. If there had been systemic abuse and wrongdoing against Aboriginal children up until the early 1970s, one would have expected the first writ to issue

before 1994.[124] The delay should be seen in historical context. The flow of Stolen Generations litigation began after the groundbreaking decision in *Mabo*.[125] There is no doubt that following that decision there was a change in perception about how the legal system dealt with Aboriginal plaintiffs in the courts in native title claims. Another major event was the 1994 Conference in Darwin entitled *Going Home*[126] where over 600 removed children came together to discuss their experience and future prospects for justice. This conference led to the national Inquiry and *Bringing Them Home* report, which in turn led to the Prime Minister's apology. This momentum may have inspired those potential litigants who finally took legal action against the government.

D Psychological, Socio-Economic and Cultural Impediments

The removal of Aboriginal children from their families occurred in the historical context of a broader social injustice. The circumstance which led to, and in many cases caused, the poor social and economic conditions of Aboriginal Australians was colonisation, and the consequent disempowerment of the Aboriginal population.[127] This injustice is tied to the identity of the Stolen Generations as Indigenous people, and their relations with colonisers. It may have inhibited some peoples' ability or desire to litigate:

> [T]heir removal and subsequent life stories are mediated by the policies, practices and politics of living within the boundaries of a nation-state built on dispossession, violence, and legal regimes which denied to Indigenous peoples the fundamental rights enjoyed by non-Indigenous Australians. As a consequence, Indigenous Australians remain significantly disadvantaged according to all major social and economic indicators including criminal justice, health, education, housing and employment.[128]

Socio-economic factors, including high rates of mental illness, substance abuse, health problems, lower life expectancy, and poor education, continue to be of concern in child protection within Indigenous communities.[129]

For some, there is also a psychological impact of suing as a member of a colonised people,[130] which goes some way to explain the lack of litigation.[131] An analogy can be drawn between the reasons why victims of sexual abuse delay reporting sexual offences, and the delay in reporting or failure to report victimisation through systemic racist conduct by the government. It applies not only to members of the Stolen Generation, who were sexually abused, but to all, due to the relationship between themselves and the Government who removed them, and the ensuing trauma and shame.[132] The shame and humiliation victims feel can be a powerful emotional disincentive to litigate.[133] This is compounded where the victim has previous negative experiences with the law.[134] All courts in Stolen Generations litigation have acknowledged the serious impact of the removal on mental wellbeing but more research is required.

Legal proceedings also occur within the context of pre-existing trauma, as well as a broader sense of historical and cultural imbalance and colonial injustice,[135] and 'spiritual oppression'.[136] All this can have a negative impact on the desire and ability of Aboriginal people to effectively prosecute their claims, to mediation and through to litigation. It can also produce settlements, which do not come to the public attention. For example, in the Commonwealth Attorney-General's 2009 report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, the Access to Justice Taskforce noted: 'Indigenous Australians were the group most likely to take no action in response to legal events, doing so for 50.9 per cent of legal events, compared with 32 per cent for non-Indigenous people'.[137]

Windschuttle speculates that there is an army of human rights lawyers waiting in the wings of the courts to represent Stolen Generation members pro bono. From this suggestion he implies that the cost of litigation is

not a significant barrier to the Stolen Generations in court. Some lawyers may have volunteered their time to prepare and appear in these cases. On the other hand, commentators have noted how 'cases have consumed significant resources of Indigenous organisations throughout Australia'.[138] The availability and cost of legal assistance to members of the Stolen Generations, both in the past and in the future, is an issue that requires thorough investigation, not mere speculation.

E The Inadequacy of Damages

Litigants have not been driven solely or primarily by money. O'Loughlin J stated that he 'reject[ed] any suggestion that either applicant is looking for a pot of litigation gold'.[139] Sometimes the victim does not perceive monetary compensation to be adequate compensation at all, with the need for healing from the trauma, and an apology and acknowledgement of their suffering being foremost in their minds.[140] Compensation and public judicial vindication of wrongdoing can help recovery from trauma and start to place a victim in the position they would otherwise have been in, but as Atkinson J notes, '[u]ltimately, there is no way to amend the loss of childhood, the loss of family connections and the loss of self identity'.[141] What is more, compensation cannot be given for the intergenerational effects of removal, through a removed child's inability to relate effectively to their own children.[142]

Causation difficulties also arise, as the court must consider what harm has been suffered, and when it occurred. Was damage caused by the removal itself or maltreatment in care or after release from care? This was stressed in *Williams.*[143] In *Cubillo*, O'Loughlin J attributed the loss and trauma suffered by the applicants to their removal — and associated loss of culture, language, family ties and connection to the land — for which the Director of Aboriginal Affairs was not liable, and not to their treatment in care.[144] The opposite approach was taken in *Trevorrow*, where the Court accepted that removal was the cause of much of the loss. Bruce Trevorrow was awarded $450 000 damages for personal injury and loss, which included loss of his Aboriginal culture.[145] He was also awarded $75 000 exemplary damages for false imprisonment and misfeasance in public office.[146] He was then awarded $250 000 interest.[147] This was not challenged on appeal. It is only since 2007 that the courts have accepted such a high figure.

In *Cubillo*, O'Loughlin J estimated the notional quantum of damages, including an amount for loss of culture, but reduced it owing to the plaintiffs' failure to mitigate,[148] granting Lorna Cubillo $110 000 plus $16 800 interest and Peter Gunner $125 000 plus $19 800. Abadee J in *Williams* estimated the 'contingent' quantum, [149] only half of which were general damages, with the other half being special damages for past economic loss, at $100 000 plus interest (not calculated). These amounts have been criticised as substantially less than those orders for non-Aboriginal claimants in similar circumstances[150] and prior to the *Trevorrow* decision, would not necessarily have provided a sufficient incentive to litigate.

IV CONCLUSION

Lack of litigation shows little about historical wrongdoing. Many factors influence the desire or ability of a party, and in particular a member of the Stolen Generations, to litigate and present evidence to the court. The *Bringing Them Home* report recognised many such disincentives,[151] and proposed reparations through a compensation fund board. Its approach dealt more holistically with reparations, by including for instance commitments of non-repetition.

Though the debate about genocide continues,[152] courts have accepted the beneficial intent of law makers and administrators, albeit misguided when judged by current standards. While the charge of racial discrimination might be justifiable,[153] the behaviour must be judged by the standards of the time. The moral and jurisprudential revolution in racial discrimination did not take place in Australia until at least the late 1960s

with the *Constitutional Referendum on Aboriginal Rights* in 1967, and more so in the early 1970s with the design of the Aboriginal Flag in 1971,[154] the birth of 'multiculturalism', non-discriminatory immigration reforms, the enactment of the *Racial Discrimination Act 1975* (Cth),[155] and the development of new 'Placement Principles for Aboriginal Children' in the late 1970s.[156] To judge the removal of the Stolen Generations by current standards is unfair to those who acted at the time. Such an approach would open all currently acceptable conduct to unforeseeable future civil claims or even criminal charges if standards change. Even in *Trevorrow*, the focus remained on the standards of the time.[157] The more recent the removals, however, the less acceptable they are, if made without adequate non-racial reasons.

Clearly then, there are legal impediments to the Stolen Generations litigation, but impediments exist for many litigants. There is a strong moral argument for compensation to members of the Stolen Generation.[158] However, the questions to be asked in the future are whether the legal impediments to achieving it are systemic or inherent in the nature of Stolen Generations cases, and whether these circumstances warrant future judicial or legislative intervention. They require urgent answers

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[1] A O Neville, Chief Protector of Aborigines (WA) (21 October 1931) cited in Dorris Pilkington, *Follow the Rabbit-Proof Fence* (University of Queensland Press, 1996) 126.

[2] Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Arts Centre Press, 2000) 130.

[3] See, eg, Australian Human Rights and Equal Opportunity Commission, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home* (1997) 217, 'Two Broad Periods'('*Bringing Them Home*'). The Commissioners never use the term 'Stolen Generations'. The label was coined by historian Peter Read in 1981, with reference to a more limited group of indigenous Australian children, in *Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (Ministry of Aboriginal Affairs (NSW), 6th ed, 2007).

[4] See, for instance, the discussion in Keith Windschuttle. *The Fabrication of Aboriginal History Volume 3: The Stolen Generations 1881–2008* (Macleay Press, 2009) ch 13. Contrast this with the critique by Robert Manne, 'Comment' (2010) 53 *The Monthly* 8 and the response by Keith Windschuttle, 'Manne avoids the real debate' (2010) 54(5) *Quadrant* 60. See also Australian Broadcasting Corporation, 'Academics Debate Contents of Stolen Generations Report' *7:30 Report*, 29 March 2001, <http://www.abc.net.au/7.30/stories/s268644.htm> Ron Brunton, 'Betraying the Victims: The Stolen Generations Report' (1998) 10(1) *IPA Backgrounder* 4; Robert Manne, 'In Denial: The Stolen Generations and the Right' *Quarterly Essay Issue 1* (Black Inc, 2001); D Perry, 'Debunking Windschuttle's Benign Interpretation of History' on *Crikey* (12 February 2008) <http://www.crikey.com.au/2008/02/12/debunking-windschuttles-benign-interpretation-of-history/> Peter Read, 'Don't Let the Facts Spoil this Campaign', *The Australian* (Sydney) 18 February 2008; Justice Roslyn Atkinson, 'Denial and Loss: The Removal of Indigenous Australian Children from their Families' [2005] QUTLawJJl 4; (2005) 5(1) *Queensland University of Technology Law and Justice Journal* 71, 73.

[5] The main dispute is the alleged genocidal or racial intent to put an end to Aboriginality. Sir Ronald Wilson accepted that he should not have used the word 'genocide' in *Bringing Them Home*, because it focused too

much attention on the intention, instead of the consequences, of removal: Patrick Carlyon, 'White Lies', *The Bulletin* (Sydney) 12 June 2001, 26–30, 27.

[6] *Bringing Them Home*, above n 3, 231.

[7] Ibid 241.

[8] Windschuttle, above n 4, 17.

[9] Ibid 571.

[10] Ibid. In his apology to the Stolen Generations, former Prime Minister Kevin Rudd quotes 'up to 50 000' between 1910 and 1970: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

[11] Windschuttle, above n 4, 617, Table 13.1. It appears disingenuous of him to identify the range of figures of between 50,000 and 100,000 as the pool of potential litigants, when in the next chapter he estimates the real number of stolen children at less than 10 per cent of the higher figure.

[12] Colin Bourke and Bill Edwards, 'Family and Kinship' in Colin Bourke, Eleanor Bourke and Bill Edwards (eds), *Aboriginal Australia* (University of Queensland Press, 2nd ed, 1994) 100, 101–2.

[13] In fact, the payment was in lieu of interest. See the judgment on costs and interest: *Trevorrow v State of South Australia (No 6)* [2008] SASC 4 (1 February 2008) (Gray J) (*'Trevorrow'*).

[14] Windschuttle, above n 4, 571.

[15] Ibid 572.

[16] Ibid.

[17] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (*'Mabo'*).

[18] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[19] See, eg, the quotation set out above from *Bringing Them Home*, above n 3, 241.

[20] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008 (Kevin Rudd, Prime Minister) 167. In particular at 170, the Prime Minister refers to the powers granted by statutes and delegated legislation which made race-based removal of children lawful. It was these laws which the Prime Minister said 'made the stolen generations possible.'

[21] Antonio Buti, 'Removal of Indigenous Children from their Families: The Litigation Path' (1998) *University of Western Australia Law Review* 203, 206.

[22] Bourke and Edwards, above n 12, 114–16.

[23] Julie Cassidy, '*Cubillo and Gunner v The Commonwealth*: A Denial of the Stolen Generation' [2003] GriffLawRw 5; (2003) 12(1) *Griffith Law Review* 114, 124–5.

[24] Pam O'Connor, 'History on Trial: *Cubillo and Gunner v The Commonwealth of Australia*' [2001] AltLawJl 7; (2001) 26(1) *Alternative Law Journal* 27, 30; Rosanne Kennedy, 'Stolen Generations Testimony: Trauma, Historiography, and the Question of "Truth"' (2001) 25 *Aboriginal History* 116; Chris Cunneen and Julia Grix,

The Limitations of Litigation in Stolen Generation Cases (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) 26.

[25] *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657, [33] (Dawson J), approved by a majority of the High Court in a five judge joint judgment in *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563, [15].

[26] Atkinson, above n 4, 87.

[27] This was recognised by O'Loughlin J in *Cubillo v The Commonwealth (No 2)* [2000] FCA 1084; (2000) 103 FCR 1, 41. See also the comments of Merkel J in *Nulyarimma v Thompson* [1999] FCA 1192; (1999) 96 FCR 153 at 173-174, cited with approval in *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 34. On the other hand, courts frequently dispense justice by recognising a new obligation in a contentious area, or acknowledging the development of the common law in a particular direction. The choice to recognise a novel duty in this sense can be seen as a political, law-making choice.

[28] Richard Broome, *Aboriginal Australians: A History Since 1788* (Allen and Unwin, 4th ed, 2010), 311.

[29] Ibid.

[30] Ibid 316.

[31] *Kruger v The Commonwealth* [1997] HCA 27; (1997) 190 CLR 1 ('*Kruger*').

[32] The removals were by the Chief Protector of Aborigines, later the Director of Native Affairs, in the Northern Territory between 1925 and 1949, pursuant to the *Aboriginals Ordinance 1918* (NT). The Ordinance allowed the Chief Protector to undertake the care, custody or control of Aboriginal people where in his opinion it was in their interests (s 6), made him the legal guardian of, at first every Aboriginal person and every 'half-caste' child, and later all aboriginal people (s 7). The Chief Protector was allowed to remove any Aboriginal or 'half-caste' to an Aboriginal reserve or institution, and keep him or her there (s 16). Under regulations made pursuant to the Ordinance (s 67), all Protectors were similarly empowered.

[33] This was replaced by the *Welfare Ordinance 1953* (NT), though was repealed in May 1957.

[34] *Kruger* [1997] HCA 27; (1997) 190 CLR 1, 41 (Brennan CJ), 53 (Dawson J), 79 (Toohey J), 104 (Gaudron J), 141 (McHugh J), 161 (Gummow J).

[35] Ibid 45 (Brennan CJ), 62 (Dawson J), 85 (Toohey J), 111 (Gaudron J), 144 (McHugh J), 162 (Gummow J). Brennan CJ, Dawson and McHugh JJ considered the doctrine to have no application to the Northern Territory. Toohey, Gummow and Gaudron JJ considered the doctrine applicable but not breached as the law did not provide judicial power, but administrative power for the welfare of Aboriginal people.

[36] Ibid 40 (Brennan CJ), 87 (Toohey J), 176 (Gummow J). Dawson, McHugh and Gaudron JJ did not decide the question, though Dawson J at 60–1, with whom McHugh J agreed on this point, stated that if s 116 were applicable, his Honour would agreed with Gummow J that it was not breached in the circumstances.

[37] Ibid 45 (Brennan CJ), 70 (Dawson J), 142 (McHugh J) 157 (Gummow J). Toohey J at 93 held that legislation is restricted by such a right, but that such a finding could not be made prior to trial in *Kruger* given how it has been argued. Gaudron J at 130 found parts of the Ordinance to be invalid for breach of this right.

[38] Ibid 44–5 (Brennan CJ), 68 (Dawson J), 114, (Gaudron J), 155 (Gummow J). Toohey J at 97 left this question open. McHugh J was silent on this point.

[39] Ibid 46 (Brennan CJ), 93 (Toohey J), 125–126 (Gaudron J). Dawson and McHugh JJ did not need to decide the point. Gummow J at 148 saw the challenges of pleading a novel cause of action but also decline to decide the matter. (No judge mentioned the possibility of claims in equity.)

[40] Ibid 70–1 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 158-189 (Gummow J).

[41] However, Dawson J held that the Northern Territory had no such implied freedom: ibid 72–3. On the contrary, Gaudron J at 107 identified the possibility, though not deciding the point, that the grant of legislative power in s 122 of the *Constitution* does not 'authorise gross violations of human rights and dignity contrary to the established principles of the common law'.

[42] *Kruger* [1997] HCA 27; (1997) 190 CLR 1, 36 (Brennan CJ).

[43] Ibid 36–7 (Brennan CJ). See also 52–3 (Dawson J).

[44] M Schaeffer, 'The Stolen Generations in the Aftermath of Kruger and Bray' [1998] UNSWLawJl 23; (1998) 21(1) *University of New South Wales Law Journal* 247.

[45] *Cubillo v The Commonwealth [No 2]* [2000] FCA 1084; (2000) 103 FCR 1 ('*Cubillo*'). Some aspects of the decision favourable to the applicants were reversed on appeal, but all adverse findings were affirmed: *Cubillo v The Commonwealth* [2001] FCA 1213; (2001) 112 FCR 455 (Full Court).

[46] Ibid 362–3. The case was a test case for over 2000 potential applicants in the Northern Territory: Mark Champion, 'Post-*Kruger*: Where to Now for the Stolen Generations?' [1998] IndigLawB 45; (1998) 4(12) *Indigenous Law Bulletin* 9.

[47] Ibid 443–5.

[48] *Cubillo v The Commonwealth* [1999] FCA 518; (1999) 89 FCR 528 (O'Loughlin J, Summary Dismissal Application).

[49] Ibid 103–8; 358.

[50] Ibid 408. It was the consequence, but not the purpose in relation to the applicants.

[51] Ibid 483.

[52] Ibid 358–60.

[53] See below under Part III B (Evidentiary Impediments) with respect to parental consent.

[54] Ibid 367–8.

[55] Ibid 369.

[56] Ibid 397.

[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] See *Williams v Minister, Aboriginal Land Rights Act 1983 [No 1]* (1994) 35 NSWLR 497.

[61] *Williams v Minister, Aboriginal Land Rights Act 1983 [No 2]* [1999] NSWSC 843; (1999) 25 Fam LR 86 (‘*Williams*’).

[62] While the Court concluded that Williams was not a member of the Stolen Generations at [5], because of her mother’s request that she be removed, the circumstances of the case are relevant to members of the Stolen Generations.

[63] Ibid [672]–[764].

[64] Ibid [675]–[694].

[65] Cunneen and Grix, above n 24, 15.

[66] *Williams* [1999] NSWSC 843; (1999) 25 Fam LR 86, [695]–[756].

[67] Ibid [757]–[824].

[68] Ibid [825]–[845].

[69] Ibid [846]–[865].

[70] Ibid [786]. The Court of Appeal emphasised this concern: *Williams v The Minister, Aboriginal Land Rights Act 1983 [No 3]* (2000) Aust Torts Reports 81-578, [162].

[71] *Williams* [1999] NSWSC 843; (1999) 25 Fam LR 86, [820]–[823].

[72] The potential for this cause of action was identified early: Paul Batley, ‘The State's Fiduciary Duty to the Stolen Children’ [1996] AUJlHRights 3; (1996) 2(2) *Australian Journal of Human Rights* 177; Buti, above n 21, 210–15; Melissa Abrahams, ‘A Lawyer's Perspective on the Use of Fiduciary Duty with Regard to the Stolen Generation’ [1998] UNSWLawJl 18; (1998) 21(1) *University of New South Wales Law Journal* 213; Tim Hammond, ‘The “Stolen Generation” – Finding A Fiduciary Duty’ (1998) 5(2) *Murdoch University Electronic Journal of Law* 14; Amanda Jones ‘The State and the Stolen Generation: Recognising a Fiduciary Duty’ [2002] MonashULawRw 3; (2002) 28(1) *Monash University Law Review* 59. In an extension of time application, Rolfe J in *Johnston v Department of Community Services* [1999] NSWSC 1156 (2 December 1999) [136] (‘*Johnston*’) held that the circumstances of a case might give rise to compensation from breach of fiduciary duty in the future. However, Gray J’s decision at first instance in *Treverrow* [2008] SASC 4 (1 February 2008) in favour of this cause of action was reversed on appeal.

[73] [1999] NSWSC 843; (1999) 25 Fam LR 86, [733] but also at [755], though the reasoning there was based on laches (from delay and prejudice) being a good defence, whether or not a fiduciary duty existed.

[74] [2000] FCA 1084; (2000) 103 FCR 1, 408–9.

[75] *State of South Australia v Lampard-Trevorrow* [2010] SASC 56 (22 March 2010) [342].

[76] Related to the Stolen Generations litigation is the Stolen Wages inquiries and litigation, where breaches of fiduciary duty were claimed to be of a monetary nature: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages*, (2006) 123–6; Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006); Sanushka Mudaliar, ‘Stolen Wages and Fiduciary Duties – A Legal Analysis of Government Accountability to Indigenous Workers in Queensland’ [2003] AUIndigLawRpr 33; (2003) 8(3) *Australian Indigenous Law Reporter* 1.

[77] [1999] NSWSC 1156, [200]. However, that matter did not reach final decision.

[78] James Plunkett, 'Take Care with Negligence' (2010) 86(5) *Law Institute Journal* 38.

[79] [2010] SASC 56 (22 March 2010).

[80] [2007] SASC 285; (2007) 98 SASR 136.

[81] Ibid [40].

[82] Ibid [47].

[83] Ibid [572]–[582].

[84] *State of South Australia v Lampard-Trevorrow* [2010] SASC 56 (22 March 2010).

[85] Ibid [266].

[86] Ibid [275].

[87] Ibid [409].

[88] Ibid.

[89] Ibid [388].

[90] Ibid [283].

[91] Ibid [307].

[92] Ibid [335]–[342].

[93] Ibid [276].

[94] Ibid [401]. See also above n 87.

[95] Robert Manne, 'What Justice O'Loughlin Could Not See' in Robert Manne, *Left, Right, Left: Political Essays 1977–2005* (Black Inc, 2005) 207, 215; Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law' [2001] GriffLawRw 9; (2001) 10 *Griffith Law Review* 139; Trish Luker, '"Postcolonising" Amnesia in the Discourse of Reconciliation: The Void in the Law's Response to the Stolen Generations' (2005) 22 *Australian Feminist Law Journal* 67; Elena Marchetti and Janet Ransley, 'Unconscious Racism: Scrutinizing Judicial Reasoning in "Stolen Generation" Cases' (2005) 14(4) *Social and Legal Studies* 533, 542–547; Alisoun Neville, '*Cubillo v The Commonwealth*: Classifying Text and the Violence of Exclusion' [2005] MqLawJl 3; (2005) 5 *Macquarie Law Journal* 31.

[96] Manne, 'What Justice O'Loughlin Could Not See', above n 95, 207, 215.

[97] Cunneen and Grix, above n 24, 5.

[98] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (University of New South Wales Press, 2008) 135; Simon Young, 'The Long Way Home' [1998] UQLawJl 4; (1998) 20(1) *University of Queensland Law Journal* 70, 85. The same development, or transition, occurred in native title before *Mabo*, such as *Milirrpum v Nobalco* (1971) 17 FLR 141 and *Coe v The Commonwealth* [1979] HCA 68; (1979) 53 ALJR 403.

[99] Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Lawbook Co, 4th ed, 2009) [11.390].

[100] Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 246–7.

[101] *Nulyarimma v Thompson* [1999] FCA 1192; (1999) 96 FCR 153; *Buzzacott v Hill* [1999] FCA 639; Douglas Guilfoyle '*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law in Australia?'[2001] FedLawRw 1; (2001) 29 *Federal Law Review* 1; David Markovich, 'Genocide, a Crime of which No Anglo-Saxon Nation Could Be Guilty' (2003) 10(3) *Murdoch University Electronic Journal of Law* 27.

[102] Carlyon, above n 5.

[103] Ibid.

[104] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 21. This legislation was renamed in 2009 to the *Australian Human Rights Commission Act 1986* (Cth). Such an investigation would have fallen within the Inquiry's terms of reference: *Bringing Them Home*, above n 3, 2–3.

[105] See Sir Ronald Wilson's interview in Carlyon, above n 5, 27. Modest requests for assistance and further resources were refused: Manne, 'In Denial: The Stolen Generations and the Right', above n 5, 74–5.

[106] Other than *Bringing Them Home*, several inquiries and reports in Australia have also investigated the treatment of children who have been removed from their families: See Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians who Experienced Institutional or Out-of-Home Care as Children* (2004); Leneen Forde, *Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) ('Forde Inquiry'); Senate Community Affairs References Committee, Parliament of Australia, *Lost Innocents. Righting the Record: Report on Child Migration (2001)*; Rex Wild and Patricia Anderson, Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred Report*, Northern Territory Government (2007); E P Mulligan, *Children in State Care Commission of Enquiry: Allegations of Sexual Abuse and Death from Criminal Misconduct* (2008); and most recently Ombudsman Victoria's *Own Motion Investigation into Child Protection – Out of Home Care* (2010); Tasmanian Ombudsman, *'Listen to the Children' Review of Claims of Abuse from Adults in State Care as Children* (2004).

[107] Atkinson, above n 4, 81–3.

[108] Read, above n 3.

[109] See, eg, the Queensland Government's *Missing Pieces: Information to Assist Former Residents of Children's Institutions to Access Records* (2001).

[110] *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 358.

[111] Behrendt, Cunneen and Libesman, above n 100, 246–7

[112] Cunneen and Grix, above n 24, 24. See also *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 390, though it is contentious in some respects: Cunneen and Grix, above n 24, 18–19.

[113] *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 357.

[114] Ibid 245–6.

[115] Though in the case of *Williams* [1999] NSWSC 843; (1999) 25 Fam LR 86 it was admitted by the plaintiff.

[116] Atkinson, above n 4, 81. See also Cunneen and Grix, above n 24, 24. This legislation is listed in McRae, above n 99, [1.310].

[117] Cunneen and Grix, above n 24, 23.

[118] *Butera v Director of Public Prosecutions (Vic)* [1987] HCA 58; (1987) 164 CLR 180; *Gately v The Queen* [2007] HCA 55; (2007) 232 CLR 208. See also John Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003).

[119] Diana Eades, Department of Justice (Qld), *Aboriginal English in the Courtroom: A Handbook*, (2000).

[120] See, eg, the miscommunications and their effects discussed in Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008).

[121] The equitable principle of laches has analogous application to claims for breach of fiduciary duty.

[122] For a discussion of the general policy considerations, see for instance Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)*, Report No 53 (1998) ch 2. See also 155, where the Commission considered any justifiable exception to limitations unique to the Stolen Generations, and concluded that such litigants should be in the same position as others.

[123] Joy Williams was granted leave by the New South Wales Court of Appeal in *Williams v The Minister, Aboriginal Land Rights Act [No 1]* (1994) 35 NSWLR 497; Christopher Johnson by the New South Wales Supreme Court in *Johnson* [1999] NSWSC 1156; [2000]. Others have not been successful: Lorna Cubillo and Peter Gunner in *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 443–8, particularly due to the prejudice that the Commonwealth would suffer due to the unavailability of witnesses and documents.

[124] The first Writ was that of Joy Williams, who sought leave by Notice of Motion to file her Writ out of time in 1993. Her application was refused at first instance, but allowed on appeal to the New South Wales Court of Appeal: *Williams v Minister Aboriginal Land Rights Act 1983* (Unreported, Supreme Court of NSW, Studdert J, 25 August 1993); *Williams v Minister, Aboriginal Land Rights Act, 1983 [No 1]* (1994) 35 NSWLR 497 (NSW Court of Appeal). Her substantive claim subsequently failed. See further Part I above.

[125] *Mabo* [1992] HCA 23; (1992) 175 CLR 1.

[126] Jacqui Katona and Chips Mackinolty (eds), *The Long Road Home: The Going Home Conference* (Karu Aboriginal Child Care Agency, 1996).

[127] Broome, above n 28, 51–3.

[128] Cunneen and Grix, above n 24, 3.

[129] Janet Stanley, Adam Tomison and Julian Pocock, 'Child Abuse and Neglect in Indigenous Australian Communities' (*National Child Protection Clearinghouse Issues,* No 19, Australian Institute of Family Studies, Spring 2003).

[130] See, eg, the discussion in Albert Memmi, *The Colonizer and the Colonized* (Howard Greenfeld trans, Beacon Press, 1967) 120–1, where he refers to the shame and self-hate of the colonised.

[131] Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 97–100.

[132] *Carter v Co of the Sisters of Mercy of Diocese Rockhampton & Ors* [2001] QCA 335 (28 August 2001); *R v ERJ* [2010] VSCA 61 (29 March 2010) [51]. See also Annette Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5(2) *Torts Law Journal* 221; Queensland Law Reform Commission, above n 121, ch 14 'Survivors of Childhood Sexual Abuse'; Ben Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice' (2003) 11 *Torts Law Journal* 218, 1.1.

[133] Cunneen and Grix, above n 24, 30.

[134] Haebich, above n 2, 601. In fact, being a member of the Stolen Generation has been acknowledged to reduce an offender's moral culpability in certain circumstances: Richard Edney, 'The Stolen Generation and Sentencing of Indigenous Offenders' [2003] IndigLawB 16; (2003) 5(23) *Indigenous Law Bulletin* 10.

[135] Behrendt and Kelly, above n 130, 73–85. See also National Alternative Dispute Resolution Advisory Council (NADRAC), *Indigenous Dispute Resolution and Conflict Management* (NADRAC, 2006), 16.

[136] Stanley, Tomison and Pocock, above n 128, 12–13.

[137] Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Commonwealth Government, Canberra, 2009), 20.

[138] Cunneen and Grix, above n 24, 37.

[139] *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 483.

[140] Linda Popic, 'Compensating Canada's Stolen Generations' [2008] IndigLawB 4; (2008) 7(2) *Indigenous Law Bulletin* 14.

[141] Atkinson, above n 4, 87.

[142] J A De Maio, et al, *The Western Australian Aboriginal Child Health Survey: Measuring the Social and Emotional Wellbeing of Aboriginal Children and Intergenerational Effects of Forced Separation*, (Curtin University of Technology and Telethon Institute for Child Health Research, 2005); Chis Cunneen and Terry Libesman, 'Removed and Discarded: The Contemporary Legacy of the Stolen Generations' [2002] AUIndigLawRpr 55; (2002) 7(4) *Australian Indigenous Law Reporter* 1.

[143] *Williams* (1999) 125 Fam LR 86, [846]–[865]. The Court of Appeal also emphasises this difficulty: *Williams v The Minister, Aboriginal Land Rights Act 1983* (2000) Aust Torts Reports 81-578, [157]–[158].

[144] *Cubillo* [2000] FCA 1084; (2000) 103 FCR 1, 388. A similar result occurred in Valerie Linow's initial application to the New South Wales Victims of Crime Compensation Tribunal for loss suffered in a sexual assault after her removal from her family and being placed into care: see Christine Forster, 'The Stolen Generation and The Victims Compensation Tribunal: The "Writing In" of Aboriginality to "Write Out" a Right to Compensatory Redress for Sexual Assault' [2002] UNSWLawJl 7; (2002) 25(1) *University of New South Wales Law Journal* 185, 191–2; Alexis Goodstone, 'Stolen Generations Victory in the Victims Compensation Tribunal' [2003] IndigLawB 6; (2003) 5(22) *Indigenous Law Bulletin* 10.

[145] *Trevorrow v State of South Australia (No 5)* [2007] SASC 285; (2007) 98 SASR 136, 387, 393.

[146] Ibid 393.

[147] *Trevorrow* [2008] SASC 4 (1 February 2008). See also above n 13.

[148] *Cubillo* [2000] FCA 1084; [2000] 103 FCR 1, 474–9.

[149] *Williams* (1999) 125 Fam LR 86, [867]–[1038].

[150] Cunneen and Grix, above n 24, 21.

[151] *Bringing Them Home*, above n 3, 264.

[152] *Nulyarimma v Thompson* [1999] FCA 1192; (1999) 96 FCR 153; *Buzzacott v Hill* [1999] FCA 639 (10 May 1999); Guilfoyle, above n 101; Robert van Krieken, 'Is Assimilation Justiciable? *Lorna Cubillo and Peter Gunner v The Commonwealth'* [2001] SydLawRw 10; (2001) 23 *Sydney Law Review* 239; Markovich, above n 101; Shirleene Robinson and Jessica Paten, 'The Question of Genocide and Indigenous Child Removal: The Colonial Australian Context' (2008) 10(4) *Journal of Genocide Research* 501; Robert van Krieken, 'Cultural Genocide Reconsidered' (2008) 12 *Australian Indigenous Law Reporter* 76; Julie Cassidy, 'Unhelpful And Inappropriate?: The Question Of Genocide And The Stolen Generations' (2009) 13(1) *Australian Indigenous Law Reporter* 114.

[153] Behrendt, Cunneen and Libesman, above n 100, 246–7.

[154] Designed by Aboriginal Elder Harold Thomas, and first flown in 1971 the Aboriginal Australian Flag was designated an Australian Flag under the *Flags Act 1953* (Cth), when it was proclaimed as such by the Governor-General in July 1995: Commonwealth of Australia, *Gazette*, No S259 (1995).

[155] This legislation made it illegal in certain circumstances to discriminate against a person on the basis of race, colour, descent or national or ethnic origin (s 9) and bound the Commonwealth and the States (s 6).

[156] Richard Chisholm, 'Placement of Indigenous Children: Changing the Law' [1998] UNSWLawJl 19; (1998) 21(1) *University of New South Wales Law Journal* 208.

[157] *South Australia v Lampard-Trevorrow* [2010] SASC 56 (22 March 2010), [389].

[158] Behrendt, Cunneen and Libesman, above n 100, 44–46.