

KRUGER AND BRAY AND THE COMMON LAW

TONY BUTI*

I. INTRODUCTION

The tabling in Commonwealth Parliament on 25 May 1997 of the Human Rights and Equal Opportunity Commission (HREOC) report of the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*,¹ titled *Bringing Them Home*,² focused public attention on this nation's history of removing Indigenous children from their families. Two months later, the removal issue received further media attention when the High Court of Australia handed down its decision in *Kruger & Ors v The Commonwealth of Australia; Bray & Ors v The Commonwealth of Australia*.³ The cases concerned the constitutional validity of the *Aboriginals Ordinance 1918 (NT)*,⁴ which provided the legal basis for the removal of Indigenous children from families and communities in the Northern Territory. The plaintiffs were unsuccessful.

* Lecturer at Law at Murdoch University.

1 Herein referred to as the National Inquiry.

2 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997. Herein referred to as the National Report.

3 146 ALR 126. Hereafter referred to as *Kruger and Bray*.

4 Herein referred to as the Ordinance.

This article provides a brief case note on the *Kruger* and *Bray* cases; then follows a comment on the question commonly asked by sections of the media: do the *Kruger* and *Bray* decisions affect common law litigation in the area?⁵

II. KRUGER AND BRAY

The Ordinance under challenge appointed the Chief Protector of Aboriginals as the legal guardian of every Aboriginal child in the Northern Territory. The Ordinance gave a discretion to the Chief Protector to undertake the care, custody and control of any Aborigines. Further, the Ordinance authorised the Chief Protector to cause an Aborigine to be kept within the boundaries of any reserve or Aboriginal institution.⁶

The plaintiffs were Aborigines from the Northern Territory, who had been removed from their parents and families when they were young children. They had been detained in Aboriginal institutions or reserves. The removals had occurred between 1925 and 1949 and the last detention had ended in 1960.

The plaintiffs claimed declaratory relief and damages against the Commonwealth for being removed from their families and communities. The plaintiffs challenged the constitutional validity of ss 6, 7, 16 and 67 of the Ordinance, which allowed Indigenous children to be removed from the families and communities, and were part of a legislative regime which subjugated Indigenous people in the Northern Territory. The plaintiffs also sought a declaration of constitutional invalidity of s 13(1) of the *Northern Territory (Administrative) Act* 1910 (Cth), to the extent that it purported to authorise those impugned provisions of the Ordinance.

The basis of the plaintiffs' challenge was that the removals infringed certain constitutional rights or freedoms. Those rights or freedoms were contained in paragraph 24 of the Amended Statement of Claim.⁷ Justice Gaudron succinctly summarised the plaintiffs' arguments of invalidity as follows:

- the Ordinance was not a law for the government of the Northern Territory and, thus, not authorised by s 122 of the Constitution;
- it exceeded the legislative power of the Commonwealth in that that power, whether conferred by s 122 or otherwise, does not extend to laws destroying racial or ethnic groups, their language or culture or to laws authorising genocide and crimes against humanity;

5 For example, refer to "Judges Reject Claim Over Stolen Children", *The Western Australian*, 1 August 1997.

6 Upon acquiring exclusive jurisdiction over the Northern Territory under the *Northern Territory Acceptance Act* 1910 (Cth), the Commonwealth enacted the *Northern Territory (Administration) Act* 1910 (Cth), relying on s 122 of the Constitution. Section 13(1) of that Act empowered the Governor-General to make Ordinances having the force of law in the Northern Territory. Under ss 13(2) and (3) of the Act, Ordinances were required to be laid before the Houses of Parliament, either of which had the power of disallowance. It was pursuant to s 13(1) of the *Northern Territory (Administration) Act* 1910 (Cth) that the Governor-General made the Ordinance.

7 Both cases made the same assertions.

- it purportedly conferred judicial power contrary to the provisions of Chapter III of the Constitution;
- it was contrary to an implied constitutional freedom from removal and detention without due process of law; it was contrary to an implied constitutional right and/or guarantee of equality;
- it was contrary to an implied constitutional right to and/or guarantee of freedom of movement and association;
- it was contrary to s 166 of the Constitution.⁸

The plaintiffs claimed that, by reason of the asserted constitutional invalidity of the impugned provisions, they were entitled to recover damages from the Commonwealth. They argued that they were entitled to damages for causes of action recognised by the common law (tort of wrongful imprisonment and deprivation of liberty) and for breach of their constitutional rights. The plaintiffs sought damages both with respect to the losses they had suffered in personal, cultural, spiritual and financial terms and in terms of their possible entitlements to participate in land claims.⁹

III. THE DECISION

A. Section 122: The Power to Make Laws for the Government of a Territory

Chief Justice Brennan and Toohey, Gaudron, Dawson and McHugh JJ all agreed that the Ordinance is a 'law for the government of a territory', and that the plaintiffs argued the wrong test in this regard (the nexus test being the relevant test, as opposed to the proportionality test asserted).¹⁰ Justice Gaudron stated that although s 122 has a purposive element, that purposive element was

⁸ Note 3 *supra* at 184-5.

⁹ The factual issues in the actions before the High Court have not been tried. From an earlier interlocutory hearing, Brennan CJ reserved seven 'questions of law arising on the pleadings in each of the cases for the opinion of the Full Court' (*Kruger v The Commonwealth* (1995) 69 ALR 885). If the plaintiffs failed on questions one and two, which they did, the other five questions became unnecessary to answer. The first two questions were in the following terms:

Q1. Is the legislative power conferred by section 122 of the Constitution or the power to enact the Ordinances and regulations referred to in paragraphs 7-12 inclusive of the Amended Statement of Claim so restricted by any and which of the rights, guarantees, immunities, freedoms or provisions referred to in paragraph 29 of the Amended Statement of Claim as to invalidate the Acts, Ordinances and regulations referred to in paragraphs A, B, C and D of the claim to the extent pleaded in those paragraphs?

Q2. Does the Constitution contain any right, guarantee, immunity, freedom or provision as referred to in paragraph 29 of the Amended Statement of Claim, a breach of which by:

(a) an officer of the Commonwealth; or

(b) a person acting for and on behalf of the Commonwealth;

gives rise to a right of action (distinct from a right of action in tort or for breach of contract) against the Commonwealth sounding in damages?

¹⁰ Refer to note 3 *supra* at 138 per Brennan CJ, at 147 per Dawson J, at 167 per Toohey J, at 187 per Gaudron J and at 218 per Justice McHugh.

not an issue in the case.¹¹ Accordingly, the test of proportionality of the legislation had no application. Thus, the relevant test in the case was whether the legislation had sufficient nexus with the Territory. As the law operated only on people, places and events in the Northern Territory, the nexus was satisfied.

B. Separation of Powers - Justified Power Only Able to be Conferred on Chapter III Courts

Justices Dawson, McHugh, Toohey, Gaudron and Gummow all agreed that the power to detain Aboriginal children in custody (for the purpose of their welfare) cannot be construed as an exclusively judicial power, and as such, the Chapter III requirements of the Constitution need not be complied with.¹² Justice Dawson (with whom McHugh J agreed) and Gummow J also concluded that Chapter III does not restrict the scope of s 122 in any case.¹³

C. Implied Guarantee to Due Process of Law

Justices Dawson and McHugh agreed that the Constitution does not contain a general guarantee of due process of law. Justice Dawson (with whom McHugh J agreed) stated that, unlike the United States Constitution, the Commonwealth Constitution does not seek to establish personal liberty and does not contain a guarantee of individual rights. Thus, the Constitution contains no general guarantee of due process of law.¹⁴ Justice Gaudron stated that as the power to detain in custody is not necessarily a judicial power, the power was not subject to a requirement of due process.¹⁵

D. Implied Guarantee of Legality

Chief Justice Brennan and Dawson, McHugh, Gaudron and Gummow JJ rejected the notion of an implied guarantee of substantive legal equality in the Constitution.¹⁶ Justice Toohey, relying on his earlier joint decision with Deane J in *Leeth v Commonwealth*,¹⁷ dissented on this view. Justice Toohey stated that there is an implied principle of equality of treatment in the Constitution.¹⁸ However, Toohey J held that it was not possible at this stage of the proceedings to determine whether the Ordinance contravened that principle.¹⁹

11 *Ibid* at 198.

12 *Ibid* at 154 per Dawson J, at 172 per Toohey J, at 192-3 per Gaudron J, at 218 per McHugh J and at 233 per Justice Gummow.

13 *Ibid* at 154 per Dawson J, at 218 per McHugh J and at 239-43 per Justice Gummow.

14 *Ibid* at 154 per Dawson J, at 218 per Justice McHugh.

15 *Ibid* at 193-4.

16 *Ibid* at 141 per Brennan CJ, at 155-8 per Dawson J, at 195 per Gaudron J, at 218 per McHugh J and at 227-8 per Justice Gummow.

17 (1992) 174 CLR 455.

18 Note 3 *supra* at 179-82.

19 *Ibid* at 182.

E. Implied Freedom of Movement and Association

Justices Toohey and Gaudron recognised the existence of an implied freedom of movement and association in the Constitution, which also confined the operation of s 122.²⁰ Justice Toohey commented that the question of whether the Ordinance contravened the implied freedoms is a question of whether the provisions were disproportionate to what was reasonably necessary for the protection of the people to whom the Ordinance applied. However, Toohey J held that at this stage of the proceedings, it was not possible to answer the question.²¹ Likewise, Gaudron J refrained from answering the question because it was first necessary to determine the veracity of the Commonwealth's plea that the Ordinance was enacted "for the purpose of the protection and preservation of persons of the Aboriginal race".²² This plea was the subject of reserved question 3, which did not need to be answered.²³ Justice McHugh recognised the existence of an implied freedom of movement and association in the Constitution, which were necessary to guarantee the implied right of political communication in the Constitution.²⁴ However, McHugh J held that:

... from the time when the 1918 Ordinance was enacted until it was repealed in 1957, the residents of the Northern Territory had no part to play in the constitutionally prescribed system of government or in the procedure for amending the Constitution ...

Indeed, it was not until 1977 that the residents of the Northern Territory finally received constitutional as well as democratic recognition by being given the right to vote in a referendum to amend the Constitution ...

For these reasons, nothing in the Constitution implied that the plaintiffs had any freedom or immunity from laws affecting their common law rights of associations or travel during the life of the 1918 Ordinance.²⁵

Justices Dawson and Gummow rejected the notion of an implied freedom of movement and association,²⁶ whilst Brennan CJ did not need to decide the issue, as his Honour concluded that it would have no effect either way.²⁷ Chief Justice Brennan held that the impugned provisions were not directed to impeding protected communications. Accordingly, even if there was an implied constitutional right to freedom of movement and association, such a constitutional requirement would not have invalidated the impugned provisions.²⁸

20 *Ibid* at 175-8 per Toohey J and at 195-201 per Justice Gaudron.

21 *Ibid* at 179.

22 *Ibid* at 201.

23 Reserved question 3: If yes to question 1 or question 2, are any and which matters pleaded in subparagraphs (d) and (c) of paragraph 29 of the Amended Defence relevant to the existence, scope or operation at any material time of any and which of the rights, guarantees, immunities, freedoms and provisions?

24 Note 3 *supra* at 218.

25 *Ibid* at 219.

26 *Ibid* at 160 per Dawson J and at 230 per Justice Gummow.

27 *Ibid* at 141-2.

28 *Ibid*.

F. Genocide²⁹

All six judges agreed that the Ordinance did not authorise genocide.³⁰ Chief Justice Brennan held that none of the impugned provisions could be taken to have authorised acts done for the purpose or with the intention of causing harm. It was therefore unnecessary to consider whether the Ordinance was inconsistent with an implied constitutional freedom or immunity from any law or executive act having the effect of the destruction of a racial or ethnic group.³¹

Justice Dawson (with whom McHugh J agreed) stated that there was nothing in the Ordinance which conferred authority to commit acts of genocide.³² Justice Dawson also stated that consistent with the doctrine of parliamentary supremacy, there was no constitutional restriction on s 122 of the Constitution not to authorise acts of genocide.³³ He commented:

... the legislative power of parliament to make laws for the government of the territories is sovereign and, subject to the possibility of any specific limitation to be found elsewhere in the Constitution, there is nothing which places rights of any description beyond its reach.³⁴

Justice Toohey held that there was nothing in the Ordinance, according to the ordinary principles of construction, which would justify a conclusion that it authorised acts “with intent to destroy, in whole or in part the plaintiffs’ racial group”.³⁵ He added, “it is necessary to keep in mind that it is however the validity of the Ordinance, not any exercise of power under the Ordinance, which is the subject of these proceedings”.³⁶

Justice Gaudron held that under the settled principles of statutory construction, the Ordinance did not authorise acts of genocide.³⁷ However, in contrast to Dawson J, Gaudron J was of the opinion that s 122 of the Constitution was restricted by prohibition against “laws authorising acts of genocide as defined in Part II of the Genocide Convention”.³⁸

Justice Gummow held the actions authorised by the Ordinance did not amount to genocide as defined by the Genocide Convention.³⁹ Justice Gummow agreed

29 Pursuant to Article II of the Convention on the Prevention and Punishment for the Crimes of Genocide (‘Genocide Convention’), genocide is defined *inter alia* to mean:

... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: ...

(d) Imposing measures, intended to prevent births within the group;

(e) Forcible transferring of children of the group to another group.

30 *Ibid* at 137 per Brennan CJ, at 161-2 per Dawson J, at 175 per Toohey J, at 190 per Gaudron J, at 220 per McHugh J and at 230-2 per Justice Gummow.

31 *Ibid* at 137.

32 *Ibid* at 161-2 per Dawson J and at 220 per Justice McHugh.

33 *Ibid* at 162-3.

34 *Ibid* at 163.

35 *Ibid* at 175.

36 *Ibid* at 175.

37 *Ibid* at 190.

38 *Ibid*, compare with Dawson J at 162-3.

39 *Ibid* at 232.

with Dawson J, that reliance by the plaintiffs on customary international law as it related to genocide was “misplaced”.⁴⁰

G. Freedom of Religion

Chief Justice Brennan held that s 122 of the Constitution restricted s 116 (freedom to exercise any religion) but “none of the impugned laws on its proper construction can be seen as law for prohibiting the free exercise of a religion”.⁴¹ Justice Toohey left open the question of whether s 116 restricted s 122 but, in any case could not find an intention to restrict the free exercise of religion in the Ordinance.⁴² Justice Gummow held that s 122 was subject to s 116,⁴³ but there was no breach by the Ordinance.⁴⁴

Justice Gaudron held that s 122 should be read as being subject to s 116.⁴⁵ However, her Honour did not come to a conclusion as to whether or not there was a restriction of the free exercise of religion in the case in hand.

Justice Dawson (with whom McHugh J agreed), held that the Territories are not parts of the Commonwealth, but rather are parts annexed to the Commonwealth and subordinate to it. Accordingly, Chapter V of the Constitution does not apply to the Territories. Similarly, s 116 of the Constitution does not restrict the operation of s 122.⁴⁶ Justice Dawson added:

... that if I am wrong in this conclusion, I would [hold] ... that the 1918 Ordinance contains nothing which would enable it to be said that it is a law for prohibiting the free exercise of religion.⁴⁷

H. Actions for Damages for Infringement of Constitutional Rights

Chief Justice Brennan and Gaudron J found no basis upon which an action for damages would arise upon the breach of a constitutional right.⁴⁸ Justice Toohey also answered in the negative without giving reasons,⁴⁹ whilst Dawson, McHugh and Gummow JJ decided there was no need to answer.

I. Limitation Periods

Justice Gaudron held that s 79 of the *Judiciary Act* 1903 (Cth) should be construed as intended to apply to the High Court, notwithstanding that the language of the section does not adequately reflect the nature of the jurisdiction or the manner of its exercise. Accordingly, ss 64 and 79 of the *Judiciary Act* 1903 (Cth) ‘pick up’ the provisions of the *Limitation Act* 1981 (NT) and make them applicable to the plaintiffs’ actions.⁵⁰

40 *Ibid.*

41 *Ibid* at 138.

42 *Ibid* at 173.

43 *Ibid* at 238.

44 *Ibid* at 233.

45 *Ibid* at 202-3.

46 *Ibid* at 152 per Dawson J and at 218 per Justice McHugh.

47 *Ibid* at 153.

48 *Ibid* at 142 per Brennan CJ and at 205 per Justice Gaudron.

49 *Ibid* at 182.

50 *Ibid* at 216-17.

IV. COMMON LAW ACTIONS

In general, the negative outcome for the plaintiffs in *Kruger* and *Bray*, will have no significant effect for actions based on common law rights. The *Kruger* and *Bray* cases involved challenges to the constitutional validity of the Ordinance, not to any exercise of power under the Ordinance. The legal basis of the actions concerned the constitutional validity of the impugned provisions, not “whether the actions complained of were authorised by those provisions”.⁵¹

However, common law actions that depend on establishing constitutional invalidation of the removal and detention statutes in order to argue wrongful imprisonment and/or deprivation of liberty,⁵² are significantly affected by the *Kruger* and *Bray* decisions. In fact, solicitors for plaintiffs with actions currently before the Federal Court in Darwin have amended their pleadings to remove the *Kruger* and *Bray* constitutional arguments/wrongful imprisonment and deprivation of liberty nexus.

The *Kruger* and *Bray* decisions reinforce the notion that in any litigation including common law actions, it is the community standards at the time of the exercise of the legislative power and/or ‘welfare care’ under challenge that is relevant. Chief Justice Brennan and Dawson J commented in *Kruger* and *Bray* that one must look to the standards of the time. Justice Dawson stated that:

... a shift in view upon the justice of morality of those measures taken under an Ordinance which was repealed over 40 years ago does not itself point to the constitutional invalidity of that legislation.⁵³

Thus in any common law action, it is the standards of the period under question that is the relevant standard. Standards of child care may have changed over the period of the early 1900’s to the late 1960’s, where the systematic removal policies and practices were operating. Practices that may have been acceptable forty years ago, may be totally unacceptable today. However, it is what was acceptable at the period under challenge which the court will focus on, not today’s standards. Therefore, for example, in an action for breach of fiduciary duty, the courts will look to contemporary child care standards of the relevant period of the action before them. Although it should be noted that evidence presented to the National Inquiry detailed incidents of excessive and violent punishment and sexual abuse, that could not have been accepted by any contemporary standards this century.⁵⁴

V. CONCLUSION

Whilst the decisions in *Kruger* and *Bray* were a severe blow to the plaintiffs in those cases, its impact on future court actions should not be overstated. Most

51 *Ibid* at 167 per Justice Dawson. Executive power granted by statute will be bound by constitutional limitation and guarantees. See *James v Cowan* (1932) 47 CLR 386 at 396.

52 Such arguments were made by the plaintiffs in *Kruger* and *Bray*.

53 Note 3 *supra* at 147.

54 Refer to note 2 *supra*, and T Buti, *After the Removal*, Aboriginal Legal Service of Western Australia, (1996).

common law actions, for example, breaches of fiduciary duty, negligence and statutory duties are not effected.

Indigenous litigants and their legal representatives have many other problems upon which they can expend their energies. Obstacles presented by limitation statutes and evidentiary concerns will prevent time being spent on contemplating what could have been if *Kruger* and *Bray* were decided differently.