A LAWYER'S PERSPECTIVE ON THE USE OF FIDUCIARY DUTY WITH REGARD TO THE STOLEN CHILDREN

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Much has been written on the concept of fiduciary duties over the last ten years. However, there is still no clear definition which adequately encompasses the different ways in which the term is used, or which sufficiently describes the different kinds of relationships to which it can be applied. Perhaps one reason why a vagueness continues to surround it is that the concept of a fiduciary is an attempt to contain the ephemeral and shifting notions of loyalty, good faith and trust.

The most commonly accepted definition of a fiduciary is one who undertakes to act for, or on behalf of, or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense.[1] Some cases have also emphasised the notions of trust and vulnerability inherent in the fiduciary relationship. I do not intend to dissect the thematic development of fiduciary law here, as this has been done far too well by other writers.[2]

In this article, I will briefly consider how well fiduciary law can be moulded to accommodate the particular relationships between the Indigenous people and the State which arose as a result of the State's removal and assimilationist

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1 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-7 per Justice Mason.

2 For discussion particularly related to Aboriginal people, see P Batley, "The State's Fiduciary Duty to the Stolen Children" (1996) 2 *Australian Journal of Human Rights* 177.

policies and practices. I will do this by focusing on some of the practical difficulties experienced by Stolen Generation claimants in their search for recognition and compensation for the harm done to them. What I hope to emphasise here is the difficulty of squeezing the lived experiences of the Stolen Generation into the narrow categories of the law, even when that law is as theoretically flexible as the law governing fiduciary relationships purports to be.

The first hurdle, which any Indigenous claimant seeking to assert their rights has to overcome, is the question of limitations. A claim for breach of fiduciary duty falls within the sphere of equity and therefore is not strictly subject to the time periods specified in limitations legislation. Nonetheless, the limitations legislation can be applied by analogy, and the equitable defence of laches can potentially be raised by a defendant.[3] In order for the defence of laches to succeed, the defendant must show that the plaintiff, by delaying the institution or prosecution of their case, has either acquiesced to the defendant's conduct or caused the defendant to alter their position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.[4] In the case of the Stolen Generations, the issue of delay in bringing claims is particularly concerning because of the long periods of time which have passed between the moment of accrual of the cause of action and the bringing of the claim.

According to current understanding, the various causes of action which are potentially available to these claimants supposedly accrued during their childhood and youth when they were, for the most part, unaware of the fact that harm in a legal sense was being done to them. Even allowing for them to reach an age of maturity, it is submitted that it is unreasonable to expect most of the claimants to have had the capability to bring a claim until very recently. There are two main reasons for this.

Firstly, the particular harm done to the members of the Stolen Generations was such that many, if not all, of them have been unable to comprehend the extent of the loss which resulted from their removal from their families. An overwhelming sense of grief, confusion and pain has been compounded by a general inability to access services. This is partly due to the fact that many Aboriginal people who were taken were denied education, which then placed them in a lower socio-economic position, and partly due to the psychological impact of their childhood experiences. This sense of confusion has been exacerbated by media attention which, though important, has stirred up long repressed emotions, and by the Commonwealth Government's stated refusal to offer an official apology.

The second main reason for the delay in bringing claims is the lack of access to records. This has prevented potential plaintiffs from having knowledge of the facts which would indicate whether there is, or may be, a cause of action available to them. It is still the case that some people do not even know that they

3 The relevant legislation in New South Wales is the *Limitations Act* 1969. See specifically s 23.

4 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221. See also R Meagher, W Gummow, J Lehane, *Equity: Doctrines and Remedies*, Butterworths (3rd ed, 1992), p797.

are members of the Stolen Generation, or have only recently found out by accessing government files. The knowledge that they are part of this sad chapter of Australian history can often be completely overwhelming and it can take years from the point of discovery to the time when they feel able to take positive action.

The difficulty in accessing records is also significant when a member of the Stolen Generations has decided to bring a claim for some form of compensation. In order to substantiate a claim for breach of fiduciary duty, a plaintiff must prove to the court that there was a fiduciary relationship between the parties, that it was reasonable to have expected the fiduciary to act in a certain way, and that the expected duty has been breached. This leads to argument about what kinds of relationships may give rise to fiduciary duties and the nature and scope of those duties. Whether or not a fiduciary relationship exists between Indigenous people and the State, and the details of such a relationship, has not yet been fully accepted or articulated by Australian courts.[5]

In the case of the Stolen Generations, it may be possible to argue that there was, on one hand, a regular guardianship/ward relationship between the State and the children who were taken. This relationship may arise in the common law sense from the actual taking of the children,[6] or it may arise from the legislation which gave the State power to remove the children.[7] On the other hand, it may be possible to argue that the unusual relationship between Indigenous people and the State, which arises due to the vulnerability of the Indigenous people and the undertakings of the Government, gives rise to a *sui generis* type of fiduciary relationship.[8]

Whatever the case, if a relationship is found to exist, it will then be necessary to expand on the nature of the duties of the relationship and to prove that these duties were breached. It is here that the difficulties in accessing documents again becomes relevant. Indigenous children in New South Wales were being taken from their families beginning in the late 1880s and in some forms this practice continues today. The actual Aboriginal-specific legislation was in effect from 1909 until 1969, but this did not prevent children being taken under regular child welfare legislation.

The children who were taken were put into various types of accommodation throughout their lives, including prisons, hospitals, state funded homes, non-government homes, foster homes, work places, schools, reserves, missions and mental institutions. Sometimes there was a record of their movements, sometimes there were records of their stay. Sometimes these records still exist, sometimes it is possible to locate and access the records. Often there is little or

5 Again much has been written on this topic. Some starters: P Batley, note 2 *supra*; P Finn, "The Forgotten 'Trust': The People and the State" in M Cope (ed), *Equity: Issues and Trends* (1995); L Di Marco, "A Critique and Analysis of the Fiduciary Concept in *Mabo v Qld*" (1994) 19 *MULR* 868; D Tan, "The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?" (1995) 69 *ALJ* 440.

6 See *Anderson v Smith* (1990) 101 FLR 34.

7 An amendment to the *Aborigines Protection Act* 1909 in 1940 made it explicit that children who had been admitted to the control of the Aborigines Welfare Board or committed to an institution were wards of the State, but until this change the relationship between the parties was not clear.

8 See D Tan, note 5 *supra*.

no indication in these records of the lives which the Stolen Generations experienced as children. Even if records are found and accessed, the documents do not record the nights spent crying in loneliness, the pain and humiliation that was the daily experience for these children; the beatings, the rapes, the hunger or the cold. Therefore it is often very hard to gather the material evidence which is required to fulfil the tests established by the law.

If sufficient evidence is gathered to draw a statement of claim and begin proceedings, other practical difficulties arise in relation to the court process. Putting aside the issue of the cost of legal representation and the possibility of adverse costs orders, one is then confronted with the task of fitting the human element into the sterile environment of a court. Two issues arise as the most serious: finding witnesses who are able and willing to give evidence, and helping them and the claimant to understand and cope with evidence in chief and cross examination.

Similar to the difficulty of locating documents, is the difficulty of locating witnesses. Many of the people who actually removed the children or who looked after them are no longer alive, too old to give useful evidence or simply cannot be found. A further difficulty in the court process is the requirement placed on the claimants to give evidence under circumstances which are often alien to them and require them to revisit past trauma in the absence of counselling and other support services.

At the end of the day, if and when an Aboriginal plaintiff is successful in bringing a claim for breach of fiduciary duty against the Government, they may receive some equitable compensation for their troubles. The remedy can only be in the form of financial compensation, although a question often asked by Indigenous claimants is whether monetary compensation alone can make up for the loss suffered by these people. The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home*,[9] recommends that the wider concept of reparations be adopted. This would encompass financial compensation, but also extend to cover acknowledgments and apologies, restitution, rehabilitation and guarantees against future repetition. It is submitted that by adopting these measures the Government will go some way to not only benefiting individual members of the Stolen Generations but also to help Australia as a nation on the path to reconciliation.

9 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.