

SLAVERY AND CONSTITUTIONAL INVALIDITY: RETHINKING *KRUGER AND BRAY*

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I INTRODUCTION

The purpose of this article is to consider what might seem an extraordinary proposition: that ‘protective’ legislation such as the *Aboriginals Ordinance 1918–1953* (NT) might be found constitutionally invalid, in whole or in part, for breach of 19th century British anti-slavery laws.¹

It has been argued elsewhere, and will consequently not be argued in detail here, that the conditions under which some, indeed many, Aboriginal people lived and worked during the period in which such Ordinances were in force can be regarded as amounting to ‘slavery’.² Aboriginal people who gave evidence to the 2006 report of the Senate Standing Committee on Legal and Constitutional

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1 The first of these passed by the UK Parliament was *An Act for the Abolition of the Slave Trade 1807*, 47 Geo III c36. This was followed by further legislative measures in 1824, 1833 and 1843. Under section 10 of the *Slave Trade Act 1824* 5 Geo IV c113, it was an offence to ‘deal or trade in slaves or persons intended to be dealt with as slaves’. These provisions were primarily directed at the international slave trade, particularly that coming out of Africa. Britain also entered into various anti-slavery treaties during this period. It seems clear that slavery was outlawed in the British Empire by 1833. In any event, unambiguous legislation consolidating these Acts of Parliament was passed in 1873: see *The Slave Trade Act 1873*, 36 and 37 Vict c88. For discussion of the 19th century offence of slavery, see Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 9, Offences Against Humanity: Slavery* (1998) Australian Government Attorney-General’s Department <http://www.ag.gov.au/www/agd/agd.nsf/Page/Model_criminal_code> at 10 September 2008; see also Stephen Gray, ‘The Elephant in the Drawing Room: Slavery and the “Stolen Wages” Debate’ (2007) 1 *Australian Indigenous Law Review* 30. For discussion of the 20th century history of the offence in the High Court, see *R v Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008), [23]–[35] (Gleeson CJ).

2 For example, Rosalind Kidd has recently suggested that this legislation ‘imposed a form of slavery on those persons’: Rosalind Kidd, *Trustees on Trial: recovering the stolen wages* (2006) 11. For consideration of the current meaning of slavery in Australian law, see *R v Tang* [2008] HCA 39 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [28], adopting the approach of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Dragoljub Kunarac, Roadmir Kovac and Zoran Vukovic*, Case No, IT-96-23-T & IT-96-223/IT (22 February 2001). For an argument that this approach is also applicable to the treatment of Aboriginal workers during the protection and assimilation periods, see Gray, above n 1.

Affairs, *Unfinished business: Indigenous stolen wages*, referred to their conditions as ‘slavery’.³ Employers exercised a high degree of control over ‘their’ Aboriginal workers. In some cases, Aboriginal workers were bought and sold as chattels, particularly where they ‘went with’ the property upon sale. There were restrictions on their freedom of choice and freedom of movement. These restrictions were exercised regardless of consent.⁴ There were threats and actual use of force. There was a fear of violence, subjection to cruel treatment and abuse, control of sexuality and forced labour.⁵

While the law formally provided for wages, various exceptions to this – most notoriously, the provision allowing an employer to be exempted from paying wages where he was maintaining an employee’s ‘relatives and dependants’⁶ – meant that wages, at least in country districts, were rarely paid. Prevailing laws and practices were routinely described as ‘slavery’ not only by journalists and unionists, but also government officials and others responsible for their administration.⁷

3 See, eg, Mrs Valerie Linow, Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished business: Indigenous stolen wages* (2006) 91:

What if your wages got stolen? Honestly, wouldn't you like to have your wages back? Honestly, I think it should be owed to the ones who were slave labour. We got up and worked from dawn to dusk ... We lost everything – family, everything. You cannot go stealing our lousy little sixpence. We have got to have money back. You have got to give something back after all this country did to the Aboriginal people. You cannot keep stealing off us.

4 According to the anthropologists R M and C H Berndt, who conducted a survey of Northern Territory cattle stations in 1944, the Aborigines

owned neither the huts in which they lived nor the land on which these were built, they had no rights of tenure, and in some cases have been sold or transferred with the property. Their security depended on the new land-holders – a precarious security at times and in places where there were few, if any, checks or curbs on the treatment accorded these people who had, for a long period, no effective rights at law:

See R M and C H Berndt, *End of an Era: Aboriginal Labour in the Northern Territory* (1987) 272–3.

5 Ibid 103. See, eg, the practice of ‘cockfighting’ described at 24. According to the authors, ‘any manifestation or even hint of rebellion was met with instant physical punishment’. They also describe the local administration of ‘justice’ such as severely beating three young men caught cattle-stealing, and chaining them up at the homestead for several days, the result of ‘the belief that Aborigines were better disciplined by the sight and the experience of punishment meted out on the spot’: at 124 The authors also describe how one European ‘always went armed when there were Aborigines near’. For a joke, this armed man shot into ground at the feet of a blind Aboriginal man approaching the homestead: at 124.

6 For example, regulations introduced in June 1933 under the *Aboriginals Ordinance 1918* (NT) (*‘1918 Ordinance’*) prescribed conditions on the grant of a license to employ Aborigines in country districts. The grantee of a license was required to pay wages at the rate of 5s per week for each Aboriginal employed by him, plus food, clothing and tobacco. However, a loophole allowing country employers to avoid paying wages was created or expanded by a provision under regulation 14 that ‘where it is proved to the satisfaction of the Chief Protector that the grantee of the license is maintaining the relatives and dependants of any aboriginal employed by him, the Chief Protector may exempt the grantee from the payment of any wages in respect of that aboriginal.’

7 In the early 1930s, for example, Chief Protector of Aborigines in the Northern Territory, Dr Cecil Cook pointed out that Australia was in breach of its obligations under the League of Nations Slavery Convention, since the conditions of half-castes under the age of 21 in Central Australia amounted to ‘forced labour analogous to slavery’: see Tony Austin, *Never Trust a Government Man* (1997) 204. See further, Gray, above n 1.

However, a perusal of the Ordinance seems to give little support to the proposition that its purpose was to create or authorise conditions of 'slavery'. The words of the legislation are paternalistic, but apparently benign. Most fundamentally, the proposition appears to be negated by the fact that the powers of the Chief Protector or Director of Welfare⁸ in relation to Aboriginal employees – just like his powers in relation to Aboriginal children – were required to be exercised 'in the best interests of' the Aboriginal person concerned. Under section 6 of the *Aboriginals Ordinance 1918* (NT) ('1918 Ordinance'), 'the Chief Protector shall be entitled at any time to undertake the care, custody or control of any aboriginal or half-caste if, in his opinion, it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so'.

Thus, prima facie, even if acts which amounted to acts of slavery were done under the apparent authority of the *1918 Ordinance*, this could not be an indication of the invalidity of the *1918 Ordinance*. It can never be in a person's 'interests' to be kept in slavery. No law can simultaneously authorise only actions carried out 'in the interests of the aboriginal or half-caste' and authorise that person being kept in slavery. Any act authorised by the *1918 Ordinance* could not be an act of slavery. Any act of slavery could not be authorised by the *1918 Ordinance*. In other words, if an act of slavery occurred under the apparent authority of the *1918 Ordinance*, such an act could only be an invalid exercise of power, not an indication that the power itself was invalid.

This was precisely the point made by the High Court in the first of the so-called 'stolen generations' cases, *Kruger v Commonwealth; Bray v Commonwealth*.⁹ In this case, the High Court relied on section 6 to reject an argument that the *1918 Ordinance* was invalid because it authorised the removal of Aboriginal children with a genocidal intent – that is, with the intent to destroy the relevant racial or cultural group.¹⁰ The High Court considered that the power to remove Aboriginal children under the *1918 Ordinance* could not be a law 'authorising genocide', because the power was required to be exercised 'in the interests of the aboriginal or half-caste'. According to Brennan CJ:

a power which is to be exercised in the interests of another may be misused. Revelation of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation, but the susceptibility

8 Pursuant to the 'New Deal' policy of 1939, the office of Chief Protector of Aborigines was abolished in the Northern Territory under the *Aboriginals Ordinance 1939* (NT), and replaced by the office of Director of Native Affairs. In 1953, pursuant to the *Welfare Ordinance 1953* (NT) ('*Welfare Ordinance*'), the office of Director of Native Affairs was abolished and its functions subsumed into those of the new Director of Welfare.

9 *Kruger v The Commonwealth; Bray v The Commonwealth* (1997) 190 CLR 1 ('*Kruger and Bray*'). The other 'stolen generation' case was decided by O'Loughlin J at first instance in *Cubillo v Commonwealth* (2000) 103 FCR 1. On appeal, see *Cubillo v Commonwealth of Australia; Gunner v Commonwealth of Australia* (2001) 112 FCR 455 (*Cubillo and Gunner*). *Cubillo and Gunner* did not raise issues of constitutional law, being primarily concerned with tort.

10 The plaintiffs argued that the Ordinance exceeded the legislative power of the Commonwealth in that that power, whether conferred by section 122 or otherwise, does not extend to laws destroying racial or ethnic groups, their language or culture or to laws authorising genocide or crimes against humanity: *Kruger and Bray* (1997) 190 CLR 1, 39–40 (Brennan CJ), 100 (Gaudron J).

of a power to its misuse is not an indicium of its invalidity ... the erroneous formation of an opinion by the Chief Protector which purported to enliven the exercise of the power conferred by s 6 or the removal regulations does not deny the validity of s 6 or those regulations, though it may deny the validity of the exercise of the power.¹¹

In words to the same effect, Toohey J stated that ‘it is necessary to keep in mind that it is the validity of the *1918 Ordinance*, not any exercise of power under the *1918 Ordinance*, which is the subject of these proceedings’.¹²

A similar argument would appear at first sight to apply in relation to slavery. As a consequence, it would seem, an argument based on slavery – like the argument based on genocide pursued in *Kruger and Bray* – must fail.

However, this argument is not as self-evident as it may first appear. In particular, it depends upon an unexpressed approach to statutory interpretation, according to which it is unnecessary and impermissible to go beyond the express words of the statute in interpreting what the statute ‘means’ – that is, the question of statutory intent. If the statute says that all powers must be exercised in the interests of the ‘aboriginal or half-caste’, that is the end of the matter. No inquiry into any inconsistent or ulterior motive can be entertained. The ‘true meaning’ of the statute is simply what the statute says – or, to be more precise, what a judge thinks it says, without taking into account evidence which may bear on the question and many years after the event.

This approach, it will be suggested, is as debatable in law as it is politically and morally questionable. In other contexts, extrinsic materials have been referred to in statutory interpretation in order to assess the question of statutory ‘intent’. This article will argue that a reference to extrinsic materials is permissible in the context of a debate about the constitutional validity of ‘protective’ legislation such as the *Aboriginals Ordinance 1918–1953* (NT), and that reference to such materials renders the argument that the Ordinance was invalid for breach of anti-slavery legislation stronger than it would first appear.

The article will proceed in five stages. First, it will consider – and criticise – the reasoning of the High Court on this issue in *Kruger and Bray*. Secondly, it will consider the extent to which the constitutional argument pursued in *Kruger and Bray* is relevant to a possible argument based on slavery – noting most obviously that the former concerns inconsistency with the *Australian Constitution*, while the latter concerns inconsistency with British laws. Thirdly, it will consider the statutory interpretation question in more detail, noting the extent to which extrinsic materials such as parliamentary debates can be considered in assessing the ‘true nature’ of a statute, and assess the extent to which such a consideration might lead to the conclusion that the *1918 Ordinance* was invalid for breach of British law. Fourthly, it will consider what types of evidence might be relevant in practice to such an argument. The final section

11 *Kruger and Bray* (1997) 190 CLR 1, 36–7 (Brennan CJ) citing *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151–2.

12 *Kruger and Bray* (1997) 190 CLR 1, 88.

will, inter alia, place this debate in the context of other, similar, contemporary political and legal debates concerning the past treatment of Aboriginal people.

II KRUGER AND BRAY RECONSIDERED

The plaintiffs in *Kruger and Bray* were Aboriginal people from the Northern Territory who had been removed from their parents as young children. The removals occurred between 1925 and 1949 and were hence purportedly pursuant to the powers of the Chief Protector or Director of Native Affairs under the *1918 Ordinance*. The *1918 Ordinance* was passed pursuant to Commonwealth legislation,¹³ which was reliant for its validity upon the ‘territories power’ in section 122 of the *Constitution*.¹⁴ The plaintiffs sought a declaration that ‘the provisions of the Ordinances of the Northern Territory under which these alleged actions were taken were invalid’.¹⁵

The plaintiffs advanced numerous possible bases for their argument that the *Aboriginals Ordinance* or its successors were wholly or partially invalid on constitutional grounds. They argued that the *1918 Ordinance* was contrary to an implied constitutional right to freedom from removal and detention without due process of law;¹⁶ that it purported to confer judicial power on persons not entitled to exercise that power under Chapter III of the *Constitution*;¹⁷ that it was contrary to an implied constitutional right to legal equality;¹⁸ that it was contrary to an implied constitutional right to freedom of movement and association;¹⁹ that it was

13 In particular, the *Northern Territory Acceptance Act 1910* (Cth) and the *Northern Territory Administration Act 1910* (Cth): *ibid* 33 (Brennan CJ).

14 Section 122 of the *Constitution* provides:

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

15 *Kruger and Bray* (1997)190 CLR 1, 33 (Brennan CJ).

16 See, eg, *Kruger and Bray* (1997)190 CLR 1, 84 (Toohey J).

17 *Ibid* 107–11 (Gaudron J).

18 Relying on his own earlier joint judgment with Deane J in *Leeth v The Commonwealth* (1992) 174 CLR 455, Toohey J accepted that the legislative power conferred by section 122 was qualified by an implied doctrine of legal equality. However, he cast doubt on whether the Ordinance could be viewed as infringing any such doctrine: *ibid* 97. Gaudron J accepted that a ‘limited constitutional guarantee of equality before the courts’ existed, but considered that this had no bearing on the validity of the Ordinance: *ibid* 112–3. Other judges rejected the notion of an implied doctrine of legal equality: *ibid* 44–5 (Brennan CJ), 63–6 (Dawson J), 142 (McHugh J) and 153–5 (Gummow J).

19 Chief Justice Brennan did not find any implied constitutional right to freedom of movement or association that might limit the powers conferred by section 122: *ibid* 45. Justice Dawson reached a similar conclusion: *ibid* 68–70. Justice Toohey found that there was an implied right to freedom of movement and association but considered that ‘it is not possible to say at this stage of the proceedings that the impugned provisions of the Ordinance are necessarily invalid on that account’: *ibid* 93.

not a law for the government of the Northern Territory;²⁰ and that it was a law prohibiting the free exercise of religion contrary to section 116 of the *Constitution*.²¹ All of these grounds are set out in the judgments.²² All were rejected and all have been extensively discussed elsewhere.²³ Consequently, they will not be discussed further here.

For potential ‘stolen wages’ claimants seeking to pursue the slavery argument, the most significant aspect of the High Court decision in *Kruger and Bray* was the plaintiffs’ argument that the *1918 Ordinance* was contrary to an implied constitutional right to freedom from any ‘law, purported law or executive act’:

Constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising:

- (i) the removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group’s physical destruction in whole or in part;
- (ii) actions which had the purpose, the effect or the likely effect of causing serious mental harm to members of a racial or ethnic group; and
- (iii) the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part.²⁴

This wording was based on the definition of ‘genocide’ in the *Convention on the Prevention and Punishment of the Crime of Genocide*,²⁵ which was ratified by Australia in 1949. The definition of ‘genocide’ states that

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²⁶

20 See, for rejection of this argument, Brennan CJ: *ibid* 41. This argument is substantially similar to the argument put in *Namatjira v Raabe* (1959) NTJ 608 (‘*Namatjira*’) that the Ordinance was not for the ‘peace, order and good government’ of the Northern Territory. While the appellant’s argument in the earlier decision relied on the ‘peace, order and good government’ formula in s 4U *Northern Territory (Administration) Act 1910* (Cth), the plaintiffs in *Kruger and Bray* relied directly on section 122 of the *Constitution*. The question raised in *Namatjira* will be discussed further in Part IV, below.

21 See, for rejection of the freedom of religion argument, *ibid* 40 (Brennan CJ), 86–7 (Toohey J).

22 See, eg, *ibid* 38–9 (Brennan CJ) and 100 (Gaudron J).

23 See, eg, ‘Forum: Stolen Children: from Removal to Reconciliation’ (1998) 21(3) *University of New South Wales Law Journal*. More recently on the prospects at international law, see Maria O’Sullivan, ‘Past Violations under International Human Rights Law: The Indigenous “Stolen Generation” in Australia’ (2005) 23 *Netherlands Quarterly of Human Rights* 243.

24 *Kruger and Bray* (1997) 190 CLR 1, 39 (Brennan CJ).

25 Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (‘*Genocide Convention*’).

26 The definition is set out in *Kruger and Bray* (1997) 190 CLR 1, 70 (Dawson J).

The plaintiffs argued that the *Genocide Convention* ‘reflected a norm of international law’, and that the *1918 Ordinance* should be construed ‘on the footing that section 122 was not intended to confer a power to make a law authorising acts in conflict with that norm’.²⁷ Their statement of claim pleaded in addition that the *1918 Ordinance* was invalid as contrary to this norm because it had the ‘effect or the likely effect’ of destroying the racial group. However, according to Toohey J, the plaintiffs’ arguments in court were ‘confined to the submission that the Ordinance was invalid because it authorised acts of genocide’.²⁸

Chief Justice Brennan accepted that the detention of Aboriginal children ‘might well have caused mental harm in at least some cases’. However, he noted that ‘the susceptibility of a power to its misuse is not an indicium of its invalidity’.²⁹ If the Chief Protector’s or Director’s actions in separating children from their families amounted to acts of genocide within the definition, this might be an indication that the Director’s actions were invalid exercises of power. It would not be an indication that the powers themselves were invalid, since the powers required that any actions be taken in the ‘best interests’ of the children concerned:

It can be accepted that the detention of Aboriginal children and keeping them away from their mothers and families in Aboriginal institutions or reserves might well have caused mental harm in at least some cases but, as a matter of statutory interpretation, none of the impugned provisions can be taken to have authorised or purportedly authorised acts done for the purpose or with the intention of causing mental harm ... If the impugned laws authorised the keeping of a plaintiff child in Aboriginal institutions or reserves ‘in the interests’ of the child or for some other legitimate purpose under section 16, they did not thereby authorise an intentional or purposeful infliction of mental harm.³⁰

As a result, according to Brennan CJ, it was unnecessary to consider whether an implied constitutional prohibition on genocide existed at the relevant time in Australian law, or whether any such prohibition might restrict the scope of section 122 of the *Constitution*.³¹

27 Ibid 88 (Toohey J).

28 Ibid.

29 Ibid 36–7 (Brennan CJ).

30 Ibid 40 (Brennan CJ).

31 According to Brennan CJ:

Unless some one or more of these provisions arguably authorises the taking of action which is inconsistent with one or more of the proposed grounds of constitutional protection referred ... it is unnecessary to consider whether those grounds restrict the scope of section 122 of the *Constitution*: ibid 40.

Similarly, Dawson J pointed out that the ‘powers conferred by the 1918 Ordinance were required to be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population generally’. They were not conferred, or exercised, ‘with intent to destroy in whole or in part any Aboriginal group’. Consequently he considered that the 1918 Ordinance, or the acts authorised by it, could not fall within the definition of genocide.³² Justice Gummow agreed with Dawson J on this issue,³³ while the conclusions of Toohey Gaudron JJ were to similar effect.³⁴

Thus, the High Court was at pains to point out that a law does not contravene the *Genocide Convention* (assuming that this Convention formed part of Australian law at the relevant time³⁵) merely because acts may have been committed under its purported authority which could be regarded as acts of genocide. In addition, it was necessary to show that the statute authorised these acts, within the terms of the Convention, and that it did so ‘with intent to destroy’ the racial group. Genocide is a crime requiring intent and ‘the words of the Ordinance did not display the necessary intent’.³⁶

On this analysis, the plaintiffs’ argument appears to be caught neatly in a dilemma. If the Director’s acts of separating children from their families were genocidal, they could not therefore have been authorised by the 1918 Ordinance. If the Director’s acts were authorised by the 1918 Ordinance, they could not therefore be genocidal. There is an absolute contradiction, according to the High Court, between the requirement in section 6 of the 1918 Ordinance that the

On this point Dawson J went further, pointing out that the Genocide Convention ‘has not at any time formed part of Australian law’: *ibid* 70. On the other hand, Gaudron J accepted that ‘[w]ere it necessary to decide the matter, I would hold that, whatever the position with respect to other heads of legislative power, s 122 does not confer power to pass laws authorising acts of genocide as defined in Art II of the Genocide Convention’: at 104–7. The question of whether the international crime of genocide was also an offence under the Australian common law was also discussed in *Nulyarimma v Thompson* (1999) 96 FCR 153. The majority (Wilcox and Whitlam JJ) held that, in the absence of appropriate legislation, genocide as a crime was not cognisable in Australian courts: at 166. Justice Merkel dissented on this point: at 205. For criticism of this decision, see Douglas Guilfoyle, ‘*Nulyarimma v Thompson*: is Genocide a Crime at Common Law in Australia?’ (2001) 29 *Federal Law Review* 1. See also Kristen Daghish, ‘The Crime of Genocide: *Nulyarimma v Thompson*’ (2001) 50 *The International and Comparative Law Quarterly* 404.

32 *Kruger and Bray* (1997) 190 CLR 1, 70 (Dawson J).

33 *Ibid* 159 (Gummow J).

34 *Ibid* 88 (Toohey J), 104–7 (Gaudron J).

35 See above n 31 for a brief discussion of the High Court’s conclusion on this matter. As the High Court pointed out, the *Genocide Convention* does not form part of Australian law unless incorporated by statute. However, the plaintiffs argued that the *Genocide Convention* should ‘throw light on the proper construction of a statute or subordinate legislation which is ambiguous’: *ibid* 87–8 (Toohey J). Also, the *Genocide Convention* was not ratified until some thirty years after the Ordinance. The plaintiffs argued that the provisions of the *Genocide Convention* were part of customary international law before its formal ratification: at 70 (Dawson J). For the purposes of this article, it is unnecessary to consider this issue further, since it seems clear that a prohibition on slavery did form part of Australian law at the relevant time.

36 Matthew Storey, ‘*Kruger v The Commonwealth*: Does Genocide Require Malice?’ in ‘Forum: Stolen Children: from Removal to Reconciliation’, above n 23, 226.

power of removal be exercised ‘in the interests of the aboriginal or half-caste’³⁷ and the necessity that an act of genocide be committed with ‘intent to destroy’.

Thus, the High Court has refused to enter into debate about whether some more sinister purpose might lurk behind the *1918 Ordinance*’s apparently beneficial words. In so doing, it has avoided some potentially difficult empirical and logical terrain: that is, discussion of whether particular acts were done under the express or implied authority of the *1918 Ordinance* – pursuant to the ‘true’ intent lurking behind the beneficial words – or whether they were done in spite of that beneficial purpose.

To put this in another way, a significant question avoided by the High Court in *Kruger and Bray* is the question of whether statutory intention is to be determined entirely on the basis of what Parliament says it intended – or whether other facts bearing on the question of its ‘true’ purpose or intent also come into play. The question might arise, for example, of whether it is sufficient that Parliament states that it was acting ‘in the interests’ of Aboriginal people, even though better-informed bystanders – either now or at the time – might regard their actions as clearly motivated by some other purpose.

It is important to note that the question is not what Parliament ought to have done. No court is likely to second-guess Parliament. However, there is a clear distinction between that argument and an argument that Parliament did not in fact intend to pass beneficial legislation where its actions are known to be detrimental to the people they supposedly benefit, or are contrary to the available evidence about that legislation’s likely effect. The High Court has neatly avoided all such difficulties by accepting as determinative what one provision of the legislation said, rather than delving into what the legislation may have actually meant.

The High Court’s approach also avoids any discussion of whether Parliament might have more than one ‘intent’ in passing legislation such as the *1918 Ordinance*. There seems no reason in principle why benevolent and malevolent intentions, or even humanitarian and genocidal intentions, might not co-exist. It might even be argued, for example, that the legislation was passed with the intention of preventing one form of genocide while facilitating another: that is, that genocide in its extreme form of rape and slaughter was to be exchanged for genocide by the forcible transfer of children leading to destruction of the cultural group.

If this were the case, a genocidal intent might indeed co-exist with an intent to act ‘in the interests of’ the Aboriginal person. In order to show that such intentions co-existed, the plaintiffs might seek to adduce evidence suggesting that Parliament was of the opinion that it was ‘in the interests of’ Aboriginal people to be given the opportunity to be killed slowly rather than quickly. As it was more eloquently expressed at the time, Parliament may have intended that their ‘dying pillow’ might be smoothed.

One practical effect of the High Court’s approach to statutory interpretation is that governments could avoid responsibility for acts of genocide in a range of

37 *1918 Ordinance* s 6.

circumstances by passing legislation along the lines of the ‘best interests’ formula in section 6. To take a hypothetical example, suppose that a government, G, formulates and pursues policies towards a minority racial or cultural group, X. Suppose G believes that the cultural practices of X are backward and useless in the modern world, that its traditions are violent and that parents from X, being uneducated themselves, are unable or unwilling to provide adequately for the education of their children. G may believe, as a consequence, that allowing X – as a distinct cultural group – to become extinct is in the best interests of each individual member of X. G may pass legislation designed to further that goal – for example, legislation permitting removal of children on the basis of race, or the forced sterilisation of women from X.

If this legislation were challenged before the High Court as amounting to ‘genocide’, the approach in *Kruger and Bray* would dictate that such a challenge would fail. This is because the High Court would be bound to decide that those policies were pursued with the ‘best interests’ of the members of X group in mind. G’s own belief on the matter of ‘best interests’ would be conclusive – albeit that no objective bystander would think that the policies were in fact in X’s interests and moreover that it was G, not X, which decided what those interests required.³⁸

Alternatively, G may not, in fact, have the best interests of the members of X in mind at all. It may wish to destroy X as a distinct racial or cultural group – for example, in order to allow untrammelled access by mining companies to X’s land. However, after consideration of the High Court’s reasoning in *Kruger and Bray*, G inserts a formula into the legislation under which it intends to pursue its policy of destroying X. It states that the actions contemplated are required to be taken in the best interests of X. It knows that the only people taking decisions under that legislation will be members or agents of G, not of X. Again, the statutory formula enshrined in G’s legislation would – following the reasoning of the High Court in *Kruger and Bray* – mean that any argument that the legislation had a genocidal intent would be doomed to fail.

These examples are not entirely abstract. According to Robert Manne, ‘irrefutable archival evidence exists to show that the Federal Government supported [former Chief Protector Cecil] Cook’s “half-caste” eugenics policy from 1932 until the end of 1938’.³⁹ Manne argues that ‘[b]efore the Second World War, the removal of “half-caste” children from Aboriginal camps and settlements was frequently driven by a determination to “solve” the “problem” of the Aborigines once and for all’.⁴⁰ As a consequence, he considers, sufficient

38 This example assumes that there is an implied constitutional prohibition on genocide in Australian law. For discussion of this point see above n 31 and n 35.

39 Robert Manne, ‘In Denial: the Stolen Generations and the Right’ (2001) 1 *The Australian Quarterly Essay* 1, 78, 64–5.

40 Ibid 38. For further references on the influence of eugenics on government policy towards Aboriginal people until the mid-20th century, see R McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory 1889-1939* (1997); and Justin Malbon, ‘The Race Power under the *Australian Constitution: Altered Meanings*’ (1999) 21 *Sydney Law Review* 80, 94–5.

evidence exists in the *Bringing them home* report to support the conclusion that Commonwealth policy-making prior to World War II was driven by a genocidal intent.⁴¹

However, Manne's arguments are legally irrelevant, on the approach to constitutional and statutory interpretation preferred by the High Court in *Kruger and Bray*. The High Court in *Kruger and Bray* did not look at debate preceding the enactment of the *1918 Ordinance*, nor at debate preceding any of the numerous amendments made before its eventual repeal. Nor did it look at debate preceding the *Genocide Convention*. It ignored evidence that it was Commonwealth policy, particularly during the 1930s, to separate 'half-caste' children from their parents in order to 'breed out the colour'. It did not even consider other more intrusive provisions of the *1918 Ordinance* such as those regulating intermarriage, on the basis of which it might be argued that the intent of the *1918 Ordinance* was genocidal notwithstanding the apparently beneficial motive expressed in section 6.⁴²

In an article published shortly after the decision in *Kruger and Bray*, Matthew Storey referred to discussion during the drafting of the *Genocide Convention* concerning whether the definition should include a requirement of malice. A number of delegates argued that 'an enumeration of motive was useless and even dangerous', since it could allow perpetrators of genocide to argue that their motives were beneficial, or even that they had a combination of motives for their acts. As a consequence, according to Storey:

the intent requirement in genocide then would appear to be the undertaking of one of the prohibited acts in relation to one of the protected groups with the intent to destroy that group in whole or in part. The fact that this act is committed with beneficial motive is apparently irrelevant. Genocide does not require malice; it can be (misguidedly) committed 'in the interests of' a protected population.⁴³

Thus, Storey argues, the *1918 Ordinance* might still be found to evince the necessary intent, even if its motives were 'beneficial'. He adds that

41 According to Manne, sufficient evidence exists in the *Bringing them home* report (Human Rights and Equal Opportunity Commission, *Bringing Them Home – National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1995) ('*Bringing them home* report')) alone to justify this conclusion. However, Manne criticises the authors of the *Bringing them home* report for their 'failure to distinguish between the policies of "absorption" and "assimilation" and between the philosophies of A O Neville and Paul Hasluck', which led them to 'the misleading claim that the post-war child removal policies were driven by genocidal intentions': Manne, above n 39, 40.

42 For discussion of these provisions, see Jennifer Clarke, 'Case Note: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 218, 223–4, and see further discussion below.

43 Storey, above n 36, 228.

while it would appear open to the Court to have concluded that the fact that the *legislation* (and not just its operational implementation) operated on an explicitly racial basis demonstrated the necessary intent, this opportunity has apparently been rejected.⁴⁴

While, according to Storey's argument, it is not necessary to look beyond the terms of the legislation in order to find evidence of 'malice', it is still necessary to look beyond those terms in order to find whether or not there exists an 'intent to destroy'. Thus, Storey's argument rests on an 'originalist' approach to constitutional and statutory interpretation. This approach differs from the High Court's 'literalist' approach in that it evinces a 'keen[ness] to look beyond the text to historical and other circumstances surrounding the writing of the text'.⁴⁵

At first sight it seems odd that Storey refers to debates preceding the *Genocide Convention* in support of an argument concerning the 'intent' of the *Aboriginals Ordinance*, which was passed in its original form some 30 years before. However, debate preceding the *Genocide Convention* is relevant to determining the prevailing understanding of genocide prior to 1948 in customary international law. It would be relevant to establishing that, at some time prior to 1948 – and possibly in 1918, when the Ordinance was passed, or the period between 1925 and 1949, when the plaintiffs were removed from their parents – it was accepted in customary international law that genocide could be committed even where the perpetrator claimed to have a beneficial motive.⁴⁶

In addition, Storey refers to evidence suggesting that the *Aboriginals Ordinance* did in fact demonstrate the necessary intent. Such evidence exists in official reports from the early 1930s concerning the operation of the assimilationist policies in the Northern Territory. These reports made it clear that the goal of the legislation was the 'breeding out' of the 'half-castes ... with a view to their absorption by the white race'.⁴⁷

Storey's argument illuminates the fact that the High Court's approach to the question of genocide in *Kruger and Bray* rested on an unexpressed 'textualist' approach to statutory interpretation. On this approach intent 'is revealed in the textual expression chosen by the authors',⁴⁸ not by referring to extrinsic materials. On an alternative 'originalist' approach, other circumstances

44 Ibid 229. In support of this suggestion, Storey refers to evidence that it was Commonwealth policy during the 1930s to 'breed out' part-Aboriginal people and absorb them into the white population.

45 See, for discussion of these differences in approaches to constitutional interpretation, Justin Malbon, above n 40, 82–3; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1. See further discussion below.

46 It is worth noting that the materials Storey quotes – from debates just before the *Genocide Convention* was passed in 1948 – appear to refer to the difficulties which might arise where individuals commit acts of genocide, whether with or without the authority of the state. This, it might be thought, is not quite the same question as whether a statute itself exhibits a genocidal 'intent'. A jury would, however, evaluate both an individual's intent and the question of statutory 'intention' by reference to extrinsic materials, particularly historical sources.

47 The reports quoted are the Northern Territory Administrator's Report (1933) 7 and J W Bleakley, *The Aboriginals and Half-Castes of Central Australia and North Australia: Report* (1929) (the 'Bleakley Report'); see Storey, above n 36, 229.

48 Malbon, above n 40, 82.

surrounding the enactment of the legislation – the legislative history – may be taken into account. In addition, under such a view, it is arguable that ‘genocidal’ acts done under the actual or apparent authority of the *1918 Ordinance* may be taken into account in considering its ‘intent’; or, to put the matter in a way that avoids the apparent logical contradiction, it is permissible to take into account the alleged effects of the *1918 Ordinance* in considering its ‘true nature’ or intent.

In a case note published following Justice O’Loughlin’s decision at first instance in *Cubillo v Commonwealth*,⁴⁹ Jennifer Clarke argued that both *Kruger and Bray* and *Cubillo* represented a ‘partial and ... unsatisfactory analysis of the *1918 Ordinance*’,⁵⁰ one focusing on the ostensibly ‘beneficial’ provisions regarding child removal and institutionalisation, while ignoring other provisions such as those regulating Aboriginal labour or restricting freedom of movement or sexual relations.⁵¹ She suggests, for example, that the question of whether Commonwealth policy was designed to promote ‘biological assimilation’ should consider ‘not only ... the Directors’ approach to removing “half-caste” children, but their approaches to their power to control the marriages of “aboriginals” or “wards” to “non-aboriginals” or non-“wards”’.⁵² She argues that ‘the true nature of “protection” and “welfare” laws can only be comprehended when the full scope of these detailed controls is understood’, while recognising that ‘the likelihood of these issues being aired in modern litigation is remote’.⁵³

Again, the question of whether such matters can be ‘aired in modern litigation’ is a question of whether a textualist or an originalist approach to statutory interpretation is preferred.

III THE *ABORIGINALS ORDINANCE* AND SLAVERY

As noted above, slavery was first outlawed in British law in 1807, and at any event by 1873.⁵⁴ There is no doubt that these laws applied in Australia, either expressly or by necessary intendment, by virtue of the doctrine of paramount force. According to Castles, ‘[t]he *Slave Trade Act*, 1843, for example, applied to the British *Slave Trade Act*, 1824, in its entirety to British subjects everywhere, whether they were on British territory or not’.⁵⁵

By virtue of section 2 of the *Colonial Laws Validity Act 1865* (UK), any colonial laws which were ‘repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate’ were void or inoperative to the extent of that repugnancy.⁵⁶ This position was not altered by the adoption of the *Statute of Westminster 1931* (Imp), since British laws applying to the

49 (2000) 103 FCR 1.

50 Clarke, above n 42, 222.

51 Ibid 223–4.

52 Ibid 250–1.

53 Ibid 224.

54 See above n 1.

55 Alex Castles, *An Australian Legal History* (1982) 410.

56 See, eg, ibid 408.

Commonwealth by paramount force up to 3 September 1939 continued to apply, unless later repealed or amended by the Commonwealth Parliament.⁵⁷ As is well known, British laws applying to the States – although not, interestingly, the Territories⁵⁸ – continued to apply until the adoption of the *Australia Act 1986* (Cth) and associated legislation.⁵⁹

A more difficult question is whether the *Aboriginals Ordinance* or its successors actually were ‘repugnant’ to British anti-slavery laws. Although, as Castles points out, attempts to define ‘repugnancy’ ‘with some degree of precision’ were never ‘particularly successful’,⁶⁰ it appears that the determination of ‘repugnancy’ is not unlike the determination of inconsistency between Commonwealth and State laws under section 109 of the *Constitution*.⁶¹ According to Higgins J in 1915, ‘no colonial Act can be repugnant to an Act of Parliament of Great Britain unless it involves, either directly or indirectly or ultimately a contradictory proposition ... contradictory duties or contradictory rights’.⁶²

Clearly, neither the *Aboriginals Ordinance* nor its successors explicitly created the institution of slavery. However, it might be argued, as Rosalind Kidd has recently suggested, that the regime of ‘absolute control’ imposed by the legislation might amount to slavery. Alternatively, and perhaps somewhat inconsistently,⁶³ it might be argued that the legislation was designed to legitimate and perpetuate treatment of Aboriginal employees amounting to slavery.

Whether any of these possibilities would lead to the Northern Territory legislation being found ‘repugnant’ is a matter of statutory interpretation. It raises the question of whether the ‘contradictory duties or contradictory rights’ required by Higgins J must be found on the face of the statute – its plain meaning – or whether they can be found more indirectly by an examination of its ‘true’ purpose or effects. It would be necessary to convince a court to look beyond the

57 This was accomplished when the Commonwealth passed the *Statute of Westminster Adoption Act 1942* (Cth), which provided that the *Statute of Westminster* was to apply retrospectively to the day Australia entered the Second World War on 3 September 1939: see Alex Castles, ‘The Paramount Force of Commonwealth Legislation since the Statute of Westminster’ (1962) 35 *Australian Law Journal* 402. See also *ibid* 414.

58 As Castles points out, the Northern Territory was actually in a superior constitutional position with regard to British statutes than the States, since after the adoption of the *Statute of Westminster* ‘legislative authority may be exercised to repeal or amend the application of British statutes, including those which can still apply in the States by paramount force’: Castles, *An Australian Legal History*, above n 55, 425. However, British statutes passed prior to the adoption of the *Statute of Westminster* applied in the Territories on the same basis as they applied to the Commonwealth.

59 See, eg, *Bistrivic v Rokov* (1976) 135 CLR 552, and Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th edition, 2006) 162.

60 Alex Castles, ‘The Reception and Status of English Law in Australia’ (1963) 2 *Adelaide Law Review* 1, 31. For further discussion of the operation of the doctrine of repugnancy, see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) 398–400.

61 Castles, *An Australian Legal History*, above n 55, 420.

62 *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148, 178.

63 Inconsistently, because the first argument suggests that a state of slavery existed by virtue of the government’s ‘absolute control’, while the second suggests that such a state exists by virtue of the government’s (wilful) failure to control employers’ actions.

ostensibly ‘beneficial’ purpose of the legislation, to the official reports, debates, correspondence and other documents which might shed a more revealing light.

IV STATUTORY INTERPRETATION: THE INTERPRETATION OF LAWS ‘FOR THE BENEFIT OF’ ABORIGINAL PEOPLE

Statutory interpretation is an ‘art’, not a science.⁶⁴ Courts traditionally are bound to give effect to the ‘ordinary and plain meaning’ of a statute where the words used are capable of only one construction.⁶⁵ More recently, however, the courts have exhibited an increased willingness to depart from the literal meaning of a statute where that meaning ‘does not give effect to the purpose of the legislation’.⁶⁶ The ascendancy of this purposive approach is bolstered by legislation concerning the interpretation of statutes that enjoins courts to prefer a construction which promotes the purpose or object of an Act to one which does not.⁶⁷ Legislation in all jurisdictions except South Australia now also permits the use of extrinsic materials to determine the meaning of legislation or the context in which the law was enacted, whether or not there is a specific ambiguity in the words.⁶⁸

However, this is not to say that extrinsic evidence ought to be admitted in a particular case. As Hal Wootten points out, courts are not established ‘for the purpose of ascertaining truth’, but are rather ‘machinery to bring disputes between parties about certain kinds of issues to an end in an acceptable way’.⁶⁹ Consequently, there are limits upon a court’s ability to consider ‘a wealth of information which a court, in a practical sense, cannot properly digest’.⁷⁰ Courts are traditionally reluctant to consider historical evidence which is likely to be hotly contested: and there is little doubt about the controversial nature of evidence as to whether the legislative purpose of the *Aboriginals Ordinance* was to authorise or condone conditions amounting to slavery.

On the other hand, as Justin Malbon points out, this does not imply that courts should maintain a ‘studied ignorance of history’.⁷¹ To similar effect, Goldsworthy has argued in favour of courts taking account of extrinsic evidence in their search for the original or intended meaning of constitutional or statutory provisions, even where such a task may be difficult or contested:

64 Lord Steyn, ‘The Intractable Problem of the Interpretation of Legal Texts’ (2003) 25 *Sydney Law Review* 5, 8.

65 *Higgon v O’Dea* [1962] WAR 140.

66 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 421–3, cited by the High Court with approval in *Bropho v Western Australia* (1990) 171 CLR 1, 20.

67 See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; and *Interpretation Act 1978* (NT) s 62A.

68 See *Acts Interpretation Act 1901* (Cth) s 15AB; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408. See generally discussion in Patrick Parkinson, *Tradition and Change in Australian Law* (3rd edition, 2005) 222.

69 Hal Wootten, ‘Conflicting imperatives: pursuing truth in the courts’ in Iain McCalman and Ann McGrath (eds), *Proof and Truth: the Humanist as Expert* (2003) 15, 16–17.

70 Malbon, above n 40, 86.

71 *Ibid* 86.

once it is understood that the clarification of a statute's meaning requires taking account of all relevant evidence of legislative intention, then it should be appreciated that there can be a wide variety of evidence, that some pieces of evidence may contradict others, and that a final judgment requires weighing them against one another. The difficulty of the task should not impugn its authenticity ... Contextual evidence of the legislature's intentions is not an optional extra, to be taken into account at the judges' discretion only when a statute is unclear and judicial creativity is required to clarify it. On the contrary, it helps to determine what statutes mean: what the law is, rather than what it ought to be.⁷²

These policy issues surrounding the question of admissibility of extrinsic evidence have largely been discussed in the context of constitutional – rather than statutory – interpretation. The High Court has referred to historical evidence in numerous cases for the purpose of ascertaining the meaning of constitutional provisions. In *McGinty v Western Australia*, for example, McHugh J stated that the *Constitution* should be interpreted 'according to the natural and ordinary meaning of its text, read in the light of its history'.⁷³ There are compelling arguments to the effect that the true meaning of the 'race' power under section 51(xxvi) can only be understood by 'considering the historical circumstances of the creation of the provision and the meaning that was attached to race'.⁷⁴ However, such policy arguments are equally applicable to the process of statutory interpretation, particularly when they relate to what is in effect a question of constitutional invalidity.

In addition, case law both before and after *Kruger and Bray* provides support for the use of extrinsic materials in searching for the 'intent' of statutes applicable to Aboriginal people. In an early such case, *Namatjira v Raabe*,⁷⁵ the well-known Aboriginal artist Albert Namatjira appealed against his conviction for supplying liquor to a ward, contrary to the *Licensing Ordinance 1957* (NT). Namatjira argued that the *Welfare Ordinance* was unconstitutional because it was not a law for the 'peace, order and good government of the said Territory' and hence was not a law authorised by section 4U of the *Northern Territory (Administration) Act*. According to Kriewaldt J, summarising the defence argument:

[t]wo examples were put forward of laws that would be outside the ambit of the power conferred on the Legislative Council: (a) a law for the periodical sacrifice of human beings, and (b) a law for the enslavement of a part of the population of the Northern Territory. The second step in the argument was that any law which interfered drastically with the liberty and property and status of a substantial part of the inhabitants of the Territory (to such an extent that the feelings of all decent people were outraged) could not be a law for the peace, order and good government of the Territory. The final step in the argument was that the *Welfare Ordinance* did transgress beyond what was authorised by the words 'peace, order and good government' so defined.⁷⁶

72 Goldsworthy, above n 45, 11.

73 (1996) 186 CLR 140, 230 ('*McGinty*'). See also *Victoria v Commonwealth* (1996) 138 ALR 129, 138–44; *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104, 197; and *Cheatle v The Queen* (1993) 177 CLR 541, 560–2.

74 Malbon, above n 40, 80.

75 (1958) NTJ 608.

76 *Ibid* 616.

Justice Kriewaldt considered that the words ‘peace, order and good government’ could not be interpreted as restricting the Legislative Council’s powers so that they could only enact what the Court considered to be ‘wise legislation’. He added that:

[t]he safeguard the inhabitants of the Territory have against the passage of Ordinances providing for human sacrifice or slavery rests not on any limitation to be found in the words ‘peace, order, and good government’, but on the fact that the Northern Territory is a civilised community. It is inconceivable that either the nominated or the elected members of the Legislative Council would vote for such legislation.⁷⁷

In any case, even if the words did constitute such a restriction, Kriewaldt J considered that the history of the legislation’s passage through Parliament clearly indicated that the *Welfare Ordinance* should be ‘interpreted as if it were in form what it is in fact, an Ordinance designed to extend help and guidance to the Aboriginals of the Northern Territory. So regarded, the Ordinance is clearly a law for the peace, order and good government of the Territory.’⁷⁸

The defence argument, according to Kriewaldt J, was based on the contention that ‘the liability to be declared a “ward”... is based on standards of uncertain meaning and capable of capricious application’.⁷⁹ This ‘capricious’ quality arose from the fact that ‘the Ordinance could be applied to all (or nearly all) inhabitants of the Territory and not only to those who were Aboriginals’.⁸⁰ While only Aboriginal people had hitherto been declared wards, there was nothing in the *Welfare Ordinance* to prevent white people from being so declared in future. This led Kriewaldt J, rather paradoxically, to cite the legislative history of the *Welfare Ordinance* – in particular the fact that it was defeated in its original form by members who feared that it would be applied to non-Aboriginal as well as Aboriginal people – as conclusive of the fact that it was, indeed, an Ordinance for the ‘peace, order and good government’ of the Territory. Justice Kriewaldt rejected the constitutional argument, along with the other arguments advanced in the plaintiff’s cause. *Namatjira* did not pursue the constitutional argument on his unsuccessful appeal to the High Court.⁸¹

By modern standards, it seems odd that Kriewaldt J should have accepted that the legislation satisfied the ‘peace, order and good government’ test because it affected the civil rights of a part of, rather than all, the inhabitants of the Territory. Nevertheless the result in *Namatjira* is well within established principle and consistent with the High Court’s later decision in *Kruger and Bray*.⁸² In any case, the significant point for the current discussion is that Kriewaldt J was prepared to refer to the legislative history of the *Welfare Ordinance*, including parliamentary debates, as a guide to determining whether it

77 Ibid 616–7.

78 Ibid 617–8.

79 Ibid 617.

80 Ibid.

81 *Namatjira v Raabe* (1959) 100 CLR 664.

82 That is, both decisions accept that the legislation with which they are concerned has a beneficial intent: *Namatjira v Raabe* (1959) 100 CLR 664; *Kruger and Bray* (1997) 190 CLR 1.

satisfied the ‘peace, order and good government’ test. This stands in contrast to the more restrictive approach to constitutional and statutory interpretation taken in *Kruger and Bray*.

More recently, in *Re Thompson: Ex parte Nulyarimma*, the trial judge, Crispin J, took into account the legislative history of the ‘Ten Point Plan’ and the *Native Title Amendment Act 1998* (Cth), in assessing whether this legislation exhibited a genocidal intent.⁸³ Nevertheless, he found no evidence to suggest that this legislation exhibited such an intent. On appeal in *Nulyarimma v Thompson*, the Full Court agreed with Justice Crispin’s conclusion.⁸⁴ Again, however, it appears to have been quite willing to consider the ‘legislative policy’ leading to the formulation of the Ten Point Plan, albeit once again in a manner adverse to the arguments advanced by the Aboriginal appellants.

V EXTRINSIC EVIDENCE AND THE *ABORIGINALS ORDINANCE*

It seems clear, then, that an argument that the *Aboriginals Ordinance* or its successors were repugnant to British anti-slavery laws would only succeed if an Australian court would have to adopt a broader approach to statutory interpretation than that adopted in *Kruger and Bray*. It would be necessary to follow an originalist approach in which it is acceptable to look at evidence of parliamentary intent beyond the beneficial purpose expressed on the face of the legislation. Such an approach would not, however, be inconsistent with case law, not to mention the views on constitutional and statutory interpretation expressed by academic commentators such as Storey, Clarke, Malbon and Goldsworthy.

What type of evidence might be relevant to the question of whether the ‘true nature’ or intent of the *1918 Ordinance* was to create or authorise conditions amounting to slavery? Firstly, relevant evidence might be found in the provisions of the Ordinance itself. As was noted above,⁸⁵ the *1918 Ordinance* made it easy for employers to avoid paying wages in a variety of circumstances and particularly where he was allegedly maintaining the employee’s relatives and dependants. In addition, as Clarke has pointed out, the *1918 Ordinance* contained detailed and oppressive controls over freedom of movement and association,⁸⁶ including the right to marry or have sexual relations. Taken in conjunction with

83 *Re Thompson: Ex parte Nulyarimma* (1998) 148 FLR 285, 300.

84 (1999) 96 FCR 15, 207.

85 See above n 6.

86 Under section 15 of the *1918 Ordinance*, for example, a Protector could ‘if he thinks fit give authority in writing to any person so desiring it for the removal of any aboriginal, or any female half-caste, or any half-caste male child under the age of eighteen years, from one district to another’. Provisions requiring the Protector or Director’s consent for marriage existed under the 1918 legislation and continued even after the passing of the *Welfare Ordinance*. Under the 1953 legislation, no person was permitted to ‘habitually live with a ward’ unless he was ‘a ward or a relation of the ward’ (s 61), and a male other than a ward was prohibited from having or attempting to have sexual intercourse with a ward (s 64). A non-ward was not permitted to marry a ward without the consent of the Director (s 67). See generally Clarke, above n 42, 223–4.

the employer's ability to employ a person for no wages, it is arguable that this system of control amounted to 'slavery'. Even where the law appeared to require a 'reasonable' standard – for example in the provision of accommodation to Aboriginal employees – standards were so vague as to be unenforceable.

Second, evidence as to the 'true' nature or intent of the Ordinance could be found in parliamentary debates. Admittedly, such evidence would not always be favourable to the argument that the intent was to create or authorise conditions of slavery. For example, the first legislation relating to Aboriginal 'protection' introduced into the South Australian Parliament appears to have been designed to prevent – not authorise – practices amounting to slavery, including the kidnapping of young boys and girls and requiring them to work and to provide sexual companionship on stations far away from their homeland.⁸⁷ On the other hand, opponents of the legislation referred to the system which required employers to obtain permits to employ Aboriginal workers as 'the thin edge of the wedge of slavery'.⁸⁸

Thirdly, a court might consider evidence from debates or official reports preceding the numerous amendments to the original Ordinance. Such evidence might reveal less benevolent motivations than those expressed in parliamentary debates. For example, Baldwin Spencer was a highly influential Chief Protector shortly after the Commonwealth took over administration of the Northern Territory in 1911. His *Preliminary Report on the Aborigines of the Northern Territory*, provided to the Commonwealth in 1913, made the following comments:

while it is true that, in some parts, the aboriginal gives trouble, it is equally true that, at the present day, practically all the cattle stations depend on their labour and, in fact, could not get on without it, any more than the police constables could. They do work that it would be very difficult to get white men to do and do it not only cheerfully but for a remuneration that, in many cases, makes all the difference at the present time between working the station at a profit or a loss.⁸⁹

Other official correspondence might add to this picture of the 'true nature' of the Ordinance. During the early years of the Commonwealth's administration of the Northern Territory, the White Australia policy meant that it was no longer

87 The legislation, entitled 'An Act for the Protection and Care of the Aboriginal and Half-Caste Inhabitants of the Province of South Australia, and for Other Purposes (SA)' was introduced into the South Australian Parliament in July 1899. It was drafted by Charles Dashwood, Judge and Government Resident of the Northern Territory from 1892. The legislation was never passed. For discussion of the Bill, see Peter Elder, *Northern Territory Charlie: Charles James Dashwood in Palmerston 1892–1905*, Honours thesis, Australian National University, 1979, 55–60, and Tony Austin, *Simply the Survival of the Fittest: Aboriginal Administration in South Australia's Northern Territory 1863–1910* (1992) 46. See also, for discussion of the motivations for the *Aborigines Protection and Prevention of the Sale of Opium Act 1897* (Qld) on which the Northern Territory legislation was based, Malbon, above n 40, 87–8.

88 This comment was made by the influential FJ Gillen, at that time a Sub-Protector of Aborigines, in reply to a question about permits and written employment agreements. He stated that '[i]t is the thin edge of the wedge of slavery to introduce the permit system in the case of the blacks': PP (SA), 1899, no 77, 99, referred to in Elder, above n 87, 58. For a discussion of Gillen's opposition to the Bill, see also Austin, *Simply the Survival of the Fittest*, above n 87, 68–9.

89 W Baldwin Spencer, *Preliminary Report on the Aborigines of the Northern Territory*, Department of External Affairs (1913) 12.

politically possible to advocate the development of the Northern Territory through the use of cheap ‘coloured’ (particularly Chinese) labour. As a result, as Mulvaney and Calaby point out,

[t]he Aborigines as an alternative labour force consequently became a consideration of paramount importance. It is likely that [Northern Territory Administrator] Gilruth attached much significance to it at this period, although the cheap labour issue was one requiring low-key treatment.⁹⁰

For example, in 1913, Atlee Hunt, the influential Department Secretary to the Minister for External Affairs, visited the Territory. He wrote that

[i]n a country where white domestic service is unprocurable, and white labour generally is expensive and unreliable, the presence of these docile, cheap, cheerful, loyal people alone makes life tolerable.⁹¹

In general, there is ample evidence that the legislature was highly sensitive to the concerns of employers, particularly pastoralists, who argued for decades that low wages and vague or unenforceable accommodation and other standards were essential to the pastoral industry’s survival. Evidence exists that amendments reducing wage levels, or widening the loopholes allowing pastoralists to avoid paying wages altogether, were passed in response to pressure from employer groups. The *Aboriginals Ordinance 1933*, which reduced pay and conditions and widened the loophole allowing employers to avoid paying wages, was passed following several years of acrimonious debate on the question of ‘half-caste’ and other employment on cattle stations. The arguments of the pastoral industry on the issue were successful following the election of a conservative government in 1932.⁹²

On the other hand, when officials did not act in accordance with the wishes of pastoralists, they could face repercussions. For example, in 1930, when Chief Protector Cecil Cook induced the Government Resident to introduce new regulations improving pay and conditions for ‘half-caste’ apprentices on cattle stations, section 67 of the *1918 Ordinance* was amended to take away the Government Resident’s power to make regulations under the Ordinance.⁹³ According to Cook, this was the result of the fact that he had introduced the *Apprentices (Half-Castes) Regulations* without reference to Canberra.⁹⁴

In summary, responsible officials including law-makers were aware of the harsh conditions prevailing for most Aboriginal employees, particularly in the pastoral industry. On occasions they used the term ‘slavery’ to describe those

90 DJ Mulvaney and JH Calaby, *So Much that is New: Baldwin Spencer 1860–1929* (1985) 312.

91 Ibid 312.

92 See *Amendment of Apprentices (Half-Castes) Regulations*, 16 June 1932, and general discussion in Tony Austin, *Never Trust a Government Man*, above n 7, 206. In 1933 the wages of all pastoral workers were reduced by 20 per cent: at 264.

93 The word ‘Minister’ was substituted for the word ‘Administrator’ where it occurred: see Commonwealth, ‘Ordinance No 5’, *Commonwealth of Australia Gazette*, 22 May 1930, 1080.

94 See Interview with Dr C E (Mick) Cook, NTRS 22, TS 179, Northern Territory Archives Service (Darwin) 38. Cook also induced Administrator Weddell to ‘announce, again without reference to Canberra, an increase in pay for Aboriginal drovers’: see Austin, *Never Trust a Government Man*, above n 7, 260–1, 204.

conditions. However, they were also susceptible to arguments by the pastoral lobby that their industry would not survive, and that northern development would thereby be impeded, if employers were required to pay wages to their Aboriginal employees. As a result the *1918 Ordinance* was amended on various occasions to entrench and legitimise the non-payment of wages.

More generally, the laws were framed, and then amended, in order to ensure the continued supply of cheap Aboriginal labour on which the economic survival and development of the Territory was perceived to depend. The fact that the laws also had more benevolent purposes – particularly an attempt to restrain the worst excesses of the frontier, such as rape, murder, and death through willful neglect – is neither fatal to, nor necessarily inconsistent with, the argument that its true nature or purpose was to authorise and perpetuate conditions amounting to ‘slavery’.

Those laws remained in force until 1957, when the *Wards’ Employment Ordinance 1957* (NT) came into force. It is even arguable – although the argument is weaker – that the laws allowing Aboriginal workers to be paid less because they were ‘wards’ and ‘slow workers’, continued to legitimise frontier practices amounting to ‘slavery’ until the coming of equal wages in 1968.⁹⁵

One further difficulty stands in the way of a successful argument on constitutional grounds. According to Brennan CJ in *Kruger and Bray*:

[t]he *Constitution* reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes of action enforceable by awards of damages are created by the common law (including for this purpose the doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions.⁹⁶

This point is also relevant to an argument that the *Aboriginals Ordinance 1918–1953* was invalid for breach of British anti-slavery laws. Even if the plaintiffs were able to establish that the *Aboriginals Ordinance 1918–1953* was wholly or partially invalid, they would still have to establish an intention in the anti-slavery laws, or more generally at common law, to create a cause of action against the government for breach of its provisions.⁹⁷

However, a declaration that the *Aboriginals Ordinance 1918–1953* was wholly or partly invalid is of primarily symbolic, not monetary, significance. At a time when the Prime Minister of Australia has just apologised to Aboriginal people for the policies giving rise to the Stolen Generations,⁹⁸ the importance of such a symbolic declaration should not be underestimated.

95 See *In the matter of the Conciliation and Arbitration Act 1904–1965, and of the Cattle Station (Northern Territory) Award 1951* (1966) 113 CAR 651 (‘Equal Wages decision’).

96 *Kruger and Bray* (1997) 190 CLR 1, 46–7 (Brennan CJ); see also Toohey J at 93, Gaudron J at 125–6 and Gummow J at 146–8.

97 The factors relevant to whether such a cause of action exists are arguably not dissimilar to those relevant to whether a cause of action for breach of statutory duty exists against the government in tort.

98 See Parliament of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–73 (Kevin Rudd, Prime Minister).

VI CONCLUSION: THE 'HISTORY WARS' AND THE QUESTION OF STATUTORY INTENT

The political debate surrounding the Prime Minister's Apology of February 2008 is in part a debate about what matters it is appropriate to take into account in the process of 'judging the past'. While the Prime Minister's speech gave dignity and weight to the suffering of Aboriginal people, the Opposition Leader emphasised the 'good intentions' of 'decent Australians' who had carried out government policies in ignorance of their long-term consequences.⁹⁹ Also, the Prime Minister's speech referred – if largely implicitly – to a broader range of materials bearing upon the question of the 'intent' of those who passed legislation authorising Aboriginal child removal on the basis of race, including for example, the eugenicist and social Darwinist beliefs prevalent in the 1930s.¹⁰⁰ Public discussion at the time of the Apology also emphasised the apparent dichotomy between the 'good intentions' of those who created and implemented the policies, and their evil effects.¹⁰¹

These cracks in the bipartisan façade are all that is currently visible of an only slightly older, but often uglier, debate – the Howard-era 'history wars'. One manifestation of such debates is the historical controversy about whether 19th century colonial legislatures may be said to have pursued policies of 'genocide'

99 Ibid 173–7 (Brendan Nelson, Leader of the Opposition). The speeches of the Prime Minister and Opposition Leader reveal a distinct division on the question of whether it is apologising for policies of racist malignity, or simply for good intentions gone awry. On the former view, Australia is deeply morally tainted by legislation designed – in spirit if not in letter – to hasten the extinction of Aboriginal people as a distinct cultural group, as a result of which Aboriginal people endured intense and continuing suffering. On the latter, Australia may say 'sorry' for the effects of past policies – for example, for the abuse suffered by Aboriginal children in institutions – but the apology remains ambivalent, tempered by the knowledge that the policies were designed and executed with good intentions, 'in the best interests' of the Aboriginal people concerned. Thus, the Prime Minister's speech focused upon the effect of past policies – taking into account the victim's perspective – while the Opposition Leader focused upon the 'intentions' of legislators and administrators. Dr Nelson also referred to our wartime dead, and the 'brutally harsh' conditions endured by the early white settlers of this land.

100 The Prime Minister noted that the policy of forced removal 'was taken to such extremes by some in administrative authority that the forced extractions of children of so-called mixed lineage were seen as part of a broader policy of dealing with the problem of the Aboriginal population'. One of the most notorious examples of this approach was from the Northern Territory Protector of Natives, who stated: 'Generally by the fifth and invariably by the sixth generation, all native characteristics of the Australian Aborigine are eradicated.' The problem of our "half-castes" – to quote the protector – 'will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white': see Rudd, above n 98, 169. It is, however, notable that the Prime Minister refers to the 'administrative' rather than political authority of those with such views. Arguably this implies that such views or policies were outside the true nature or intent of the legislation.

101 For example, former patrol officer Harry Kitching, in an interview with *The Age*, stated that he supported Rudd's apology, and looked back with 'a certain sadness, even anger', at the policy of removal of part-Aboriginal children: 'I didn't like that policy of having to take children just because they were half-caste.' Nevertheless he said that 'I would still have done what I did', that his intentions in removing individual children were to try 'to improve [the children's] living conditions', and that removals were in all but one case at the request of the mother. Kitching was involved in the removal of Peter Gunner, one of the plaintiffs in *Cubillo v Commonwealth* (2000) 103 FCR 1. See Andrew West, 'A man with good intentions looks back in sorrow at stolen generations', *The Age* (Melbourne), 9 February 2008, 3.

against Aboriginal people.¹⁰² As has been noted above, debate has also been joined – if more tentatively – on the question of whether governments prior to the 1950s pursued policies of Aboriginal child removal with a genocidal intent.¹⁰³

For historians, these are in part debates about whether the effects of state policy – particularly where those effects were known to legislators¹⁰⁴ – can be taken into account in assessing the question of genocidal ‘intent’. Some historians regard as relevant only the benign sentiments usually expressed by colonial legislatures, and argue as a consequence that there is little or no evidence to suggest that extermination of Aboriginal people(s) was deliberate state policy.¹⁰⁵ Others have suggested that:

[s]uch a perspective insulates the state from powerful social forces that push for the expulsion or extermination of native peoples on coveted land ... The intentionalist paradigm of genocide is really a species of totalitarian theory. It is not equipped with the intellectual tools to consider the issues raised by colonialism.¹⁰⁶

At a legal level, these are questions of statutory interpretation. They are questions of how far, in assessing Parliament’s intention, it is appropriate to take into account extrinsic materials, such as the statements of politicians and bureaucrats, evidence from historians about social and community standards, not to mention Aboriginal oral evidence.

This article has argued that – *Kruger and Bray* notwithstanding – there is no reason why extrinsic evidence bearing on the question of the ‘intent’ of the statute should not be considered in a future case. Such evidence might be relevant

102 See, eg, A Dirk Moses, ‘Genocide and Settler Society in Australian History’ in A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (2004) 3, 25.

103 See discussion in Part I, above, and in Manne, above n 39.

104 Interestingly, Moses cites a concept of intention prevalent in 19th century British criminal law in support of the argument that the state should be liable for more than what it could be said strictly to have ‘intended’. This is the notion that a person was ‘inferred to have intended the ‘natural consequences’ of his or her actions: if the result proscribed was reasonably foreseeable as a likely consequence of his or her actions, the presumption was that the accused had intended the result’: Moses, above n 102, 28.

105 Rather, responsibility for such acts must be sheeted home to ‘scurrilous whites, such as escaped or former convicts, rather than to the colonisation project as a whole’: Moses, above n 102, 25.

106 *Ibid* 26.

to whether the overall nature or purpose of the legislation was to authorise conditions amounting to slavery, even where a single section suggested a beneficial purpose. Extrinsic evidence of this type might not always be consistent. It might reveal motives which today we would regard as both 'good' and 'bad'. It might, however, reveal a truer picture of the past than that suggested by a bald restatement of the legislation's benign words.