The State and the Stolen Generation: Recognising a Fiduciary Duty

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This article examines the liability of the State as fiduciary for the Stolen Generation. The Stolen Generation is a term usually used to describe indigenous people removed as children from their families. Anglo-Australian fiduciary law is designed to protect economic interests, but it is the fundamental human interests of the Stolen Generation that are in need of protection. A re-formulation of fiduciary principles, by imposing positive duties, is needed in order to protect these non-economic interests.

There has been limited recognition of a fiduciary duty owed to indigenous people, based in native title and possibly more broadly applicable. The Canadian development of fiduciary principles provides useful guidance for the extension of fiduciary law. Canadian courts have recognised that fiduciary law protects non-economic interests, and have done this through the imposition of prescriptive, or positive, duties on fiduciaries.

The role of guardian is a sub-type of fiduciary, carrying additional, more onerous duties than other types of fiduciary. The law of guardianship carries specific positive fiduciary duties relating to the care and protection of wards. This law is particularly applicable to the Stolen Generation. This is a sound basis on which fiduciary law can develop in a principled manner to protect the non-economic interests of the Stolen Generation. The application, specific to the situation of the Stolen Generation, would be a controlled development of the doctrine, enabling the legitimate, non-economic interests of the Stolen Generation to be recognised under the appropriate doctrine of fiduciary duties.

INTRODUCTION

The law of fiduciary obligations is flexible, and open to principled development.[1] Its basis in relationships of trust and confidence make it a particularly appropriate avenue of redress for the Stolen Generation. This article aims to examine the applicability of fiduciary principles to the Stolen Generation, and the

* This article is based on an Honours thesis which was submitted as part of the bachelor of Laws course at Monash University. I am grateful to Elizabeth Lanyon and Susan Barkehall-Thomas for comments on drafts of this article.

1 For example, joint ventures were recognised as a new category of fiduciary relationship by the High Court of Australia in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

developments necessary in Australian fiduciary law to enable the principles to be applied fully.

A factor of the Stolen Generation litigations is that the actions are being brought up to fifty years after the alleged damage occurred. This is mainly due to the slow accrual of resulting conditions, and lack of access to medical assistance. As a result, the limitation periods of tortious claims have expired. The advantage of bringing an action for breach of fiduciary duty is that equitable actions are not generally subject to limitation periods.[2] However, the equitable defence of laches can still apply, and at the discretion of the judge, an action in fiduciary duty can be barred. There are also advantages in remedy: equitable compensation is not limited by heads of damage or to economic loss.[3]

Australian courts will not generally allow an action for breach of fiduciary duty where there is an adequate remedy available in tort. However, in circumstances involving abuse of trust, fiduciary law offers a more appropriate action, as fiduciary principles capture 'the essential nature of the wrong.'[4] For example, Parkinson is of the view that in cases of sexual abuse of children by members of religious organisations, fiduciary law is a more appropriate cause of action than tort.[5] For Stolen Generation plaintiffs, bringing a claim for breach of fiduciary duty rather than tort would allow compensation to be awarded in 'meritorious claims' where limitation periods would otherwise stand in the way.[6]

The current law in Australia, and the possibility of using the Canadian formulation of fiduciary duties, are discussed in the first part of this article. The first section outlines the typical fact situation arising from the Stolen Generation, and the claims for breach of fiduciary duty that have been made in the past. It will be shown that, in order to adequately protect the fiduciary interests of the Stolen Generation, it is necessary to recognise and protect non-economic interests as fiduciary, through the imposition of prescriptive duties.

There are several ways this can be done in a principled expansion of the fiduciary concept. One is to recognise the special relationship between the State and indigenous people, giving rise to particular duties that differ from those imposed in ordinary fiduciary relationships. This has been foreshadowed in the context of native title, and its application to the Stolen Generation is discussed in the second section. Alternatively, fiduciary principles could be expanded to encompass non-economic loss, as has been done in Canada. This will be discussed in the third section.

2 The exception in Australia is the *Limitation Act* 1969 (ACT): s11(1) applies a six-year limitation period for actions in tort and fiduciary duty.

3 Michael Tilbury, 'Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (LBC Information Services, Sydney, 1996, 790.

4 *Norberg v Wynrib* (1992) 92 DLR (4th) 449 at 484 (McLachlin J).

5 Patrick Parkinson, 'Fiduciary Obligations', in Patrick Parkinson (ed), above n 3, 374.

6 Ibid.

Suggestions for the principled development of fiduciary law are given in the second part of the article. The relationship between the State and the Stolen Generation is an exceptional one, with a greater number of, and more onerous, duties than other fiduciary relationships. Such duties can be found in the Law of Guardian and Ward, which dates back to the 17th Century, but has not been applied in recent times. These duties are specific and positive, providing guidance for a guardian in how to properly care for a ward. This law remains relevant, and its application to the Stolen Generation is discussed.

It will be shown that breach of fiduciary duty is an appropriate action through which members of the Stolen Generation can find redress. The alternative basis suggested for imposing positive fiduciary obligations of the State demonstrates that in this situation, fiduciary duty is not a supplement for tort. The duties discussed indicate that guardianship is a broader concept than negligence and carries broader duties than those of the duty of care. This would enable a principled extension of fiduciary law to encompass non-economic loss.

Part 1: Existing Fiduciary Law and the Stolen Generation

THE STOLEN GENERATION CLAIMS

The Stolen Generation

The term 'Stolen Generation' has been applied to indigenous people removed from their families as children. From the early 20th Century until the 1960s, there was a commonly held view that 'part-Aboriginal' children should be removed from Aboriginal culture and raised and educated as part of mainstream white society. As a result, various States pursued a practice of removing these children from their families and detaining them in institutions. During the later years of this policy, children were placed in foster homes with white families.

The experiences of members of the Stolen Generation are varied. Typically, they were removed as children from their families and taken into institutional care until the age of eighteen. Some were forcibly removed; others were handed over to authorities with the apparent consent of their mothers. For the purposes of this article, the experiences of three plaintiffs will be used as typical of the Stolen Generation: Joy Williams, Peter Gunner and Lorna Cubillo.

Joy Williams

Joy Williams was removed from her mother in 1942 as an infant, and placed in the control of the Aboriginal Welfare Board (the AWB) under s7(2) of the

Aborigines Protection Act 1909 (NSW)[7]. She was placed in a United Aborigines Mission home at Bombaderry, where she remained until 1945, when at the age of four-and-a-half she was transferred to Lutanda Childrens' Home. She remained there until she was 18, leaving in 1960.

Ms Williams claimed that she suffered physical and psychological harm during her childhood. She claimed that the Board had failed to adequately supervise her at Bombaderry and Lutanda. She asserted that, had the Board made proper inquiries of the staff at both homes, they would have realised that her behaviour indicated an attachment disorder, and that she was at risk of developing Borderline Personality Disorder. She claimed that she should have received medical care.

Ms Williams developed Borderline Personality Disorder, a substance abuse problem and an attachment disorder. She attributes these problems to the lack of opportunity to bond with and become attached to a caring adult during her childhood, amounting to maternal deprivation. Despite displaying symptoms of these disorders as a child, no treatment was sought for Ms Williams. She was not informed of her Aboriginality, and was physically and sexually abused.[8]

Lorna Cubillo

Mrs Cubillo was removed from her family under the *Aborigines Ordinance 1918* (NT), which provided in s6 that the Director of Native Affairs could at any time

> 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, and for that purpose may enter any premises where the aboriginal or half caste is or is supposed to be, and may take him into his custody.

Mrs Cubillo and 15 other children were taken by truck from the Phillip Creek Settlement to the Retta Dixon Home in Darwin in 1947. Both the settlement and the home were overseen by the Aborigines Inland Mission. The standard of accommodation at the Retta Dixon Home was low, and the facility was overcrowded. Mrs Cubillo suffered harsh treatment and lack of affection at the hands of missionaries. She was forced to practise the Christian faith, and was told that her culture was 'heathen.'[9] She was told to forget about her family. She was 'flogged' for speaking her Aboriginal language.[10] Mrs Cubillo was also

7 *Williams v Minister, Aboriginal Land Rights Act 1983* [2000] NSWCA 255.

8 See: 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) Part Three, for details on the impact the experiences had on the lives of the witnesses to the inquiry.

9 *Cubillo v Commonwealth of Australia; Gunner v Commonwealth of Australia* (2000) 174 ALR 97, 277 (hereafter *Cubillo*).

10 Ibid 287.

sexually abused by a missionary at the home.

Mrs Cubillo suffers post-traumatic stress disorder and depression, caused by incidents in her childhood. She has not re-established any connection with her Aboriginal community.

Peter Gunner

Mr Gunner was born in 1948 in an Aboriginal community at Utopia Station, where he lived a happy and healthy life until 1956. Patrol officers recommended that he be removed to an institution. He was admitted to St Mary's Hostel in Alice Springs, which was run by the Australian Board of Missions. Mr Gunner was made a ward under the *Welfare Ordinance 1953* (NT),[11] which declared the Director of Welfare guardian of all wards.

St Mary's Hostel was badly administered and under-staffed. Accommodation was below standard and unhygienic. Mr Gunner was flogged for using his Aboriginal language; for wetting his bed; and for attempting to run away. He was the victim of physical and sexual abuse by a missionary at the Hostel. Mr Gunner developed chronic depression as a result of his experiences.

The Fiduciary Claims

Williams v Minister, Aboriginal Land Rights Act 1983

Ms Williams brought an action against the Minister responsible for the implementation of the *Aborigines Protection Act* claiming breach of fiduciary duty, negligence and false imprisonment. An application was made for extension of time under s60G(2) of the *Limitation Act 1969* (NSW), which was appealed to the NSW Court of Appeal.[12] Kirby P (as he then was) and Priestly JA granted the application; Powell JA dissented. The Court of Appeal decision is referred to as *Williams (No.1)*. The issues of the case were heard at first instance by Abadee J in the NSW Supreme Court case referred to as *Williams*.[13]

It should be noted that it was found in *Williams* that Ms Williams was not a member of the Stolen Generation, as Ms Williams' mother voluntarily gave her up to the control of the AWB. However, it is suggested that Ms Williams' experiences once she left her mother's care were typical of children removed during that time under the various statutes, whether voluntarily given up or forcibly removed.

[11] The *Welfare Ordinance* repealed the *Aborigines Ordinance* 1918 (NT).
[12] *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497.
[13] *Williams v Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843. The applicant then appealed to the NSW Court of Appeal (*Williams v Minister* [2000] NSWCA 255), but the court did not make extensive comment on the issue of fiduciary duties, so the appeal is not referred to.

In *Williams (No.1)*, Kirby P held that the AWB was the statutory guardian of Ms Williams, and was therefore arguably under a fiduciary duty in providing for her custody, maintenance and education. He stated that 'it is distinctly arguable that a person who suffers as a result of a want of proper care on the part of a fiduciary, may recover equitable compensation from the fiduciary for losses occasioned by the want of proper care.'[14] He therefore found that Ms Williams' action was not statute-barred.[15]

Abadee J in *Williams* distinguished Kirby P's views on the basis of changes made to the actions pleaded in the interim. He agreed with Powell JA's dissenting approach of assuming that a fiduciary relationship arose in a situation where a person or body undertakes the role of parent or guardian of a child, but refusing to extend the duties applicable to that relationship. He refused to find that such a fiduciary relationship invoked the duties alleged by Ms Williams. His Honour reviewed the use of fiduciary principles in Canada, where non-economic interests have been protected under fiduciary law. He refused to extend fiduciary principles in Australia to cover the 'fundamental human and personal interests'[16] claimed by Ms Williams. His Honour found that, although Ms Williams was a ward, the Board was not her guardian. Therefore the duties attaching to guardianship did not apply to this case.[17] Alternatively, the relationship of guardian and ward is not one of the established categories of fiduciary relationship, and one was not established on the facts.

A successful claim of breach of fiduciary duty was therefore precluded on several fronts. If a relationship could be established, which was not conceded, the scope of such relationship did not encompass the personal, non-economic interests claimed.

Cubillo v Commonwealth

The cases of Mrs Cubillo and Mr Gunner were heard together before the Federal Court at first instance.[18] The plaintiffs claimed that a fiduciary relationship existed between the Commonwealth and each of them. The relationship arose from the actions of Commonwealth servants and agents in removing and detaining the plaintiffs, and was based on the power and discretion of the Commonwealth and the corresponding vulnerability of the plaintiffs, and the assumption of responsibility for them made by the Commonwealth. The plaintiffs claimed that the Director of Native Affairs breached several fiduciary duties owed to them, including a duty to act in their interests and to ensure they

14 *Williams (No.1)* [2000] NSWCA 255, 511.
15 Priestly JA concurred with Kirby P; Powell JA dissented.
16 *Williams* [1999] NSWSC 843, [704] quoting McLachlin J in *Norberg v Wynrib* (1992) 92 DLR 4th 449, 499.
17 Ibid 710.
18 *Cubillo* (2000) 174 ALR 97.

were adequately cared for in the institutions. They claimed that the Commonwealth knew of and assisted in these breaches.[19]

O'Loughlin J acknowledged that a fiduciary duty relating to Aboriginal interests could arise.[20] The existence of such a relationship was a question of fact and would depend on the nature of the interests concerned. He examined the current status of Australian fiduciary law, as stated in *Hospital Products v United States Surgical Corporation*[21] (Hospital Products) and *Breen v Williams*.[22] His Honour considered whether the plaintiffs were in a relationship of guardian and ward with the Commonwealth, but did not conclusively decide the issue.

He considered the case of *Paramasivum v Flynn*,[23] in which the Full Federal Court found that sexual abuse of a ward by his guardian was not a breach of fiduciary duty. This decision was based on the premise that Anglo-Australian fiduciary law protects economic interests only. O'Loughlin J looked at the Canadian cases which extended the ambit of fiduciary principles to cover non-economic interests, and decided that this extension was not applicable in Australia. He concluded that it would be 'inappropriate for a judge at first instance, to expand the range of the fiduciary relationship so that it extends, as would be the case here, to a claimed conflict of interests where the conflict did not include an economic aspect.'[24]

His Honour considered that, had an action for breach of fiduciary duty been established, it would be barred by operation of the equitable defence of laches. He found that the plaintiffs had not knowingly delayed bringing an action. However, he found that it would be grossly unfair to allow a case to proceed, if breach of fiduciary duty had been found, due to the inability of the Commonwealth to access the evidentiary materials required to properly defend the claim.

Cubillo - Full Federal Court

The plaintiffs appealed to the Full Federal Court, whose unanimous judgment rejecting the appeal was handed down on 31 August 2001.[25] The Court upheld O'Loughlin J's findings that the Director of the AWB owed fiduciary obligations to the appellants, as their statutory legal guardian, but that the Commonwealth was not vicariously liable as the appellants' guardian. A significant reason for rejecting the use of fiduciary law in this case was the apparent overlap with tort law. As the duties and breaches of the claimed fiduciary duty were largely co-

19 Ibid 499.
20 Ibid 500-501.
21 (1984) 156 CLR 41.
22 (1995) 186 CLR 71.
23 (1998) 160 ALR 203.
24 *Cubillo* (2000) 174 ALR 97, 508.
25 *Cubillo & Gunner v Commonwealth* (2001) 112 FCR 455. Hereafter *Cubillo*

extensive with the claimed duty of care and breach, and the evidence to support each claim was essentially the same, Their Honours found that tort was the appropriate action, not fiduciary duty. They stated that 'Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles.'[26]

With respect, this approach is too broad. The concurrence of tortious and fiduciary liability is well documented. In *Nocton v Lord Ashburton*[27] the House of Lords found a breach of fiduciary duty where the tort of deceit could not be made out. It is argued that concurrent liability means that a fiduciary action does not necessarily conflict with tortious principles, as alleged by the Court. Many relationships, such as solicitor and client, can give rise to contractual, tortious and fiduciary liability.

The Court in this case quoted with approval McLachlin J in the Canadian case of *Norberg v Wynrib*, where her Honour stated that:

> [t]he foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort . . . In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest . . . The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.[28]

The Stolen Generation can be better categorised as being in a fiduciary relationship than one involving contract or tort. The children removed from their parents were not 'independent and equal actors'. They had no choice in their removal or placement in institutions. They cannot be seen as equating to contracting parties. This is a situation where there is overlap between fiduciary law and tort: actions can appropriately be brought in the alternative. The benefit of bringing an action in fiduciary duty is that limitation periods do not generally apply to equitable actions.[29]

The Full Federal Court upheld O'Loughlin J's finding that Mrs Cubillo's removal and detention had been authorised by the *Aboriginals Ordinance*. As a fiduciary obligation cannot modify the operation of a statute, 'no fiduciary obligation could forbid what the legislation permitted.'[30] Their Honours also upheld the finding that Mr Gunner was removed with his mother's permission, and stated that this finding 'leaves no room'[31] for an argument that his removal was in breach of the

26 *Cubillo* (2001) 112 FCR 455, 576.
27 [1914] AC 932.
28 [1992] 2 SCR 226, 272.
29 Except in ACT: above n 2.
30 *Cubillo* (2001) 112 FCR 455, 577.
31 Ibid.

Commonwealth's breach of fiduciary duty. However, they did not go on to consider whether the treatment Mrs Cubillo and Mr Gunner endured after their removal breached the fiduciary duties of the Commonwealth. It is argued that, whether or not their removal was authorised by statute or their parents, Mrs Cubillo and Mr Gunner were owed fiduciary duties arising out of their removal, and those duties were breached by the treatment they received in the years following.

The Court also upheld the finding of O'Loughlin J that, had a claim for breach of fiduciary duty been established, it would have been barred by the equitable defence of laches.

Australian Fiduciary Law and the Stolen Generation Cases

In these cases, the courts have relied upon the traditional formulations of fiduciary relationships. Although the theoretical basis of fiduciary relationships applies particularly well to the Stolen Generation, the circumstances of these relationships do not fit well within traditional formulations of duties and breach.

The modern statement of the characteristics of a fiduciary relationship was made by the High Court in *Hospital Products*[32] and further refined in *Breen v Williams*.[33] For an excellent analysis of current Australian fiduciary formulations, see Professor Glover's *Commercial Equity: Fiduciary Relationships*.[34] It is not necessary for the purposes of this article to go into detail, although it is important to remember that the categories of relationship recognised as fiduciary are not closed;[35] nor are the characteristics of these relationships uniform and settled.

The Australian approach to breach of fiduciary duty is proscriptive: 'it is concerned with the maintenance of fidelity to the beneficiary; and it is activated when the fiduciary seeks improperly to advance his own or a third party's interest in or as a result of the relationship.'[36] Anglo-Australian fiduciary law proscribes the act of placing oneself in conflict, and making an undisclosed profit. Other acts or omissions done in the capacity of fiduciary are not regulated by fiduciary law. This approach is quite narrow, and has been used to confine the scope of the fiduciary action. The conflict and profit rules apply most readily to transactions involving economic loss. Relationships which are fiduciary in character but do not come within an economic context are difficult to fit into the Australian concept of fiduciary law. A new formulation and application of fiduciary duties in the context of the Stolen Generation is needed. One basis for extending fiduciary principles is recognition of the special relationship between the State

32 (1984) 156 CLR 41.
33 (1995) 186 CLR 71.
34 Butterworths, Sydney, 1995.
35 *Hospital Products* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J).
36 *Finn, P, Fiduciary Obligations*, 1977, p 25

and indigenous people, and the fiduciary obligations attaching to that relationship.

A FIDUCIARY DUTY TO INDIGENOUS PEOPLE

The Duty in the USA and Canada

One basis for fiduciary duties relating to removal of children is an application of the duties attached to native title. Fiduciary duties owed to indigenous land holders are well-recognised in North America. Courts in the United States have recognised a general fiduciary duty owed by the State to Native Americans. In *White v Califano*[37] the government was found to have a duty to provide health care for a mentally ill Sioux woman. An appellate court found that the government had a general responsibility regarding the health of Indian people, and the specific power to commit Indians involuntarily to psychiatric institutions. Buti argues that this is analogous to the situation in Australia. The Western Australian government, for example, had the power to remove Aboriginal people from reserves, and children from their homes. Applying the principle in *White v Califano*, the State would be responsible for the health and welfare of Aboriginal people.

However, United States courts have departed considerably from the Anglo-Australian application of fiduciary principles. It is highly unlikely that an Australian court would see *White v Califano* as persuasive authority, as the generality of the duty and application of positive duties is markedly different to the fiduciary principle in Australia today.

Fiduciary principles in Canada and Australia have developed in similar ways, and have been influential in the recognition of a fiduciary duty by some judges in Australia.[38] Canadian courts have recognised that the Crown owes a fiduciary duty to Indian land holders. The leading case is *Guerin v The Queen*[39]. Legislation stated that the only way Indian reserve land could be alienated was by surrender to the Crown. Surrender of reserve land was negotiated by the Crown in a way that disadvantaged the Indian band concerned. The leading judgment of the Supreme Court of Canada was given by Dickson J,[40] who stated that the fiduciary relationship was based in native or Indian title and the fact that the land was alienable only by surrender to the Crown.[41] His Honour said that the

37 *White v Califano* 581 F 2nd 697 (1978), referred to in Tony Buti, 'Removal of Indigenous Children from their Families: The Litigation Path', (1998) 27 *Western Australian Law Review* 203, 210.

38 Especially Toohey and Brennan JJ in *Mabo v State of Queensland (No.2)* (1992) 175 CLR 1, and Brennan J in *Wik Peoples v State of Queensland* (1996) 141 ALR 129.

39 (1984) 13 DLR (4th) 321.

40 Beetz, Chouinard and Lamer JJ concurred.

41 *Guerin v The Queen* (1984) 13 DLR (4th) 321, 334. Hereafter *Guerin*

obligation of the Crown fell short of a trust, and was 'rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.'[42] He concluded that the Crown had breached its fiduciary duty, and was liable to pay damages. Wilson J[43] also found the Crown liable, but her reasoning differed slightly from that of Dickson J. Her Honour found a more general fiduciary duty owed to the Indians to protect their land interests, which on the facts of the case gave rise to a trust.[44]

After *Guerin* it remained unclear whether the fiduciary duty arose on surrender of land, and was thus of narrow application, or whether it was of a more general nature and acted to protect Indian interests in land.[45] The broader application was adopted in *R v Sparrow*.[46] The fiduciary relationship was described as arising from the *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown,' as a result of which 'the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.'[47] The Court found that a federal exercise of power must be balanced against the effect on aboriginal rights. The Crown owes a responsibility to aboriginal people which 'requires that aboriginal rights be protected unless substantial and compelling policy objectives require their limitation.'[48]

Indigenous Canadians have constitutional protection, so the situation differs from that in Australia. Every law Parliament enacts that affects Indian people must be balanced against the fiduciary duties owed. Here, such a duty would breach Parliamentary sovereignty, as the duty would be placed above the power of Parliament to make laws.[49]

The state of the general fiduciary duty owed to Canadian Indians by the Crown is now less applicable to Australian circumstances. The constitutional basis of the broad responsibility the Canadian Crown now has 'to act in a fiduciary capacity with respect to its aboriginal peoples'[50] has meant that Australian courts look less towards Canada to draw an analogy with our own State/indigenous relationship. The earlier use of fiduciary law regarding Indian interests in land has, however, been used in Australia as the basis for the recognition of fiduciary duties relating to indigenous interests in land.

42 Ibid.
43 Ritchie and MacIntyre JJ concurred.
44 *Guerin*, 361.
45 Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada', (1993) 16(1) *UNSW Law Journal* 70, 91.
46 (1990) 70 DLR (4th) 385
47 Ibid 408.
48 Hughes above n 45, 92.
49 Ibid. It is beyond the scope of this thesis to consider the impact on a fiduciary duty owed by Parliament in creating laws. This discussion is limited to consideration of the duty owed by the executive government in implementing laws.
50 *Mabo (No.2)* (1992) 175 CLR 1 (Dawson J).

A General Duty in Australia

In Australia, the existence of a fiduciary duty owed to indigenous people has been recognised by some members of the High Court. It has thus far been applied only to land, but has been described in terms that leave the possibility open for a more general application.

Mabo v State of Queensland (No.2)[51]

In *Mabo (No.2)*, the plaintiffs claimed that the Crown was 'under a fiduciary duty, or alternatively bound as a trustee to the Meriam People . . . to recognise and protect their rights and interests in the Murray Islands.'[52] They argued that the duty

> arises by reason of annexation, over which the Meriam people had no choice; the relative positions of power of the Meriam people and the Crown in right of Queensland with respect to their interests in the Islands; and the course of dealings by the Crown with the Meriam people and the Islands since annexation.[53]

Thus, the duty was expressed in terms that reflect the traditional characteristics of a fiduciary duty,[54] particularly an inequality of bargaining power, and power to affect the interests of another. As the case was decided on the basis of the existence of native title, it was not necessary for the judges to discuss the fiduciary issue. However, most judges mentioned fiduciary duty, with the exception of Deane and Gaudron JJ who discussed a more general equitable relief.[55]

Justice Dawson saw that the existence of a fiduciary duty was 'dependent upon the existence of some sort of aboriginal interest existing in or over the land.'[56] In his opinion, any rights were extinguished on the annexation of the Murray Islands to Queensland, and thus there was 'no room' for any application of fiduciary principles.[57] Although he mentioned the general fiduciary duty found in Canada and USA, he limited the existence of any duty to an interest in the land. Brennan J (with whom Mason CJ and McHugh J concurred) saw any applicable fiduciary duty as being similar to that recognised by Dickson J in *Guerin*: one that arises upon surrender of land to the Crown. As there was no issue of surrender on the

51 (1992) 175 CLR 1. Hereafter *Mabo (No.2)*
52 Ibid 199.
53 Ibid.
54 Identified in *Hospital Products* (1984) 156 CLR 41; and *Breen v Williams* (1995) 186 CLR 71, discussed above.
55 *Mabo (No.2)* (1992) 175 CLR 1, 113 (Deane and Gaudron JJ).
56 Ibid 166.
57 Ibid 166-67. Dawson J was the only judge in this case to mention *R v Sparrow* in the fiduciary context; he did so only to mention the disparity between the Canadian and Australian situations, due to the constitutional basis of general indigenous protection in Canadian law.

facts, he considered that the extent of any fiduciary duty need not be considered.[58]

The existence and extent of the fiduciary duty was considered in much more detail by Toohey J. His formulation of the fiduciary duty in the indigenous context could be given a wider application. His Honour considered the extension of fiduciary principles into the indigenous context as a legitimate progression of the law. As an alternative to the native title recognised by the majority, he found that the State owed the Merriam people a fiduciary duty to act in their interests with respect to their land. He found a second basis for this duty in the course of dealing between the Merriam people and the State. This second basis means that the duty could be applied outside the question of land to other aspects of the relationship between the State and indigenous people.

In Toohey J's view, the vulnerability of the indigenous people, especially regarding the power of the Crown to destroy their title to land, gave rise to a duty owed by the Crown to act in the interests of indigenous titleholders. He saw the situation of Australian Aborigines as analogous in some ways to that of the Canadian Indians as described by Dickson J in *Guerin*. Both groups had restrictions imposed on the exercise of their rights over their land, particularly restrictions on alienation. The 'power to destroy or impair a people's interests in this way is extraordinary,'[59] and, coupled with the corresponding vulnerability of the indigenous people, gives rise to a fiduciary obligation. The duty is therefore based on the traditional characteristics of power or discretion, and corresponding vulnerability. The duty arises through the extraordinary interest in land held by indigenous people, and the scope of the duty is limited to transactions and actions relating to the land.

As an alternative, Toohey J looked to the course of dealings between the State of Queensland and the indigenous inhabitants to identify a fiduciary relationship arising on the facts. He examined the legislative and executive attitude towards Indigenous Australians, and identified 'a policy of "protection" by government' arising from the legislation generally, as well as executive actions such as the creation of reserves and the appointment of trustees.[60] He concluded that the State undertook to act in the interests of the indigenous inhabitants, giving rise to fiduciary obligations.

His Honour also referred to 'the exercise of control over or regulation of the Islanders themselves by welfare legislation.'[61] This is suggestive of a fiduciary duty of more general application than only interests in land. The duty could be equally applicable to other situations in which welfare legislation was used to control the lives of indigenous people. The removal of children from their

[58] Ibid 60.
[59] Ibid 203.
[60] Ibid 201.
[61] Ibid 203.

families is a clear example of such control. The course of dealing in which children were removed was the implementation of welfare and other legislation, and on Toohey J's analysis could give rise to a fiduciary duty owed by the State to indigenous children removed from their families.

According to Toohey J, the nature of the obligation on the Crown was 'to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders.'[62] This is therefore a positive duty to act in the interests of the indigenous landholders. The duty is not limited to the traditional situations of avoiding conflict between interests, or interests and duties, and of not making an unauthorised profit. Toohey J was advocating an extension of fiduciary principles in this special situation to include a wider scope and a broader range of duties.

Toohey J did not explore the scope of duties outside the immediate situation relating to land. The duty he identified was to not act 'contrary to the interests'[63] of the land holders. Extrapolating from this, a general duty applicable to the Stolen Generation could be to not act contrary to the interests of indigenous children. This could encompass the removal of children from their families, and their treatment if legitimately removed.

Wik Peoples v State of Queensland[64]

While in *Mabo (No.2)*[65] Brennan J (as he then was) considered fiduciary principles to be of narrow application, his Honour expanded his consideration of the existence and scope of a fiduciary duty in the indigenous context in *Wik*.[66]

It was argued that the State owed a fiduciary duty to indigenous inhabitants of land subject to pastoral leases. Such a duty was based, in accordance with Toohey J in *Mabo (No.2)*, on 'the vulnerability of native title, the Crown's power to extinguish it and the position of the indigenous people in relation to the State government.'[67] Brennan CJ maintained that this power of extinguishment alone was not enough to create a fiduciary duty: in addition he required the more traditional hallmarks of a fiduciary relationship. He said that it must be possible 'to identify some action or function' in addition to the circumstances, on which to base a fiduciary duty. The action must affect the interests of the beneficiary, such that it 'is reasonable for the beneficiary to believe and expect that the fiduciary will act in [their] interests.'[68] He acknowledged that 'a discretionary power - whether statutory or not - that is conferred on a repository for exercise on behalf of, or for the benefit of, another or others might well have to be exercised by the

62 Ibid 204.
63 Ibid.64 (1996) 141 ALR 129. Hereafter *Wik*
65 (1992) 175 CLR 1.
66 Brennan CJ was the only judge to consider the equitable claims made in *Wik*.
67 Buti, above n 37, 212.
68 *Wik* (1996) 141 ALR 129, 160-161.

repository in the manner expected of a fiduciary.'[69]

Identifying the relevant action to be the statutory power to alienate land and thereby extinguish native title, his Honour decided that this was not an action that could be described as fiduciary. The statutory power was one which necessarily had a detrimental effect on the rights or interests of the indigenous land holders. It was therefore impossible to expect that an exercise of this necessarily detrimental power be in the interests of the landholders.

Brennan CJ's formulation is an application of standard fiduciary theory to a new situation. The elements of power and discretion, and the corresponding vulnerability, and reasonable expectations form the basis of the duty. His Honour was extending the application of fiduciary principles to a non-commercial situation. The interest involved was an interest in land, so it was still economic. This formulation is not far from the current application of fiduciary principles in Australian law. Broadening the application of fiduciary principles to non-commercial situations could be the beginning of the protection of non-economic interests, at least in limited circumstances. Canadian courts have extended the application of fiduciary principles to protect non-economic interests. This will be discussed in detail below.

Application to the Stolen Generation

Brennan CJ's analysis of the fiduciary duty in *Wik* could clearly have a more general application. Along with Toohey J's analysis in *Mabo (No.2)*, there is a sound basis for the High Court to recognise the existence of a general fiduciary duty applicable to indigenous People. Brennan CJ's formulation in *Wik*, requiring a particular action as well as a situation of extraordinary power and vulnerability, would allow the court to ensure that the progression of fiduciary law in this area remains true to its principles.

Brennan CJ's formulation is easily applied in the Stolen Generation context. The existence of circumstances of power and vulnerability in *Wik* was the power of the Crown to extinguish native title. In the Stolen Generation context, it was the power of the State to remove children from their families. The children were in a position of vulnerability in relation to the State, their removal involved an action which was discretionary, and the reasonable child could have believed that the State would act in their interests, both in removing them from their families, and in keeping them institutionalised throughout their childhood. The reasonable expectation is that of the child, judged by reference to the expectation of the reasonable child. It is certainly to be expected that a child taken from his or her mother into the care of the State would reasonably believe and expect that the State would act in their interest. Indeed, the purported welfare purpose of many

[69] Ibid 160.

of the removals makes this expectation overt. Finally, the various statutory schemes under which children were removed, whether specifically targeted at indigenous peoples or more general welfare legislation, involved a discretion in removing the children.[70]

As His Honour found no fiduciary duty arising on the facts of *Wik*, he did not consider the possible scope of such a duty. It therefore remains to be considered whether the duty would be limited to the traditional rules precluding situations of conflict of interest or duty, and of making an unauthorised profit, or whether the duties would be broader. Buti suggests that there is scope for the courts to find a duty 'to ensure the "preservation" of the Aboriginal race as a whole.'[71] He argues that breach of the duty is found in the assimilationist practices of the States, 'to the extent that the policy of forced assimilation was aimed at the disappearance of a distinctive Aboriginal race and culture, one could argue that it was a policy in direct conflict with the duty owed.'[72]

In the light of the reluctance of Australian courts to extend fiduciary principles, it is considered unlikely that this approach would be accepted, or at least in the near future. Development of the principle on a case-by-case level is more likely to find favour. Using Brennan J's *Wik* formulation, the application of fiduciary law to the Stolen Generation context is in line with established principles. It could be shown that the removal of a child, as well as the position of power held by the State in its power to affect the removal, and the consequent extreme vulnerability of the child, gave rise to a fiduciary duty. Such a duty means that the State in exercising its discretion in the removal and care of the child was expected to act in the best interests of the child.

Although existing case law in Canada and Australia suggests that the 'firmest basis for a fiduciary obligation is where the government has direct control over Aboriginal funds or land',[73] it is clear that the extension of such obligations into other areas of State / indigenous interaction is valid. Toohey J in *Mabo (No.2)* based a fiduciary duty partly on the course of dealings between the State and indigenous people, including the implementation of welfare legislation. Brennan CJ in *Wik* supported the extension of fiduciary principles to the indigenous context generally. This provides a solid basis for the finding of a fiduciary relationship in the indigenous context. The scope, and the specific duties that might attach to that relationship have not yet been explored. Guidance for a way to extend fiduciary duties can be found in Canadian cases.

70 For example, s 6(1) of the *Aboriginals Ordinance 1911* (NT), allowed the Director of Native Affairs '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' (emphasis added).

71 Buti, above n 37, 213.

72 Ibid.

73 Hughes, above 45, 95.

EXTENSION OF THE FIDUCIARY PRINCIPLE: THE CANADIAN APPROACH

Fiduciary Relationships in Canada

The courts in Canada have taken a different approach to fiduciary law from that taken by the Australian and English courts. The main differences have been in (i) the application of fiduciary principles to situations involving non-economic loss, and (ii) the placing of prescriptive duties on fiduciaries.

The Canadian approach to finding a fiduciary relationship appears to be quite similar to that favoured in Australia.[74] Recent Canadian cases have emphasised vulnerability and power or discretion as a basis for the extension of fiduciary principles to situations of non-economic loss. This has lead to a divergence from the Australian use of fiduciary principles, and an application of the fiduciary label to a wider range of factual situations.

La Forest J identified as fiduciary categories of relationship that 'have as their essence discretion, influence over interests, and an *inherent* vulnerability.'[75] Such relationships give rise to a rebuttable presumption that 'one party has a duty to act in the best interests of the other party.'[76] These include the traditional fiduciary relationships of trustee and beneficiary and the like. Where a fiduciary relationship arises on the facts, La Forest J stated that 'the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue.'[77]

The Canadian approach in recent years has been to create new categories of fiduciary relationship, or to extend the scope of recognised categories, rather than to identify a fiduciary relationship as arising out of the factual matrix of a given case. In *McInerney v MacDonald*[78] the Supreme Court of Canada recognised the doctor-patient relationship as fiduciary. McLachlin J in *Norberg v Wynrib*[79] saw that fiduciary principles were more appropriate than tort or contract for a patient who provided sexual favours to her doctor in exchange for a supply of the painkiller to which she was addicted, because the doctrines of tort and contract fall short of recognising the full extent of the duty owed by the doctor. The Supreme Court of Canada held that incest is a breach of the fiduciary duty owed by a parent, in *KM v HM*.[80]

[74] The classic modern statement is that of Wilson J in *Frame v Smith* (1988) 42 DLR (4th) 81.
[75] *Hodgkinson v Simms* (1995) 117 DLR (4th) 161, 176.
[76] Ibid.
[77] Ibid.
[78] (1992) 93 DLR (4th) 415.
[79] (1992) 92 DLR (4th) 449.
[80] (1992) 96 DLR (4th) 289.

A key feature of these applications of the fiduciary principle is the lack of property as the basis of the relationship, and the non-economic character of the loss suffered. Wilson J in *Frame v Smith* said that '[t]o deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would . . . be arbitrary in the extreme.'[81] Her Honour pointed out that the courts are willing to recognise non-economic interests in commercial situations, evidenced by the recognition of a fiduciary duty in *Reading v Attorney-General*,[82] where '[t]he Crown's interest was a "practical" or even a "moral" one, namely that its uniform should not be used in corrupt ways.'[83] She saw no reason, therefore, to preclude recognition of moral interests in non-commercial settings.

Canadian courts, and to a greater extent, those in the United States, have taken a prescriptive approach to fiduciary law: one concerned 'with whether the beneficiary's interests are in fact being served by the fiduciary.'[84] This approach 'uses possible effects on those interests as the determinant in settling the fiduciary's responsibilities.'[85] Thus, in *KM v HM*, the fiduciary duty of a parent was held to include a duty 'to care for and minister to his child'.[86] The Supreme Court in *McInerney v McDonald* held that the fiduciary duty of a doctor to a patient includes a duty to provide access to medical records.

The Canadian approach to fiduciary principles is particularly applicable to the situation of the Stolen Generation. The characteristics of a fiduciary relationship identified by Wilson J in *Frame v Smith* are present: (1) the State had scope for the exercise of discretion and power in the removal of the children, and in their placement and treatment once removed; (2) such power was unilateral and affected their interests in a real and practical way, as well as their legal status; and (3) the State's power could not be questioned or challenged by the children, or, effectively, their parents.[87] The interests in need of protection are non-economic: the children's interest in remaining in their homes, and being raised within their own culture; their interest in decent living conditions; their interest in gaining sufficient love and affection; and their interest in not being physically, psychologically and sexually abused.

These interests are best protected by prescriptive duties. A duty similar to that found in *KM v HM*, to 'care for and minister to'[88] the children would encompass

81 (1988) 42 DLR (4th) 81, 104.
82 [1951] AC 507. A British soldier wore his uniform to avoid inspection when smuggling goods.
83 *Frame v Smith* (1988) 42 DLR (4th) 81 at 99.
84 Finn, above n 36, 25.
85 Ibid.
86 (1992) 96 DLR (4th) 289 at 322
87 The *Aborigines Protection Act 1909* (NSW), after 1915 contained s13A, which gave the parents of a child removed under the Act the right to appeal the action to a Court. It is unlikely that this right could be widely used, as the access of Aboriginal people to information and legal assistance was minimal: see HREOC, *Bringing Them Home*, above n 8, 42.
88 *KM v HM* (1992) 96 DLR (4th) 289, 322.

the relevant interests. More specific duties could be to provide adequate housing, to ensure they are not abused, and to provide opportunity for the formation of loving and affectionate relationships.

The emphasis placed on the elements of power, discretion and vulnerability by the Canadian courts fits well with the experiences of the Stolen Generation. The relationship between the State and the children removed is one which has as its 'essence' discretion and particularly an '*inherent* vulnerability.'[89] The presumption then applies, and it is clear that the children would expect it so, that the State would act in their best interests.

Australian Attitudes to the Canadian Formulation

Australian courts have resisted widening the application of the fiduciary principle, so that the law differs to that of Canada in (i) protection of non-economic interests; and (ii) imposition of prescriptive duties on fiduciaries.

In *Williams (No.1)*, Kirby P of the NSW Court of Appeal recognised that a fiduciary duty could apply to protect non-economic interests. He saw that it was 'distinctly arguable that a person who suffers as a result of a want of proper care on the part of a fiduciary, may recover equitable compensation from the fiduciary for the losses occasioned by the want of proper care.'[90] This was a preliminary decision only, and did not involve consideration of the facts of the case. As such, it is not outright approval of the doctrine, but it does show that Kirby J would probably be sympathetic to a claim for breach of fiduciary duty relating to non-economic interests and positive duties.

Brennan CJ in *Wik* approved of the application of fiduciary principles to the non-commercial situation of indigenous land holdings. He was therefore in favour of the extension of Anglo-Australian fiduciary principles. Although he did not consider the further extension of fiduciary principles to protection of non-economic interests, this can be seen as a natural progression on principled lines.

However, the High Court of Australia in *Breen v Williams* was uniformly critical of the approach taken by the Supreme Court of Canada in placing prescriptive obligations on fiduciaries. They stated that Australian fiduciary law imposes proscriptive obligations on a fiduciary to avoid conflict and unauthorised profit, but 'does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.'[91] The imposition of prescriptive obligations has been seen as

> reflective of a tendency, not found in this country . . . to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty

89 *Hodgkinson v Simms* (1995) 117 DLR (4th) 161,176 (La Forest J).
90 *Williams (No.1)* (1994) 35 NSWLR 497, 511.
91 *Breen v Williams* (1995) 186 CLR 71, 113.

and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong.[92]

Application to the Stolen Generation

The Canadian approach could act as a guide to Australian courts in extending fiduciary principles to encompass the Stolen Generation claims. This could be achieved through the recognition of the Stolen Generation as a category of fiduciary relationship; or through establishing the relationship on the facts of each case. This would result in a more limited group of people being entitled to relief for breach of fiduciary duty, and may seem to the Australian courts as a more natural progression of the fiduciary principle: a reasoned application of the fiduciary characteristics in each case, rather than a blanket label applied to a broad group of people. This would still require the Australian courts to protect non-economic interests using fiduciary law.

It is argued that such extension, if properly managed by the courts, would be beneficial, and indeed enable the fiduciary principle to fulfill its intended operation: 'if a confidence is reposed, and that confidence is abused, a court of equity shall give relief.'[93] While Australian courts are unlikely at present to follow the Canadian extension of fiduciary principles, if non-economic interests are recognised, as foreshadowed by Brennan CJ in *Wik*, the Canadian example is a good model for the principled extension of the doctrine. It should therefore not be discounted completely.

Part 2: A Special Type of Relationship

INTRODUCTION

An extension of fiduciary principles to encompass protection of non-economic interests would be a step toward helping the Stolen Generation. Australian cases in which a fiduciary duty has been claimed in relation to non-economic interests, and specifically the Stolen Generation, have attempted to fit into existing formulations of the doctrine. Thus the plaintiffs in *Cubillo* claimed that the interests of the State conflicted with the interests of the plaintiffs.

Rather than attempting to twist the circumstances of the Stolen Generation to fit current formulations of fiduciary obligations, appropriate formulations should be developed. The scope of each fiduciary relationship is different: so too should be

[92] Ibid 95.
[93] *Gartside v Isherwood* (1788) 1 Bro CC 588, 560, cited in Parkinson, above n 3, 337.

the obligations attaching to the relationship. Some recognition was given to this concept in *Mabo (No.2)* and *Wik*. There, the special relationship between the State and indigenous people was recognised as possibly giving rise to special obligations. This concept can be taken further.

Although recent use of the fiduciary doctrine has been mostly in a commercial context, this was not always the case. Equity has long placed positive obligations on certain fiduciary relationships. Guardian and ward is one such relationship which once carried clear, positive fiduciary obligations.

THE STATE AS GUARDIAN OF THE STOLEN GENERATION

A fiduciary relationship could arise if the State is established as guardian of the indigenous children removed from their families. In the Stolen Generation context, guardianship arose through the statute authorising the child's removal, the nature of the relationship itself, or the circumstances of a particular case. Duties attaching to the relationship of guardian and ward are imposed on the State. The Crown has *parens patriae* jurisdiction over wards as people who are unable to care for themselves.[94] The people who affected the removal and detention of the children were acting as servants of the various States, so their actions should be vicariously attributable to the State.[95]

Establishing a Guardianship Relationship

Statutory basis

Some statutes explicitly declared that all Aboriginal children were wards of the State. In Western Australia, s8 of the *Aborigines Act 1905* established the Chief Protector as the guardian of all Aboriginal children under 16 years of age. However, not every statute authorising the removal of children created a relationship of guardian and ward.[96]

Recognised category of fiduciary relationship

Many judges and commentators consider the relationship of guardian and ward to be one of the recognised categories of fiduciary relationship.[97] The Full Federal Court in *Paramasivam v Flynn* stated that the relationship of guardian

94 *Marion's Case* (1992) 175 CLR 218, 258-259.

95 It should be noted that the Full Federal Court in *Cubillo* found no vicarious liability attributable to the Commonwealth, although they did not give reasons for this: see (2001) 112 FCR 455, 575.

96 In *Williams* [1999] NSWSC 843 at [710] Abadee J considered that under the *Aborigines Protection Act* the use of the term 'ward' did not invoke the concept of 'guardian'. He found there was no relationship of guardian and ward between Ms Williams and the AWB.

97 Finn, above n 36, 33; *Williams (No.1)* (1994) 35 NSWLR 497, 511 (Kirby P); *Hospital Products* (1984) 156 CLR 41 at 141 (Dawson J); *Bennett v Minister for Community Welfare* (1992) 176 CLR 408; *Clay v Clay* (1999) 20 WAR 427.

and ward '*may* give rise to duties typically characterised as fiduciary.'[98] It is therefore likely, but not certain, that a court considering the matter would regard guardian and ward as an established category of fiduciary relationship.

Fiduciary relationship on the facts

Whether or not guardian and ward is recognised as a category of fiduciary relationship, the existence of a fiduciary relationship is a question of fact.[99] This leaves the possibility of a particular relationship of guardian and ward being found as fiduciary on its facts. On the facts of the typical Stolen Generation situation, a fiduciary relationship can easily be established. The State in removing a child from his or her family undertook to care for the child. This undertaking is evident in the purported welfare aim of much of the legislation: the State judged that the child's family was not capable of caring for him or her, and undertook to do so instead. The children reasonably relied on the State to provide them with care and education. The State had a great deal of power and discretion regarding the welfare of the children. They had discretion in the removal of the children, in placing them in institutions, in the conditions of those institutions, and in the standard of care the children received. It is therefore likely that a fiduciary relationship could be established on the facts of the experiences of a member of the Stolen Generation. Such a fiduciary relationship is most appropriately labeled guardian and ward.

Fiduciary Obligations of a Guardian

The State as guardian is under the traditional duties of a fiduciary not to place itself in a position of conflict and not to make an unauthorised profit. It is argued that the relationship of guardian and ward is a sub-category of fiduciary relationship, to which additional duties attach. The interests in need of protection in the guardian-ward relationship are different from those in other fiduciary relationships. Many of the interests are not economic, but are fundamental human interests instead. Different duties need to be imposed on the guardian to ensure those interests are protected. This can be achieved by the imposition of positive duties on the guardian which are fiduciary in origin.

Duties of Guardianship

The relationship of guardian and ward, once recognised as fiduciary, carries specific obligations. These obligations were developed in the law of equity during the 18th and 19th Centuries.[100] Subsequent development of family law, mainly through legislation, has displaced the role of equity in outlining the duties of guardians, but the law of guardian and ward still exists and, although dormant,

[98] *Paramasivam v Flynn* (1998) 160 ALR 203, 218. Emphasis added.
[99] *Cubillo* (2000) 174 ALR 97, 503.
[100] Paul Bately, 'The State's Fiduciary Duty to the Stolen Children', 2(2) *AJHR* (1996) 177, 187.

can be revived in the appropriate context. The Stolen Generation is such a context. Guardianship can attach separately to the ward's person and their property.[101] Thus, two separate people can be appointed guardian, and, of greater use here, the duties attaching to each can be considered separately.

A guardian of the estate is entrusted with the personal and real property of the child. This relationship is a traditional trust, and the duties attaching to it are also traditional: not to place oneself in a position of conflict, and not to derive a profit from the position of trustee.[102]

Guardians of the person are also considered trustees, although 'this species of guardianship is a more exacting kind of trusteeship than the mere trust to hold and dispose of [the child's] property.'[103] Courts therefore exact a high standard of behaviour from guardians of the person, and will act to restrain a guardian 'from exercising his legal powers to the infant's detriment'.[104] Specific positive duties attach to the position of guardian: to 'shield and protect'[105] the ward; to educate, which involves selecting 'a proper school';[106] and to pay deference to the parents' choice of education and religious faith.[107]

Recognition in Modern Case Law

In *Williams*, Abadee J noted that guardianship 'is recognised as conferring rights on the guardian in respect of custody and upbringing (educational as well as in respect of the religion of the child).'[108] He acknowledged that Courts of Equity have since the 17th Century found that guardians 'have duties including ordinarily, a duty to educate.'[109] His Honour recognised that these old duties are still in existence, and have merely fallen out of use in modern times.[110]

The Full Federal Court in *Paramasivam v Flynn* found that 'a relationship of guardian and ward may give rise to duties typically characterised as fiduciary'.[111] In their view, breach of such duties would be limited to the duty not to allow a conflict of interests and not to make an unauthorised profit.[112] The question before the court was whether the appellant's claim of breach of fiduciary duty was a strong one. The court in a unanimous judgment stated that in Anglo-Australian law the interests protected by fiduciary duties are economic. It is argued that

101 I Stranger-Jones, *Eversley on Domestic Relations* (First Published 1885, 6th ed 1951), 436.
102 Ibid 437. A trustee also has duties of active management, which are not relevant here.
103 Ibid 457.
104 Ibid 458, citing *Andrews v Salt* (1873) LR 8 Ch App 622.
105 Ibid 473.
106 Ibid.
107 Ibid 474.
108 [1999] NSWSC 843, 710, referring to *Youngman v Lawson* [1981] 1 NSWLR 439, 445.
109 Ibid, referring to *Duke of Beaufort v Berty* [1721] 24 ER 579, 580.
110 Ibid.
111 *Paramasivam v Flynn* (1998) 160 ALR 203, 218. This was an appeal from the decision of Gallop J of the ACT Supreme Court that an extension of time should not be granted under the *Limitation Act 1985* (ACT), which prescribes a six-year limitation period for actions in tort and fiduciary duty.
112 Ibid 218.

while this is valid for the majority of fiduciary relationships, guardian-ward should be outside this analysis. It is a special type of fiduciary relationship that since the 17th Century has carried positive duties that protect fundamental human interests. The Full Court should have examined the actions of Flynn in the context of his role as guardian, which carries positive duties to act in the best interests of his ward, including to shield and protect.

The Full Federal Court in *Cubillo* also recognised that the relationship of guardian and ward can carry fiduciary obligations.[113] It is argued that, while their Honours recognised the duties of a guardian concerning the estate of the ward,[114] they neglected to consider the other side of the guardian's role in caring for the person.

In *Bennett v Minister for Community Welfare*,[115] the majority of the High Court in a joint judgment acknowledged that positive duties attached to the relationship between the State as guardian and a ward. In that case, the plaintiff Bennett was a ward of the State and in care when he suffered an injury resulting in the amputation of four fingers on his left hand. The plaintiff did not receive correct legal advice regarding his rights against the Director of Community Welfare until after the limitation period for any action had expired. The existence of a duty of care to the plaintiff had been admitted. The extent of that duty was in issue, and the question before the High Court was whether the duty extended to ensuring the plaintiff received *correct* legal advice. In discussing the basis and extent of the duty, Mason CJ, Deane and Toohey JJ in a joint judgment held that:

> the duty of care appears to have been equated to, even derived from, a fiduciary duty owed by the Director to the appellant arising out of his statutory office as guardian. *That fiduciary duty was a positive duty* to obtain independent legal advice with respect to the possible existence of a cause of action . . .[116]

Application to the Stolen Generation

The duty to 'shield and protect' a ward is of particular application to the Stolen Generation. The bulk of the claims made by the plaintiffs in the cases discussed earlier, and identified in *Bringing Them Home*,[117] come under this duty. A duty to shield a ward can be read to include a duty to provide adequate housing and hygienic conditions. 'Shield and protect' taken together implies a duty to ensure the ward is not exposed to any form of abuse, whether physical, psychological or

113 *Cubillo* (2001) 112 FCR 455, 575-78.
114 Ibid 575, referring to *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 420-421 (Dixon J).
115 *Bennett v Minister for Community Welfare* (1992) 176 CLR 408.
116 Ibid 411. Emphasis added.
117 *Bringing Them Home*, above n 8.

sexual; and to ensure the emotional well being of the ward is provided for and protected.

These old duties of guardians were not pleaded in the cases of *Williams* and *Cubillo*. Instead, the plaintiffs attempted to fit the interests in need of protection into the traditional fiduciary breaches of conflict of interest. The plaintiffs in *Cubillo* did claim a duty to properly supervise institutions.[118] They did not, however, argue the background of the duty to shield and protect. This means that the applicability of these old duties of guardianship have not recently been considered by the courts.

The duty to pay deference to a parent's wishes regarding a religious upbringing for their child is also relevant to the Stolen Generation. Children removed from their families were also removed from their culture. They were prevented from speaking their language, and had no way of participating in traditional or customary life: 'Aboriginal customs like initiation were not allowed . . . I never had a chance to learn about my traditional and customary way of life . . .'[119]

This removal of any indigenous cultural influence had far-reaching effects: '[t]hey changed our names, they changed our religion, they changed our date of birth, they did all that. That's why today, a lot of them don't know who they are, where they're from.'[120]

Many of the problems experienced in later life by members of the Stolen Generation are attributable to lack of knowledge and experience of their culture.[121] The State was under a positive duty to respect a parent's wishes regarding religion. In completely disregarding Aboriginal tradition and culture, and going so far as to prevent children speaking their own language, the State breached this duty.

These cases and examples support the continued existence of positive fiduciary obligations attaching to the relationship of guardian and ward. It is argued that these positive obligations signify the special status of the guardian-ward relationship. It is clearly fiduciary in nature, and carries with it the accepted duties regarding conflict and profit. Therefore situations involving the economic aspects of guardianship can be sufficiently dealt with within the ambit of existing fiduciary principles. The traditional division of the guardianship role into two parts acknowledges the equal importance of the personal aspect of guardianship. This aspect of the relationship encompasses notions of love and affection which do not fit easily into the current parlance of the fiduciary principle, limited as it

[118] *Cubillo* (2000) 174 ALR 97, 499.
[119] 'Confidential submission 110, Queensland: woman removed in the 1940s', HREOC, *Bringing Them Home*, above n 8, 154.
[120] Confidential evidence 450, New South Wales', HREOC, *Bringing Them Home*, above n 8, 156.
[121] Ibid 153-167.

has been to protection of economic interests. The traditional imposition of positive fiduciary obligations on guardians remains relevant to the guardian-ward relationship in modern times and would enable the full extent of the Stolen Generation claims to be vindicated.

CONCLUSION

This article has demonstrated that there are two sound bases for the imposition of positive duties on fiduciaries. The use of fiduciary duty in the Stolen Generation context is appropriate. Australian fiduciary law as it stands cannot properly accommodate the Stolen Generation claims. Rather than attempting to twist the claims to fit a formulation designed to protect economic interests, a change in the formulation is needed.

Protection of non-economic interests such as those of the Stolen Generation requires the imposition of prescriptive duties. Fiduciary law in Canada now protects non-economic interests by imposing positive duties in some circumstances. Australian courts have rejected the application of the Canadian developments. However, in relation to the Stolen Generation situation, positive duties can be found in the Law of Guardian and Ward. This provides specific, positive duties appropriately imposed on guardians in their capacity as guardian of the person. It should be recognised that the Law of Guardian and Ward regulates the relationship between the State and the Stolen Generation.