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We Took the Children From the Mothers: What About the Mothers (and Fathers) Then?

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Introduction

The quotation in the title to this paper was spoken by the then Prime Minister of Australia, the Hon Mr Paul Keating, at Redfern, 10 December 1992, when launching the ‘International Year of Indigenous People’. The Prime Minister, added: “We failed to ask – how would I feel if this were done to me?”

Much has happen since 1992, including the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (hereafter National Inquiry) and the ‘Peoples Walk for Reconciliation’. Hence, to some extent we (non-Aboriginal Australia) have asked the question. However, the question and the answer(s) have, to a large degree, focused on how the removed children felt and how their ‘rights’ were violated. Some, but little attention, has been spent on examining Keating’s question from the view of the parents of the removed children. To some degree this is understandable because, in comparison to the removed children, very few of the parents remain alive to express their hurt and damage.

In some small way, this article seeks to rectify this imbalance. My focus here is on the parental rights violated under the laws, policies and practices of Aboriginal child removals. The Western Australian history is used as an example as Western Australia formed a blueprint for much, but not all, of what happened in other jurisdictions in Australia.
When discussing the issue of parental rights here, we are dealing with the law as it stood during the period of this historical study – that being the first six decades of the twentieth century. Moreover, when talking about parental rights in this article, we are discussing more than just ‘law’ as understood by precedent and statute. The law on parental rights is used as the foundation for discussing how these ‘rights’ were violated – whether these rights were clearly recognised in law or were merely freedoms or moral rights.

**Parental Rights**

In Roman law, the parents, or more accurately the father, had unlimited power over his children, including a power of life and death over them. Under the doctrine of *patria postestas*, the father’s children were his dependants and personal property. This Roman law formed the basis of the law of parents and children under the English common law. But as the great English jurist Sir William Blackstone once remarked, the laws of England moderated the all powerful power and rights of the father over his children under Roman law. Having said that, Blackstone continued:

He [the father] may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The content or concurrence of the parent to the marriage of his child under age, was also directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is another means, which the law has put into the parent’s hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages... He may indeed have the benefit of his children’s labour while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for a mother, as such, is entitled
to no power, but only to reverence and respect), the power of a father, I say, over the persons of his children ceases at the age of twenty one … Yet until that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.9

The father’s powers and rights, writes Blackstone, are derived from the duties they have to their children. That is, the parent needs certain powers and rights in order to carry out their duties.10 Likewise, the need to have the power to perform a duty was recognised by McHugh J in Secretary, Department of Health and Community Services v JMB and SMB, in which it was stated that, “whenever the law imposes a duty, it will imply, if necessary, the power to carry out that duty to the extent required by the need.”11

The duties that a father (and mother) has to their children include the duty to maintain, the duty to protect from harm, the duty to educate and the duty to provide emotional support and affection.12 It should be added that a non-parental guardian also has these duties. In fact, the guardian has the same powers and rights as a parent, although there are some differences.13

As the common law has developed and evolved, the near absolute rights of the father, have been modify to consider the rights of the mother and also the rights of the child. American legal scholar Danya Wright notes that in the eighteenth century the Court of Chancery regularly placed the interests of children higher than those of parents or guardians.14 The nineteenth and twentieth centuries witnessed a continuation of the developments that earmarked the eighteenth century as a century of change in relation to parental and guardianship law. In addition to giving greater prominence to the interests of the child, the courts and legislatures of the eighteenth and nineteenth centuries also brought the rights of the father and mother on a more even keel, although this did not always happen.15
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The next section of this paper looks at the individual parental rights. The discussion is restricted to some of the rights most relevant to the historical study of Aboriginal child removals – that being the right of custody and possession, the right of access and visitation and the right to determine the education of the child (including religious education).

Right to Custody and Possession

What ‘custody’ means has not always been clear. Here I am referring to it in its wider sense to include a ‘bundle or rights’ or ‘bundle of powers’ over such matters as education, religion and physical control of the child. This is the approach taken in Hewer v Bryant:

These include power to control education, the choice of religion, and the administration of the child’s property. They include entitlement to veto the issue of passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the courts to exercise the power of the Crown as parens patriae. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely, such personal power or physical control as a parent or guardian may have.

Of particular relevance within the historical context of this article is the question of the ‘strength’ of this parental right to custody and control. The majority opinion in J v C suggests that it is not very strong. Indeed, in this case the majority seemed to be saying that the parental right to possession is not an independent right as such. Rather, it is only part of the factors to consider when making a decision on what is in the best interest of the child.
This is illustrated in the judgement of Wilberforce J, who wrote that possession of the child by the parent will be considered “not on the basis that the person concerned has a claim which he has a right to have satisfied, but, if at all and to the extent that, the conclusion can be drawn that the child will benefit from the recognition of this [parental] tie.”

Lord Upjohn, on the other hand, thought differently:

The natural parents have a strong claim to have their wishes considered; first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the infant that he should be with them, but also because as natural parents they themselves have a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world.

British family law expert, John Eekelaar, prefers the reasoning of Lord Upjohn to that of the majority. Eekelaar argues that the *ratio decidendi* of *J v C* relates to disputes between parents and strangers. Thus, the interpretation placed on it in relation to parental rights to possession are only obiter. Eekelaar argues that the “parental claim [to possession] must be given independent, though subordinate, weight.” He states that this is achievable by applying the welfare principle as follows:

The course dictated by the child’s welfare should always be chosen even if inconsistent with possession by the parents unless, from the point of view of the child’s welfare, there is no difference between the two courses or the differences is small or largely speculative.

Thus, the parent does retain a right to claim possession of the child. The parent has a right against a third party to have the child returned subject to the welfare principle and, in some cases, a possible limited right of a child to select its own residence.
Access or Visitation Rights

The common law sought to ameliorate the absolute right of the father to custody of the child by conferring access or visitation rights on the mother. However, some have found difficulty with such an approach in so far as it is seen as a means of improving the rights or status of mothers. For example, in debating the *Custody of Infants Act 1839* (UK), Lord Wynford, a member of the House of Lords stated:

… the custody of the children belonged by the law to the father. This was a wise law, for the father was responsible for the rearing up of the child; but when unhappy differences separated the father and mother, to give custody to the father and to allow access it by the mother, was to injure the child; for it was natural to expect that the mother would not instill into the child any respect for the husband whom she might hate or despise. The effects of such a system would be most mischievous to the child, and would prevent its being properly brought up. If the husband was a bad man, the access to the children might not do harm, but where the fault lay with the wife, or where she was of bad disposition, she could seriously injure its future prospects.27

Even though there were opposing voices, the 1839 Act came into existence and contributed to gender equalization between parents. The access or visitation right moved from an issue of a ‘mother’s right’ to one of a ‘parental right’, regardless of sex. This right is of critical importance when a child is separated from one or both parents. The right of access or visitation has been considered to be a “basic right of any parent.”28 It demands special attention because the preservation of the right of access or visitation may be the only way that a parent separated form her/his child can maintain a relationship with the child. The importance of this right, argues Eekelaar, means that it should be given “even greater independent weight than the
right to possess the child” and thus should “be upheld unless there would be clear prejudice to the child if enforced.”

**Right to Determine Education (including Religious Education)**

Blackstone has stated that:

>[t]he last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any... [I]t is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and he suffers him to grow up like a mere beast, to lead a life useless to others, and harmful to himself.

With this duty comes a parental right to determine or have a say in the secular educational path of the child. However, there is a limit to this right. The parent has only the right to determine the secular education among the alternatives provided by the State. In relation to private schools, the school is not required to accept a child for education just because the parents have decided that the child should attend the school in question. Thus, as Eekelaar writes, the right is more of a freedom to decide on educational pathways that are available and comply with the parents’ duties to “provide efficient, full time education.”

In relation to the form of religious education, a parent does not have a duty to provide religious instruction to the child, but does have a right to have the child brought up in the religion of the parents’ choice, subject to the best interest of the child. This is probably more of a freedom than a right per se– that is, the parent may attempt to instruct the child in the religion of the parents choosing. The courts have shown a propensity to have the child brought up in the religion...
of the parents. However, as stated, this is governed by what is deemed to be in the best interests of the child. The courts will not enforce the parental wishes of either or both parents regarding religious upbringing if it would be detrimental to the child. However, the courts have generally held that it is in the best interest of the child to be brought up in the parents’ religion or the religion of the parents choosing.

**Aboriginal Child Removals and Parental Rights**

I am afraid that [my wife] will commit suicide if the boy is not back soon for she is good for nothing only cry day and night ... I have as much love for my dear wife and children as you have for yours ... so if you have any feeling at all, please send the boy back as quick as you can. It did not take long for him to go but it takes a long time for him to come back.

**Attitudes, Policy and Practice**

From at least the turn of the twentieth century until at least the mid to late 1960s, large numbers of Aboriginal children in all States and Territories of Australia were removed from their families to be raised in institutions and by foster parents. The justifications and policy motives behind the practice varied “but at its most pernicious the practice was a result of theories such as Eugenics and assimilation.”

There was a perception that the ‘pure’ Aboriginal population was declining and that in time there would be no ‘pure’ Aboriginal people left. Aboriginal people of mixed descent were, however, throughout most of this period, seen as needing to be assimilated into the non-Aboriginal community. It was thought that the earlier a child was removed from Aboriginal society, and the more completely the child was isolated from it, the more likely he or she would be successfully assimilated.
The rights of parents were not given much consideration in this push to remove Aboriginal children from their families in pursuit of the assimilation goal. In fact, many considered that the rights and feelings of the parents, generally the mother, had to be ‘sacrificed’ for the good of the child and in order to achieve the assimilation goal.

For example, in discussing the report of the 1904 Roth Royal Commission into Conditions of Natives in the Western Australian Parliament, one parliamentarian made the following comment: “a half-caste, who possesses few of the virtues and nearly all of the vices of whites, grows up to be a mischievous and very immoral subject ... it may appear to be a cruel thing to tear an Aborigine child from its mother, but it is necessary in some cases to be cruel to be kind.” Further, it was claimed to be “wrong, unjust, and degrading to this state” to leave Aborigines as they were and a “maudlin sentiment” to consider the mother’s feelings as they would “forget all about it in 24 hours, and ... is glad to get rid of it ...”

Such disregard for the parents is also reflected in the 1905 Parliamentary comments of the Member for the Pilbara, J Isdell. In debating the *Aborigines Bill 1905* (WA) he claimed:

> There is a great deal of maudlin sentiment about taking away a child from the native mother; but the man who sees it done will lose all that sentiment; because when you take a child away from a native woman she forgets all about it in 24 hours and, as a rule, is glad to get rid of it.

In the first half of the twentieth century, the towering figure in Aboriginal affairs in Western Australia was the Chief Protector of Aborigines, AO Neville. He dominated Aboriginal affairs for nearly three decades after becoming Chief Protector in 1915. He also took a central role at the 1937 Commonwealth-State Conference on Aboriginal matters in Canberra. The conference provided an ideal platform for him to espouse his assimilation views. He continued the
attitude of giving little credence to the rights and feelings of the parents, as evidenced by the following comments:

... Every administration has trouble with half-caste girls. I know of 200-300 girls, however, in Western Australia who have gone into domestic service and the majority are doing very well. Our policy is to send them out into the white community, and if the girl comes back pregnant our rule is to keep her for two years. The child is then taken away from the mother and sometimes never sees her again. Thus these children grow up as whites, knowing nothing of their own environment. At the expiration of the period of two years the mother goes back into service. So that it really does not matter if she has half a dozen children.

And elsewhere:

... When they enter the institution, the children are removed from the parents, who are allowed to see them occasionally in order to satisfy themselves that they are being properly looked after. At first the mothers tried to entice the children back to the camps, but that difficulty is now being overcome.

One should not be mistaken in assuming that all people in ‘officialdom’ were as insensitive to the effects on the parents, particularly the mothers, of removing the children from them. For example, Royal Commissioner Moseley, displayed some sensitivity on the issue:

As I have already observed, there is a duty on the community to see that half-castes are placed in surroundings and given a training which will fit them later to take their place, if necessary, in a white civilization. Any easy method from one point of view would be to remove them when young from the influence of the aboriginal and form settlements at which, on
similar lines to those applied in the case of orphaned white children, they might receive the training above referred to. That method, however, does not appear practicable for the application to all half-castes. The great objection in many cases is that they have parents, and there is beyond doubt in the native woman a great love for her child, whether that child’s father be black or white. It may be said that it is the child we must think of, not the mother: that is true, but we must, I think, in common decency, seek some solution which will benefit the half-caste child but not inflict cruelty on that child’s mother, unless indeed the mother, by her mode of living, is deserving of no consideration.48

Nonetheless, Moseley did not recommend departure from the removal policies and practices.

Another example of voicing concerns for the mothers is provided by the Hon T Moore, a year after the 1935 Moseley Report. In debating the Aborigines Act Amendment Bill 1936 (WA) he stated that ‘half-caste’ children were being removed, no matter how they were cared for by their natural mothers. He added that “[i]t is a shame to take a child away from its mother. It is inhuman.”49

Despite this, Aboriginal children continued to be removed from their parents. Indeed, the practice of removing Aboriginal children from their families pursuant to assimilation policies continued into the 1960s. Children were removed from their parents and sent to church run missions, government institutions and foster parents. Parents were often denied access and visiting rights to their children.50 They were given no say in the upbringing of their children - the children being denied access and knowledge of their Aboriginal culture and being inculcated into Christian religions that were often foreign to them.51
Legislation

The seminal piece of legislation in relation to the removal of Aboriginal children from their families in Western Australia is the *Aborigines Act 1905* (WA). This Act was based on the *Aborigines Protection and Restriction of the Sale of Opium Act 1897* (Qld). The 1905 Act acted as a blueprint for much of the specific Aboriginal legislation that was to follow in the other jurisdictions of Australia and basically remained intact in its original form in Western Australia until the passing of the *Native Welfare Act 1963* (WA), which removed the State guardianship power. The other major statutes, the *Aborigines Act Amendment Act 1936* (WA) and the *Native Welfare Act 1954* (WA) did not alter the 1905 Act in any significant way, although these two later Acts did give some additional powers and coverage to the Chief Protector of Aborigines or the Commissioner of Native Affairs (always a male).

Section 6 of the *Aborigines Act 1905* (WA) provided for the Aborigines Department to have the duty of "custody, maintenance and education of the children of Aborigines." Section 8 provided that the Chief Protector of Aborigines was the legal guardian of every Aboriginal and half-caste child until such child attained the age of 16 years. Section 12 of the *Aborigines Act 1905* (WA) empowered the Chief Protector to order that any Aborigine be moved from a reserve or district to another reserve or district and be kept there. Many summary offences were created for contravention of the various provisions of the Act, and extensive regulation-making powers were conferred on the Governor.

There is no doubt that the 1905 Act provided for legislative interference with parental rights by allowing the child to be removed from their parents – in this case, for no other reason than that the child was deemed to be Aboriginal or half-caste under the Act. However, the 1905 Act did not provide for the total abolition of parental rights; for example there was no provision expressly
Arguably, the general legal guardianship provision found in s 8 of the 1905 Act, by superimposing a ‘State guardianship’ over the natural parental guardianship, removed any parental rights. However, it can equally be argued, and it is the preferred argument of this writer, that parental rights were not removed. Rather, the 1905 Act provided for the interference with parental rights to the extent required for the legal guardian to fulfil his guardianship duties. This position is given added credence by the 1911 amendment to the 1905 Act, which added the words, “to the exclusion of the rights of the mother of an illegitimate half-caste child.”53 Thus, the legislation does expressly provide for the rights of the mother of an illegitimate half-caste child to be superseded by the ‘State guardianship’ but not that of parents of legitimate Aboriginal and half-caste children.

However, even if the 1911 amendment did allow significant interference with the mother’s rights in relation to an illegitimate half-caste child, the State guardian (Chief Protector) was still obliged to act in the best interests of the child – this being the case whether the child was legitimate or illegitimate. And arguably, acting in the best interests of the child would require respect for the rights of the parents. There is evidence available, much of it available at certain stages of the historical period under study, to sustain the view that if the State guardian was acting in the best interest of the child he should only have removed a child from its mother in the most extreme circumstances and as a measure of last resort and that after removal, the child should have been provided with regular parental contact.54 Arguably, unless detrimental to the child, the child should have been educated in the religion of the parents, as religion potentially plays an important role in family bonding and is closely linked to the natural law of parenting.55

In any case, regardless of whether the Aboriginal specific legislative scheme that provided for the removal of Aboriginal children from
their families allowed for removal or interference of parental rights, the fact remains that the legislatures, policy makers and public servants held attitudes and engaged in practices that were insensitive to the ‘rights’ and feelings of the parents. This created much harm for many parents as epitomised by the quote at the commencement of this section. And, although not the focus of this article, in many cases, the clear violations of parental rights were not in the best interest of the children removed.

Conclusion

Yes, the State did take the children away from their mothers (and fathers). And, in doing so, little regard was given to the views or feelings of the parents. Nor was any recognition given to their parental rights - rights that were a combination of common law rights and freedoms and moral rights. Unfortunately, the parents of the removed Aboriginal children have been largely forgotten in the academic, legal, political and public debate surrounding the issue of Aboriginal child removals. It is hoped that this article goes some way towards rectifying this deficiency. Obviously, much more research, analysis and debate is required, for as Prime Minister Keating stated in his Redfern speech, “[w]e simply cannot sweep injustice aside”.56

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The National Inquiry was launched on 10 August 1995, in Adelaide. The National Inquiry terms of reference were originally announced on 11 May 1995 by the then Attorney-General of Australia, Michael Lavarch. However, those terms of reference were revoked and replaced with similar but wider terms of reference, including the examination of compensation principles on 2 August 1995. The terms of reference of the National Inquiry were: tracing past laws, practices and policies that lead to the removal of Aboriginal and Torres Strait Islander children from their families and the effects of those laws, practices and policies; examining compensation issues; examining current laws, practices and policies with respect to services and procedures available to those affected by removal and recommending appropriate changes; and examining current laws, practices and policies with respect to child placement and care of Aboriginal and Torres Strait Islander children and recommending appropriate changes, taking into account the principle of self-determination.

On May 28 2000, up to 250 thousand people walked across the Sydney Harbour Bridge in support of reconciliation between Aboriginal and non-Aboriginal Australians. Politicians from all major parties were represented but the Prime Minister of Australia, the Hon Mr John Howard refused to participate in the reconciliation march.


Although there may be differences between powers and rights, here they are used interchangeably - referring to the ‘rights’ a parent has with respect to their child. On issues of rights and powers (and duties) refer to W Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 32 Yale Law Journal 16.


Ibid, 441.

Ibid, 440.


Above n 8, 434-435, WGW White. above n.6, 231-244.

Thomasset v Thomasset [1894] P 295, 297-299; Secretary, Department of Health and Community Services v JMB and SMB (1991-1992) 175 CLR 218, 292.


It is not always clear what other rights parent have, but they may include for example, the right to discipline and punished a child, the right to consent to marriage and the right to determine nationality and domicile.


Above n 16, 373-374.

J v C [1970] AC 668
21 Ibid, 713-714.

22 Ibid, 724.


24 Ibid.

25 Ibid.


27 Parl Deb House of Lords (3d) 492 (1839), per Lord Wynford.

28 S v S [1962] 2 All ER 1, 3.

29 Above n 23, 219.

30 Above n 8, 438-439.

31 Hall v Hall (1749) 3 Atk 721; Wakeham v Wakeham [1954] 1 All ER 434.

32 Above n 23, 220.

33 Ibid, 221.

34 Above n 23, 221.

35 Hawksworth v Hawksworth (1871) 6 LR Ch App 539, 542; Re Carroll (No 2) [1930] All ER 192, 210


37 Re Carroll (No 2) [1930] All ER 192, 210.

38 AD 12/1903.
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30 S Beckett (ed), The Stolen Generation: A Legal Issues Paper for Lawyers and Other Advisers (Public Interest Advocacy Centre Sydney 1997), 5-6.

40 Aboriginal Legal Service of Western Australia (Inc) (hereafter ALSWA), Telling Our Story (ALSWA (Inc) Perth 1995).

41 Commissioner WE Roth Royal Commission on the Conditions of the Natives Report (Government Printer Perth 1905).

42 Western Australian Parl Debs vol 1 series 25 2RSP Assembly (4 October 1902) col 558.

43 Western Australian Parl Debs vol 1 series 28 2RSP Assembly (3 December 1905) col 426. (Note that in 1905 there was only one volume.)

44 Western Australian Parl Debs series 28 2RSP Assembly (12 December 1905) col 426

45 Neville’s views have recently been aired in the film ‘Rabbit Proof Fence’.

46 Commonwealth of Australia Aboriginal Welfare-Initial Conference of Commonwealth and State Aboriginal Authorities (AGPS Canberra 1937) 10-11, 15


49 Western Australian Parl Debs vol 1 series 97 2RSP Assembly (6 October 1936) col 978.

50 Above nn 40, 1, 78, 111-112, 118.

51 Ibid, 67-126; HREOC, Bringing them home (AGPS Canberra 1997) 169-171. Also refer generally to ALSWA, After the Removal (ALSWA Perth 1997); Q Beresford and P Omaji, Our State of Mind (Fremantle Arts Centre Press Fremantle 1998); A Haebich, Broken Circles (Fremantle Arts Centre Press Fremantle 1998).
This was increased to 21 years of age under s 8 of the Aborigines Act Amendment Act 1936 (WA).

Aborigines Act Amendment Act 1941 (WA), s 3.


Re Carroll (No 2) [1930] All ER 192, 210.

Above n 1, 4.