University of New South Wales
University of New South Wales Faculty of Law Research Series
2008

Year 2008 *Paper* 4

'The Cost of a Wounded Society': Reparations and the Illusion of Reconciliation

Andrea Durbach*

*University of New South Wales

'The Cost of a Wounded Society': Reparations and the Illusion of Reconciliation

Andrea Durbach

Abstract

The history of reparations for Indigenous Australians removed from their families has been sporadic, piecemeal and devoid of any national conviction. This uneven and divisive approach, which has failed to capture and implement the key features of a comprehensive reparations strategy, has consequently allowed the historical injustice of past practices to permeate the social, economic and cultural lives of contemporary Indigenous communities. By reference to a national reparations tribunal proposal, isolated individual legal proceedings and a small-scale state-based compensation scheme, this paper explores Australia's splintered efforts at remedying the gross human rights violations experienced by the Stolen Generations. It argues that Australia's ongoing failure to address the magnitude of the moral wrong perpetuated against victims of removal policies and the enduring harm and disadvantage borne by successive generations, stands out as a significant lost opportunity for a nation to realise its commitment to the prerequisites of reconciliation.

'The cost of a wounded society'[1]: reparations and the illusion of reconciliation

Andrea Durbach
Associate Professor
Director, Australian Human Rights Centre
Faculty of Law
University of New South Wales

The history of reparations for Indigenous Australians removed from their families has been sporadic, piecemeal and devoid of any national conviction. This uneven and divisive approach, which has failed to capture and implement the key features of a comprehensive reparations strategy, has consequently allowed the historical injustice of past practices to permeate the social, economic and cultural lives of contemporary Indigenous communities. By reference to a national reparations tribunal proposal, isolated individual legal proceedings and a small-scale state-based compensation scheme, this paper explores Australia's splintered efforts at remedying the gross human rights violations experienced by the Stolen Generations. It argues that Australia's ongoing failure to address the magnitude of the moral wrong perpetuated against victims of removal policies and the enduring harm and disadvantage borne by successive generations, stands out as a significant lost opportunity for a nation to realise its commitment to the prerequisites of reconciliation.

*My appreciation to Julia Mansour for her rigorous editing and insights, valuable comments and meticulous footnoting.

[1] Nathalie des Rosiers, 'Moving Forward with Dignity – The Report of the Law Commission of Canada and its Aftermath' in *Moving Forward: Achieving Reparations for the Stolen Generations* Conference Papers, Human Rights and Equal Opportunity Commission, Sydney, 2001 http://www.humanrights.gov.au/social_justice/conference/movingforward/speech_desrosiers.html

> It is my belief that when the Aboriginal and Torres Strait Islander story of Australia is heard and understood then there will be true reconciliation. The abstract language of human rights and justice will settle down on the realities of the lives and aspirations of individual men, women and children who wish simply to have their humanity respected and their distinctive identity recognised.
>
> Michael Dodson, *Reshaping Perspectives*, First Report, Aboriginal And Torres Strait Islander Social Justice Commission, 1993

> It was wrong to simply say 'turn the page'. It's right to turn the page but first you have to read it. You have to understand it. You first have to acknowledge it and then you can turn the page.
>
> Dr Alex Boraine, Vice-Chairperson, South African Truth and Reconciliation Commission, address to the National Press Club, Canberra, 22 May 1997

Acknowledging identity and dignity: the drawbacks of litigation

A decade after the *Bringing them home* Report[2] recommended that 'for the purposes of responding to the effects of forcible removals… reparation be made in recognition of the history of gross violations of human rights',[3] the Supreme Court of South Australia became the first Australian Court to recognise that the removal of an Aboriginal child from his mother was unlawful and amounted to wrongful imprisonment. Bruce Allan Trevorrow[4] was awarded $525 000 as compensation for the emotional, physical and cultural consequences of his unlawful removal at the age of 13 months. His award included a provision for exemplary damages, the court finding that 'the conduct of the State in this case was voluntary, deliberate, and carried out in spite of legal advice that it was acting *ultra vires*'.[5] Five years earlier, Sydney woman Valerie Linow[6] was awarded $35, 000 by the New South Wales Victims Compensation Tribunal for the psychological harm arising from the sexual assault and violence she suffered after she had been sent to work as a domestic servant on a rural property at the age of 14.[7] At age two, the Aboriginal Welfare Board had removed Ms Linow from her family placing her in the Bomaderry children's home and subsequently, at Cootamundra Girl's Home. In *Bringing them home*, the Human Rights and Equal Opportunity Commission estimated that one in six witnesses who appeared before its

---

[2] Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('The National Inquiry Report')

[3] Ibid. Recommendation 3 of the National Inquiry Report reads that for the purposes of responding to the effects of forcible removals, `compensation' be widely defined to mean `reparation'; that reparation be made in recognition of the history of gross violations of human rights; and that the van Boven principles guide the reparation measures. Reparation should consist of:
1. acknowledgment and apology, 2. guarantees against repetition, 3. measures of restitution, 4. measures of rehabilitation, and 5. monetary compensation.

[4] *Trevorrow v State of South Australia* (2007) SASC 285. ('*Trevorrow*')

[5] Ibid at para 1215

[6] This case was unreported and the reasons remain confidential.

[7] The alleged assaults which were the subject of the application occurred in 1958. Section 26(1) of the *Victims Support and Rehabilitation Act 1996* (NSW) (the 'Act') provides that applications for compensation must be lodged within two years of the relevant act of violence occurring. However, s 26(2) of the Act entitles the Director of the Tribunal to accept applications despite the fact that they have been lodged out of time, and s 26(3)(b) establishes a presumption in favour of giving leave in cases involving sexual assault. At the time, the maximum compensation payable by the tribunal was $50 000.

National Inquiry in 1995-1996 had been subjected to sexual or physical abuse.[8]

The *Linow* case followed the decision of the Federal Court in 2000 in *Lorna Cubillo and Peter Gunner v The Commonwealth*[9]. The Federal Court dismissed claims by the plaintiffs for wrongful imprisonment, breach of statutory duty, negligence and breach of fiduciary duty arising from their removal from their families and their detention in mission-run institutions, claims similar to those brought by Bruce Trevorrow. Justice O'Loughlin of the Federal Court found against the plaintiffs citing as reasons the significant absence of evidence to support the causes of action, the plaintiffs' inability to recall 'accurately events that occurred … when they were small children"[10], the 'overwhelming' prejudice to the defendant given the effluxion of time since the plaintiffs' removal (25-35 years) and that the responsibility of removal lay with independent officials and missions, not with the named defendant, the Commonwealth. Justice O'Loughlin did however assess notional general damages for each applicant in the event that he was overruled on the law, calculating Lorna Cubillo's damages at $126,800 and Peter Gunner's damages at $144,100. In 2001, Lorna Cubillo and Peter Gunner lost their appeal to the Full Federal Court.[11].

While the *Linow* case sought damages for harm incurred whilst 'in care' rather than for the act of removal *per se*, the claim was pursued in an attempt 'to establish an alternative process to litigation for members of the Stolen Generations seeking compensation for harm that occurred to them while in State care'.[12] The claim via the tribunal was assessed solely on the papers, determined expeditiously and with comparative minimal cost.

Despite the 'devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment,'[13] the cases referred to comprise part of a handful of legal proceedings initiated by members of the Stolen Generations since the release of the *Bringing the home* Report.[14] Most of the litigation has been unsuccessful for the reasons declared by Justice O'Loughlin in *Cubillo*: the unavailability of critical evidence and the failure to discharge the onus of proof, the prejudice to the defendant given the frailty, illness or death of key witnesses (potential evidence 'clouded by age or time'[15]) and/or the loss or destruction of records and material documents.[16] Additionally, the 'protection' and 'welfare' laws[17] and policies between the early 1920s and 1960s which regulated the removal of Aboriginal and part Aboriginal children, were primarily assessed in the litigation by

---

[8] Human Rights and Equal Opportunity Commission, above n 1, 372

[9] *Cubillo and Another v Commonwealth* (No. 2) [2000] FCA 1084 ('*Cubillo*') at http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/1084.html

[10] Ibid at para 1545.

[11] *Cubillo and Another* v Commonwealth [2001] FCA 1213

[12] Alexis Goodstone, 'Stolen Generations Victory in the Victims Compensation Tribunal' (2003) 5 (22) *Indigenous Law Bulletin* 10 – 11.

[13] The Full Court of the Family Court *In the Marriage of B and R* (1994-1995) 19 Fam LR 594 at 602 per Fogarty, Kay and O'Ryan JJ quoted in *Cubillo* at para 72

[14] Chris Cuneen and Julia Grix, 'Chronology of the Stolen Generations Litigation 1993-2003', (2003) 5 (23) *Indigenous Law Bulletin* 14

[15] Jennifer Clarke, 'Case Note - Commonwealth Not Liable: *Cubillo and Gunner v Commonwealth*', (2000) 5(2) *Indigenous Law Bulletin* 11

[16] Ibid

[17] Ibid

reference to the values and behaviour prevailing at the time[18] – the standards of entrenched 'misguided paternalism'[19]. Prompted by an apparent responsibility to serve the best interests of the children removed and their community, these laws and practices were judged lawful according to the standards of the time. Anthropologist Professor WEH Stanner observed in 1964 that it was perhaps difficult for those well-meaning men and women who implemented the policies and laws to see their misguided intentions as racist and 'fundamentally dictatorial'.[20]

In *Trevorrow*, Justice Gray, acknowledged that the proceedings related to events commencing some 50 years earlier but noted that that 'extensive contemporaneous documentation relevant to the events was tendered in evidence'[21] - including parliamentary debates, second reading speeches and academic texts and publications which confirmed the 'well-recognised' significance of 'the bond and attachment between mother and child.'[22] In addition to the contemporaneous evidence that forced removal of a child from it's mother might not coalesce with the 'best interest of the child', Justice Gray referred to the legislative constraints which operated in the exercise of powers under the *Aborigines Act 1934-1939*. 'First,' said Justice Gray, 'the power to take children from their natural parents and place them into the custody of others

> could only be exercised in circumstances where it was demonstrably in the best interests of the child that he or she be removed. That required detailed consideration of all the relevant circumstances. It did not empower the APB to move children around without regard to the needs of the child or the consequences to that child. Second, it could only be exercised by the APB. In the present case, it could not be said that removing the plaintiff from his natural family was in his best interests without an inquiry, and in the absence of evidence, that he was in fact neglected. Furthermore, departmental officers effected the removal of the plaintiff with only the subsequent ratification of the board. The process of removal placed the plaintiff under the direct and immediate control of the APB. The plaintiff was a vulnerable infant. Even if the removal was lawful the circumstances gave rise to a duty of care both with respect to the removal and the subsequent separation and return.[23]

The findings of the South Australian Supreme Court might offer other members of the Stolen Generations some hope of judicial success. However, the prospect of protracted and expensive litigation and of revisiting the trauma of removal and subsequent harm in an adversarial setting, has

---

[18] Toohey J in *Kruger* cited in *Cubillo* at para 97; see also *Williams v Minister*, Aboriginal Land Rights Act 1983 [No 2] [1999] NSWSC 843 ('Williams v Minister [No 2]'). Abadee J at para 757:

> 'It is appropriate to repeat, that the events that I am being asked to judge and evaluate commenced in 1942 and finished in 1960. Thus in 1999 I am asked to judge that which took place 39 to 57 years ago (over a half a century)! I repeat again that these are events that occurred in a different Australia, a society with different knowledge, and with different moral values and standards. To apply attitudes of the present community to a period commencing so long ago would be to apply the standards of today not those of the 1940s and 1950s.'

See Cubillo at para 101

[19] Cubillo at paras 1306 and 1560

[20] Robert Van Krieken R, 'Is assimilation justiciable?' (2001) 23(2) *Sydney Law Review* 23-60 at fn 133

[21] Trevorrow at para 14

[22] Trevorrow at para 1046. At para 1104, the judgment makes reference to Parliamentary debate on the *Aborigines Half Caste (Children) Bill 1921*, during which a Member of Parliament said: "To take a child from its mother's arms, as may be done under this Bill, is altogether too drastic.... I am not going to be a party to taking a child away from its parents unless with the consent of the parent and the child, particularly the parent. ...This is one of the cruellest things I have ever heard of." Another Member of Parliament is cited during the second reading speech on the *Aborigines (Training of Children) Act 1923*, stating: "The dictates of humanity forbid the State to deprive mothers of their infant children in cases when the mothers desire to keep them, even though it were ultimately for the child's benefit".

[23] Trevorrow at para 1095

presented very real barriers to legal recourse by actual and potential claimants who have elected to withdraw from or avoid litigation.[24] The *Cubillo* litigation comprised four years of legal proceedings and 106 days of hearings involving 60 witnesses. The case cost somewhere between $11 million and $12 million. Despite evidence (and a subsequent finding by Justice O'Loughlin) that the plaintiffs, who were taken from their parents at an early age, had suffered painful experiences of separation and physical and sexual abuse, counsel for the Commonwealth, Douglas Meagher SC, subjected the plaintiffs to 'humiliating and harrowing treatment in court'. Kim Beazley, the then leader of the Australian Labor Party (ALP) Opposition said that the Commonwealth adopted a line of defence which displayed a 'singular lack of compassion or cultural sensitivity (which has) astounded those who have studied (the case)':[25]

> Any person thinking of making a complaint, and any legal service thinking of supporting them is to be left in no doubt as to the consequences. The matter will be fought out in court. The process will be long and expensive. No secret, no private matter, no youthful indiscretion will go untouched. The Commonwealth will set out to humiliate, discredit and defeat every claimant.[26]

As the case of *Cubillo* demonstrated, the legal and evidentiary obstacles – the limitations barriers, the absence of key witnesses and records, the adversarial, often brutal nature of cross-examination, the reluctance of the courts to see behind or beyond the apparent good intentions underlying government policy at the time – make the conduct, let alone the viability, of these cases, extraordinarily complex and questionable.[27] The drawbacks of litigation coupled with the consistent failure of the Federal government to apologise to the Stolen Generations and offer redress – Prime Minister John Howard declaring in 2001 that Australians of 'this generation should not be required to accept guilt and blame for past actions and policies over which they had no control'[28] – and the denial in 2001 by the then Federal Aboriginal Affairs Minister, John Herron, of the existence of a 'Stolen Generation','[29], has often meant that legal proceedings have been initiated as the only or inevitable option or last resort open to the Stolen Generations to exact some justice from a recalcitrant government.[30]

While litigation can 'identify the legal cause of a past injustice'[31], clarify the law and where the

---

[24] Andrea Durbach, 'Repairing the Damage: Achieving Reparations for the Stolen Generations,' *Alternative Law Journal*, (2002) 27 (6), 262-266; see also Cunneen ibid n 14; Chris Cuneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases', *Research Discussion Paper No. 15*, 2004, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra

[25] Kim Beazley, "Labor's response to the stolen generation (sic) – *bringing them home repor*t', address, Melbourne, 2001 quoted in Bessant, J (2004) 'Procedural Justice, Conflict of Interest and the Stolen Generations' Case', *Australian Journal of Public Administration* 63 (1), 74–84

[26] Ibid at 78.

[27] Durbach above n24 at 264

[28] Prime Minister John Howard, address delivered at the Reconciliation Convention, Melbourne, 1997

[29] Commonwealth Government, Submission to the Senate Legal and Constitutional Affairs Committee, 'Report on the Stolen Generation Inquiry- Healing: A Legacy of Generations '(1999). Senator Herron, delivering the Government's submission, claimed that no more than 10 per cent of children were taken from their families 'including those who were not forcibly separated and those who were forcibly separated for good reason', in his view a number too insignificant to constitute 'a generation'. The submission also asserted that the treatment of separated children was 'essentially lawful and benign'.

[30] Durbach above n 24

[31] Sir Gerard Brennan, 'Reconciliation Forum - Requirements of Justice: Legal Perspectives on Reconciliation', *University of New South Wales Law Journal* (1999) 22 (2) 595- 599 at 596

evidence demonstrates its breach, yield some redress, courts can 'not set right all of the wrongs of the past.'[32] In an article on reconciliation and the requirements for justice, Sir Gerard Brennan argues that 'sometimes the injustice is beyond legal remedy':

> Even if the law identifies the cause of a past injustice, it cannot undo the hurt, the alienation, the loss of dignity, the self abnegation which the injustice (and particularly institutionalised and repetitive injustice) has produced. The law does not provide, indeed cannot provide, remedies for every kind of injustice or every aftermath of an injustice suffered. It provides remedies only for an infringement of a legal right and its remedies are too blunt to undo all the effects of past injustices.[33]

Sir Gerard continued that the role of courts is not 'to chart a just political and social course for the future'.[34] The limitation of the courts in forging comprehensive and long-term social solutions was addressed by Justice O'Loughlin in *Cubillo*, in which he recognised 'that the subject of the removal and detention of part Aboriginal children has created racial, social and political problems of great complexity'. 'While historians', said Justice O'Loughlin, 'may wish to adjudicate on the racial and social policies of former Governments … it must be left to the political leaders of the day to determine what, if any, action might be taken to arrive at a social or political solution to these problems.'[35] All of the state parliaments have formally apologized to the Stolen Generations,[36] although there has been no comprehensive, 'meaningful'[37] national apology by the Australian Government through the Federal Parliament.[38].Rather, the Howard government's response has been to avoid acknowledgement of any moral culpability for the legacy carried by thousands of victims of racist removal policies which continue to diminish the lives of Indigenous families and communities across the nation. Coupled with the failure to acknowledge 'the darkest aspect of the history of this nation'[39], has been the failure by government to recognise 'the need for redress for

---

[32] per Merkel J in *Nulyarimma v Thompson* (1999) 165 ALR 621 at 638-639 quoted in *Cubillo* at para 79
[33] Brennan above n. 31 at 595
[34] Ibid
[35] Cubillo at para 105
[36] The State Parliamentary Motions of Apology adopted were:
Queensland: 26 May 1999 - Stolen Children, Aboriginal Reconciliation
Western Australia: 27 and 28 May 1997 - Aborigines, Family Separation
South Australia: 28 May 1997 - Aboriginal Reconciliation
ACT: 17 June 1997 - Motion in Response to the 'Bringing Them Home' Report
NSW: 18 June 1997 - Stolen Generations Apology
Tasmania: 13 August 1997-Motion of Apology to Aboriginal People
Victoria: 17 September 1997-Motion of Apology to Aboriginal People
See National Sorry Day Committee at
http://www.nsdc.org.au/index.php?option=com_content&task=view&id=95
[37] The Law Commission of Canada report *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* delineates the necessary elements of a meaningful apology: acknowledgement of the wrong done; accepting responsibility for the wrong that was done; the expression of sincere regret or remorse; assurance that the wrong will not recur; and reparation through concrete measures. Law Commission on Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000) Ottawa, 83
[38] On 26 August 1999, Prime Minister John Howard moved a motion of reconciliation in Federal Parliament which stated:
'...this House acknowledges that the mistreatment of many Indigenous Australians over a significant period represents the most blemished chapter in our history… [this House] expresses its deep and sincere regret that Indigenous Australians suffered injustices under the past generations and the hurt and trauma that many Indigenous people continue to feel as a consequence of those practices... '
Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 1999, 435 (John Howard)
[39] *Mabo & Ors v. The State of Queensland (No.2)* (1992) 175 CLR at 109

present disadvantage flowing from past injustice and oppression.'[40]

In late 1997, six months after the tabling of the *Bringing them home* Report, the Federal government allocated $63 million over a four-year period (from 1998-2001) for mental health counseling, family reunion services, parenting support programs, preservation of Indigenous languages and culture, oral history recordings and archiving of records.[41] This package, embodying the notion of 'practical reconciliation', has been criticized as being directed to only 17 of the 54 recommendations contained in the *Bringing them home* Report, determined without consultation about the use of the funds and with little reference to addressing individual harm and the right to reparations via recommended and accepted measures, such as a national apology and compensation.[42] Clearly, the Federal government saw the need to offer a response to the National Inquiry's recommendations and meet its international human rights obligations in some form. However, its insular concern to contain potential liability rather than take up Justice O'Loughlin's invitation to fashion an enduring social or political solution has seen the Prime Minister consistently avoid a national apology and hold that the court process was the appropriate mechanism for securing compensation. The government has cast its response away from the context of forcible removals, 'seeking to discharge (its) obligations through a range of rehabilitative and restitutionary measures.' [43] In doing so, it has failed to acknowledge that compensation is primarily a 'symbolic act' given that often the

> loss, grief and trauma experienced by victims of gross human rights violations can never be adequately compensated...Nonetheless, … (f)rom the victims' perspective, it has been suggested, monetary compensation 'concretizes ...the confirmation of responsibility, wrongfulness, s/he is not guilty, and somebody cares about it.' Thus, '[i]t's not the money but what the money signifies - vindication.' ...Importantly, as well, for many victims, monetary support can make a practical difference, can make the lives of communities and individuals easier.[44]

Waiting it out: the imperative of reparations

> It is very sad that this young man (Bruce Trevorrow) has had to go to the courts to seek redress . . . The governments of Australia have had a report recommending an appropriate administrative, non-litigious response, and with the exception of Tasmania, have done nothing to implement that.
>
> Fred Chaney, a board member of Reconciliation Australia and a former Liberal Aboriginal Affairs minister[45]

---

[40] Sir William Deane, 'Some Signposts From Daguragu', address delivered for the Council for Aboriginal Reconciliation's Inaugural Lingiari Lecture, Darwin 22 August 1996 at http://www.austlii.edu.au/au/other/IndigLRes/1996/2/index.html#3

[41] A further $54million over four years from 2002 was allocated by the Government in response to the Senate and Constitutional Committee Report

[42] See for example Human Rights and Equal Opportunity Commission, Social Justice Report, Aboriginal and Torres Strait Islander Social Justice Commissioner (2001), Canberra; Human Rights and Equal Opportunity Commission, Moving Forward - Responses to the *Bringing them home* report at http://www.hreoc.gov.au/education/bth/australia/moving_forward.html#journey

[43] Antonio Buti, 'Unfinished Business: The Australian Stolen Generations' (2000) 7 *Murdoch University Electronic Journal of Law* 4

[44] Sarah Pritchard, 'The Stolen Generation and Reparations,' (1997) 4(3) *UNSW Law Journal Forum* 28-31

[45] *The Age*, 'Stolen Generation Payout', 2 August 2007

> I want to make it very, very plain on behalf of the Government -- we do not support the idea of the reparations tribunal and one of the reasons we don't support it is we don't believe it would be cheaper than going through the court system.
>
> John Howard, Parliament, August 14 2000

The *Trevorrow* decision has been heralded a 'landmark judgment', a 'watershed' moment for all members of the Stolen Generations, 'sending a powerful message to other states and territories that compensation is rightfully owed to the victims of these policies which were in place across Australia for most of the 20th century, and impacted badly on generations of Indigenous Australians.'[46] Expressing concern at the need to seek redress via litigation, Mike Rann, the Premier of South Australia (the state against which Mr Trevorrow successfully argued his claim), has indicated that his government is keen to explore options for resolving claims 'more sensitively and efficiently.'[47] To this end, South Australian Aboriginal Affairs Minister, Jay Wetherill commented that

> (t)he people that have been subject to these abuses have been waiting, in some cases, for generations and a number of them are no longer with us sadly. We should be ensuring that it doesn't happen to anyone else.[48]

The limitations and disadvantages of Stolen Generations litigation and the need to assess the merits of each case on its own particular facts, have been factors reducing an anticipated 'floodgate' of cases being initiated across the nation. However, cases like *Linow* and *Trevorrow* serve to remind governments of their obligations and to hold them accountable for the social and economic wellbeing and development of their citizens. Regrettably, since the tabling of *Bringing them home*, most state governments – despite their public declarations of apology and acknowledgment – have failed to act pre-emptively. Rather they have allowed those suffering the enduring effects of disadvantage[49] arising from removal policies to 'wait for generations' before a successful court action delivering redress (*Trevorrow*) has triggered a slow turning of the fiscal mind to 'more sensitive and efficient' options for resolution.

In an address to a Sydney conference in 2001 on reparations for the Stolen Generations, Nathalie des Rosiers, President of the Law Commission of Canada, referred to a Law Commission report initiated by the Canadian Federal Minister of Justice to assist governments respond to claims and law-suits arising out of child abuse in institutions, including abuse suffered by Aboriginal children sent to residential schools in the late 1800s - 1980s. The report, which articulates government not as defender, but as 'protector of the public interest', provides a range of options for a government response to the variety of needs of survivors.[50] Ms. des Rosiers warned the conference about the 'costs of doing nothing … the costs to the Aboriginal society, to the Canadian society of not responding, of not acknowledging the past history'.. In acknowledging the complex nature and cost of healing 'a wounded society', Ms des Rosiers highlighted the need for an imaginative, flexible

---

[46] Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma, 'Stolen Generation Compensation Long Overdue', Human Rights and Equal Opportunity Commission Media Release, 2 August 2007

[47] Premier of South Australia News Release, 'Bruce Trevorrow will get full compensation', 2 August 2007

[48] National Nine News, 'SA may create fund for stolen generation', 3 August 2007

[49] Dr Bill Jonas, Human Rights and Equal Opportunity Commission, 'Whatever Happened to Reconciliation?' Media Release, 15 May 2002

[50] Durbach above n 24

and urgent response and compensation, the absence of which would simply 'worsen the injury.'[51]

In its *Bringing them home* Report, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('the National Inquiry') stated 'the only appropriate response to victims of gross violations of human rights is one of reparation.' [52] In doing so, it adopted the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* drafted in 1996 by the former UN Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, Professor Theo van Boven. The Inquiry, by reference to various submissions and recommendations, noted that the term 'compensation' was limited to a monetary form, whereas 'reparation' was more 'comprehensive' and 'encompassing', and included:

i. acknowledgment and apology
ii. guarantees against repetition
iii. measures of restitution
iv. measures of rehabilitation, and
v. monetary compensation.[53].

In addition to its recommendation that 'reparation' comprise a comprehensive package, the Inquiry recommended that reparations should be extended to include not only the individuals removed, but also family members, communities and descendants of those forcibly removed, 'who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land'.[54]

Taking its lead from the National Inquiry's recommendations on reparations and the establishment by the Council of Australian Governments of a joint National Compensation Fund[55] which would assess (on a balance of probabilities[56]) and administer a minimum lump sum payment to 'an Indigenous person … removed from his or her family during childhood by compulsion, duress or undue influence'[57], the Public Interest Advocacy Centre (PIAC) [58] proposed the establishment of a

---

[51] des Rosiers above n 1 at 33-34

[52] Human Rights and Equal Opportunity Commission above n 2, Section 14 – Making Reparations

[53] Ibid. Recommendation 14 of the Report (Heads of Damage) states that monetary compensation be provided to people affected by forcible removal under the following heads:
1. Racial discrimination
2. Arbitrary deprivation of liberty
3. Pain and suffering
4. Abuse, including physical, sexual and emotional abuse
5. Disruption of family life
6. Loss of cultural rights and fulfilment.
7. Loss of native title rights
8. Labour exploitation.
9. Economic loss
10. Loss of opportunities

[54] Ibid. See particularly recommendation 4

[55] Ibid. See particularly recommendation 15. Recommendation 17 provides that claimants would receive free legal advice and representation and would not be bound by the rules of evidence; no limitation period would apply and procedures would be culturally appropriate with participation of Indigenous decision-makers assured

[56] Ibid. See particularly recommendation 19

[57] Ibid. See particularly recommendation 18. The recommendation also provides '(t)hat it be a defence to a claim for the responsible government to establish that the removal was in the best interests of the

Stolen Generations Reparations Tribunal in 1997[59] ('the PIAC proposal'). The proposal was a response to three concerns: firstly, an acknowledgment that the nature of potential claims and the redress sought would not necessarily be accommodated appropriately 'within the confines and limitations of the traditional legal process''[60];secondly,
the need to extend the role of the National Compensation Fund beyond its limited focus on monetary compensation to allow for a more comprehensive approach to reparation in keeping with the Van Boven principles[61]; and thirdly the social and economic imperatives to address the extensive and continuing damage articulated by members of the Stolen Generations at the National Inquiry within an innovative and compassionate framework.

The PIAC proposal, developed in consultation with representatives from Link Up (NSW), the Stolen Generation Working Group (NSW), the State Reconciliation Council (NSW), the NSW Department of Aboriginal Affairs, the NSW Attorney General's Aboriginal Justice Advisory Council, the Human Rights and Equal Opportunity Commission ('HREOC') National Inquiry Secretariat, the Aboriginal and Torres Strait Islander Commission ('ATSIC'), Aboriginal Legal Services and Aboriginal Medical Services and focus groups of Stolen Generation members across the country,[62] recommended the establishment of a tribunal that would meet the key objectives of:

- ensuring that Indigenous people were involved in the design and delivery of reparations processes and outcomes;
- validating the specific experience and identity of the Stolen Generations; and
- acknowledging, both symbolically and substantively, the magnitude of the moral wrong perpetuated against the victims of removal policies and the pain and enduring harm borne by the Stolen Generations.[63]

The proposal called for a legal mechanism that would incorporate some of the key advantages of a reparations model or approach as against litigation. These included:

- compliance by claimants with certain threshold tests or criteria for eligibility for reparations avoiding the difficult and, at times, artificial exercise of trying to fit concepts such as loss of culture, loss of Aboriginality and entitlement to traditional land into narrow legal categories which go to questions of fiduciary and statutory duty, harm and liability;
- an absence of emphasis on corroborative evidence (where threshold criteria had been clearly met) in recognition of the fact that with the effluxion of time, many witnesses were no

---

child.' Recommendation 20 states that 'the proposed statutory monetary compensation mechanism not displace claimants' common law rights to seek damages through the courts. A claimant successful in one forum should not be entitled to proceed in the other'.

[58] The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal and policy centre located in Sydney. Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia.

[59] Public Interest Advocacy Centre, *Providing Reparations: A Brief Options Paper* (1997)

[60] Public Interest Advocacy Centre, Submission to the Senate Legal and Constitutional Affairs Committee, 'Report on the Stolen Generation Inquiry- Healing: A Legacy of Generations' (1999)

[61] Ibid. PIAC argued for a body that 'should not only make awards of monetary compensation, but also allocate funding for other reparation measures, and have the power to recommend that third parties eg churches, welfare agencies, take action to implement reparations, where appropriate.'

62 PIAC's proposal gained widespread support from Indigenous and non-Indigenous organizations after it was further developed via a series of consultations with urban, regional and remote Indigenous communities on the tribunal's structure, functions and processes, entitlement to and potential content of reparations measures.

[63] Durbach above n 24

longer alive or were unavailable and documentary evidence or records were non-existent or had been destroyed;
- avoidance of the prospect of revisiting the trauma surrounding acts of removal and subsequent harm in an adversarial setting;
- an absence of overly formal procedures and the inclusion of tribunal members and staff with links to Indigenous communities, appropriate training and a demonstrated understanding of and expertise in Stolen Generations issues and history;
- the determination of relief expeditiously without incurring substantial costs for both the claimants and respondents;
- a shift away from a focus on damages sounding in individual monetary compensation. In developing the proposal, PIAC consulted extensively with members of the Stolen Generations across Australia. On the question of compensation, many members of the Stolen Generations expressed a concern that it was difficult and inappropriate to determine a measure of damages sufficient to meet the extent of their suffering. In addition, individual monetary compensation was considered divisive and reparations offered a more collective approach to redress in recognition of the harm suffered by whole families and communities[64];
- the forms of reparations, determined by reference to the van Boven principles, would be shaped by the claimants with reference to historical and sociological factors, community need and available resources.[65]

PIAC's proposal drew extensively on models such as the New South Wales Victims Compensation Tribunal and the Veterans Review Board and envisaged that the reparations tribunal would be accommodated within an existing structure, have a specific term of operation and that only claims lodged within 10 years of its establishment would be assessed. The proposal also highlighted growing commitment by international governments to a right to reparations for gross violations of human rights, in particular where governments were confronting contemporary harm incurred by citizens as a consequence of policies implemented by previous governments. In this regard, PIAC drew on the work of the Canadian Healing Foundation (an initiative which developed from the deliberations of the Royal Commission on Aboriginal Peoples)[66], the South African Reparations and Rehabilitation Committee (established to implement the recommendations of the Truth and Reconciliation Committee)[67], and the New Zealand Waitangi Tribunal.[68] The rationale for and

[64] Public Interest Advocacy Centre above n 60
[65] Durbach above n 24
[66] In response to the Canadian Royal Commission into Aboriginal Peoples, which dealt with Canada's residential schooling policy, under which many Indigenous children were removed from their families, the Canadian Government established the Aboriginal Healing Foundation, which grants funds to community based healing initiatives for use in developing and delivering programs and services for the victims of residential schooling. The Government has committed $350 million for the Foundation to distribute. See Aboriginal Healing Foundation website, http://www.ahf.ca.
[67] The Truth and Reconciliation Commission was established in 1995 to assist South Africa to 'transcend the divisions and strife of the past' and rebuild a future based on respect for human rights. It investigated and held hearings into human rights violations and, in its 1998 Report recommended that victims of gross violations of human rights receive reparations, including monetary compensation. It also recommended communal reparations in the form of a community rehabilitation program, institutional reform and symbolic measures of reparations. See, *Truth and Reconciliation Commission, Final Report* (1998) Volume 1 Chapter 1<http://www.truth.org.za>. The Commission made findings of gross violations of human rights in relation to 22,000 victims, recommending that they each receive a

development of all of these bodies lies in stark contrast to the approach adopted by the Australian government - 'that our generation should (not) be asked to accept responsibility of earlier generations, (for events) sanctioned by the law of the times'.[69]

In November 1999, the Australian Senate referred an inquiry to the Senate Legal and Constitutional References Committee to review the implementation of recommendations made in the *Bringing Them Home* report, including the adequacy and effectiveness of the Government's response. The Committee's terms of reference included consideration of 'the establishment of an alternative dispute resolution tribunal to assist members of the Stolen Generations by resolving claims for compensation through consultation, conciliation and negotiation, rather than adversarial litigation. The Senate tabled its report, *Healing: A Legacy of Generations*, in November 2000. Its primary recommendations focused on the reporting and monitoring of responses to the *Bringing them home* Report and on the establishment of a Reparations Tribunal. The Senate report recommended a reparations tribunal as the model best able to 'address the need for an effective process of reparation, including provision of individual monetary compensation'[70] and noted that 'the model put forward by PIAC be used 'as a general template for the recommended tribunal.'[71] The Federal Government tabled its response to the Senate Committee's report in June 2001, rejecting the reparation tribunal proposal and recommendations and adding that:

> State governments are responsible for the laws which were in place in their jurisdictions during the period that Indigenous child removals took place. No state government has offered to pay monetary compensation or establish such a tribunal. It is a matter for the non-government organisations involved in the removal and care of children to respond to compensation claims addressed to their actions.[72]

In light of the federal government's response, [73] PIAC began to direct its efforts at state governments. In an independent evaluation of government and non-government responses to the *Bringing them home* report, the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA) noted that in spite of the apologies made by all the states and territories to the Stolen

---

monetary package based on a benchmark amount of R21,700 (the median annual household income in South Africa in 1997) per annum for six years (at the time, approximately equivalent to Aus $6,000 per annum)

[68] The Waitangi Tribunal in New Zealand was established in 1975 in recognition of the large scale dispossession brought about by colonisation and the consequences for the Maori nation. Claims may be made where individuals are, or are likely to be, prejudicially affected by any past or present actions or omissions of the Crown which are inconsistent with the principles of the Treaty of Waitangi. See *Treaty of Waitangi Act 1975* (NZ) s 6(1).

[69] Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, quoted in Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Commissioner, Social Justice Annual Report (1998) at 63.

[70] Senate Legal and Constitutional References Committee Report, *Healing: A Legacy of Generations* (2000) at xviii (Recommendation 7)

[71] Ibid. Recommendation 8.

[72] Federal Government response To *Healing: A Legacy Of Generations*, 28 June 2001 at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=1902233&TABLE=hansards&TARGET=

[73] Former Human Rights and Equal Opportunity Commission Social Justice Commissioner, Dr Bill Jonas, warned of the social and economic costs resulting from 'the narrowness and unwillingness of the Government to consider alternative approaches to redressing … the urgent need for reparations and healing'. See Human Rights and Equal Opportunity Commission, 'Moving Forward: Achieving Reparations for the Stolen Generations' Conference Papers (2001) at 4

Generations and the broad range of initiatives initially promised by State governments to address the reparations recommendation, most of the states had 'diverted from their original commitments', illustrated by the fact that 'many of the deliverables (did) not match up.'[74] While failing to offer compensation to those suffering harm from forcible removal practices, both the New South Wales[75] and Queensland Governments[76] have however established reparation schemes to address claims relating to wages and entitlements, such as welfare payments, owing to Indigenous people. These amounts were taken by state officials and paid into government trust funds pursuant to government policy to control the financial and other affairs of Indigenous Australians.

In a significant development in September 2006, Tasmania became the first state in Australia to introduce legislation to financially compensate Indigenous people forcibly removed from their families. Delivering his annual State of the State address to parliament, the Tasmanian Premier Paul Lennon said Tasmania was 'setting the standards' for other states by recognising the wrongs of the past.[77]

The Stolen Generations of Aboriginal Children Act 2006 (Tas) was passed by both Houses of the Tasmanian Parliament in November 2006. The legislation created a $5 million fund to provide payments to eligible applicants, including children of deceased members of the Stolen Generations. Eligible applicants are entitled to ex gratia payments of $5,000 each, with a maximum of $20,000 for a family group. An Office of the Stolen Generations Assessor has been established and claims for compensation will be determined by mid-January 2008.[78] In March 2007, the Queensland Democrat Senator, Andrew Bartlett, tabled an exposure draft of the Democrats Stolen Generation Compensation Bill. Similar in content and structure to the Tasmanian legislation, the Bill was introduced to initiate 'an effort to address some of the unimplemented recommendations from the Bringing them Home report … tabled … in May 1997.' [79] The Exposure Draft [80] provides for ex gratia payments to eligible applicants from a Stolen Generations Fund (comprising $40 million) to be determined by a Stolen Generations Assessor. Following the Trevorrow decision, the South Australian government announced that rather than appeal the judgment, it would examine the Tasmanian compensation fund and ascertain the success of the Tasmanian approach.[81]. In response,

---

[74] Ministerial Council for Aboriginal and Torres Strait Islander Affairs, *Evaluation of Responses to Bringing Them Home Report*, December 2003

[75] For more information on the NSW Aboriginal Trust Fund Repayment Scheme, see http://www.premiers.nsw.gov.au/AboutUs/OurStructure/AboriginalTrustFundRepaymentScheme/default.htm

[76] For more information on the Queensland Government Unspent Indigenous Wages and Savings Reparations (IWSR) funds, see http://www.Indigenous.qld.gov.au/datsip/work_savings.cfm

[77] Sydney Morning Herald, 'Tasmania to compensate Stolen Generation', 26 September, 2006

[78] In August 2007, the Tasmanian Minister for Community Development announced that Tasmania's Stolen Generations assessor had received 151 applications for compensation. Tasmanian Minister for Community Development Media release, 'Stolen Generations Compensation Assessment Begins', 12 August 2007. In January 2008, the Tasmanian Premier, Paul Lennon, announced that 106 claimants - 84 people removed from their families as children - will be compensated from the $5million fund.

[79] Australian Democrats Press Release, Senator Andrew Bartlett, 28 March 2007. *Brisbane Times*, 22 January 2008 at http://news.brisbanetimes.com.au/tas-announces-stolen-generation-payments/20080122-1ndu.html

[80] Exposure Draft, Stolen Generation Compensation Bill 2007. See http://andrewbartlett.com/data/stolen-generation-compensation-bill-exposuredraft-2007.pdf

[81] National Nine News above n 48

Mary Buckskin, Chief Executive Officer of the peak body representing Aboriginal health services in South Australia, called on Premier Rann "to consult with the Aboriginal community on any such fund to ensure that it appropriately meets the needs of our Stolen Generations" and to educate the broader community about the need for and importance of such a fund.[82]

When introducing the Tasmanian legislation, Premier Paul Lennon said that the 'fundamental' issue of compensation 'has to be addressed before we can achieve true reconciliation with the Tasmanian Aboriginal people'.[83] While the Tasmanian initiative suggests a significant way in which leadership at a state level can shift the divide between Indigenous and non-Indigenous Australians, authentic and effective reconciliation requires a cohesive national commitment to justice rather than splintered state by state 'manifestations of benevolence.'[84] The *Bringing them home* report called for a 'whole-of-government response' to a history which 'had a profound impact on every aspect of the lives of Indigenous communities'. This response required 'immediate targets, long-term objectives and a continuing commitment', with each component – 'whether provision of family history information or enhancing well-being through medical and mental health services' – needing to 'derive its rationale from that central policy commitment.'[85]

The PIAC model sought to achieve the implementation of a holistic and enduring resolution grounded in testimony presented to the National Inquiry and designed in accordance with the needs of potential claimants and the principles of participation and self-determination. A central aspect of the formulation of the proposal, which drew on ideas and suggestions collated during a national consultation process, was to ensure that those affected by forcible removals have an active role in shaping the nature and content of reparations rather than 'constantly being the subject of other people's decisions about what is best for you, what you deserve, what you are entitled to.'[86] In addition to the potential benefits for members of the Stolen Generations, the model also offered significant implications for governments, including:

- access by those harmed by removal policies to an agreed form of compensation;
- the existence of a scheme for financing a range of reparations measures;
- the possible containment of litigation, creating finality and certainty for governments and those affected by forcible removal policies; and
- an effective mechanism for providing social justice for Indigenous people[87]

The illusion of reconciliation

> [T]rue reconciliation between the Australian nation and its indigenous peoples is not achievable in the absence of acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and

[82] Aboriginal Health Council of South Australia, Media Release, 'SA Aboriginal Leader Congratulates Bruce Trevorrow and calls on Rann to Consult Aboriginal Leaders regarding a Compensation Fund for SA's Stolen Generations', 7 August 2007
[83] Sydney Morning Herald, above n 77
[84] Brennan above n 31 at 595
[85] Human Rights and Equal Opportunity Commission above n 2 (Chapter 15: Evaluating Government Responses)
[86] Human Rights and Equal Opportunity Commission, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Sixth Social Justice Report (1998) at 18
[87] Public Interest Advocacy Centre above n 60

> degradation of the Aboriginal peoples. … national shame, as well as national pride, can and should exist in relation to past acts and omissions, at least when done or made in the name of the community or with the authority of government. Where there is no room for national pride or national shame about the past, there can be no national soul.
>
> Sir William Deane – Some Signposts From Daguragu [88]

> Let none tell me the past is wholly gone.
>
> Oodgeroo Noonuccal[89]

Soon after the *Trevorrow* judgment was handed down, a major Australian television network conducted a nationwide poll on the question: "Does the 'stolen generation' (sic) deserve compensation?" The poll indicated a 67% vote against awarding compensation.[90]. While clearly not a comprehensive or conclusive analysis, the response to the media poll suggested that many Australians "have little idea of the trauma suffered by Aboriginal people," [91] despite the extraordinarily widespread dissemination, media coverage and public response to the publication of the 700 page *Bringing them home* report. The Human Rights and Equal Opportunity Commission reported that "tens of thousands of copies of the community guide to the report were requested and sent to schools, to community groups and to others, over 20 000 copies of the report were sold and thousands of copies of the *Bringing them home* video were distributed to Indigenous and non-Indigenous communities"[92].

In October 2007, in the lead-up to the federal election, Prime Minster John Howard announced that if re-elected, he would seek, via referendum, the support of the Australian people "to formally recognise Indigenous Australians." To this end, the Prime Minister saw as his primary goal the incorporation of "a new Statement of Reconciliation" into the preamble of the Australian Constitution. While the Prime Minister believed that the time was "right to take a permanent, decisive step towards completing some unfinished business of this nation," he remained of the belief "that a collective national apology for past injustice fails to provide the necessary basis to move forward."[93] In an interview after his announcement, Mr Howard, when pressed on an apology to the Stolen Generations, said: "I have always supported reconciliation but not of the apologetic, shame-laden, guilt-ridden type. … I think in the past we have become obsessed with things like

---

[88] Deane above n 40

[89] David J. Tacey, *Edge of the Sacred*: *Transformation in Australia*, Harper Collins Publishers, Victoria, (1995) at 147

[90] See http://news.ninemsn.com.au/previousvote/– Wednesday, 01 August 2007:
Yes: 26608 (33%)
No: 54638 (67%)

[91] Aboriginal Health Council of South Australia above n 82

[92] http://www.hreoc.gov.au/education/bth/australia/moving_forward.html. In the month following the tabling of the *Bringing them home* Report in 1997, an analysis of the newspaper coverage of the Report in ten general daily newspapers estimated that the value of the coverage was the equivalent - in advertising rates for the quantity of space - of approximately $1.5 million (Mervyn Smyth & Associates, *An Analysis of the Media Coverage of Bringing them home*, 1997)

[93] John Howard, 'A new Indigenous settlement', *The Australian*, 12 October 2007. See also: http://www.thesydneyinstitutepodcast.com/2007/10/12/JohnHowardTheRightTimeConstitutionalRecognitionForIndigenousAustrali

apologies and there are millions of Australians who will never entertain an apology because they don't believe that there is anything to apologise for."[94]

In his article 'Race Apologies', Eric Yamamoto[95] conveys a concern expressed by participants in the South African Truth and Reconciliation Commission proceedings that

> storytelling about personal trauma and words of apology alone are unlikely to be enough to engender meaningful reconciliation. Those who suffered need to perceive an apology as complete and sincere. … For many the acknowledgment and the apology must also be accompanied by social, structural and attitudinal changes.

In Australia, a critical contribution to meaningful reconciliation and 'attitudinal change' remains absent as the leader of Australia for the past 11 years has continued to hold out against offering an apology to the Stolen Generations on behalf of the nation. In addition, while resources necessary for the application of measures of 'practical reconciliation' have been made available, the federal government has made it clear that the courts remain the only national forum for the determination of an entitlement, or otherwise, to reparations claimed by those who have suffered harm as victims of forced removal policies. At Corroboree 2000, a major event organized by the Council for Aboriginal Reconciliation, Mick Dodson said that "although issues of health, housing and education of Indigenous Australians are of key concern to us as a nation, they are not issues that are at the very heart or the very soul of reconciliation. … (T)hey are, to put it quite simply and plainly, the entitlements every Australian should enjoy. … Reconciliation is about deeper things, to do with nation, soul and spirit"[96]

The work of the Council for Aboriginal Reconciliation (CAR) and that of the National Inquiry demonstrated that many of the thousands of families torn apart by forcible removal policies have never been reunited, and Indigenous communities remain affected by the trauma of separation and its impact on family and cultural life. *Bringing them home* further recorded how separation 'not only from family, but from heritage and cultural identity'[97] endured in differing degrees by successive generations of Indigenous people, is undoubtedly an underlying cause of violence, alcoholism, drug abuse, suicide, crime, family breakdown and widespread health problems within Indigenous communities.[98] It is for this reason that CAR has referred to the history of the Stolen Generations as the 'unfinished business of reconciliation'. While the effective implementation of 'practical reconciliation' initiatives are essential to halting the 'enduring cycles of disadvantage' endemic to Indigenous communities, at the core of 'true' reconciliation is acknowledgement of 'the realities of the lives and aspirations of individual men, women and children who wish simply to have their humanity respected and their distinctive identity recognised.'[99].Addressing the Australian Reconciliation Convention in Melbourne in 1997, Vice-Chairperson of the South African Truth and

---

[94] *The Australian*, 'PM must say sorry: indigenous groups', 12 October 2007 at http://www.theaustralian.news.com.au/story/0,25197,22573508-5013404,00.html

[95] Eric Yamamoto, 'Race Apologies' (1997) 1 *The Journal of Gender, Race and Justice* at 52

[96] ABC Radio National - Encounter, transcript of address by Mick Dodson at Corroboree 2000, 11 June 2000

[97] Kay Schaffer and Sidonie Smith, *Human Rights and Narrated Lives: The Ethics of Recognition*, Palgrave MacMillan, New York (2004) at 105

[98] Human Rights and Equal Opportunity Commission above n 2

[99] Michael Dodson, *Reshaping Perspectives*, First Report of the Aboriginal And Torres Strait Islander Social Justice Commissioner (1993)

Reconciliation Commission, Dr Alex Boraine spoke of the 'three anchors'[100] required to ground the vision of reconciliation in realty: – truth-telling which creates a common or shared memory, upon which a shared identity, necessary for the unity of a nation, depends[101]; restitution – 'helping those who have been hurt … in the most practical terms'; and 'moral transformation', the rediscovery of the soul of the nation.

During the parliamentary debates about the reconciliation process, the Minister for Aboriginal and Torres Strait Islander Affairs at the time, Robert Tickner, argued that "there can be no reconciliation without justice" and that process should address indigenous aspirations, human rights and, social justice."[102] Sir Gerard Brennan has argued that 'in the absence of reconciliation, injustice festers with the passing of time'[103]; conversely, it may be argued that the absence of justice erodes the possibility for effective reconciliation, that an 'obligation of justice' is intrinsic to reconciliation.[104]. Despite apologies from state parliaments and church organisations, some success at tracing at reuniting family members, Sorry Day commemorations and Bridge Walks in every major city by thousands of Australians, Australia's ongoing failure to address the magnitude of the moral wrong perpetuated against victims of removal policies by way of apology, acknowledgment of historical truth and the validation of contemporary damage, and accountability through reparation[105], stands out as a significant lost opportunity for a nation to realise its commitment to reconciliation.

Members of the Stolen Generations across Australia courageously came forward to give testimony about broken lives and irreparable harm caused by government-sanctioned policies and practices[106] 'laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress (and) undue influence.'[107] However the corresponding 'concepts of confession, repentance, … reparation … inseparable parts of the whole context of reconciliation'[108] the 'act of recognition'[109] and acceptance of national responsibility, have remained shamefully off limits for the Howard Government. Consequently, the process of healing is suspended, trauma is repeated and even re-enacted and the progress of reconciliation is illusory.

In the majority report of the Senate Legal and Constitutional Affairs Committee inquiring into the implementation of the *Bringing them home* report, the Committee recommended that 'the

---

[100] Alex Boraine, address to Australian Reconciliation Convention, Melbourne, 1997. See http://austlii.law.uts.edu.au/au/other/IndigLRes/car/1997/4/borspoke.htmil

[101] Ibid quoting Pepe Zalaquett

[102] Robert Tickner, *Taking a Stand: Land Rights to Reconciliation. NSW*, Allen and Unwin, Sydney.(2001) at 29

[103] Brennan above n 31 at 595

[104] Ibid.

[105] In his keynote address to the 'Healing The Pain' Stolen Generations Conference in Adelaide, 2001, Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Bill Jonas said: "First, reparation — the process of making amends for harm and injustice suffered — is fundamental to reconciliation. There cannot be reconciliation without reparation".

[106] Schaffer and Smith above n 97 at p105

[107] Human Rights and Equal Opportunity Commission, above n 2, Terms of Reference (a)

[108] Frank Chikane as quoted in Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimising the post-Apartheid State*, Cambridge University Press, Cambridge (2001) at 105

[109] Paul Keating, 'Australian Launch of the International Year for the World's Indigenous People', speech given to launch the International Year for the World's Indigenous People, Redfern Park, Sydney, 1992

Commonwealth convene a Summit meeting twelve months from the date of the federal government's response to this inquiry to co-ordinate and address the issues and recommendations identified in (the) report'.[110] Having endorsed the proposal for the establishment of a reparations tribunal based on the PIAC model, the Committee further recommended that details of the form and operations of the tribunal be finalised following consultation at the proposed National Summit.[111] In June 2001 the Government tabled its response to the Committee's recommendations. Seven years later, the proposed National Summit is yet to be convened. However, the opportunity to address 'the magnitude of the moral wrong' and implement the Committee's recommendations has presented itself in the wake of the 2007 federal election. '

In November 2007, the Australian people elected a new national government. Soon after the Australian Labor Party (ALP) ousted the Howard Government from power, Prime Minister-elect, Kevin Rudd "signaled his administration's change of direction" by undertaking to issue a national apology to the Stolen Generations "early in the parliamentary term"[112]. The exact wording of the apology is to be drafted in consultation with Indigenous communities. While a critical first step in resurrecting a flagging and devalued reconciliation process in Australia, an apology alone runs the risk of being a baldly symbolic gesture in the absence of a parallel, national program to compensate the damage suffered by members of the Stolen Generations. Despite the ALP commitment (contained in the majority report of Senate Legal and Constitutional References Committee in 2000) to the "establishment of a reparations tribunal", the structure and operations of which would be considered at a national summit, the new Federal Indigenous Affairs Minister, Jenny Macklin, has evidently ruled out reparations for the Stolen Generations. A month after her Prime Minister announced that the new government would apologise to the Stolen Generations, Jenny Macklin, when asked about a corresponding provision of compensation, echoed the sentiments of former Prime Minister Howard and declared on national television:

> We don't think that it's the right thing to have a national compensation fund. We think it would be far more productive to really put that money into addressing the very serious levels of disadvantage that still exist in Indigenous communities. … (D)ifferent states are addressing this issue in different ways and … that really is something that I respect…. We've made clear our decision. And we really do make this decision in the full knowledge that we want to make a difference to people's lives in the areas of health, education, building economic independence. We think that's if you like the middle way forward to really look to the future and make a difference to people's lives..[113]

As the new Federal Government struggles to distinguish itself from the old, it is disappointing that its Indigenous Affairs Minister seems to have reverted to an approach endemic to the Howard government's failure to 'to cope adequately … with the human misery' of Indigenous communities and respond appropriately to their long-standing needs.[114] Firstly, this approach continues to fail to acknowledge that current levels of serious and enduring disadvantage are inextricably linked to past

---

[110] Senate Legal and Constitutional References Committee Report above n 70. See in particular, Recommendation 2

[111] Ibid. See in particular, Recommendation 9

[112] BBC World, 'Rudd to apologise to Aborigines', 26 November 2007 at http://news.bbc.co.uk/2/hi/asia-pacific/7112773.stm

[113] ABC 7.30 Report, 'Macklin under fire over compo issue', 7 January 2008 at http://www.abc.net.au/7.30/content/2007/s2133493.htm

[114] ABC News, 'PM Likens Indigenous Crisis to Hurricane Katrina', 26 June 2007 <http://www.abc.net.au/news/stories/2007/06/26/1961802.htm>

practices of removal. In response to Minister Macklin's "unequivocal rejection"[115] of compensation for the Stolen Generations, Lyn Austin, Chairperson of Stolen Generations Victoria reiterated the findings that emerged from the Council for Aboriginal Reconciliation (CAR) and that of the National Inquiry:

> We've (still) got people living in third world conditions in our communities - you've got homelessness, you've got drug and alcohol issues, you've got people that have some sort of addiction and you've got people in and out of the system being incarcerated and that's part of them being separated from their families and you go through that whole system again and again.[116]

Secondly, the new Minister's adherence to the denounced 'practical reconciliation' catchcall of the Howard government, ignores the critical obligation of a government to provide its citizens with appropriate acknowledgement and meaningful redress for harm incurred from gross violations of their human rights.[117] Providing better health care and access to education and creating opportunities for economic development and independence, are, as Mick Dodson has pointed out, expected entitlements enjoyed by Australian citizens. The physical and psychological experience of members of the Stolen Generations however has to be addressed in ways which recognize and validate individual trauma if the process of healing and moving forward is to be executed effectively.[118] "Social reconstruction as a form of reparation" writes Brandon Hamber, in a paper which explores the complex factors which require consideration when formulating and granting reparations, "has its place, but this form of 'reparations', (ie enhancing access to health care and education), should take place in addition to, and not to the exclusion of, individualized reparations or collective reparation strategies."[119]

> People get compensation from victims of crimes, prisoners get compensation for some unjust treatment in the prison system or I could walk out in the street and fall over and I could sue the council for injuries ... why not the stolen generations for the past injustices that were done?[120]

The granting of reparations by governments not directly accountable for the harm suffered by its citizens, is not novel nor exceptional. There are many examples of governments of the day recognizing the critical importance of a nation "making acknowledgements to people"[121] who have suffered human rights abuses at the hands of former administrations[122]. These governments on

---

[115] Senator Andrew Bartlett, 'Labor continues Howard approach on Stolen Generations compensation', 7 January 2008 at http://andrewbartlett.com/blog/?p=1899

[116] *The Age*, 'Aboriginal leader backs compensation call', 7 January 2008 at http://www.theage.com.au/news/national/stolen-generation-pay-demand/2008/01/07/1199554539362.html?page=2

[117] see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law at http://www2.ohchr.org/english/law/remedy.htm

[118] Brandon Hamber, 'Repairing the Irreparable: dealing with the double-binds of making reparations for crimes of the past', (2000), 5(3/4) *Ethnicity & Health* 215-226 at 224

[119] Ibid.

[120] Lyn Austin above n.116

[121] Archbishop Tutu at the announcement of the draft South African Truth and Reconciliation Commission's Reparations and Rehabilitations Committee, quoted in Brandon Hamber at p 218

[122] These include the governments of Germany, Chile, Canada, Timor-Leste, Ghana. For a comprehensive study on reparation programs developed in 14 countries, see Pablo de Greiff (ed), *The Handbook of Reparations*, Oxford University Press, Oxford, (2006). The Australian government, despite its reluctance to make individual reparations to members of the Stolen Generations, has demonstrated

different continents, confronting varied histories and post-conflict scenarios, have chosen to lead their respective nations and recognize that reparations "concretize the state's acknowledgement of wrong-doing", restore dignity to survivors and "raise public consciousness" about a nation's "moral responsibility to participate in healing those hurt in the past."[123] The response of the Federal Minister is perhaps more peculiar given her statement that she "respects" the actions of different states (such as Tasmania) who have taken steps to address the issue of reparations yet her government is unwilling to commit to taking a similar step at the national level.

A refusal to address the source of the harm dictated by what the Federal government thinks "is the right thing", further ignores the clear and sustained requests that those most affected by removal policies have made since the publication of the *Bringing them home* report, a request recently transformed into a legitimate claim in the *Trevorrow* decision. To "make a difference" to the lives of Indigenous Australians requires the government to listen and "respond appropriately to their long-standing needs". In relation to the Stolen Generations, the majority report of Senate Legal and Constitutional References Committee in 2000 demonstrated an appreciation of a specific need when it recommended the establishment of a Reparations Tribunal as an effective and appropriate mechanism for resolving claims for compensation rather than having to rely on adversarial, protracted and expensive litigation for redress. Seven years later, many members of the committee which drafted the majority report, are now in a position to .confront the challenge of history and 'assert our identity as a nation'[124] by executing a critical plan towards the resolution of "unfinished business.". Australians now have the opportunity to hold government to its commitment to implement a national process of reparation as a matter of urgency or risk remaining unwitting peddlers of the mythology of reconciliation.

---

a capacity to make an analogous gesture to acknowledge the harm incurred by Australians interned as Prisoner's of War. In 2001, the Australian Government, under Prime Minister Howard, made ex gratia payments of $25 000 to Japanese Prisoners of War or the widows. Similar payments were made in 2003 to North Korean PoWs or their widows and in 2007, payments were made to Australians held as PoWs in Europe during World War II. The Hon Bruce Billson MP, Minister for Veteran Affairs, Minister Assisting the Minister for Defence, ' Ex-Gratia Payments To Australia's Former European Pows Imminent', Media Release, 8 June 2007 at
http://minister.dva.gov.au/media_releases/2007/06_june/va076.htm

[123] Hamber above n 118 at 218

[124] Deane above n 40