

University of New South Wales
University of New South Wales Faculty of Law Research Series
2011

Year 2011

Paper 2

State Crime, the Colonial Question and
Indigenous Peoples

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Abstract

The purpose of this chapter is to consider how our understanding of state crime needs to be mediated through an appreciation of colonial processes. The chapter explores a number of inter-related issues around the question of colonialism, state crime and Indigenous peoples. The historical relationship between Indigenous people and the development of modern nation states raises the problem of the extent to which contemporary liberal democracies like Australia, Canada or the US were founded on processes we would now regard as state crime, and indeed engaged in activities which at the time could have been regarded as unlawful. Further, while there has been considerable literature on transitional justice and processes for reparations in post-conflict societies, this body of scholarship has tended to ignore the extent to which liberal democracies themselves might be considered in need of 'post-conflict' reconciliation and restorative justice. This chapter explores these questions through a discussion of Australia, Canada and the US, although the primary focus is on Australia and its relationship with the continent's Indigenous peoples.

Cunneen, C. (2008) 'State crime, the Colonial Question and Indigenous Peoples' in Smuelers, A. and Haveman, R. (eds) (2008) *Supranational Criminology: Towards a Criminology of International Crimes*, Intersentia Press, Antwerp. ISBN 978 90 5095 791 5. pp159-180

State Crime, the Colonial Question and Indigenous Peoples

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Introduction: Colonialism and State Crime

The purpose of this chapter is to consider how our understanding of state crime needs to be mediated through an appreciation of colonial processes. The chapter explores a number of inter-related issues around the question of colonialism, state crime and Indigenous peoples. The historical relationship between Indigenous people and the development of modern nation states raises the problem of the extent to which contemporary liberal democracies like Australia, Canada or the US were founded on processes we would now regard as state crime, and indeed engaged in activities which at the time could have been regarded as unlawful. Further, while there has been considerable literature on transitional justice and processes for reparations in post – conflict societies, this body of scholarship has tended to ignore the extent to which liberal democracies themselves might be considered in need of 'post-conflict' reconciliation and restorative justice. This chapter explores these questions through a discussion of Australia, Canada and the US, although the primary focus is on Australia and its relationship with the continent's Indigenous peoples.

It is well acknowledged that the modern political state has been integral to the commission of genocide and other state crimes. Genocide and modernity have gone hand in hand (Bauman 1989), and the specific modernity of genocide is that the vastness and totality of 'final solutions' could only be pursued by the modern state with its access to significant resources, administrative capacities and law-making functions (Gellately & Kiernan 2003, 4). However, the colonial context adds a further dimension to how we see understand the connection between the development of the modern political state and the globalised nature of gross violations of human rights and state crime.

It is not the purpose of this chapter to engage with debates around the difficult issues associated with defining state crime. However, several points can be made at the outset. On the one hand, the concept of state crime can help us understand the development of modern political states and their violent and at times genocidal dispossession of Indigenous peoples. The argument here is that modern state building had as a foundational core an important element of criminality against dispossessed Indigenous groups. In other words, state crime is not an incidental or accidental element in the history of the modern state. The colonial context places state crime at the core of the modern state. Thus how we might conceptualise a 'deviant' state is problematised to the extent that many contemporary states were founded and developed on the basis of state crime – however, state crime might be defined in international law, criminal law or as serious human rights violations.

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Many contemporary states are built on crimes committed against colonised and enslaved peoples.¹ Indigenous people have been victims of profound historical injustices and abuses of human rights which can be understood in the context of state crimes committed in pursuit of colonial domination. The claims concerning historical injustices and human rights abuses against Indigenous peoples are multilayered. At the highest level is the claim that particular colonial practices against Indigenous peoples constituted genocide. Below genocide are claims of mass murder, racism, ethnocide (or cultural genocide), slavery, forced labour, forced removals and relocations, the denial of property rights, systematic fraud, and the denial of civil and political rights. Over-generalised claims of genocide against Indigenous people in the settler-colonies of North America, New Zealand and Australia have been controversial (Van Krieken 2004). However there is no doubt that genocide is the appropriate description for specific colonial laws and practices at particular times and places (Churchill 1997, Moses 2000). More broadly, the concept of ethnocide or cultural genocide captures the aggressive attempt to 'civilise' Indigenous peoples through a range of state-endorsed laws, policies and practices. The civilising process itself gave rise to specific state crimes such as the unlawful imprisonment and the denial of civil and political rights.

Genocide and Mass Murder

Extreme violence against Indigenous people can be defined as state crime in a number of ways. At its most systematic, and where there was clear intention to destroy a particular group then the most appropriate description is genocide. Beyond genocide there are countless examples of state-enforced or state-sanctioned mass murder.

The crime of genocide has been levelled against colonial regimes in their treatment of Indigenous peoples in Australia and the Americas. In relation to genocide and Native Americans, Ward Churchill has noted the following:

During the four centuries spanning the time between 1492... and 1892 when the U.S. Census Bureau concluded that there were fewer than a quarter million Indigenous people surviving within the country's claimed boundaries, a hemispheric population estimated to have been as great as 125 million was reduced by something over 90 percent. The people had died in their millions of being hacked apart with axes and swords, burned alive and trampled under horses... intentionally starved and frozen to death during a multitude of forced marches and internments, and in an unknown number of instances, deliberately infected with epidemic diseases (Churchill 1997,1).

Intention is a key element of genocide, and much of the recent analysis draws distinctions between the intentional killing of Indigenous people by colonial forces as distinct from the deaths of Indigenous peoples arising from introduced diseases, malnutrition and other factors that may not have demonstrated a necessary intention to destroy (Stannard 1993, xii). Massacres of Indigenous people by colonial state forces occurred across North America and Australia during the colonial period. On both continents, Indigenous men, women and children were murdered. As Stannard has

¹ The arguments in this chapter are specifically concerned with Indigenous peoples. However the colonial context also resulted in the crimes of slavery and post-slavery racial violence and discrimination.

noted in relation to the US, 'the European habit of indiscriminately killing women and children when engaged in hostilities with the natives of the Americas was more than an atrocity. It was flatly and intentionally genocidal. For no population can survive if its women and children are destroyed (Stannard 1993, 118-119).

There are well documented massacres of Aboriginal people in Australia in the late eighteenth and nineteenth centuries. There was never any doubt at the time that the Indigenous people and the colonisers were indeed at war in parts of southeastern Australia (Goodall 1996), in Tasmania during the 1820s and early 1830s (Reynolds 1995), and in Queensland during the mid to later half of the nineteenth century (Reynolds 1993). Yet these 'wars' were never declared as such because of the legal ambiguity of the place of Aboriginal people in Australia. It was assumed that Australia was acquired by peaceful settlement, that Aboriginal people had never been in 'possession' of their land, and that when the British claimed sovereignty over Australia in 1788, Aboriginal people became British subjects.

In some cases this 'war' can be seen as genocide. Moses (2000) for example argues that particular campaigns undertaken by Native Police against Indigenous nations in Queensland during the later part of the nineteenth century were genocide – they were clearly undertaken with the intention of physically destroying a whole group of people. In Western Australia authorities spoke of police 'teaching the blacks a lesson' and 'dealing out a fearful punishment' (Cunneen 2001, 50). At particular moments this can be seen as genocide. As late as the end of the nineteenth century senior state officials described events in the terms of a war of extermination. Correspondence between the Western Australian under-secretary and the premier of Western Australia in July 1895 noted, 'There can be no doubt from these frequent [police] reports that a war of extermination in effect is being waged against these unfortunate blacks in the Kimberley district' (quoted in Cunneen 2001, 50).

It is clear that colonial processes meant that the rule of law as a constraint on arbitrary power and state violence, and as a guarantee of equality before the law was suspended in relation to Aboriginal people in Australia. It is what one legal historian has referred to as a 'rubbery attitude to the law' where basic notions of the rule of law could be cast aside (Kercher 1995, 6). Punitive expeditions were ordered, collective punishment was exercised, armed 'pacification' parties were used against Indigenous people, and at various times martial law was declared. Men, women and children were killed. Kercher (1995, 7-9) has noted that if Aboriginal people were indeed British subjects then the official and unofficial killings which took place were mass murders. Even the declaration of martial law did not legitimise the killing of children, or non-combatants, or captives without some form of trial.

There were relatively recent massacres in Australia in the early part of the twentieth century. The last recorded massacre occurred in 1928 in Coniston, Northern Territory when some sixty to seventy Walpiri people were killed over several weeks by a police party. Murray, the officer in charge openly admitted to a policy of shoot to kill. According to a missionary who spoke to survivors of the killings, 'the natives tell me that they simply shot them down like dogs and that they got the little children and hit them on the back of the neck and killed them'. Murray admitted killing 31 people. Other estimates by missionaries put the figure at between 70 and 100 Aboriginal people killed. An Inquiry, headed by a police inspector, was established into the

killings. Aboriginal people were refused legal representation. The Inquiry cleared those who were involved (Cunneen 2001, 55).

Despite the view that Aboriginal people were British subjects, the processes of colonisation required a suspension of the rule of law in relation to Indigenous people. Terror was an important tool of the colonial state and was used as an instrument of control. The summary executions and the hanging of corpses in trees, the attacks on tribal groups as a form of collective responsibility, the indiscriminate killing of men and women, adults and children were designed to terrorise and pacify. In other words, the violence was not simply a series of undifferentiated acts. There was a 'culture of terrorism' which sustained the use of violence (Morris 1992). Colonisers could engage in a form of 'redemptive' violence which involved massacring Aboriginal people defined as 'treacherous savages'. Different treatment on the basis of race became justified. Aboriginal people were still publicly executed in Western Australia long after the practice of public executions had ceased for non-Indigenous people. Violence became accepted as a normal and justifiable way of dealing with Indigenous people. Racial differences were used to justify the use of brutal punishments. For Aboriginal people, floggings and the use of neck and leg chains remained in use until the 1930s. It was not until 1936 that the Northern Territory superintendent of police banned police punitive patrols and the use of violence in interrogations (McGrath 1993, 103-104).

The basic point to be drawn from this is that colonial expansion and the development of the territorial basis for new states like Australia rested on dispossession, and the processes of ensuring dispossession can be properly considered in the context of state crime. While international law may have justified the acquisition of colonies under particular circumstances, neither international nor domestic law justified mass murder.

The Forced Removal of Indigenous Children

A key component of the colonial process was the 'civilising' mission which involved changing natives from 'savages' to civilised Christians. It was a task that occupied the European empires over several centuries, and continued into the twentieth century in settler states like Australia and North America. The civilising process was often brutal. Native Americans were placed on church missions where the death tolls were horrific. While many of these deaths were caused by European-introduced diseases, the conditions on these missions also directly contributed to the large number of deaths. Severe malnutrition resulted from the inadequate diets and long hours of forced labour. Grotesque forms of punishment were used against the rebellious (Stannard 1993, 138).

The civilising process was to be partly accomplished through the removal of Indigenous children from their communities and families. The Canadian residential school policy was based on assimilation – of changing Indigenous peoples from savage to civilised by educating the young away from the influences of their parents and tribes. As Milloy (1999, xv) has noted in the Canadian context, the process was 'violent in its intention to "kill the Indian" in the child for the sake of Christian civilisation. In that way, the system was, even as a concept, abusive'.

In Canada the residential school system lasted from the 1870s to the 1980s. There was a nationwide network of schools operated by the Anglican, Catholic, Presbyterian and United Churches. Thousands of Indian, Inuit and Metis children were to pass through the schools. The system was a church-state partnership with the Department of Indian Affairs providing the funding, setting the standards and exercising legal control over the children who were wards (Milloy 1999).

In Australia Aboriginal children had been forcibly removed from their families by colonisers since the beginning of European occupation of Australia. However by the late nineteenth and early twentieth centuries there developed a systematic and state-sponsored policy of removal which was far more extensive than any previous interventions. In many states of Australia, Aboriginal children were placed in church-run institutions, while in some states like New South Wales the institutions were operated by the state. For a full discussion of the history of removal laws and policies in Australia, see NISATSIC 1997, 25-1490.

The Australian removal policies rested on specific assumptions about race, 'blood' and racial hygiene. Aboriginal people were divided according to the amount of European 'blood' they might possess. Law became fundamental to the categorisation and separation of individuals within racialized boundaries. According to the social Darwinist ideas, so-called 'full blood' Aboriginal people were bound to die out because of their inferiority. However, the concern for the state was the apparently rapidly growing population of 'mixed blood' children. It was these children that became the target of intervention. By permanently removing them from their families and communities it was believed that this group of children would, over generations, eventually be biologically absorbed into the non-Indigenous population. Their Aboriginality would be 'bred' out. Eugenicist arguments required a proactive state to manage, cleanse and maintain the 'white' population. Law provided the foundation through which an administrative edifice would define Indigenous people as 'full blood', 'half caste', 'quarter caste' and so on.

Both the Canadian and the Australia authorities saw the removal process as part of a civilising mission and spiritual duty to uplift the 'natives'. By today's standards the assimilationist 'civilising' process would be condemned as ethnocide or cultural genocide – and properly considered as a state crime. However, there are separate reasons for considering the forced removal of Indigenous children as a state crime on the basis of the what was done to these children after they were removed from their families and placed in the care of either the state or church-run institutions. In other words it is not simply a matter of judging the past by the standards of today. In both Australia and Canada, the system was never properly resourced or supervised, and shocking neglect and physical abuse were common. In 1996 the Canadian Royal Commission on Aboriginal Peoples (RCAP 1996) released its final report. As a result the Canadian Government has acknowledged past injustice and apologised to Indigenous peoples, particularly in relation to the effects of the residential school system.

The 'Stolen Generations' Inquiry

In Australia the forced removal of Indigenous children has been the subject of a major federal inquiry. The 'Stolen Generations' Inquiry was established by the Australian

Government in 1995 after a long battle for recognition of the issue by Indigenous people and their organisations (NISATSIC 1997, 36). The Inquiry estimated that 10 per cent of Indigenous children were removed from their families and communities under state sanctioned policies and removal practices in Australia between 1910 and 1970 (NISATSIC 1997, 18). Today, most Indigenous families continue to be affected in one or more generations by the forcible removal of children during this time (NISATSIC 1997, 37).

The Inquiry found that basic safeguards which protected non-Indigenous families were cast aside when it came to Indigenous children. The main components of the forced removal of Indigenous children which were unlawful were deprivation of liberty, deprivation of parental rights, abuses of power, and breach of guardianship duties. In relation to international human rights the main obligations imposed on Australia and breached by a policy of forced removals were the prohibitions on racial discrimination and genocide. The policy continued to be practiced after Australia had voluntarily subscribed to treaties outlawing both racial discrimination and genocide (NISATSIC 1997). In other words there are very good grounds for considering the policies of Aboriginal child removal as an example of state crime - a crime that was pursued as part of the colonial project of 'civilising' natives.

Deprivation of liberty

In regard to deprivation of liberty, the Inquiry found that 'the taking of Indigenous children from their homes by force and their confinement to training homes, orphanages..[etc] amounted to deprivation of liberty and [unlawful] imprisonment' (NISATSIC 1997, 253). The safeguard of court scrutiny before detention which protected arbitrary removal of non-Indigenous children, was denied Indigenous children. Indigenous children could be removed by the order of a public servant. At the same time the removal of non-Indigenous children required a court order.

Deprivation of parental rights

In regard to deprivation of parental rights, it was found that in some jurisdictions legislation stripped Indigenous parents of their parental rights and made a Chief Protector the legal guardian all Indigenous children. This was contrary to the common law which safeguarded parental rights - a parent could only forfeit their parental rights if a court found misconduct or that state guardianship was in the child's best interest (NISATSIC 1997, 255).

Abuses of power

Although legislation authorised the removal of Indigenous children, some Aboriginal Protectors and Inspectors resorted to kidnapping or trickery to take the children from their parents. There are many examples of children being taken directly from school without their parents' knowledge, or other cases where Indigenous parents were told their children were being taken to school but were then never seen again (NISATSIC 1997, 257). These actions were abuses of power - actions beyond what was authorised by the legislation.

Breach of duty of care and guardianship duties

Furthermore, Aboriginal Protectors and Protection Boards had a duty of care and protection to those over whom they exercised control. The report identified at least

three ways in which guardianship duties and statutory duties were failed with Indigenous children.

Firstly, there was a failure to provide contemporary standards of care for Indigenous children to the same level as non-Indigenous children. Although standards of care for non-Indigenous children were far from satisfactory, Indigenous children experienced appalling standards of care, brutal punishments, cold, hunger, fear and sexual abuse. Standards of care were less than the corresponding levels of care for non-Indigenous children. Secondly, there was a failure to protect Indigenous children from harm, from abuse and exploitation. Many of the children were verbally, physically, emotionally or sexually abused. Thirdly, there was a failure to consult or involve parents in decisions about the child. Many children who were institutionalised were then falsely told their parents were dead. For further discussion of guardianship duties, state obligations and the removal of Aboriginal children see Buti 2004.

Violation of international human rights standards

According to the inquiry, the main international human rights obligations imposed on Australia and breached by a policy of forced removals were prohibitions on racial discrimination and genocide. The policy of forced removal continued to be practised after Australia had voluntarily subscribed to treaties outlawing both racial discrimination and genocide, which was from the mid 1940s onwards (NISATSIC 1997, 266).

The legislative regimes created for the removal of Indigenous children were different and inferior to those established for non-Indigenous children. They were racially discriminatory and remained in place until 1954 in Western Australia, 1957 in Victoria, 1962 in South Australia, 1964 in Northern Territory and 1965 in Queensland. In addition, Government officials knew they were in breach of international legal obligations (NISATSIC 1997, 270). The Inquiry found that the policy of forcible removal of Indigenous children could be properly called genocide and breached international law.

Official policy and legislation for Indigenous families and children was contrary to accepted legal principle imported into Australia as British common law and, from late 1946, constituted a crime against humanity. It offended accepted standards of the time and was the subject of dissent and resistance. The implementation of the legislation was marked by breaches of fundamental obligations on the part of officials and others to the detriment of vulnerable and dependent children whose parents were powerless to know their whereabouts and protect them from exploitation and abuse (NISATSIC 1997, 275).

In summary, the Inquiry found that the policy of forced removal of Indigenous children was contrary to prohibitions on racial discrimination and genocide, and was contrary to accepted legal principle found in the common law. Finally, the removals had led to other forms of criminal victimisation including widespread sexual and physical assault (NISATSIC 1997, 277-278).

There has been considerable argument in Australia as to whether the policy of removal constituted genocide, and if so, did it continue to constitute genocide in the

post 1945 period when policies moved towards assimilation (Manne 2001). However, even if one does not accept that the forced removal policies constituted genocide, there are other substantial reasons for regarding the actions as state crime. The finding of genocide was one part of the claim concerning the violation of international human rights standards – the other was racial discrimination. Furthermore, international human rights violations were only one of five legs to a claim of unlawful behaviour: the others being breaches of statutory and common law duties and principles.

Institutional Racism as a Foundational Harm

As indicated above, racism was a precondition for the colonial genocides and the systematic abuse of human rights of Indigenous peoples in Australia and the Americas. As Stannard (1993, 247) notes, Spanish and Anglo-Americans saw the natives of the Americas as racially inferior beings. Racial discrimination provided an overarching basis to governmental law and policy towards Indigenous people throughout much of the eighteenth, nineteenth and twentieth centuries. The suspension of the rule of law and the use of terror and violence by colonial authorities against Indigenous people was also contextualised and legitimated within racialised constructions of Indigenous people as inferior, lesser human beings. There is no doubt that these racialised constructions changed during the eighteenth, nineteenth and twentieth centuries: in Australia this move was from notions of barbarism to views about a race ‘doomed’ to extinction. Indeed competing views about race were often prevalent at the same time. However, what is important is that racialised constructions of Indigenous people inevitably facilitated discriminatory intervention. In Australia institutionalised and legalised discrimination reached a peak during the ‘protection’ period of the twentieth century.

In terms of understanding state crime, the importance of recognising the role of racism is that it provided a foundational logic to many of the harms that subsequently developed. Specific harms like the forced removal of children occurred as a result of racial discrimination. The policies and practices of protection and assimilation were built on assumptions about racial inferiority which justified discriminatory treatment. After the 1940s ideas about cultural assimilation came to the fore and largely replaced ideas about the biological basis to racial inferiority. However, cultural assimilation was still based on a view of the inferiority of the native – now defined more in terms of culture rather than biology. The ultimate goal had not changed: the disappearance of Indigenous people as a distinct group of people. In Australia, cultural assimilation was seen as leading to a form of ‘equality’ with European Australians. However, this equality was to be one defined on the assumption of the superiority of white Anglo-Australian cultural, economic and political institutions. It was to be the equality of ‘sameness’: where everyone could participate on a social terrain defined by the coloniser. The goal of equality still authorised racial discrimination. To reach the level of equality the colonial subject required tutelage. They had to be taught and trained to be equal. As a result, there was authorised intensive supervision and surveillance through a range of state agencies including child welfare, health, housing and criminal justice agencies.

Forced Labour and Government Fraud



Overwhelmingly, discussions on state crime concentrate on the use of force – and there is clearly a good reason for this given the role of the modern state in the murder of vast numbers of people (Green & Ward 2004, 1). However, crime is also defined by fraud as well as force. A consideration of the colonial process shows how the state was involved in vast fraudulent schemes against Indigenous people who were under the state's care and protection. These include such matters as stolen wages, missing trust monies, and under-award payments for Indigenous workers. There were negligent and, at times corrupt and dishonest practices which lead to the withholding of moneys from Aboriginal wages that had been paid into savings accounts, and trust funds.

Part of the precondition for this fraudulent activity was state control over Indigenous labour which itself amounted to forced labour and bordered on a type of slavery in some cases. Many Aboriginal workers in Western Australia were not paid wages and were primarily remunerated through rations such as flour, tea, tobacco and clothing. As late as the early 1960s Aboriginal workers employed as stockmen were given 'perhaps two shirts and two pairs of trousers a year, working boots, hat, canvas swag, and a couple of blankets...no money' (Toussaint 1995, 259). The exploitation of Aboriginal workers in the pastoral industry was often considered as 'unpaid slavery' at the time (Haebich 1992, 150). Australia was clearly in contravention of various International Labour Organisation (ILO) conventions to which it was a party. In 1930 Australia had signed the Forced Labour Convention which generally prohibited forced labour and working for rations.

Kidd (1997 & 2000) conducted extensive research in Queensland on the way corruption and financial abuse by police 'protectors' and other state officials led to diversion of Aboriginal money from trust funds. In December 2006 the Australian Senate Standing Committee on Legal and Constitutional Affairs [hereafter the Standing Committee] released the report of its inquiry into what has become known as Indigenous 'Stolen Wages'. The terms of reference for the inquiry related to Indigenous workers whose paid labour was controlled by government. Throughout the nineteenth and twentieth centuries, various Australian governments put in place legislative and administrative controls over the employment, working conditions and wages of Indigenous workers. These controls allowed for the non-payment of wages to some workers, the underpayment of wages, and the diversion of wages into trust and savings accounts (Standing Committee 2006:3). The inquiry took a broad view of 'wages' to include wages, savings, entitlements, and other monies due to Indigenous people.

The Standing Committee found that there is

compelling evidence that governments systematically withheld and mismanaged Indigenous wages and entitlements over decades. In addition, there is evidence of Indigenous people being underpaid or not paid at all for their work. These practices were implemented from the late 19th century onwards and, in some cases, were still in place in the 1980s. Indigenous people have been seriously disadvantaged by these practices across generations (Standing Committee 2006:4).



Typically state protection legislation set out controls on Indigenous workers whereby they could only be employed under a permit granted by a protector. Minimum wages were set for Indigenous workers with a permit. For example in Queensland the wage was set at less than one-eighth the 'white wage'. Protectors could instruct the employer to pay the wages of the Indigenous worker directly to the protector. Monies held by the protector were to be deposited in the worker's name in a government bank account where accounts of expenditure were to be kept. Some small percentage of the worker's wage could be given to the worker as pocket money, either by the employer or the protector. In Queensland further deductions could be taken from the wages of Indigenous workers to be placed in an Aboriginal Provident Fund (later the Aboriginal Welfare Fund) which was established for the 'relief of natives'.

In the Northern Territory protectors could direct an employer to pay a portion of Aboriginal worker's wages to the protector to be subsequently held in a trust account. However, it was also the case that after 1933 employers of Aboriginal workers could be exempted from paying *any* wages if the protector was satisfied the employer was maintaining the relatives and dependants of the Aboriginal employee.

In New South Wales the focus of control of the Aborigines Protection Board was the apprenticeship (or indenture) of Aboriginal children. The power of the Board to apprentice Aboriginal children 'on such terms and conditions as it may think under the circumstances of the case are desirable' continued until 1969 (Standing Committee 2006,15). The protection legislation established the wages for Aboriginal apprentices and directed that a small percentage be given as pocket money to the apprentice and the remainder go into a trust account to be paid out to the apprentice at the end of their apprenticeship.

The inquiry found that governments had put in place compulsory regimes for the regulation of Indigenous money, including compulsory contributions to savings and trust fund accounts. However, governments failed to ensure that Indigenous people received the money they were entitled to, and failed to ensure that the savings and trust fund accounts were properly protected from misappropriation and fraud (Standing Committee 2006, 41).

The stolen wages and missing trust funds of Aboriginal peoples was fraud on a vast scale over many decades. The effects of the stolen wages of Indigenous people and subsequent immiseration arising from this exploitation, is fundamental to understanding the contemporary situation of Indigenous people in Australia. While Aboriginal people substantially contributed to the economic development of the nation, they

were subject to a disabling system which denied them proper wages, protection from exploitation and abuse, proper living conditions, and adequate education and training. So while other Australians were able to build financial security and an economic future for their families, Aboriginal workers were hindered by these controls. Aboriginal poverty... today is a direct consequence of this discriminatory treatment (Haebich, cited in Standing Committee 2006, 68).



The long term impact of government policy in the realm of financial controls over Indigenous people is probably as great as the impact of the policies of Aboriginal child removal. It also provides a compelling argument for considering systematic government fraud as a state crime, and shows the importance of seeing colonial policy and practice in the context of state crime.

Loss of Civil and Political Rights

It was typically the case that settler colonial states put in place restrictions on the civil and political rights exercised by Indigenous peoples. Thus the foundations of liberal democracies were built on various exclusionary measures aimed at the original inhabitants of the land. In Australia the denial of civil and political rights included numerous legislative controls and restrictions on movement, residence, education, health care, employment, voting, worker's compensation, and welfare/social security entitlements. These restrictions continued well into the later part of the twentieth century.

Under British law imported into Australia at the time of colonisation, Indigenous people were regarded as British subjects. However, as the colonies gained self government and eventually federated into the Commonwealth of Australia, Indigenous people were consistently excluded from the enjoyment of citizenship rights. At a national level, the practical denial of Australian citizenship rights was achieved through various parliamentary legislation and administrative practices beginning with the *Commonwealth Franchise Act 1902* which expressly disenfranchised Aboriginal people.

These restrictions were to remain well into the twentieth century. The *Nationality and Citizenship Act 1948* established the legal construct of 'Australian citizen'. So by virtue of being born in Australia, Aboriginal people were automatically entitled to Australian citizenship. However, this citizenship was largely an empty shell without the citizenship rights that other Australians enjoyed. Even after the passage of the *Nationality and Citizenship Act*, Aboriginal people could not vote in Federal elections, or elections in Queensland, the Northern Territory, and Western Australia. Indigenous 'citizenship' was thus devoid of the substantive rights and privileges associated with citizenship and was inherently discriminatory (Chesterman & Galligan 1997, 3). It was not until 1962 that Commonwealth amendments to electoral laws removed any remaining prohibitions on voting at the federal level. States began to dismantle their discriminatory laws during the same period. Restrictions on Indigenous voting rights in Queensland were not removed until 1965.

The developments which we associate with the rise of modern social welfare-oriented liberal democracies during the course of the twentieth century need to be considered against the backdrop of a range of exclusionary practices which were essentially derived from the colonial experience. For example, Aboriginal people were largely excluded from the right to social security: a number of federal statutes explicitly disqualified Aboriginal people from receiving government entitlements claimable by non-Indigenous Australians. These included:

- The *Invalid and Old-Age Pensions Act 1908* which barred 'aboriginal natives' of Australia and the Pacific from receiving an old-age and/or invalid pension

- The *Maternity Allowance Act 1912* which disqualified ‘women who are aboriginal natives of Australia’ from receiving the maternity allowance
- The *Child Endowment Act 1941* prohibited the payment of the benefit to an ‘aboriginal native of Australia’ who was nomadic or dependent on Commonwealth or State support
- The *Widows’ Pensions Act 1942* which denied the pension to any ‘aboriginal native of Australia’.

These discriminatory laws remained in effect until the 1960s, and discriminatory restrictions on eligibility for social security benefits for Aboriginal people were not completely lifted until 1966.

Individual states in Australia also had their own ‘protection’ legislation. Among other powers this legislation allowed for control over Indigenous movement and residence in a manner that was incompatible with basic freedoms enjoyed by other Australians. Administrators and police could force Aboriginal people to reside on specified reserves. In addition Indigenous people could be moved from camps, or removed from whole districts to another location or moved between reserves and institutions. We noted above that protection legislation also regulated employment. In addition an Aboriginal person could not marry a non-Aboriginal person without authorization from the Director of the Native Affairs or a specially empowered protector. State legislation which restricted the citizenship rights of Indigenous people living on reserves in Queensland remained in place until the 1980s (Chesterman & Galligan 1997).

The absence of basic civil and political rights for Indigenous people throughout much of the twentieth century represented an abrogation by the state for ensuring fundamental human rights. As we have seen in the discussions relating to stolen wages and the forced removal of children, the abrogation of fundamental rights gave rise to a range of subsequent crimes. However, there is a good argument that these breaches of fundamental rights should be seen as state crimes in themselves. While there has been much debate on the relationship between human rights and state crime, it is imperative that breaches of fundamental human rights such as freedom from racial discrimination should be seen as state crime. If the principle of non-discrimination had been adhered to in relation to Aboriginal people, then the debilitating laws and policies noted above would never have been enacted.

After State Crime: The Struggle for Reconciliation and Reparation

The final section of this chapter is concerned with the issue of reparations for Indigenous people for the harms caused by colonial law, policy and practice. It focuses in particular on the contemporary demand for reparations and compensation by Indigenous people in Australia, but acknowledges that similar demands are being made by Indigenous peoples in other settler societies, including the United States and Canada. There are also parallels with demands by African Americans for reparations for slavery. Indeed, both African American and Indigenous peoples have lessons which can be learned from each other in their respective struggles to deal with

historical injustices. Although slavery was different to the dispossession of Aboriginal peoples, both groups were subject to institutionalized racial discrimination and violence, and within nations that defined themselves as liberal democratic societies guided by the rule of law.

As demonstrated in this chapter, many of the harms against Aboriginal peoples relied on law for their legitimacy. Many were essentially aimed at destroying Indigenous cultures. They were cultural harms in the broadest sense: colonial laws, policies and practices which, at various times, sought to assimilate, 'civilize', and Christianise Aboriginal peoples through the establishment of reservations, the denial of basic citizenship rights, the forced removal of children and forced education in residential schools, the banning of language, cultural and spiritual practices, and the imposition of an alien criminal justice system (RCAP 1996, NISATSIC 1997, Tsosie 2004).

Finding a just solution and remedy for historical wrongs is an important part of any discussion on state crime. In relation to Indigenous peoples in Australia, New Zealand and North America there has been much discussion on reconciliation. However, there can be no effective reconciliation without addressing in a meaningful way the wrongs of the past. Thus reconciliation requires a reparations process. Such a process provides both a moral and a legal response to policies and practices that, as a society, we recognize as abhorrent. This is not simply judging the past by the standards of today. As argued in this chapter, many of the practices engaged in by the state were unlawful at the time – such as the fraudulent misappropriation of the wages and trust funds of Indigenous peoples.

Principles of Reparations

The process of developing principles and guidelines on the right to reparation for victims of violations of international human rights law has been ongoing for sometime. It is uncontroversial, in international or domestic law, to state that where a right has been violated it should be remedied. However, the questions of 'who' and 'how' with respect to violations of international human rights law have always been difficult and are now being addressed systematically in the international arena. The Van Boven/Bassiouni principles have developed since the then United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities first commissioned Special Rapporteur Van Boven to report on the issue in 1989. In 1998 the Commission on Human Rights appointed Cherif Bassiouni to further revise the principles developed by Van Boven on the right to reparations for victims of gross violations of human rights. It is expected that these principles will be adopted eventually by the United Nations General Assembly.

The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Violations of Humanitarian Law contains 29 principles. Broadly, the principles state the obligation to respect, ensure respect for and enforce international human rights and firmly locate the right to afford remedies to victims within the scope of this obligation. The principles aim to identify and provide mechanisms and procedures to implement existing obligations to victims, and in this sense also aim to rationalise a consistent approach to the means by which victims' needs can be addressed. For example, Principle 7 states that statutes of limitations should not unduly restrict the ability of a victim to pursue a claim against a

perpetrator – a particular problem which victims of historical injustices such as Indigenous peoples have faced.

Principles 16-25 address the right to adequate, effective and prompt reparation. Ultimate responsibility for reparations lies with states: a state is to provide reparation for its own violations and in the event that another party is responsible and unwilling or unable to meet their obligations to repair, the state should endeavour to provide assistance, including reparations. Successor states shall provide reparations for violations of previous governments. Questions of how to repair are given extensive attention under the headings: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.

Restitution should, whenever possible, restore the victim to the original situation. Restitution can include the restoration of social status, identity, return to one's place of residence, restoration of employment and return of property (Principle 22).

Compensation should be provided for any economically assessable damage: physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including employment, education and social benefits; material damages and loss of earnings; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services (Principle 23).

Rehabilitation should include, as appropriate, medical and psychological care as well as legal and social services (Principle 24).

Satisfaction and Guarantees of Non-repetition includes cessation of continuing violations, verification of the facts and full public disclosure of the truth (to the extent that such disclosure does not cause further unnecessary harm to the victim), the search for the whereabouts of the disappeared and for the bodies of those killed, and assistance in the recovery, identifications and reburial of the bodies in accordance with the cultural practices of the families and communities; apology, including public acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred in educational material at all levels (Principle 25).

Internationally there has been growing acceptance that governments acknowledge and make reparations for the victims of human rights abuses. There has been widespread agreement on the principle of reparations, including a variety of methods of redress; the importance of public acknowledgment of wrong-doing and apology for harm; the importance of participation of victims in the process of acknowledgment; and the acceptance of internationally accepted human rights norms as a basis for reparations. The Van Boven/Bassiouni principles outlined above provide a broad principled framework for reparations. As a practical example of how these principles have been developed into specific recommendations, we return to the issue of the Stolen Generations and the forced removal of Aboriginal children from their families and communities. The main recommendations of the national inquiry broadly followed the requirements of acknowledgment and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and monetary compensation.

Acknowledgment and apology

The Stolen Generations Inquiry recognised the need to establish the truth about the past as an essential measure of reparation for people who have been victims of gross violations of human rights. The Inquiry was told of the need for acknowledgment of responsibility and apology in many of the submissions from Indigenous organisations and the personal testimonies of individuals who had been forcibly removed from their families.

Various recommendations called for the recording of the testimonies of Indigenous people affected by the forced removal policies, commemoration of the events and apologies from Australian parliaments and other state institutions, such as police forces, which played a key part in the removal (NISATSIC 1997, 285). Like victims of other crimes, people who have been subjected to the gross violation of their human rights want public recognition of the harm they have suffered – they are not necessarily vengeful. Further, it is recognised that commemoration is an important part of the reparation process. Commemoration allows both mourning and the memory to be shared and to be transformed into part of the national consciousness.

Guarantee against repetition

It is widely recognised that guarantees against repetition are an important part of the reparation process. These include such things as democratisation, political reforms, law reform and the need for compulsory educational modules in schools and universities on the particular issue. Some form of guarantee against repetition is a necessary component of international redress for human rights abuses. It is necessary before the process of healing for all parties can begin and the reintegration of the offender back into the community can occur. Such a notion is basically a reassurance to the community that future harmful acts will not occur.

Clearly, such a reassurance is more difficult in cases where the state has been the perpetrator rather than an individual offender. The process is made even more complex and more imperative when there are multiple victims and offenders and the offending behaviour has at some time received legitimacy and support from state institutions.

The Stolen Generations Inquiry recognised the need for guarantees against repetition. Recommendations in three areas deal specifically with this issue. They include developing educational materials. Secondly there was a recommendation that the Government legislate the Genocide Convention for effect in domestic law (NISATSIC 1997: 295). A further political guarantee against repetition is the recognition of the Indigenous right to self-determination. There were several recommendations on the principle and practice of self-determination.

Measures of restitution and rehabilitation

The purpose of restitution is to re-establish, to the extent possible, the situation that existed prior to the perpetration of gross violations of human rights. The Stolen Generations Inquiry recognised that ‘children who were removed have typically lost the use of their languages, been denied cultural knowledge and inclusion, been

deprived of opportunities to take on cultural responsibilities and are often unable to assert their native title rights' (NISATSIC 1997: 296). As a result the Inquiry made recommendations concerning the expansion of funding to language, culture and history centres, funding for the recording and teaching of local Indigenous languages, funding for Indigenous community-based family tracing and reunion services and recommendations aimed at the preservation of records, Indigenous access to records, and Indigenous community management over their own records..

Measures for rehabilitation were also an important component of the reparations package. The Stolen Generations Inquiry was made very aware of the long term problems caused by forcible separation and made significant recommendations in relation to mental health care and assistance in parenting and family programs for those who had been removed.

Monetary compensation

Typically, commissions inquiring into human rights abuses recognise that the loss, grief and trauma experienced by those who were abused can never be adequately compensated. However, such inquiries also usually recommend some form of monetary compensation for the harm that has been suffered - particularly as a form of recognition of the responsibility for the causes of that harm. It is common for such commissions to advocate for simple and relaxed procedural principles to be applied in dealing with applications for compensation.

The Stolen Generations Inquiry recognised that the loss, grief and trauma experienced by victims could not be fully compensated. However, the submissions to the Inquiry also demanded some form of monetary compensation for the harm that had been suffered - particularly as a form of recognition of the responsibility for the causes of that harm. The Inquiry recommended the establishment of a National Compensation Fund to provide an alternative to litigation and to ensure consistency in compensation.

Conclusion

This chapter shows the need to think about state crime in a broader historical context that recognises the long term impact of colonialism. In particular it is an argument about the importance of understanding the origins of liberal democracies within processes of dispossession and exclusion. Contemporary liberal democracies like Australia were built on processes of state crime – defined by a broad range of offences including mass murder, systematic fraud and institutionally racist laws, policies and practices.

Importantly for an understanding of state crime, these laws, policies and practices did not simply disappear after the peak of the colonial enterprise in the nineteenth century. They were firmly entrenched until well into more contemporaneous times. The colonial experience also shows the importance of thinking about state crime in a context that is broader than a concentration on force and violence. Certainly while the most extreme crimes of the state against colonised peoples involved violence, that is not the full extent of the story. The institutionalised laws and policies built on racial discrimination allowed for a range of crime to develop from those involving the forced removal of Aboriginal children to the systematic denial of basic civil and

political rights. Definitions of state crime clearly need to be able to incorporate these types of crime if they are to have salience for understanding some of the most profound injustices perpetrated within the boundaries of liberal democracies.

Further the colonial experience shows the need for definitions of state crime that include fraud as well as force. The systematic state fraud against Indigenous people in Australia and north America continues to be a source of demands for compensation and reparation. The long term loss of access to proper wages, social security benefits and the savings of trust funds has had profound effects on the long term ability of Indigenous people to accumulate basic family wealth. The contemporary impoverishment of Indigenous people is a direct result of state law and practice.

Finally, the struggle by Indigenous peoples to receive compensation and reparation for these historical wrongs raises important questions for how we define and mobilise for adequate remedies to state crime. While there has been much written on truth commissions, restorative justice and reparations, most of this work has not dealt with how historical wrongs should be dealt within liberal democracies like Australia or Canada or the US. The Indigenous experience shows that historical wrongs must be confronted within the heartlands of nations that pride themselves on their liberal democratic traditions. Indeed part of the argument of this chapter has been that liberal democracies, at least in some places, were founded on state crime.

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