Review Article

Learning From The Past: Aboriginal Perspectives On The Effects And Implications Of Welfare Practices On Aboriginal Families In New South Wales, Gungil Jindibah Centre, Southern Cross University (NSW Department of Community Services, 1994) pp (i)-(v) + 1-130

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The shameful history of Australia's "stolen generation" has for far too long been a largely ignored part of Australian history. A number of recent developments have highlighted the many social and psychological problems of indigenous Australians caused by the welfare policies of Australian governments. Most importantly, indigenous Australians are now more willing to talk about their experiences and demand some form of redress from the various Australian governments. This has directly led to other significant developments such as the commencement of two ground breaking legal actions,[2] and the announcement of the National Inquiry into the Separation of Aboriginal Children.[3]

Another such development was the establishment of an Aboriginal Research Project as part of Family Week in NSW. This resulted in funding for a project to examine and report upon the nature, extent and present effects of the NSW welfare policies on Aboriginal families.[4] The purpose of this proposed study was not just to look back at history, but also to recommend changes to the present practices of the NSW Department of Community Services (DCS).[5] The Gungil Jindibah Centre[6] of Southern Cross University was commissioned by the DSC to carry out the research and to write up the project.

The Gungil Jindibah Centre's Report, *Learning From The Past: Aboriginal Perspectives On The Effects And Implications Of Welfare Practices On Aboriginal Families In New South Wales* (the Report), draws its most important information from 155 interviews[7] with people (mostly Aboriginal) affected in one form or

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2 See *Williams* v *Minister, Aboriginal Land Rights Act* 1983, Supreme Court of NSW (1994) 35 NSWLR, discussed in Batley P "The State's Fiduciary Duty to the Stolen Generation" (1995) 2 *Australian Journal of Human Rights* 177; *Kruger* v *The Commonwealth of Australia*, High Court Proceeding No M21 of 1995, discussed in (1995) 3(73) *Aboriginal Law Bulletin* 25.

3 This is presently being conducted by the Human Rights and Equal Opportunity Commission. See (1995) 3(74) *Aboriginal Law Bulletin* 3 and (1995) 3(73) *Aboriginal Law Bulletin* 2.

4 See (i) and (ii) of the Terms of Reference, set out at p 2 of the Report.

5 See (iii) of the Terms of Reference, *ibid*.

6 This autonomous Centre at Southern Cross University is designed to improve the access and participation of Indigenous Australian people in tertiary education, and increase awareness of indigenous culture within the wider community.

7 See Appendix 1 of the Report (at p II) for a complete account of the methodology used.

another by the NSW welfare practices. The Report is deliberately written in non-technical language, designed to be culturally appropriate and accessible to Aboriginal people. It also uses the innovative device of using italics every time an indigenous person is directly quoted. This is in keeping with the main thrust of most of the recommendations coming out of the Report — the importance of listening to what indigenous people and communities are saying. The strong need for empowerment of indigenous people is particularly pertinent to this inquiry. This is because the removal of Aboriginal children from their families without proper consultation or consent was a form of complete disempowerment, and proper redress can only begin to occur when the people affected have their sense of power and autonomy fully restored.

The Report is divided into three sections, with only the first two being of a substantial nature. Section Three simply restates the formal recommendations already mentioned in Section Two of the Report. The history of the segregation and assimilation policies of the NSW government are examined in Section One. These policies led directly to the tragedy of the separation of Aboriginal children from their families.[8] The section commences with a useful and simple time line of key events,[9] and proceeds to outline the legal framework (or, at times, the lack thereof) in NSW for the removal of Aboriginal children. Whilst reading this, I was struck by the terrible realisation that the classification systems used in some of this legislation[10] was embarrassingly similar to the Nazi Nuremberg laws,[11] and the laws under the South African former apartheid system.[12] Such laws represent a dramatic confirmation and reminder of the inadequacy of a "black-letter", atheoretical and non-critical approach to the study of law.

The historical, legal, social and personal history of the "stolen generation" is well set out in this section, examining relevant events in NSW between 1788 right up until the enactment of the *Children (Care and Protection) Act* 1987 (NSW). The section provides two possible explanations for these policies: Christianity and Social

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8 Statistics on the number of forced removals are notoriously unreliable. The Report quotes estimates of between 5,625 and 10,000 Aboriginal children being removed from their parents in NSW (see pp 45-47).

9 See pp 8-9 of the Report.

10 For example, the *Aborigines Protection Act* 1909 (NSW) defined Aboriginal people as "full-blooded or half-caste Aborigine" (see p 16), and later 1918 amendments extended the Act to "quadroon" and "octoroon" Aboriginal people.

11 For example, s 5 of the *First Regulation to the Reich Citizen Law* 1935 states that "A Jew is a person descended from at least three grandparents who are full Jews by race . . . , and a *Mischling* who is subject of the state is also considered a Jew if he is descended from two full Jewish grandparents: (a) who was a member of the Jewish Religious Community at the time of the promulgation of this Law, or subsequently married to a Jew . . . ". See Arad Y *et al* (eds) *Documents on the Holocaust* (Yad Vashem & Pergamon Press, 1981) at p 80.

12 One such example of these laws that stands out in my mind is a race classification judgment entitled *Verhoog* v *Secretary of the Interior* (1967) referred to in Appendix D in Weeramantry C *Apartheid: The closing phases* (Latina, Melbourne, 1980) at pp 290-291.

Darwinism.[13] What is perhaps not actually expressed directly, but is implicit in both these reasons, is simply racism, which lies at the core of black-white relationships in this country and around the world. Another possible reason for the removal of children not frequently discussed, but which is referred to much later in this section, is that of slave labour.[14] This question could have been developed a little more. The other minor criticism I would make of this section is that the discussion of the relationship between crime and psychiatry[15] fails to refer to the link between the "stolen generation" and Aboriginal Deaths in Custody. Significantly, the Report on Aboriginal Deaths in Custody discovered that 43 deaths out of 94[16] (45.7%) were of Aboriginal people who had been removed from their natural families through the intervention of the state.[17]

Section Two of the Report examines Aboriginal perceptions and ideas for change, and includes all of the 34 recommendations contained in the Report. These are not particularly extensive or detailed — the emphasis of the Report being on highlighting the main issues and "bread and butter questions as to how to implement policy arising from the report are viewed as being outside the project's scope".[18] While this may be disappointing to some, keeping the Report as clear and non-technical as possible makes it culturally appropriate and accessible to Aboriginal people (as well as non-Aboriginal readers), and is thus in keeping with the key principle of Aboriginal empowerment.

The first recommendation of the Report calls upon the Premier of NSW to make a formal apology to the Aboriginal people of NSW for the damage caused to Aboriginal families by the state's welfare policies. Bob Carr did make such an apology shortly after coming to power. However, not surprisingly, he has not been forthcoming in relation to the recommendation that a "compensatory social justice programme for Aboriginal people"[19] be established. This raises an interesting issue of whether, if compensation is to be granted, it should be provided on a state by state basis, or a national approach should be adopted. Although the history of Aboriginal children being removed from their natural families reveals some variations between jurisdictions, throughout Australia one can detect common social, emotional and psychological problems of the "stolen generation". I would thus argue that it would be preferable to institute a national approach, such as an Australia-wide compensation scheme.[20] This could be carried out as part of, or separate to, an overall

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13 See pp 12-13 of the Report.

14 See the views of Eve Fesl at p 41 of the Report.

15 See pp 52-53 of the Report.

16 Although 99 deaths in custody were investigated, in 5 cases it was not known whether or not there had been childhood separation.

17 See *Royal Commission into Aboriginal Deaths in Custody: National Report* (AGPS, 1991) Vol 1 at p 44, [2.2.9], Table 2.10.

18 Page 60 of the Report.

19 Recommendation 3 at p 62 of the Report.

20 One suggestion has been made that a special compensation Tribunal should be set up. See "Leading QC seeks 'stolen generation' claims tribunal", *The Australian*, 5 October 1994.

Treaty with Australian indigenous peoples. The future recommendations of the National Inquiry into the Separation of Aboriginal Children (due to report in early 1997) in relation to compensation issues will be watched with close interest in this regard.

The next part of Section Two refers to the need for greater education and awareness of the welfare practices of NSW governments. From my own experience in legal education, there is a strong need to encourage issues relating to the "stolen generation" to be included within law school curricula.[21] The Report then discusses the difficulty that many of the "stolen generation" face when attempting to first make contact with their natural families. Reunion can be traumatic, not only for the stolen generation, but also for their foster family, and their natural family. Rejection and anger are emotions that may be experienced by all parties in the reunion process. For these reasons, the importance of Aboriginal controlled welfare services, such as Link-Up, is stressed in the Report as well as the need for adequate culturally sensitive counselling and support services for all involved.[22]

There is a common perception in the community that removal practices have ceased. However, what is not well known is that removal of Aboriginal children from their natural family may still occur under the *Children (Care and Protection) Act* 1987 (NSW) (the "Act"),[23] where a child is deemed by the Court to be "in need of care".[24] The Act was seen as a vast improvement on its predecessors, as removal from the Aboriginal community can now only take place as a last resort. This is because there is built into the Act a descending order of placement options for Aboriginal children.[25] However, some submissions to the inquiry were still concerned that the DCS still had too much discretion to remove Aboriginal children from the community.[26] In particular, the Report refers to the concern that cultural differences between Aboriginal society and mainstream Australian society are not well understood by many working within the DCS, and that Aboriginal families were being judged according to white standards. Greater cross-cultural training for DCS personnel was thus recommended, as was greater ongoing support for

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21 The most obvious law subject for such material is Family Law, although perhaps other subjects of a more compulsory nature, such as Torts or Equity, could easily incorporate such material. However, it should be noted that even with respect to Family Law, what is considered to be the most progressive textbook at present, Parker S, Parkinson P and Behrens J *Autralian Family Law in Context: Commentary and Materials* (Law Book Company, 1994) only makes passing references to these issues.

22 See recommendations 6-9, at pp 63-73 of the Report.

23 This discussion excludes the phenomenon that about 25% of children held in juvenile detention centres in NSW are of Aboriginal descent (see the Preface to Luke G and Cunneen C *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System* (Juvenile Justice Advisory Council of NSW, January 1995). This could be regarded as a modern form of removal.

24 This is the language used in the Act, as can be seen, for example in s 10 of the Act.

25 See s 87 of the Act.

26 See p 94 of the Report.

Aboriginal District Officers working within the DCS.[27] One of the important recommendations to arise from this aspect of the Report is that children should only be removed from Aboriginal communities in consultation with the family and the community.[28]

To the credit of the Report and those who contributed to it, the difficult issue of child abuse within Aboriginal communities has not been avoided. The Report acknowledges that this problem has in the past often been hidden by Aboriginal communities.[29] However, these communities increasingly are acknowledging the problem and now are requesting help from the authorities, provided the help is carried out in a culturally sensitive and appropriate manner.[30]

In conclusion, I would strongly commend this Report and advocate that it be read widely in the community. Aboriginal people involved in the Report were encouraged that this was the first time the DCS had actually consulted them about how they felt, and what they wanted for the future. White Australians can particularly benefit from reading this Report, as they will be made more aware of this blight on Australia's history, and will become more sensitive to indigenous perspectives concerning this issue. Given the current political climate where attacks on services for indigenous people are increasing, this Report is an important reminder that reconciliation between indigenous and white Australia is still possible.

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27 See recommendation 12 (p 77 of the Report) and 18-21 (p 93 of the Report).

28 Recommendation 22 (p 95 of the Report).

29 One Aboriginal person was quoted as saying ". . . *Aboriginal people need to come to terms with sexual assault. Too many people like to cover up the incidence of child sexual abuse in the community*" (p 97 of the Report).

30 See pp 97-99 of the Report.