TRUTH

But Still Waiting For Justice

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The stolen children — it's time to bring them home.

In international law there is a movement towards establishing, after gross violations of human rights, a truth and justice commission as part of a nation's healing process. The Human Rights and Equal Opportunity Commission Report into the 'stolen children' completed in April 1997 can be regarded as a truth commission. Justice, however, is yet to come.

The Report concerns real lives, both past and present. It is about children being taken from mothers and families and the continuing effects of that separation. 'Bringing Them Home' — The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (the Report) is no ordinary report: 'grief and loss are the predominant themes.'[1] The following testimony highlights the tragedy of separation:

> They put us in the police ute and said they were taking us to Broome. They put the mums in there as well. But when we'd gone about [ten miles] they stopped, and threw the mothers out of the car. We jumped on our mothers' backs, crying, trying not to be left behind. But the policemen pulled us off and threw us back in the car. They pushed the mothers away, and drove off, while our mothers were chasing the car, running and crying after us. We were screaming in the back of that car. [p.6]

The terms of reference

The Inquiry was driven by Indigenous group and community concern with the general public ignorance of the policies and laws that created the stolen children (p.18), the need for a true record of what actually occurred and the continuing effect of these policies. The terms of reference of the Inquiry were to trace past laws, practices and policies which resulted in removal by compulsion, duress or undue influence; examine the adequacy of services for those who were affected by the separation (this includes access to records and reunifying families); and examine the justifications for compensation and the causes of removal today.[2]

The law

The Report found that before the enactment of legislation there was a common practice of removal of Indigenous children often for labour or domestic service. By 1911, the Northern Territory and each State except Tasmania had legislation for Indigenous people's welfare to be overseen by the Chief Protector or Protection Board. In the Northern Territory, the *Northern Territory Aboriginals Ordinance 1911* gave the Chief Protector power to have 'the care, custody or control of any Aboriginal or half caste if in his opinion it is necessary or desirable in the interests of the Aboriginal or half caste for him to do so' (p.132). Furthermore the Chief Protector was appointed the 'legal guardian of every Aboriginal and every half caste child up to the age of 18 years' (p.132).

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These powers were further expanded by the *Aboriginals Ordinance 1918* (Aboriginals Ordinance). This ordinance was the subject of the recent High Court decision in the case of *Kruger & Ors v The Commonwealth of Australia; Bray & Ors v The Commonwealth of Australia* (*Kruger & Bray*) (unreported, High Court of Australia, 31 July 1997, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ). The *Aboriginals Ordinance* particularly impacted on Indigenous women. Aboriginal women remained under the total control of the Chief Protector all their lives. The only way of removing this control was to marry a non-Indigenous man, which could only be done with the permission of the Chief Protector. If the Indigenous woman and non-Indigenous man had children the cycle would start again. The parents had no guardianship over their children who could be taken away at any time (pp.133–4). The Report notes that Aboriginal males could be released at 18.

This legal regime continued until 1957. After that date the *Welfare Ordinance 1953* came into effect. The prevailing theory was one of assimilation. Aboriginal children would eventually be assimilated and therefore should be subject to the same laws as white Australia. Although the *Welfare Ordinance 1953* did not specifically refer to race it still only applied to Indigenous people. This was because of the interplay of two factors. The first factor was the wide powers given to the Director of Welfare in relation to wards. Once a person had been declared a ward they could be removed to an institution or mission and their property could be taken. Second, the definition of a ward specifically did not include people with voting rights. The 1957 legislation retained the wide and racially discriminatory powers of earlier legislation (p.144).[3] This legislation was reflective of laws in other States.

The theory

The legislation reflected government theories of merging and later assimilation. It was thought that forcible removal of Indigenous children would ensure that their destiny was one of 'ultimate absorption by the people of the Commonwealth'.[4] Their destiny however was one of loss:

> Our life pattern was created by the government policies and are forever with me, as though an invisible anchor around my neck. The moments that should be shared and rejoiced as a family unit, for [my brother] and mum and I are forever lost. The stolen years that are worth more than any treasure are irrecoverable.[5]

Assimilationist policies were officially retained until 1973 when a policy of self-management was adopted. Although the Report notes that assimilation polices are no longer retained they 'continue to influence public attitudes and some practices today' (p.266).

International human rights

A feature of the Report is its reliance on international law, specifically analysing the practice of removal from the perspective of the prohibition against racial discrimination and genocide. The recommendations for reparations are also heavily influenced by a report prepared for the United Nations Sub Commission on the Prevention of Discrimination and Protection of Minorities by Professor Theo van Boven.[6] The Report establishes that at least by '1950 the prohibition of systematic racial discrimination on the scale experienced by Indigenous Australians was recognised as a rule binding all members of the United Nations' (p.269). Two aspects of this finding are important. The first is the fact that in establishing a discriminatory practice it is the *effect* of that practice rather than the intention that is the crucial element. Regardless, therefore, of any protective intentions, the *effect* of the law was racially discriminatory. It directly discriminated by requiring Indigenous children to be arbitrarily removed without the protection of a court order.[7] It was also indirectly discriminatory through the creation of legislation defining 'neglect' to mean, among other things, 'homelessness', a characteristic which disproportionately applied to Indigenous people (p.267).

The Prime Minister has recently indicated that most Australians would reject the notion that past practices were 'genocidal.'[8] This is a disappointing position. The word genocidal has a particular legal meaning which includes *forcibly transferring children of the group to another group* with the intent to destroy, in whole or in part, their national, ethnic, racial or religious grouping.[9] The Report argues that past practices of removal fall clearly within this definition. The Report draws from the debates at the time of drafting the Convention on the Prevention and Punishment of the Crime of Genocide which 'establishes clearly that an act or policy is still genocide when it is motivated by a number of objectives' (p.274). Furthermore, there was overwhelming evidence to prove that the main reason for removal was on the basis of the children's Aboriginality. It was clearly intended that they be removed from their culture and families rather than assess each individual child's needs. This finding of the Report is now at odds with *Kruger & Bray* in which a majority of the judges found that the *Aboriginals Ordinance* was not intended to, and did not, authorise genocide. It appears that these judges approached the issue in a formalistic manner and because the ordinance used the term care, this justified the benevolent interpretation adopted by the court. There was no reference to the 'effect' of genocide or to the requirement of 'mixed objectives' referred to in the Report. The treatment of the genocide argument by the court was very superficial.

Reparations

Reparation as a remedy is regarded as a holistic form of compensation. It encompasses all aspects of a state's response to a gross violation of human rights. The Inquiry recommended, following the van Boven principles, that 'reparation should consist of acknowledgment and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation' (p.282). Specific recommendations giving content to those principles included a national apology and a national sorry day, compensation including descendants who continue to suffer from the effects of removal, provision of holistic mental health services, assistance in the return to land and consistent and appropriate polices for the collection and access of family records. All of these recommendations are a humane and rational response to past actions, the effects of which continue today.

The Commonwealth submission on reparations returned to the problem of accountability for past actions. They argued that if compensation were given for one wrong policy it would open the flood gates for other actions for compensation. The Inquiry responded to these submissions by clarifying the fact that the past policy in question was a fundamental breach of human rights constituting systematic racial discrimination and genocide which distinguished it from other policies.

Present forms of removal

Carol who was taken as a child gave evidence to the Inquiry:

> The Thing that hurt me most while growing up is that we were pulled away from our sisters and brothers. My sister's a year younger than I, yet I could not hold her, cry with her, play with her, comfort her when someone hit her or eat with her. [At 19 years of age Carol gave birth to a son] ... I had no one to guide me through life, no one to tell me how to be a good mother ... [Carol's second child was taken by welfare and Carol's third child fathered by Carol's employer was put up for adoption at the father's insistence] [p.404]

It is impossible to understand the present without taking into account the past. This is one of the reasons that the Report recommended that schools incorporate the history and effects of the stolen children in their core curriculum. Nevertheless there are still forms of contemporary removal practiced in Australia. The Report highlights the treatment of Indigenous children in the juvenile justice system and in the child welfare system: 'Indigenous children are six times more likely to be removed for child welfare reasons and 21 times more likely for juvenile justice detention than non-Indigenous children' (the Guide, p.31). In the Northern Territory, for example, the Northern Territory Government has recently introduced legislation that requires juveniles serve 28 days in prison for their second property offence.[10] This legislation directly contravenes recommendation 48 of the Report that prison be considered a last resort.

The impact of such legislation is an example of the contemporary and discriminatory forms of removal in Australian society. It is also symbolic that a case challenging the constitutional validity of the mandatory sentencing regime for adults in the Northern Territory involves a young Aboriginal mother with no prior convictions who on her first property offence, which involved stealing one can of beer, will have to be imprisoned for 14 days if the constitutional challenge fails.[11] This case again illustrates a separation under an arbitrary and unjust law. The thrust of the recommendations on contemporary forms of removal is to heighten the concept of self-determination and to facilitate for example the transfer of jurisdiction in child welfare and juvenile justice matters to the communities or modifications of current laws depending on the self identified needs of the community.

The High Court litigation

Kruger & Bray involved a claim for declaratory relief and damages against the Commonwealth of Australia. The case challenged the Constitutional validity of the *Aboriginals Ordinance*.[12] Essentially it was a legal challenge to the legislative framework that created the stolen children. The plaintiffs had argued that the *Aboriginals Ordinance* offended the separation of powers doctrine because the Ordinance conferred power to make removals and detentions without judicial authority or any other form of due process (see plaintiffs' submissions, p.13) and furthermore by authorising the forcible transfer of Aboriginal children because of their race, the *Aboriginals Ordinance* authorised or constituted the crime of genocide.

It was also submitted that the *Aboriginals Ordinance* was invalid on the basis of several implied rights, firstly, the Commonwealth *Constitution's* implicit adoption of the general doctrine of legal equality at common law.[13] It was argued that the *Aboriginals Ordinance* by removing only Aboriginal children offended this right as the basis for the removal relied on distinctions as superficial and offensive as skin colour and the social belief 'that persons of Aboriginal descent were members of a lower social order' (see plaintiffs' submissions, p.34). The second implied right breached by the arbitrary and complete restrictions imposed by the *Aboriginals Ordinance* was the right to freedom of movement and association. The plaintiffs argue that this right was to be drawn primarily from the implied constitutional right to freedom of political expression.[14]

The final argument concerned the application of s.116 of the Commonwealth Constitution guaranteeing the freedom to exercise religion. The *Aboriginals Ordinance* denied the exercise of religion by severing contact with the family which is instrumental in passing on religious beliefs and rites and substituting the Christian religion in church-run institutions. The removal of children and their placement in institutions actively discouraged association with the children's cultural heritage (see plaintiffs' submissions, p.81).

The central defence of the Commonwealth, which is also the issue at the core of reconciliation, government accountability, and community attitudes toward the stolen children, is the defence of history. The Commonwealth argued that the *Aboriginals Ordinance* was made when community attitudes were different and that the ordinance should be viewed as intending the care and protection of Aboriginal people. It could not, therefore, be judged or characterised by contemporary attitudes or laws. The majority of the court effectively accepted this defence and found that the *Aboriginals Ordinance* was not constitutionally invalid, rejecting the implied and specific rights argued by the plaintiffs. The court was unanimous in not specifically defining the *Aboriginals Ordinance* as genocidal.

According to the High Court the past is neatly protected by its own justifications. *Kruger & Bray* did not provide the justice or recognition that had been hoped for by the stolen generations. The Commonwealth had successfully argued that essentially community attitudes provide a basis for constitutional validity. This is effectively a type of constitutionalism by popular majority.

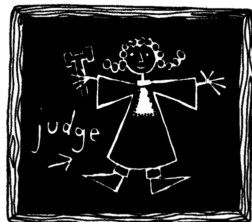
Federal Court

The Report details the treatment that children received in institutions, missions and foster homes. In legal terms the quality of this treatment is now currently being argued before the Federal Court. Over 560 writs, arguing among other things breach of fiduciary duty, have been lodged.[15] This issue was specifically dealt with by the Report, where it was found that the state (p.259) was in a fiduciary relationship with the children and adults in their care and this had been breached even by contemporary standards of the day. Sexual abuse was reported to the Inquiry by one in five people who were fostered and one in ten who were institutionalised. Furthermore, individual testimony retold of hunger, little education, fear of excessive and violent punishment and emotional abuse (p.262). The Report also found a breach of common law rights, specifically respect for liberty in that Indigenous children and parents had no judicial review of the removals and deprivation of parental rights in that the common law recognised that parents are the legal guardians of their children unless a court order decides otherwise. These rights have not been specifically argued in the High Court or Federal Court but were implicit in the arguments by the plaintiffs that the *Aboriginals Ordinance* was to be characterised as amounting to discrimination and arbitrary detention rather than for care and protection.

The High Court case did not deal with facts. It was to that extent an abstract discussion of the legal regime that created the stolen children. By contrast the Report substantiates each of its findings and recommendations from individual testimony. Arguments for reparations or discrimination are made personal. Individual experiences are drawn together to create an overwhelming account of Australia's systematic and consistent removal of Indigenous children from their families. The Report is therefore an act of trust. It is a retelling of painful stories, hoping for justice. If the truth is ignored this trust will be broken, again.

References

1. National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 'Bringing them Home', (the Report) HREOC, 1997, p.3. Page numbers in brackets in this article refer to this Report.
2. 'Bringing them home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families', (the guide) p.7.
3. Cummings, B., *Family Culture and Bureaucracy — Cross-Cultural Perspectives on the Delivery of Family Services in the Northern Territory,* Sixth Alicia Johnson Memorial Lecture, Darwin 1997.
4. See Executive Summary of the Report citing the 1937 Commonwealth-State Native Welfare Conference, p 2.
5. See the Report p.3 citing from a confidential submission 338 (Victoria).
6. van Boven, T., Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law pursuant to Sub-Commission resolution 1995/117, UN Doc: E/CN4/Sub2/1996/17, 24 May 1996.
7. The Report found that there was no requirement for a court order to separate Indigenous children from their families (despite this being a requirement for non Indigenous Families) in the NT until 1964; WA (1905–1954); NSW (1915–1940); SA (1911–1923); Qld (1897-1965).
8. Stephens, T., 'Double trouble for Howard over "folly" on racism', *Sydney Morning Herald,* 9 July 1997.
9. See Article II, *Convention on the Prevention and Punishment of the Crime of Genocide* 1948, 78 UNTS 277, ratified by Australia in 1949.
10. *Juvenile Justice Amendment Act (No.2) 1996* (NT). Mandatory sentencing legislation applicable to adult offenders can be found in the *Sentencing Amendment Act (No.2) 1996* (NT); Flynn, M., 'One Strike and You're Out!', (1997) 22(2) *Alternative Law Journal* 72.
11. Case stated in *Margaret Nalyirri Wynbyne v Adrian Arthur Marshall* (Court of Summary Jurisdiction — Matter 9711013).
12. See plaintiffs' submissions in the matter of *Kruger & Others v The Commonwealth; Bray & Others v The Commonwealth,* p. 5.
13. See p.47 Commonwealth submissions relying on *Leeth v The Commonwealth* (1992) 174 CLR 455 Deane and Toohey JJ at 486.
14. See plaintiffs' submissions, p.45, citing *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australia Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
15. See Storey, M., 'The Stolen Generations: More than Just A Compo Case', (1996) 3(86) *Aboriginal Law Bulletin* 4.



LEGAL STUDIES

The suggestions for class work and discussions below are based on the preceding article 'Truth But Still Waiting For Justice' by Rebecca La Forgia. Since the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From their Families and the release of the report 'Bringing Them Home', several questions have repeatedly been asked about the Inquiry's findings and recommendations. Answers to some of the following questions as well as guidance on the debate topic will be provided in the next edition of the *Alternative Law Journal.* See also *DownUnderAllOver* on p.202 of this issue.

Questions

1. From the early 1900s right up until the 1970s Indigenous children were forcibly removed from their families — how was the law used to achieve this? How were Aboriginal and Torres Strait Islander peoples treated differently by the law than non-Indigenous Australians?

2. What was the official justification for forcibly removing Aboriginal and Torres Strait Islander children from their families?

3. The findings of 'Bringing Them Home' indicate that the forced removal of Indigenous children was discriminatory although it occurred under a 'protection' regime. How can official acts done with the intention of protecting Indigenous children be discriminatory?

4. The report also found that the forced removal of Aboriginal and Torres Strait Islander children amounted to genocide as understood at international law. How can you call it genocide when people were trying to save the children?

5. 'Bringing Them Home' also found that Indigenous children continue to be removed from their families. Why did the report come to this conclusion?

6. What is a fiduciary duty? Why do Indigenous people forcibly removed from their families as children argue that this duty was breached by missions, foster homes and the institutions in which they were placed?

7. What did the High Court decide in the recent case of *Kruger?* Does this decision have implications for the findings of 'Bringing Them Home'? [*Kruger* is also discussed in *DownUnderAllOver*, p.202 this issue.]

Discussion

The High Court's findings in *Kruger* reveal that the Australian Constitution provides no positive protection for individual rights. Discuss the implications of this decision for the debate about an Australian Bill of Rights and Constitutional reform. Also consider how the Constitution may be altered to recognise the rights of Indigenous peoples, for example their right to land and to recognition as Australia's First Peoples.

Resources

Copies of 'Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' can be obtained from AGPS by phoning toll free on 132 447 or can be accessed on the internet at http://www.austlii.edu.au/rsjlibrary/hreoc/stolen/

A community guide to the Report and a video are available from the Publications Officer of the Human Rights and Equal Opportunity Commission on (02) 9284 9728.

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