BRINGING THEM HOME – WELL NOT JUST YET

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INTRODUCTION

On 24 November 1999, the Australian Senate referred a number of matters in relation to the Australian Human Rights and Equal Opportunity report, *Bringing Them Home*,[1] to the Senate Legal and Constitutional References Committee for inquiry and report by 5 October 2000. *Bringing Them Home* is the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families (hereinafter referred to as "the *Report*"). The *Report* argues that the policy and practice of the systematic removal of Aboriginal children from their families amounted to gross violation of human rights.[2] The terms of reference for the Senate inquiry include investigations into the adequacy and effectiveness of the Commonwealth Government's response to the recommendations of the *Report*; the impact of the Government's response on the reconciliation process; appropriate ways for governments to implement reparation measures; effective ways to implement the recommendations of the *Report*; and the consistency of the Government's response 'with the hopes, aspirations and needs of members of the stolen generation[s] and their descendants.'[3]

This article examines the recommendations of the *Report* and the Commonwealth Government's response. The article commences with a discussion on the obligations under international law to provide reparation for human rights abuses, followed by a chronology of the demands for an inquiry into the removal policies and practices. The findings and recommendations of the *National Inquiry* are next discussed, concluding with a critique of the Commonwealth Government's response to the recommendations of the *Report*.

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1 Human Rights and Equal Opportunity Commission, *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families: Bringing Them Home* (Sydney: Human Rights and Equal Opportunity Commission, 1997). (Hereinafter referred to as *'the Report'.)*

2 *Id*, 265-266.

3 *Id*. See further [Internet] URL < http://www.aph.gov.au/senate_legal >.

INTERNATIONAL LAW AND REPARATION

The right to reparations for wrongful acts has long been recognised as a fundamental principle of law essential to the functioning of legal systems. In 1961, Justice Guha Roy of India wrote:

> That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable.[4]

Similarly, the obligation to provide reparation for human right abuses, especially gross violations of human rights, has long be recognised under both international and national laws.[5] In 1989 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned Professor Theo van Boven to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.[6] A final report, including proposed basic principles and guidelines, was submitted in 1993.[7] A revised set of basic principles and guidelines was submitted in 1996.[8]

The *van Boven Report* examined relevant existing international human rights norms and decisions of international courts and other human rights organs. It concluded that every state "has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms".[9] Van Boven states:

> In accordance with international law, States have the duty to adopt special measures, where to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences

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4 Justice Roy 7 "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 *American Journal of International Law* 863, 863.

5 For a discussion and references on the sources and obligations under international law to provide reparations refer to Orentlicher, D.F., "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in Henkin, L., and Hargrove, J.L., (eds), *Human Rights: An Agenda for the Next Century*, (Washington DC: The American Society of International Law, 1994), 425-426;Steiner, H.J., and Alston, P., *International Human Rights in Context: Law, Politics and Morals* (Oxford: Clarendon Press, 1996) 1081-1109; and Minow, M., *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) 91-117.

6 E/CN.4/Sub.2/1989/13.

7 van Boven, T., (Special Rapporteur of the United Nations), *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report*, UN Doc. E/CN. 4/Sub.2/1993/8, 2 July 1993, 7 (hereafter the "*van Boven Report*").

8 van Boven, T, 1996: *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996 (hereafter the '*Revised van Boven Principles*').

9 n 7, 56 *supra*.

> of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[10]

Van Boven synthesised the contents of reparations to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[11] Restitution consists of measures such as restoration of liberty, family life, citizenship, return to one's place of residence and return of property. These measures seek to re-establish the situation that existed prior to the violation of human rights and humanitarian law.[12] Compensation implies monetary compensation for any economically assessable damage resulting from violations of human rights and humanitarian law.[13] Rehabilitation includes medical and psychological care as well as legal and social services.[14] Satisfaction and guarantees of non-repetition includes, inter alia, an apology (including public acknowledgment of the facts and acceptance of responsibility) and measures to prevent recurrences of the violations.[15]

Although a large body of international law relating to reparation for human rights abuses has developed since World War II, the law in this area has often not been adhered to. As van Boven states:

> It is clear from the present study that only scarce or marginal attention is given to the issue of redress and reparation to the victims... In spite of the existence of relevant international standards... the perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon. Therefore, it cannot be stressed enough that more systematic attention has to be given, at national and international levels, to the implementation of the right to reparation for victims of gross violations of human rights.[16]

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10 n 8, 2 *supra*. A number of international human rights instruments create a general duty to make appropriate reparations for violations of human rights including: *International Covenant on Civil and Political Rights, International Convention on Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child,* UNGA Res 2200A 21 UNGAUR Supp No 16, 49; UN Doc A/16546 (1966) and the *Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment* GA Res 39146 Amex 39 UNGAOR Supp No 16.

11 *Ibid.*

12 *Id*, 4.

13 *Ibid.*

14 *Ibid.*

15 *Id*, 5.

16 n 7, 53 *supra*.

THE NATIONAL INQUIRY

INTRODUCTION

Aboriginal individuals and organisations have been active since at least the late to mid 1980's advocating a national inquiry into policies and practices that led to the forced removal of Aboriginal children from their families during the first six decades of the twentieth century.[17] Many of these children were denied contact with their families and culture to be raised in government homes, religious missions and foster homes. Many suffered severe physical and sexual abuse either by institutional authorities and/or foster parents.[18]

The Secretariat of the National Aboriginal and Islander Child Care ('SNAICC') resolved at its national conference in 1990 to demand a national inquiry into the removal issue.[19] On 4 August 1991, National Aboriginal and Islander Children's Day, SNAICC, in conjunction with high profile Aboriginal entertainers Archie Roach and Ruby Hunter, publicly launched a demand for an inquiry.

Other Aboriginal organisations such as the Aboriginal Legal Service of Western Australia (Inc.) ('ALSWA') and Link-Up (NSW) were also vocal in their demands for a national inquiry.[20] In association with the push for a national inquiry into removal procedures and policies, the ALSWA commenced a project to interview Aboriginal people who had been removed from their families. The ALSWA interviewed over 600 people before it launched its first report, *Telling Our Story*[21] in June 1995. By the time the ALSWA completed its second report, *After the Removal,*[22] in May 1996 it had collected over 700 stories.[23] Both reports were submitted to the *National Inquiry*.

Others took the litigation pathway; most notable was a female plaintiff from Sydney named Joy Williams.[24] A number of Aboriginal people from the Northern Territory[25] also chose litigation. The drive towards litigation was given support by a 1994 conference in Darwin, called *The Going Home Conference*,

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17 Butler R, speaking at the workshop on removal of Indigenous children at the Australian Reconciliation Convention in Melbourne, 26 May 1997, stated that the Secretariat of National Aboriginal and Islander Child Care, along with other organisations and individuals had been lobbying governments to hold an inquiry since the late 1980's.

18 n 1 *supra*; also Buti, T., *After the Removal,* (Perth: ALSWA (Inc), 1996).

19 D'Souza, N., '"The Stolen Generation: From Removal to Reconciliation", (1998) 21(1) *University of New South Wales Law Journal* 204, 205.

20 *Ibid.*

21 ALSWA, *Telling Our Story: A Report by the* ALSWA (Inc) on the removal of Aboriginal children from their families in Western Australia, (Perth: ALSWA (Inc), 1995).

22 Buti, T., n 18 *supra*.

23 Via proof of evidence and/or questionnaire-statement from over 700 people.

24 See Case Note *Williams v Minister Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497.

25 See *Kruger v Commonwealth; Bray v Commonwealth* 146 ALR 126.

which brought together Aboriginal people, mainly from the Northern Territory, who had been removed from their families. Ron Merkel, then QC, addressed the conference.[26]

On 2 August 1995, the Commonwealth of Australia Attorney-General Michael Lavarch commissioned the Commonwealth Human Rights and Equal Opportunity Commission[27] to undertake an inquiry into the past practice of forcibly removing Indigenous children from their families. The *Report* was tabled in Federal Parliament on 25 May 1997. It documented widespread and systematic racial discrimination and gross ill-treatment of Indigenous Australians as law-makers and administrators sought to resolve "the Aboriginal problem".

THE REPORT OF THE NATIONAL INQUIRY

The *Report* found, *inter alia*, that the policy of forcible removal adversely affected Aborigines across Australia in all States and Territories. Forcible removal of Aboriginal children began as early as the mid-nineteenth century in the eastern States and was characterised by legislative and administrative regimes enacted and exercised specifically for Aboriginal people. Such regimes discriminated against them either in law or in fact. The *Report* found that forcible removal resulted in:

a) deprivation of liberty by detaining children and confining them in institutions;[28]

b) abolition of parental rights by taking children and by making children wards of the Chief Protector or Aborigines Protection Board or by assuming custody and control;[29]

c) abuses of power in the removal process;[30] and

d) breach of guardianship obligations on the part of Protectors, Protection Boards and other "carers".[31]

The legally significant consequences of forcible removal were that the Indigenous Aborigines were denied the common law rights which other Australians enjoyed,[32] suffered violation of their human rights,[33] and were often subjected

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26 See Merkel R, "Government Culpability For The Forced Removal of Aboriginal Children From Their Families", (1990) 2(47) *Australian Law Bulletin* 4.

27 Hereafter "*HREOC*". *HEROC* is a Commonwealth statutory body charged with advocating, mediating and adjudicating on matters of discrimination and human rights.

28 *Id*, 253.

29 *Id*, 255-256.

30 *Id*, 256-257.

31 *Id*, 259, 260.

32 *Id*, 277.

33 *Id*, 277, 278.

to other forms of victimisation and discrimination.[34] The practice of forcible removal continued until the 1970s.[35]

The *Report* further found the forcible removal of Indigenous children from their families to be in breach of international human rights obligations to prevent systematic racial discrimination and genocide.[36] Forcible removal was racially discriminatory because it was carried out pursuant to legislation which either denied the Aborigines' common law rights on the basis of race,[37] or because the legislation, although not discriminatory in form, had the substantive effect of discriminating against Aborigines through the exercise and use of procedures and standards "which they could not meet either because of their particular cultural values or because of imposed poverty and dependence".[38] Genocide was found on the basis that the laws and policies promoting the removal of Indigenous children was for the purpose, or had the effect of, destroying the Aborigines as a racial group, or their "Indigenous culture".[39] Under international law, these violations are attributable to the Commonwealth on the basis of the principle of State Responsibility.[40] The *Report* noted further that such breaches under international law amounted to "gross violation of human rights"[41] and recommended a system of reparations, which was essentially in conformity with those of van Boven:

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34 *Id*, 278.

35 *Id*, 250.

36 *Id*, 266, 269; and American Law Institute, *Restatement of the Law, 3rd, The Foreign Relations Law of the United States*, INTERNATIONAL LAW OF HUMAN RIGHTS, Section 702 (headnote) (St. Paul: American Law Institute Publishers, 1997).

37 n 1, 250, 277 *supra*.

38 *Id*, 277; the discriminatory operation of the legislation preceded the separate legislation.

39 *Id*, 270-275, 278. Such violations occurred during the time Australia was bound by the *Genocide Convention* and possibly before under obligation *erga omnes*; see *Hugo Princz v Federal Republic of Germany* 26F. 3d 1116, 65, cited in Buti, T, n 18, 12 *supra*; see also *Kruger and Bray cases*, n 25 *supra*.

40 Notwithstanding that the legislation authorising the removal was primarily State legislation; see *Heirs of the Duc de Guise Case (France-Italy)* (1964) 13 Reports of International Arbitral Awards 154, 161; *Pellat Case (France-Mexico)* (1952) 5 Reports of International Arbitral Awards 534, 536, cited in *Encyclopedia of Public International Law*, Vol 10 "States – Responsibility of States – International Law and Municipal Law" (Amsterdam: Elsevier Science Publishers B.V., 1987), 367-8; Charlesworth, H., "Individual Complaints: An Overview and Admissibility Requirements" in Pritchard, S, (ed) *Indigenous Peoples, the United Nations and Human Rights* (Sydney: The Federation Press, 1998), 76; *Velásquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); note also American Law Institute, *Restatement of the Law, Third, The Foreign Relations Law of the United States*, INTERNATIONAL LAW OF HUMAN RIGHTS, Section 702, Comment *b*, Reporter's Note 2, Section 703, Par *c*(St. Paul: American Law Institute Publishers, 1997).

41 n 1, 269, 282 *supra*; and n 7, paras 8, 13 *supra*; also American Law Institute, *Restatement of the Law, Third, The Foreign Relations Law of the United States*, INTERNATIONAL LAW OF HUMAN RIGHTS, Section 702, Par *m* (St. Paul: American Law Institute Publishers, 1997).

ACKNOWLEDGMENT AND APOLOGY

For victims of gross human rights violations, establishing the truth about the past is a critically important measure of reparation.[42] The *Report* recommended that all Australian Parliaments, State and Territory police forces, and churches and other relevant non-government agencies "acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal" and apologise for the wrongs committed.[43]

The demand for acknowledgment of the truth and the delivery of an apology has generated much public debate. The significance of such a demand should not be underestimated. Pritchard writes "[t]he Inquiry agreed that the first step in healing for victims of gross violations of human rights must be an acknowledgment of the truth and the delivery of an apology."[44] The Australian Government has been very reluctant to make an official apology.[45]

GUARANTEES AGAINST REPETITION

It is important to include measures to prevent such human rights violations in the future as an aspect of reparation. Emphasis should be placed on informing the wider Australian community about the history and continuing effects of separation and to promote awareness of the human rights violations suffered by Indigenous people, families and communities as a result of the separations. Recommendations made in respect of guarantees against repetition included incorporation in school curricula and professional training lessons on forcible removal.[46] Recommendation 10 argues for the Commonwealth Government to "legislate to implement the *Genocide Convention*" in domestic law.[47]

RESTITUTION

In respect of restitution, the returning to Australia of children who were forcibly removed and are now living overseas was identified as a critical step in the reunification and assistance process. To facilitate a return to their homes, support is required for "returnees" and for the communities receiving them. The *Report* made recommendations in relation to "assistance to return to country",[48] the

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42 See Orentlicher, D. F., n 5, 457 *supra*.

43 n 1 *supra*, Recommendations 5 and 6, 284-292.

44 Pritchard, S., "The Stolen Generations and Reparations" (1997) 4:3 *UNSW Law Journal Forum* 28, 28-29.

45 See *Sydney Morning Herald*, 9 January 1998; there are examples from other places, eg Canadian Government's apology for the forced removal of Canadian Indigenous children from their families, and US President Bill Clinton's apology to Africa for America's involvement in slavery. Also see below.

46 n 1 *supra*, recommendations 8 and 9, 295.

47 *Id*, 294-295. The lack of domestic incorporation of the *Genocide Convention* was noted in *Kruger and Bray* cases, n 25 (Dawson J, at 160; Toohey J, at 174; Gummow J, at 231; Gaudron J, at 190, comments on genocide being contrary to fundamental principles of the common law) *supra*.

48 n 1, Recommendation 11, 297 *supra*.

fostering of Indigenous language, culture and history,[49] and the accreditation of Indigenous organisations such as Link-Up and Aboriginal and Islander Child Care Agencies "for the purposes of certifying descent from the Indigenous people of Australia and acceptance as Indigenous by the Indigenous community."[50] Reparation of a restitutive nature can also be found in the recommendation dealing with delivery of services to those affected.[51]

REHABILITATION

The *Report* agreed with van Boven's recommendation that reparations include rehabilitation measures, such as "legal, medical, psychological and other care services". These measures require culturally appropriate delivery of services such as mental health care and counselling services,[52] parenting, and family support programmes.[53] Rehabilitative measures are essential in addressing the needs of those affected by forcible removal.

MONETARY COMPENSATION

The award of monetary compensation for those removed and/or those affected by the removals was met with opposition from the Commonwealth Government.[54] In its submission to the *National Inquiry*, the Commonwealth Government raised as a concern the difficulty in estimating the monetary value of losses, on the grounds that "[t]here is no comparable area of awards of compensation and no basis for arguing a quantum of damages from first principles."[55] Professor Graycar suggests that the Commonwealth Government's excuses for not providing compensation to Indigenous peoples who had been affected by removal policies are little more than a rhetorical device.[56] Further she states:

> Even the most minimal familiarity with the legal frameworks used for compensating various sorts of injuries would make it clear that what is, or is not, compensatory at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability... Perhaps the most common form of compensation that courts deal with is the assessment of damages for personal injuries caused by negligence, such as in the negligent driving of a motor vehicle. Many

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49 *Id*, Recommendation 12, 300.

50 *Id*, Recommendation 13, 301.

51 *Id*, Part 5.

52 *Id*, recommendations 33 - 35, 396-397; recommendation 37, 401.

53 *Id*, recommendation 36, 399.

54 Commonwealth Government, (Submissions to) National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families, 1996, 26-32. See also, "Long delay awaits victims of forced removal", *The Australian*, 27 May 1997, and "No compo for stolen children: Williams", *Canberra Times*, 22 May 1997.

55 n1, 306 *supra*.

56 Graycar, R., "Compensation for the Stolen Children: political judgments and community values" (1997) 4:3 *UNSW Law Journal Forum*, 24-25.

> tort scholars have pointed out that this process is little more than, as Ison called it, a "forensic lottery."[57] Judges often make assessments of both economic and non-economic losses, at common law, on a lump sum 'once and for all' basis. This of necessity, involves speculation about a range of imponderables...[58]

The *Report* strongly argued and recommended:[59]

"[t]hat monetary compensation be provided to people affected by forcible removal under the following heads:

a) Racial discrimination;

b) Arbitrary deprivation of liberty;

c) Pain and suffering;

d) Abuse, including physical, sexual and emotional abuse;

e) Disruption of family life;

f) Loss of cultural rights & fulfilment;

g) Loss of native title rights;

h) Labour exploitations;

i) Economic loss; and

j) Loss of opportunities.[60]

With regard to civil claims for compensation the *Report* notes the problems associated with this process:

> [d]ifficulties of proof and the expiry of statutory periods of limitation may deny a remedy to many victims of forcible removal. However, the harms they suffered... are recognised heads of damages that can be compensated under Australian law. Relying on the civil courts for remedies, however, is likely to lead to great delay, inequity and inconsistency of outcome. The civil process is daunting and expensive, thus deterring many of those affected. It will also involve great expense for governments to defend these claims.[61]

Recognising the difficulties with civil actions for compensation, the *Report* recommended the establishment of a "National Compensation Fund",[62] to be

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57 cf Ison, T., *The Forensic Lottery: A Critique of Tort Liability as a System of Personal Injury Compensation* (London: Staples Press, 1967).

58 On compensation generally, see Cane, P., *Accidents, Compensation and the Law*, 5th ed (Sydney: Butterworths, 1993); and Luntz, H., *The Assessment of Damages for Personal Injuries*, 3rd ed (Sydney: Butterworths, 1990).

59 n 1, Recommendation 14, 304 *supra*.

60 *Id*, 303-307.

61 *Id*, 305.

62 *Id*, Recommendation 16, 310.

administered by a "National Compensation Fund Board"[63] according to prescribed procedures.[64] It was recommended that a prescribed minimum lump sum be paid from the "National Compensation Fund"[65] to those forcefully removed and:

> [t]hat upon proof on the balance of probabilities any person suffering particular harm and/or loss resulting from forcible removal be entitled to monetary compensation from the National Compensation Fund assessed by reference to the general civil standards.[66]

The *Report* concludes the discussion on monetary compensation with the recommendation that the availability of any "statutory monetary compensation mechanism" should not prohibit the right to common law action but a "claimant successful in one forum should not be entitled to proceed in the other."[67]

THE COMMONWEALTH GOVERNMENT'S RESPONSE

The Commonwealth Government has been much slower than the State and Territory Governments in providing a formal apology to Aboriginal people.[68] It was not until 26 August 1999 that Prime Minister John Howard proposed a motion to Parliament offering an apology to Aboriginal people to reaffirm the Government's commitment to reconciliation between "Indigenous and non-indigenous Australians".[69] The speech acknowledged

> ...that the mistreatment of many indigenous Australians over a significant period represents the most blemished chapter in our international history;[70]

Then the motion was in part expressed:

> [D]eep and sincere **regret** that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that

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63 *Ibid.*

64 *Id*, Recommendation 17, 311.

65 *Id*, Recommendation 18, 312. "That it be a defence to a claim (for a minimum lump sum) for the responsible government to establish that the removal was in the best interests of the child."

66 *Id*, Recommendation 19, 312.

67 *Id*, Recommendation 20, 313. See 302-313 for a discussion on the monetary compensation issue.

68 South Australia: 28 May 1997; Western Australia: 28 May 1997; Queensland: 3 June 1997; ACT: 17 June 1997; New South Wales: 18 June 1997; Tasmania: 13 August 1997; and Victoria: 17 September 1997. The Northern Territory Government has not made a statement of apology. Most of the major churches have also issue statements of apology. Also a National Sorry Day organised by members of the community was held on 26 May 1998.

69 Transcript of the Prime Minister The Hon. John Howard MP Motion of Reconciliation 26 August, 1999 [Internet] URL <http://www.pm.gov.au/media/pressrel/1999/reconciliation2608.htm> 1.

70 *Ibid.*

> many indigenous people continue to feel as a consequence of those practices...[71] (emphasis added)

There still has not been any acknowledgment of the forcible removal constituting systematic racial discrimination and possibly genocide, or in any case as conduct amounting to violation of human rights. Whilst the Commonwealth recognises the need to "acknowledge the wrongs of the past",[72] the response does not express or appear to accept these "wrongs" as human rights violations.

The Commonwealth Government was much quicker to provide a response to the other recommendations made by the *Wilson Report*. In a press release by Minister for Aboriginal and Torres Strait Islander Affairs Senator John Herron on 16 December 1997, about six months after the *Report*'s tabling in Federal Parliament, the Government again reiterated its opposition to monetary compensation. Instead the Government outlined a plan to provide $63 million over four years, primarily aimed at addressing the "family separation and its consequences":

- $2 million for Australian Archives to index, copy and preserve thousands of files so that they are more readily accessible;
- close to $6 million for further development of indigenous family support and parenting programmes;
- in recognition of the importance of indigenous people and others telling their stories of family separation, $1.6 million to the National Library for an oral history project;
- a $9 million boost to culture and language maintenance programs;
- $11.25 million to establish a national network of family link-up services to assist individuals;
- $16 million for 50 new counsellors to assist those affected by past policies and for those going through the reunion process; and
- $17 million to expand the network of regional centres for emotional and social well being, giving counsellors professional support and assistance.[73]

CONSISTENCY

The response by the Commonwealth Government is consistent with its international reparation obligation in certain respects. Specifically, the Commonwealth recognised its obligation to "acknowledge the wrongs of the past and [to] address the problems that now exist as a result of those wrongs".[74] It

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71 n 70 *supra*.

72 Australia, Minister for Aboriginal and Torres Strait Islander Affairs Senator John Herron "Bringing Them Home – Commonwealth Initiatives" Media Release (16 December 1997).

73 *Id* at 1.

74 *Id*, 1.

seeks to discharge these obligations through a range of rehabilitative and restitutionary measures. Recognising the enduring "emotional and psychological damage"[75] inflicted upon both parent and child by the separation policy, the Commonwealth initiative seeks to provide rehabilitation by offering funding for additional professional counselling services and an expansion of the existing network of regional counselling centres.[76] The establishment of an oral history project will also facilitate rehabilitation of those affected by the forcible removal.[77] The project will encourage the reparative process by allowing the victims to tell their story, the simple act of which has been recognised as contributing to the healing process. Additionally, the oral history project advances the "satisfaction" obligation of verification and disclosure of the facts – it will be a permanent record of this area of Australian history and it will pay tribute to the victims by acknowledging their pain and removing any sense of guilt.

The obligation to make proper restitution within the context of forcible removal and within the context of the nature of the breach necessarily involves as one of its components the reunion of removed children with their parents and families. This was identified by the *Report* as being a matter of "most significant and urgent need".[78] The Commonwealth addresses this obligation by offering practical assistance for family reunion – the indexing and preservation of indigenous family records,[79] and increased funding for nationwide "link-up" services.[80] Certain matters of social justice[81] arising as a consequence of the removal policy and cultural restitution are also addressed.[82]

INCONSISTENCY

However, the Commonwealth's response fails to discharge its international legal human rights obligation, to make reparations in several other key areas of Commonwealth responsibility. The funding for rehabilitation and restitution constitutes the bulk of the response, leaving many other components of reparation unresolved.[83] Three areas are readily identified: the failure to pay compensation; lack of an official apology and acknowledgment of human rights

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75 *Id* 3, also n 1, 278-279 *supra*; and n 3 *supra*.

76 About $33 million in total, *Id* 8.

77 *Id*, 8-9.

78 n 1, 347 *supra*.

79 n 74, 6 *supra*.

80 *Id*, 7.

81 In conjunction with existing programmes.

82 For example family support and parenting programmes, culture and language centres. n 74, 5, 8-9 *supra*. Note that the language and culture centres component is funded from ATSIC's existing budget.

83 In fact, the Government acknowledged its incomprehensive response when it noted the Report's insistence upon compensation and other measures but stated that the proposed measures on family reunion, health and other services for those affected by forcible removal would "form the focus of the measures being announced". *Id*, 2-3.

violations; and the failure to guarantee cessation and non-repetition.

Compensation

The obligation to pay compensation for breach of international human rights is established more firmly than any other component of reparation in international law.[84] Consistent with its position prior to the tabling of the *Report*, the Commonwealth Government has not made any provision in its response for the payment of monetary compensation to victims of the human rights violations that occurred through the practice of forcible removal. In its submission to the Inquiry, the Commonwealth cited reasons precluding the ex-gratia payment of compensation.[85] The Commonwealth also rejected the *Report*'s recommendation

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[84] See for example, Article 10, 63(1), *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights* in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); Article 21(2), *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986; Article 9(5), *International Covenant on Civil and Political Rights* [ICCPR] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976; Article 5(5), *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Rome, 4.XI.1950; Article 14(1) *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Article 19, *Declaration on the Protection of All Persons from Enforced Disappearance*, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992); Article 15(2), 16(5), *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991; Articles 12-13, 19, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985); *Velásquez Rodriguez Case, Compensatory Damages (Art. 63(1) American Convention on Human Rights)*, Judgment of July 21, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990); *Velásquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 174-177; *Factory at Chorzów (Germany-Poland), Jurisdiction*, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, 21; *Factory at Chorzów (Germany-Poland), Merits*, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 29; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, [1949] I.C.J. Rep. 184; see also *John Khemraadi Baboeram, André Kamperveen, Cornelis Harold Riedewald et al. v Suriname* (1985) Communications Nos. 143/1983 and 148 to 154/1983, reported in United Nations, Human Rights Committee *Selected decisions of the Human Rights Committee under the Optional Protocol*, Vol. 2, Seventeenth to thirty-second sessions (October 1982-April 1988) (New York: United Nations, 1990); *Jean Miango Muiyo v Zaire* (1987), Communication No. 194/1995, reported in United Nations, Human Rights Committee *Selected decisions of the Human Rights Committee under the Optional Protocol*, Vol. 2, Seventeenth to thirty-second sessions (October 1982-April 1988) (New York: United Nations, 1990); and *Antonio Vianna Acosta v Uruguay* (1983) Communication No. 110/1981, reported in United Nations, Human Rights Committee, *Selected Decisions of the Human Rights Committee* (New York: United Nations, 1980).

[85] The Commonwealth submitted that three principles would preclude the ex-gratia payment of compensation: difficulties in identifying the persons eligible for compensation; difficulties in estimating the amount of loss in monetary terms; negative consequences for the wider community. See, n 1, 305-306 *supra*.

for a National Compensation Fund, merely stating that the "Commonwealth believes there is no practical or appropriate way to address [the issue of compensation]".[86]

International law clearly and explicitly imposes an obligation to pay compensation as a measure of reparation for any acts which constitute a violation of human rights. The Commonwealth, being responsible for making reparations for the breaches which occurred through forcible removal, is therefore under an obligation to pay compensation. Compensation is especially significant and appropriate because measures of restitution cannot completely and strictly restore[87] the status of those affected by the removal.[88] However, this is something that the Commonwealth has ruled out. Independently of the practicability or otherwise of compensation,[89] the response must be considered to be prima facie inconsistent with Australia's international legal obligations. That the victims may have a right, albeit limited, to seek compensation from the domestic judicial system is no answer to Australia's failure to provide compensation pursuant to its international law obligations.[90]

ACKNOWLEDGMENT AND APOLOGY

The Commonwealth Government of Australia was very hesitant in making an apology to the Australian Aboriginal community for the past policy and practice of 'systematically' removing Aboriginal children from their families. In the end, the parliamentary statement made by the Prime Minister failed to specifically mention those removed or the word 'sorry'.[91] The word 'regret' was used in a general context for past wrongs and suffering caused by government policies and practices. The statement falls short of the requirement in recommendation 5a of the *Report*. Nowhere in the response is the phrase "human rights" actually used.

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86 n 74, Summary of Recommendations and Commonwealth Initiatives *supra*.

87 Because of the nature of the breach, *restitutio in integrum stricto sensu* is not possible.

88 In the case of material impossibility: *Encyclopedia of Public International Law*, Vol 10 n 40 *supra* "States – Responsibility of States – International Law and Municipal Law" [Amsterdam: Elsevier Science Publishers B.V., 1987], 377 citing the *Walter Fletcher Smith Claim* (1949) 2 Reports of International Arbitral Awards, 9313; *Rhodope Forest Case* (1950) 3 Reports of International Arbitral Awards, 1406; *Factory at Chorzów (Germany-Poland)*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 47; *De Wilde, Ooms & Versyp v Belgium*, European Court of Human Rights, Judgment 10 March 1972 (Article 50), Series A, No. 14, para 20.

89 n1, 305-307 *supra*; and n 57 *supra*.

90 For example, *Velásquez Rodriguez Case*, n 84 *supra*; *Godinez Cruz Case*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989, Inter-Am.Ct.H.R. (Ser. C) No. 8 (1990), para 28-29.

91 n 70 *supra*. On the importance of repentance in process of reconciliation, see: The Honourable Jane Stewart, Minister Of Indian Affairs and Northern Development, *Statement of Reconciliation:*

Learning from the Past, 7 January 1998, [Internet] URL <http://www.inac.gc.ca/info/speeches/jan98/action.html >.

The Government's willingness to address thoroughly its responsibility for the human rights violations perpetrated upon the "stolen generations" and their families and communities is therefore questionable.[92] With respect to these duties, the conclusion is inescapable that the Commonwealth has failed to discharge its obligations under international law.

CESSATION AND NON-REPETITION

Although the formal policies of removal were abolished in the 1970s, the question remains whether the present state systems of child welfare legislation, in their operation and practice, continue to result in the same human rights breaches as the previous practice of forcible removal. The *Report* noted that although present regimes recognise the Aboriginal Child Placement Principle,[93] there continue to be systemic inequalities through the application of non-Indigenous standards and inequitable bureaucratic procedures – indigenous children continue to be severely over-represented within State and Territory welfare systems which continue to indirectly discriminate against Aboriginal children and families through the application of Anglo-Australian perspectives and values. Such an approach rejects as beneficial Indigenous values, culture and child-rearing practices.[94] The Commonwealth must be vigilant to ensure that current child welfare practices do not perpetuate past discriminatory practices. In its response, the Commonwealth has ignored the *Report*'s recommendation for national standards and has resolved to leave the matter to the States.

The final major concern is the present intention of Commonwealth not to implement the *Genocide Convention* in domestic legislation. This may be

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92 See generally Australia, Amnesty International "Silence on Human Rights: Government Responds to 'Stolen Children' Inquiry" Report ASA 12 February 98, para 28-30; there is also no comment upon the Government's duty to investigate and bring to justice those who perpetrated the breaches of such rights. On sanctions for perpetrators see *John Khemraadi Baboeram, André Kamperveen, Cornelis Harold Riedewald et al. v Suriname* n 84 *supra*; *Joaquin David Herrera Rubio, José Herrera and Emma Rubio de Herrera v Colombia* (1987) Communication No. 161/1983, reported in United Nations, Human Rights Committee *Selected decisions of the Human Rights Committee under the optional protocol*, Vol. 2, Seventeenth to thirty-second sessions (October 1982-April 1988) (New York: United Nations, 1990); *Jean Miango Muiyo v Zaire* (1987), Communication No. 194/1995, reported in United Nations, Human Rights Committee *Selected decisions of the Human Rights Committee under the optional protocol*, Vol. 2, Seventeenth to thirty-second sessions (October 1982-April 1988) (New York: United Nations, 1990); *Walter Lafuente Penarrieta, Miguel Rodriguez Candia, Oscar Ruiz Cáceres et al. v Bolivia* (1987), Communication No. 176/1984), reported in United Nations, Human Rights Committee *Selected decisions of the Human Rights Committee under the Optional Protocol*, Vol. 2, Seventeenth to thirty-second sessions (October 1982-April 1988) (New York: United Nations, 1990).

93 The principle that when an Aboriginal or Torres Strait Islander child is to be placed in substitute care, he or she should be placed within their own culture and community where possible.

94 n 1, 250, 269 *supra*, Part 6 – Chapter 21 generally; also Australia, Human Rights and Equal Opportunity Commission "Commission urges Government to make amends to the Stolen Children" Media Release 27 May 1997.

contrary to its obligation to guarantee non-repetition, depending largely upon whether the forcible removals amounted to genocide. The Government's reference to the High Court case of *Kruger and Bray*[95] is curious, to say the least. It appears that the Commonwealth understands *Kruger* to somehow determine the genocide question and therefore absolve the Commonwealth of any responsibility in respect of the *Genocide Convention*.[96]

However, the High Court did not decide whether the forcible removal amounted to genocide, but only whether a particular Northern Territory ordinance authorised genocide.[97] As the High Court stated, the general issue of genocide was not one to be resolved in that case and, given this uncertainty, the government's decision not to implement the Convention remains inconsistent with Australia's obligations at international law. Furthermore, the decision that the relevant Northern Territory ordinance did not authorise genocide and the subsequent uncertainty as to the substantive matter leaves an extremely significant and relevant question open - did genocide in fact occur, as the *Report* suggests it did, pursuant to a law which did not authorise it? This of itself must surely be an overwhelming reason for the immediate implementation of the *Genocide Convention*.[98]

CONCLUSION

As the Senate Legal and Constitutional References Committee inquires into the

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95 *Kruger and Bray*, n 25 *supra*.

96 Amnesty International notes that the relevant Northern Territory ordinance in issue in *Kruger and Bray*, 70 was only one of over one hundred laws and policies which applied across different jurisdictions at varying times: Australia, Amnesty International "Silence on Human Rights: Government Responds to 'Stolen Children' Inquiry" Report ASA 12 February 98, para 19.

97 n 25, per Dawson J at 167, per Toohey J at 175 *supra*.

98 It should be noted that Australian Democrats Senator Brian Greig has introduced into the Senate the *Anti-Genocide Bill1999*, which seeks to give domestic effect to the *Genocide Convention*. On 14 October 1999 the Senate referred the bill to the Legal and Constitutional References Committee for inquiry and report by 30 June 2000. See further [Internet] URL <http://www.aph.gov.au/senate/committee/legon_ctte>.

Commonwealth Government's response to the recommendations of the *Report* it will probably find the Governments response to have been somewhat mixed, and demonstrably deficient in some areas. The more difficult task for the Committee will be recommending appropriate and effective ways for the Government to implement the recommendations of the *Report*. In undertaking this task the Committee should keep in focus Australia's international legal obligations to provide reparation for human rights abuses. More importantly, however, the Committee must suggest recommendations that have been 'shaped' by the views and voices of Aboriginal people and experiences of human kind around the globe.