

THE STOLEN GENERATIONS AND REPARATIONS

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I. INTRODUCTION

On 11 May 1995, the issue of past and present practices of separation of Indigenous children from their families was referred to the Human Rights and Equal Opportunity Commission. On 2 August 1995, the original terms of reference of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families¹ were extended to require examination of "principles relevant to determining justification for compensation".²

Whilst much discussion of *Bringing Them Home* has tended to focus on the issue of compensation, closer examination reveals that its Recommendations are framed in terms of a broader notion of 'reparations'. In responding to histories of forcible removal in terms of reparations, the Inquiry drew on relevant international standards as well as a wealth of experience from other jurisdictions. The purpose of the present note is to examine the application by the Inquiry of

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1 Herein referred to as the Inquiry.

2 See Human Rights and Equal Opportunity Commission, *Bringing Them Home: A Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997. Herein referred to as *Bringing Them Home*.

the concept of reparations to the forcible removal of Indigenous children in Australia.

II. REPARATIONS

Provisions of international treaties and decisions of international bodies, such as the UN Human Rights Committee, confirm the obligation of States to provide reparations to victims of gross human rights violations. In 1996, relevant international practice was synthesised by a Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Professor Theo van Boven. Van Boven's *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* provide that:

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

In numerous submissions the Inquiry was urged to adopt a concept of reparations as recognised in international human rights law. For example, the Aboriginal Legal Service of Western Australia (ALSWA) referred to van Boven's *Principles and Guidelines* and submitted that:

[C]ompensation in th[e] context [of the National Inquiry] should, and probably is, intended to include the more encompassing term 'reparation'. Reparation includes all types of redress - restitution, compensation and rehabilitation. It involves material and non-material redress. This submission will utilise reparation and the terms that cover aspects of reparation.

The Inquiry endorsed the framework articulated by van Boven. It recommended that for the purposes of responding to the effects of forcible removal the term 'compensation' be widely defined to mean 'reparation' and that reparation be made in recognition of the history of gross violations of human rights. In accordance with van Boven's *Principles and Guidelines*, the Inquiry recommended that reparation consist of acknowledgment and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and monetary compensation.³

³ Theo van Boven, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, 1996. Herein, *Principles and Guidelines*.

⁴ Note 2 *supra*, Aboriginal Legal Service of Western Australia Inc (ALSWA) Submission, p 72.

⁵ *Ibid*, Recommendation 3.

III. ACKNOWLEDGMENT AND APOLOGY

For victims of gross human rights violations, establishing the truth about the past is a critically important measure of reparation.⁶ In this connection, the Chief of Staff of the National Commission for Truth and Reconciliation in Chile has commented:

It became clear ... that a full disclosure of the truth had enormous links with the beginning of a reparative process and in the way we came to understand it. The report frequently insists that a meaningful reparative process must express a recognition of the truth, both by the state and society.

Numerous submissions to the Inquiry emphasised the importance of confronting the truth. Link-Up (NSW) recommended that:

Any redress of the violations of the fundamental human rights of Aboriginal people as a result of the policies and practice of separation requires a full public disclosure of the facts of separation ...

Experience also suggests the importance of an acknowledgment of responsibility.⁸ The Inquiry heard numerous calls for acknowledgment of responsibility for policies and practices of separation, by governments as well as non-governmental agencies such as the churches.⁹ Related to calls for acknowledgment of responsibility were demands for apologies to the individuals, families and communities who have survived the separation of Indigenous children from their families and communities.¹⁰

The 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. It recommended that all Australian parliaments officially acknowledge the responsibility of their predecessors for the laws, practices and policies of forcible removal, and extend apologies. It also recommended that State and Territory police forces, as well as churches and other non-government agencies acknowledge their role in the implementation of laws and policies of forcible removal and make formal apologies.¹¹

An essential aspect of reparation are appropriate acts to commemorate the dignity of victims of human rights violations and the pain of their families.¹²

6 D Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation", in L Henkin and J Hargraves (eds), *Human Rights: An Agenda for the Next Century* (1994) at 457.

7 Correa, "Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship" (1992) 67 *Notre Dame Law Review* 1455 at 1478, quoting *Report of the National Commission for Truth and Reconciliation* (1991) at 824. See also J Zalaquett, "Balancing ethical imperatives and political constraints: The dilemma of new democracies confronting past human rights violations" (1992) 43 *Hastings Law Journal* 1425 at 1433.

8 Correa, *ibid* at 1483.

9 For example, note 2 *supra*, Link-Up (NSW) Draft Submission, p 5 and Broome and Derby Working Groups Submission, recommendation 3.2.8, p 4.

10 For examples see, *ibid*, Link-Up (NSW) Draft Submission, p 5; ALSWA Submission, recommendations 3, 4, 5; South Australian Aboriginal Child Care Agencies (SAACCA) Forum Submission, recommendation 5.

11 *Ibid*, Recommendations 5a-6.

12 Correa, note 7 *supra*.

Commemoration, like revelation of the truth, can be important in restoring the dignity of victims and their relatives and in removing stigma:

There should be ... [s]tatues of heroes/martyrs, paintings. Streets should be named after them, as could rooms in colleges and museums. There should be memorial services, scholarship funds, concerts and theatre performances ... Commemoration should be done with great dignity, and with a feeling that while it honours these who have died, it is also done for preventive purposes, in the spirit of the knowledge that compensation for loss of lives, health, hopes can never be fulfilled.¹³

In its submission to the Inquiry, Link-Up (NSW) stated that:

Public tribute must be paid to the survivors, and those who have not survived the policies and practices of separation. Public recognition of the ongoing courage and determination of Aboriginal people to resist the genocidal policies of separation is essential. Commemoration can and should take place at different levels. Nationally, there should be a 'Sorry Day' commemorating Aboriginal survival of the holocaust which is accorded the same recognition as ANZAC day. On a local level, communities may wish to establish commemorative places, or have a 'Welcome Home Day'.¹⁴

The Inquiry recognised that satisfaction should go beyond a single instance of acknowledgment and apology and that victims should be appropriately commemorated. Accordingly, it recommended an annual "Sorry Day" to commemorate the history of forcible removals and its effects.¹⁵

IV. GUARANTEES AGAINST REPETITION

Measures to prevent violations in the future are also an important aspect of reparation. Numerous submissions to the Stolen Generations Inquiry emphasised the importance of measures to inform 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 separations.¹⁶

The Inquiry recognised the need for measures to prevent repetition of the forcible removal of indigenous children. It recommended that such measures should include compulsory modules for primary and secondary school curricula, as well as education about the history and effects of forcible removal for undergraduates and trainees in relevant professions. As a further guarantee against repetition, the Inquiry recommended that the Commonwealth legislate to implement the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* with full domestic effect.¹⁷

13 Y Danieli, "Preliminary Reflections from a Psychological Perspective", presented at the Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (Netherlands Institute of Human Rights) 1992.

14 Note 2 *supra*, Link-Up (NSW) Draft Submission, p 6.

15 *Ibid*, Recommendations 7a-b.

16 *Ibid*, for example, SAACCA Forum Submission, recommendation 4; Link-Up (NSW) Draft Submission, p 6.

17 *Ibid*, Recommendations 8a-10.

V. MEASURES OF RESTITUTION

The Inquiry found 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. Accordingly, it made a series of Recommendations concerned with the restitution of land, culture and language, noting that 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.¹⁸

Returning to country was identified as a critical step in the reunification and assistance process. To facilitate return to country, support is required for 'returnees' and for the communities receiving them. The Inquiry recommended funding for family reunion workers to travel with clients to their country, to provide Indigenous community education on the history and effects of forcible removal, and to develop community genealogies.¹⁹ It also recommended that people who, by reason of their removal, are unable to enjoy native title rights should be able to establish that loss in any claim for monetary compensation.

Numerous submissions drew attention to the need for broader measures of 'cultural restitution', in particular through support for community cultural and language centres.²⁰ The Inquiry recommended the expansion of funding of Indigenous language, culture and history centres to ensure national coverage at a regional level, and to facilitate recording and teaching of local languages.²¹

In connection with measures of restitution, the Inquiry also received submissions with respect to the preservation of files and documentation concerning the separation of Indigenous children,²² including archival material in the possession of the churches.²³ It made a series of Recommendations designed to preserve records which might assist in re-establishing family and community links or establishing Indigenous identity;²⁴ to enhance access to records;²⁵ and to provide Indigenous communities with opportunities to manage their own historical documentation.²⁶

18 See *ibid*, ALSWA Submission, recommendation 6; Broome and Derby Working Groups Submission, recommendation 3.2.5; SAACCA Forum Submission, recommendation 2; Aboriginal Legal Rights Movement (ALRM) Submission, recommendation 21.

19 *Ibid*, Recommendation 11.

20 *Ibid*, ALRM Submission, p 22; Cape York Land Council Submission; Broome and Derby Working Groups Submission, recommendation 3.3.3.

21 *Ibid*, Recommendations 12a-b.

22 See *ibid*, Broome and Derby Working Groups Submission, recommendation 3.2.6; SAACCA Forum Submission, recommendation 3.1; ALSWA Submission, recommendations 7-8.

23 *Ibid*, see also Broome and Derby Working Groups Submission, recommendation 3.2.8.

24 *Ibid*, Recommendations 21-2b.

25 *Ibid*, Recommendations 23-6.

26 *Ibid*, Recommendations 27-9.

V. MEASURES OF REHABILITATION

The *Basic Principles and Guidelines* of Special Rapporteur van Boven recommend that reparation include rehabilitative measures, such as “legal, medical, psychological and other care and services.”²⁷ The Inquiry heard again and again of the devastation wrought upon indigenous families and communities by the systematic separation of their children. Virtually all submissions called for rehabilitative or well-being measures to address special needs arising out of separation and to promote the economic, social and cultural well-being of those affected by separations. Particular emphasis was placed on the need for culturally appropriate mental health and counselling services,²⁸ and parenting and family support programs.²⁹ A number of submissions relating to the education of groups working with indigenous communities on the issues and effects of separation.³⁰

To address the emotional and well-being needs of those affected by forcible removal, the Inquiry recommended a substantial injection of funding into mental health services. It recommended that services and programs for survivors of forcible removal policies should emphasise local indigenous healing and well-being perspectives.³¹ A very significant continuing effect of the forcible child removal policies has been the undermining of parenting skills and confidence. Accordingly, the Inquiry recommended the provision of adequate funding to relevant indigenous organisations to establish parenting and family well-being programs.³²

VI. MONETARY COMPENSATION

The provision of monetary compensation is largely a symbolic act because the loss, grief and trauma experienced by victims of gross human rights violations can never be adequately compensated.³³ Nonetheless, for many victims compensation is of major significance. From the victims’ perspective, it has been suggested, monetary compensation “concretizes ... the confirmation of responsibility, wrongfulness, s/he is not guilty, and somebody cares about it.” Thus, “[i]t’s not the money but what the money signifies - vindication.”³⁴ Importantly, as well, for many victims, monetary support can make a practical difference, can make the lives of communities and individuals easier.³⁵

27 *Ibid*, Broome and Derby Working Groups, recommendation 3.3. ALSWA Submission, at 66-7.

28 *Ibid*, Broome and Derby Working Groups Submission, recommendation 3.3.4; SAACCA Forum Submission, recommendation 1.1; ALRM Submission, recommendation 22.

29 *Ibid*, SAACCA Forum Submission, recommendations 7, 9; ALRM Submission, recommendation 23.

30 *Ibid*, SAACCA Forum Submission, recommendation 1.2; Link-Up (NSW) Draft Submission, p 6.

31 *Ibid*, Recommendation 33.

32 *Ibid*, Recommendation 36.

33 *Ibid*, Link -Up (NSW) Draft Submission, p 2.

34 Note 13 *supra* at 206.

35 Note 2 *supra*, Link-Up (NSW) Draft Submission, p 8.

The Inquiry heard frequent demands for monetary compensation from those affected by separation policies and practices.³⁶ It recommended that monetary compensation should be payable for harms and losses for which it is not possible to make restitution in kind. It recommended that any individual affected by removal policies should be entitled to make a claim for compensation, including parents, siblings and other family members in appropriate cases. It recommended that compensation be paid under heads of damage in line with those proposed by van Boven and adopted in human rights litigation in other jurisdictions. These heads of damage are racial discrimination; arbitrary deprivation of liberty; pain and suffering; abuse, including physical, sexual and emotional abuse; disruption of family life; loss of cultural rights and fulfilment; loss of native title rights; labour exploitation; economic loss; loss of opportunities.³⁷

In approaching compensation, the assessment of damages for specific wrongs to particular individuals and families can be costly, time-consuming and produce unfairness and inconsistency in results.³⁸ A number of submissions proposed that to overcome the limitations of an individual assessment of damages approach, a presumption should operate in favour of the same amount of compensation for particular categories of persons.³⁹

Experience further suggests the importance of ensuring the application of culturally appropriate assessment criteria, as well as procedures which are expeditious, non-confrontational and non-threatening, and respect and accommodate cultural and linguistic needs, in the determination of compensation claims.⁴⁰ There is also a need for some flexibility with respect to the form of filing claims and the rules of evidence. In many cases, evidentiary material such as records may be difficult to obtain or have been destroyed. There is considerable support for the view that in such cases, the burden of proof should be on governments to rebut otherwise credible claims and in the absence of proof to the contrary, claimants should be given the benefit of the doubt.⁴¹ There is also much support for the view that claims should not, in principle, be subjected to statutes of limitations.⁴² Special Rapporteur van Boven has commented:

The principle should prevail that claims relating to reparations for gross violations of human rights are linked to the most serious crimes to which, according to the

36 *Ibid*, ALSWA Submission, recommendation 11; Broome and Derby Working Groups Submission, recommendation 3, p1; ALRM Submission, recommendation 11, p 52; New South Wales Aboriginal Land Council, recommendations relating to compensation, p 1.

37 *Ibid*, Recommendation 14.

38 *Ibid*, Tasmanian Aboriginal Centre, First Submission, pp 12-13.

39 *Ibid*, Broome and Derby Working Groups Submission, recommendation 3.1.2; Tasmanian Aboriginal Centre, First Submission, p 14.; ALSWA Submission, recommendation 12.

40 Van Boven "Summary of the Discussions", presented at the Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (Netherlands Institute of Human Rights) 1992; also see E Lutz, "After the Elections: Compensating Victims of Human Rights Abuses", in E Lutz, H Hannum and K Burke (eds), *New Directions in Human Rights* (1989) at 210; also note 2 *supra*, Tasmanian Aboriginal Centre, First Submission, pp 12-14.

41 Lutz, *ibid* at 210.

42 Danieli, note 13 *supra*, at 210-11 also Lutz, *ibid* at 207-8.

authoritative legal opinion, statutory limitations shall not apply. Moreover, it is well-established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time.⁴³

To avoid the pitfalls of individual litigation, the Stolen Generations Inquiry recommended the establishment of a joint National Compensation Fund.⁴⁴ It recognised the need for culturally appropriate assessment criteria and procedures, and adopted the principle that statutory periods of limitation should not apply to gross violations of human rights. It also noted the practical difficulties which might arise in assessing what qualifies as proof of removal and proof of loss. In cases in which evidentiary material is difficult to obtain or has been destroyed, it considered that the burden of proof should be on governments to rebut otherwise credible claims. Thus, it recommended that an indigenous person removed from his or her family during childhood by compulsion, duress or undue influence be entitled to a minimum lump sum payment in recognition of the fact of removal; and that it be a defence for the responsible government to establish that the removal was in the best interests of the child.⁴⁵

Recognising that some people may be able to prove particular harm and/or loss resulting from forcible removal, the Inquiry recommended that upon proof on the balance of probabilities such persons should be entitled to monetary compensation from the National Compensation Fund, assessed by reference to the general civil standards.⁴⁶

VII. CONCLUSION

Many aspects of the report of the *Bringing Them Home* have been singled out for comment and analysis. As noted in *The Sydney Morning Herald* recently,⁴⁷ the report has become a best-seller which is reviewed in *The Times Literary Supplement*.⁴⁸ One of the most remarkable aspects of *Bringing Them Home* is its approach to the concept of reparations. From the perspective of international practice, the Inquiry's approach to reparations represent a remarkable effort at filling standards formulated at a high level of generality with meaning derived from the lived experiences of indigenous Australians. This methodology makes the basic framework mandated by international human rights law and synthesised in the van Boven *Basic Principles and Guidelines* meaningful in the lives of those affected by forcible removal in Australia.

From the perspective of survivors, *Bringing Them Home* responds to what those affected had to say about the impact of government action and policies on

43 Note 3 *supra* at [135].

44 Note 2 *supra*, Recommendation 15.

45 *Ibid*, Recommendation 18.

46 *Ibid*, Recommendation 19.

47 G Henderson, "Never too late to atone", *Sydney Morning Herald*, 14 October 1997, at 19.

48 J Brett, "Every morning as the sun came up: the enduring pain of the 'stolen generation'", *The Times Literary Supplement*, 3 October 1997, p 4.

their lives and about their needs for healing. In eloquent, skilfully articulated and forceful submissions, Aboriginal and Torres Strait Islander organisations and individual witnesses spoke of the need to have their stories heard and their pain recognised, of their need for an apology, for assistance in reuniting with their families, in locating files, in returning to their traditional country, in recovering language and culture. The Inquiry's broad, holistic understanding of reparations is grounded in survivors' subjective perceptions of what is required to repair the harms they have suffered. This methodology is one of the more exceptional features of a most extraordinary report.