

**Submission to the Senate Legal and Constitutional  
References Committee's inquiry into the stolen  
generation**

**Prepared by Dr William Jonas, Aboriginal and Torres  
Strait Islander Social Justice Commissioner on behalf  
of the Human Rights and Equal Opportunity  
Commission**

**8 June 2000**

## Executive Summary

This submission has been prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner on behalf of the Human Rights and Equal Opportunity Commission.

It responds to the Inquiry's first term of reference, namely the adequacy and effectiveness of the Commonwealth's response to the recommendations of *Bringing them home* (the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families).

The Commission is of the view that the Commonwealth government's response to date has been inadequate and inappropriate. The Commission particularly notes that the government's submission to this inquiry constitutes a fresh response to many of the recommendations of *Bringing them home*, which rejects several recommendations of report on the basis of flawed arguments and poor reasoning.

The Commission is of the view that the government has not provided any sound arguments for failing to implement the recommendations of the report. The Commission reiterates that the recommendations constitute the minimum acceptable policy response to the separation of Aboriginal and Torres Strait Islander children from their families.

The submission has the following four sections:

- 1) Introduction;
- 2) Comments on the Commonwealth's response to particular recommendations of *Bringing them home*;
- 3) Comments on the federal Government's submission to this inquiry; and
- 4) Recent international comparisons.

### **Commonwealth's response to particular recommendations of the report**

In this section the Commission identifies three principles which we recommend should be adopted by the Committee to evaluate the adequacy and effectiveness of the government's response to the recommendations of *Bringing them home*.

- **1) National coordination:** The requirement for national leadership to ensure a coordinated response to the recommendations across departments and governments in the implementation and monitoring of the recommendations. An effective response to the recommendations cannot be achieved without such leadership and coordination.
- **2) The human rights framework:** The analysis of the report is based in a detailed examination of international law standards. The government's response to date has not addressed the human rights principles raised in the report or acknowledged their importance. The Commission

considers that a response to the recommendations that does not address the human rights dimensions of removal policies cannot be seen as effective.

- **3) Indigenous participation:** There has not been sufficient consultation and negotiation with Indigenous people, particularly those who were affected by the removal policies, in developing the government's response to the report. Effective participation of Indigenous people in decisions that affect them should be adopted by the Committee as a key measure of the adequacy of the government's response to the recommendations.

The Commission then raises concerns about the government's response to particular recommendations of the report, in particular:

- **Recommendation 1 – Recording testimonies.** The Commission considers that the government has misinterpreted this recommendation;
- **Recommendation 2 – Procedure for implementation.** The current approach to monitoring and the coordination of implementation is insufficient, and does not contain the crucial elements of an effective monitoring process;
- **Recommendation 5a – Acknowledgment and apology.** The adequacy of the Commonwealth Parliament's motion of regret is a matter for the stolen generations to decide. However, the motion does not meet the requirements identified by this recommendation;
- **Recommendation 10 – Genocide Convention.** Australia is, and has been for fifty years, in breach of its obligations under the Genocide Convention to enact legislation outlawing the crime of genocide in Australian law. The implementation of this recommendation is premised on a guarantee against future incidents of genocide, and should be implemented regardless of whether past events constitute genocide;
- **Recommendations 30, 33-36 – Family tracing and reunion services, health, counselling, well-being and parenting skills.** Adequate funding must be provided for accessible and appropriate services.
- **Recommendation 42 – Social Justice.** Achieving social justice and redressing Indigenous disadvantage are human rights issues, and must be addressed in a human rights context;
- **Recommendations 43-53 – National standards and framework legislation.** The government's reasons for rejecting these recommendations are inadequate. Such legislation emphasises the importance of national coordination and implementation of Australia's international obligations. The consequences of failure to take this approach are illustrated by mandatory sentencing.

### **Comments on the federal Government's submission to this inquiry**

This section argues that the government's submission to this inquiry misrepresents or does not fully comprehend the methodology and recommendations of *Bringing them home*. It argues that the reasoning put

forward by the government is deeply flawed and constitutes an inadequate response to the recommendations of the report.

In relation to the methodology of the report, the Commission rejects the assertions by the government that the report:

- *Was not based on a critical appraisal of the claims put to the Inquiry and failed to elicit the other side of the historical record:* The report is based on a detailed examination of legislation and official government documents. The stories of Indigenous people were used to illustrate the effects of these laws, not as the basis of the report's conclusions. The 'other side of the historical record' includes the detailed records and submissions of the states and churches, which were the employers of those implementing the removal policies. The Commonwealth is alone in not accepting that the laws were discriminatory and misconceived.
- *Has contributed to a simplistic concept of a stolen generation and an emotive image of forcible removal:* The government's arguments on this point are contradictory. They assert that *Bringing them home* creates an emotive image of the child removed from its parents arms, yet acknowledges that such an image represents the experience of some people and is within the terms of reference of the Inquiry. It also acknowledges that this by no means represents the full scope of circumstances referred to in the report.
- *Does not distinguish between the various reasons for separation:* The report provides discussion on the meaning of undue influence, duress and compulsion, and distinguishes removals on these bases from those that were voluntary or where the child was orphaned. Similarly, the government submission does not refer to the findings of the report that the laws were racially discriminatory and genocidal.
- *Overestimates the number of children stolen:* The Commission notes that the government's arguments on the number of children removed are misconceived, and reiterates that the Commission's estimates are the most accurate available.

The Commission then considers the government's reasoning in relation to issues of reparation and compensation. In its response to the recommendations of the report, the government does not acknowledge the human rights basis of the report.

The Commission notes the following.

- In relation to compensation through the litigation process, the government submission places heavy reliance upon the single judge decision in the *Williams* case. As the recent decision in *Johnson* indicates, this is premature.

- The government does not acknowledge that the principle of reparations is wider than monetary compensation, and is grounded in international law. The *van Boven principles* are a synthesis of international principles, and reflect existing international standards. These principles cannot be rejected on the basis that they have no formal status in the United Nations system.
- The principle of non-discrimination and the prohibition of genocide were 'standards of the day' by 1950 at the latest. Accordingly it is appropriate to evaluate forcible removal policies against these standards.
- Forcible removal can be seen to fall within the definition of genocide in the Genocide Convention. Article 2(e) of the Convention provides that genocide includes acts committed with the intent to destroy, in whole or *in part*, a racial group *as such* by forcibly transferring children of the group to another group. Similarly, genocide can occur without physical killing, with mixed motives, some of which may be perceived as beneficial, and without the complete destruction of the group.
- Forcible removal policies were racially discriminatory. They clearly had the effect of impairing the enjoyment and exercise, on an equal footing, of the human rights by Indigenous people.

The government's rejection of the basis for monetary compensation is also flawed. It represents a lack of political will rather than true impediments to providing compensation. The Commission provides examples of schemes overseas and in Australia where similar issues have been addressed.

### **International developments**

The final section of the submission provides examples of international practice in responding to violations of human rights. It provides examples in Canada, South Africa, Aotearoa / New Zealand, Denmark, Norway and the United States of America.

Governments across the globe are increasingly scrutinising the practices of their predecessors and acknowledging the importance of making reparation to victims of violations of human rights.

These examples illustrate international acceptance of:

- the principle of reparation for violations of human rights, including monetary compensation;
- the importance of acknowledgment of the wrong done and apology;
- the need for a variety of responses to redress the harm caused;
- the human rights basis of providing redress; and
- the importance of participation of victims.

These examples reveal striking similarities to the approach taken in *Bringing them home*. The refusal of the government to apologise for policies and practices of forcible removal, and the failure to acknowledge the importance of providing reparation, is contrary to a world wide trend.

## Table of Contents

<b>1. Introduction</b>		<b>p. 1</b>
<b>2. Comments on the government response to the recommendation of <i>Bringing them home</i></b>		<b>p. 4</b>
Principles for evaluating the adequacy of the government's implementation of the recommendations of <i>Bringing them home</i>		p. 4
a) National coordination		p. 4
b) The human rights framework		p. 7
c) Indigenous participation		p. 7
Comments on the implementation of specific recommendations of <i>Bringing them home</i>		p. 9
<i>Recommendation 1</i>	Recording testimonies	p. 9
<i>Recommendation 2</i>	Procedure for implementation	p. 10
<i>Recommendation 5a</i>	Acknowledgement and apology (Australian parliaments)	p. 13
<i>Recommendation 10</i>	Genocide Convention	p. 14
<i>Recommendation 30</i>	Establishment of family tracing and reunion services	p. 15
<i>Recommendations 33-36</i>	health, counselling, well-being and parenting skills	p. 17
<i>Recommendation 42</i>	Social Justice	p. 18
<i>Recommendations 43-53</i>	National framework legislation and standards legislation	p. 20
<b>3. Comments on the Federal Government's submission to this Inquiry</b>		<b>p. 23</b>
The methodology of <i>Bringing them home</i>		p. 24
a) That the report is based on uncorroborated evidence and presented 'only one side of the historical record'		p. 24
b) That the report has contributed to 'a simplistic concept of a 'stolen generation''		p. 26
c) That the report does not distinguish between the various reasons for separation		p. 27
d) That the report overestimates the number of children 'stolen'		p. 28
The government's response to issues of reparation and compensation		p. 30

a) Compensation through litigation	p. 30
b) The principle of reparations	p. 35
c) Standards of the day and international human rights principles	p. 40
Genocide	p. 41
The prohibition of racial discrimination	p. 42
d) Forcible removal as genocide	p. 45
e) Forcible removal as racial discrimination	p. 53
f) Compensation	p. 53
<b>4. Recent international developments</b>	<b>p. 57</b>
Canada	
a) <i>Gathering Strength</i> : the Canadian Government response to the Royal Commission on Aboriginal Peoples	p. 57
b) <i>Restoring dignity</i> : the report of the Law Commission of Canada	p. 61
c) Litigation	p. 66
South Africa	p. 68
Aotearoa/New Zealand	p. 70
Denmark	p. 71
Norway	p. 72
United States	p. 72



## 1. Introduction

1.1 On 24 November 1999, the Senate referred the following matters to the Senate Legal and Constitutional References Committee for inquiry and report by 5 October 2000:<sup>1</sup>

(1) The adequacy and effectiveness of the Government's response to the recommendations of the report, *Bringing Them Home*;

(2) Appropriate ways for governments, after consultation and agreement with appropriate representatives of the stolen generations, to:

i) establish an alternative dispute resolution tribunal to assist members of the stolen generations by resolving claims for compensation through consultation, conciliation and negotiation, rather than adversarial litigation and, where appropriate and agreed to, deliver alternative forms of restitution, and

ii) set up processes and mechanisms, which are adequately funded, to:

(a) provide counselling,

(b) record the testimonies of members of the stolen generations,

(c) educate Australians about their history and current plight,

(d) help them to establish their ancestry and to access family reunion services, and

(e) help them to re-establish or rebuild their links to their culture, language and history.

(3) Effective ways of implementing recommendations of the *Bringing Them Home* report including an examination of existing funding arrangements;

(4) The impact of the Government's response to recommendations of the *Bringing Them Home* report, with particular reference to the consistency of this response with the aims of the Council for Aboriginal Reconciliation; and

(5) The consistency of the Government's response to recommendations of the *Bringing Them Home* report with the hopes, aspirations and needs of members of the stolen generation and their descendants.

1.2 This submission has been prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner, on behalf of the Human Rights and Equal Opportunity Commission (the Commission or HREOC).

1.3 This submission focuses on the first term of reference, namely the adequacy and effectiveness of the Federal government's response to the recommendations of *Bringing them home*. The Commission has chosen not to comment on the remaining terms of reference, though we note that the terms of reference are inter-related. Consequently,

---

<sup>1</sup> Hansard, *Senate*, 24 November 1999, pp10493-10501.

this submission covers matters that might otherwise be dealt with under the remaining terms of reference.

- 1.4 This submission complements material previously published by the Commission on issues relating to the separation of Aboriginal and Torres Strait Islander children from their families.
- 1.5 The Commission finalised the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (*Bringing them home*) in 1997. The report contains much material which addresses the arguments that were put forward by governments in submissions to the National Inquiry. In its response to the recommendations of the report, the Commonwealth has continued to rely on arguments that were rejected in *Bringing them home*.
- 1.6 The Commission conducted a follow-up project from December 1997 to June 1998 to collate the various governmental responses to *Bringing them home*.<sup>2</sup> The project's objectives were to explain the findings and recommendations of the report to governments; facilitate inter-governmental coordination and communication in responding to the recommendations of the report, most of which were directed to governments; and facilitate communication and mutual assistance between governments and the National Indigenous Working Group on Stolen Generations.<sup>3</sup> The report of the follow-up project was published by the acting Aboriginal and Torres Strait Islander Social Justice Commissioner as Chapter 5 of the *Social Justice Report 1998*.
- 1.7 In addition to reporting on governmental responses to *Bringing them home*, the *Social Justice Report 1998* evaluated the political, media, public and church responses to the report in the 12 months following its release. The report highlighted the aftermath of the National Inquiry and the report for Indigenous people, and considered the variety of reactions from non-Indigenous people.
- 1.8 The Commission has provided copies of *Bringing them home* and the *Social Justice Report 1998* to the Senate Committee for this inquiry. This submission does not duplicate the material in those reports. Consequently, this submission should be read in conjunction with those reports.

---

<sup>2</sup> The project was undertaken by Dr David Kinley, with funding from the Stegley Foundation and the Australian Youth Foundation.

<sup>3</sup> For further information on these objectives, see Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1998*, HREOC, Sydney, 1999, pp95-98 (hereafter *Social Justice Report 1998*).

1.9 This submission is divided into the following sections:

- 1) Introduction;
- 2) Comments on the Commonwealth's response to particular recommendations of *Bringing them home*;
- 3) Comments on the federal Government's submission to this inquiry;  
and
- 4) Recent international comparisons.

## 2. Comments on the Commonwealth's response to the recommendations of *Bringing them home*

- 2.1 This section identifies principles for evaluating the adequacy of the Commonwealth's response to the report's recommendations. It also considers the Commonwealth's response to particular recommendations of *Bringing them home*. The Commission has chosen to comment only on recommendations in relation to which there have been developments since the publication of the *Social Justice Report 1998*, or where there is a continued misunderstanding about the scope and purpose of a recommendation.
- 2.2 This section should be read in conjunction with section 3 of this submission, which examines those aspects of the Commonwealth's submission to this inquiry which respond to recommendations of the report. It should also be read in conjunction with Chapter 5 of the *Social Justice Report 1998*, which provides a detailed analysis of all governmental responses to the recommendations as at 1998-99.

### Principles for evaluating the adequacy of the government's implementation of the recommendations of *Bringing them home*

- 2.3 The Commission identifies the following principles against which the adequacy of the Commonwealth's response to *Bringing them home* can be measured:
- a) **National coordination:** ensuring national coordination between governments and departments in the implementation and monitoring of the recommendations;
  - b) **The human rights framework:** addressing the recommendations of *Bringing them home* within a human rights framework; and
  - c) **Indigenous participation:** ensuring the effective participation of Indigenous people, particularly members of the stolen generations, in the implementation and monitoring of the recommendations.

#### a) National coordination

- 2.4 The recommendations of *Bringing them home* require action from many governmental agencies across all levels of government (as well as other agencies, such as the churches).
- 2.5 An effective response to the recommendations cannot be achieved without national coordination. Such a response will ensure that recommendations are not ignored because of claimed demarcations of responsibility among governments or agencies.

2.6 The acting Aboriginal and Torres Strait Islander Social Justice Commissioner explained in the *Social Justice Report 1998*:

Collectively, the National Inquiry's recommendations are concerned to protect and promote the human rights of those people affected by the policies and practices of the separation of Indigenous children from their families. To meet this goal, or indeed, even to strive towards it, requires national coordination and leadership. Under a federal system of government such as we have in Australia, these needs are ever present and exist across a wide spectrum of areas.

The need for a nationwide concerted effort in the areas covered by the National Inquiry is emphasised by the complexity of the separation or division of responsibilities. While, for instance, responsibilities for education and health are shared between the Commonwealth, States and Territories, responsibility for record-keeping and access resides separately with each jurisdiction; that for juvenile justice and welfare lies with the States and Territories, and the Commonwealth has 'special' responsibility for Indigenous people under s 51(26) of the Constitution (the races power), as well as for Australia's international human rights obligations by way of its Executive power to ratify treaties and its power to 'incorporate' them into domestic law under s 51(29) of the Constitution.

An especially powerful message to be drawn from this is that without inter-governmental cooperation, information exchange and coordination, the States and Territories, in particular, will be left uncertain as to how to co-ordinate their responses with those of the Commonwealth in order to maximise effect and efficiency. Consequently, as related in this report time and time again, the States and Territories are simply unwilling or unable to make commitments in respect of national legislation or in the big spending areas of health and Link-Up type services, where the Commonwealth has indicated its commitment.

In the end, for the lack of adequate national and cross-government cooperation, we might not only lose those initiatives that wholly or largely depend on such concerted action, we might devalue many well-intended initiatives as are outlined in the text of this Report, that have been taken by individual governments. That would surely be a tragedy as well as an injustice.<sup>4</sup>

2.7 The Commission notes that all levels of government have previously acknowledged concerns about the lack of coordination in the delivery of services to Indigenous people. This is demonstrated by the Council of Australian Government's (COAG) adoption in 1992 of the *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders*<sup>5</sup> (the framework agreement). This framework agreement establishes guiding principles for all levels of government, including:

<sup>4</sup> *Social Justice Report 1998*, pp145-46.

<sup>5</sup> Council of Australian Governments, *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders*, COAG, Perth, 1992.

- 4.4 effective coordination in the formulation of policies, and the planning, management and provision of services to Aboriginal peoples and Torres Strait Islanders by governments to achieve more effective and efficient delivery of services, remove unnecessary duplication and allow better application of the available funds; and
- 4.5 increased clarity with respect to the roles and responsibilities of the various spheres of government through greater demarcation of policy, operational and financial responsibilities.<sup>6</sup>

- 2.8 National leadership is needed to ensure a coordinated response across governments. The Commission notes that the Commonwealth has stated in its response to the recommendations of the report that:

The majority of the 54 recommendations are directed to the states and territories, some to the Commonwealth and some to non-government organisations involved in the separation of children from their families.<sup>7</sup>

- 2.9 Twenty nine of the recommendations are directed to COAG, eight are directed jointly to the Commonwealth, state and territory governments and four are directed to the Commonwealth only. In other words, 41 of the 54 recommendations directly involve the Commonwealth.
- 2.10 The Commission also notes the Commonwealth's comments that primary responsibility for policies of forcible removal rests with the States and the churches, and that 'the Commonwealth government's response (a \$63m package) to the HREOC report recommendations... has been far more comprehensive and substantive than the response of any other government.'<sup>8</sup> The Commission is of the view that the adequacy of the Commonwealth's response is best measured by assessing the redress provided against the harm done, rather than by highlighting the paucity of redress from other sources, or by attempting to transfer responsibility to other (state and church) authorities.

**2.11 The Commission recommends that the Committee adopt the requirement of national coordination between governments as a key measure of the adequacy and effectiveness of the government's response to the recommendations of *Bringing them home*.**

<sup>6</sup> *ibid*, p5.

<sup>7</sup> Senator John Herron, Commonwealth Government response to *Bringing them home*, included as Appendix 1 in Federal Government Submission, Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation, March 2000, p6 (hereafter Federal Government Submission, Stolen Generation Inquiry).

<sup>8</sup> *ibid*, Executive Summary, pii.

## b) The human rights framework

2.12 The analysis, conclusions and recommendations of *Bringing them home* are informed by human rights principles and Australia's international obligations.

2.13 Section 3 of this submission notes that the Federal government's submission to this inquiry does not address the human rights issues raised in *Bringing them home*. Section 4 provides examples of practice in other nations, whereby human rights principles have been accepted as forming the basis of government responses to violations of human rights.

2.14 As stated in my *Social Justice Report 1999*:

There are several layers of accountability that we should expect in the delivery of services to Indigenous peoples. Accountability should be expected in every aspect of service delivery from the federal government, state/territory and local governments as well as from Indigenous organisations...

A... significant type of accountability of the federal government is to the international community through the upholding of human rights standards and compliance with treaties to which Australia is a signatory. These instruments reflect minimum standards of behaviour commonly accepted by the international community.<sup>9</sup>

2.15 A response to the recommendations of *Bringing them home* that does not address the human rights dimensions cannot be seen as adequate or effective.

**2.16 The Commission recommends that the Committee adopt compliance with international human rights standards as a key measure of the adequacy and effectiveness of the government's response to the recommendations of *Bringing them home*.**

## c) Indigenous participation

2.17 It is crucial that Aboriginal and Torres Strait Islander people, and particularly those directly affected by past forcible removal policies, are directly involved in the implementation and monitoring processes. The recommendations in *Bringing them home* were designed so that governments would genuinely involve and negotiate with Indigenous community organisations and representative bodies.

<sup>9</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, HREOC, Sydney, 2000, pp9, 13 (hereafter *Social Justice Report 1999*).

2.18 COAG's framework agreement acknowledges that in attempting to improve the effectiveness of service delivery to Indigenous people, the following issues are of primary importance:

4.1 empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders;

4.2 economic independence and equity being achieved in a manner consistent with Aboriginal and Torres Strait Islander social and cultural values;

4.3 the need to negotiate with and maximise participation by Aboriginal peoples and Torres Strait Islanders through their representative bodies, including the Aboriginal and Torres Strait Islander Commission, Regional Councils, State and Territory advisory bodies and community-based organisations in the formulation of policies and programs that affect them.<sup>10</sup>

2.19 As stated in my *Social Justice Report 1999*:

(These)... principles are also measures of accountability. They reflect Australia's international human rights obligations, which require governments to provide services and redress Indigenous disadvantage in a manner that is culturally appropriate, non-discriminatory and with adequate consultation.<sup>11</sup> This is to ensure the effective participation of Indigenous peoples, particularly in the design and delivery of services that affect them...

Indigenous people [must] be able to fully participate in decisions that affect them.... [It is] a yardstick of best practice which governments must comply with if they are to ensure greater efficiency in service delivery...

Indigenous people have continually expressed the importance of this principle, as well as reiterating the fact that we are, like all Australians, entitled by right to participate in decisions that affect us. The requirement of participation and adequate consultation is a principle that underpins the *National commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders*.

Yet despite the apparent acceptance of the importance of this principle governments continue in most instances to act in a manner that conceives of it as aspirational rather than essential. The consequence of this is that Indigenous perspectives and concerns are able to be dismissed or outweighed when there is a contrary or competing set of interests.<sup>12</sup>

2.20 In formulating its response to the recommendations of *Bringing them home*, the Commonwealth does not appear to have consulted adequately with Indigenous people, including representatives of the stolen generations:

---

<sup>10</sup> COAG, *op. cit.*, p5.

<sup>11</sup> On the meaning of adequate consultation see Jonas, W., *Consultation with Aboriginal people about Aboriginal heritage*, AGPS, Canberra, 1991.

<sup>12</sup> *Social Justice Report 1999*, pp16–17.



In the process of formulating the Commonwealth Government's response, ATSIC staff attended the single Interdepartmental Committee meeting convened on 22 July 1997 to discuss the response. ATSIC staff were also involved in a number of bilateral discussions with staff of the Department of Prime Minister and Cabinet. The ATSIC Board, however, was never formally or directly consulted, though according to Senator Herron, 'the matter was raised at a number of ATSIC Board meetings when I was present'.<sup>13</sup>

**2.21 The Commission recommends that the Committee adopt the principle of effective participation of Indigenous people in decisions that affect them as a key measure of the adequacy and effectiveness of the government's response to the recommendations of *Bringing them home*.**

## **Comments on the implementation of specific recommendations of *Bringing the home***

### **Recommendation 1 – Recording testimonies**

2.22 Recommendation 1 of *Bringing them home* reads:

That the Council of Australian Governments ensure the adequate funding of appropriate Indigenous agencies to record, preserve and administer access to the testimonies of Indigenous people affected by the forcible removal policies who wish to provide their histories in audio, audio-visual or written form.

2.23 In announcing the Commonwealth's response to *Bringing them home*, Senator Herron stated:

I have been profoundly moved by the stories of the Indigenous people, but like many others I also wanted to hear from others involved in the process. Why did they do it? What did they feel? I think it is important that the missionaries and administrators of the time, the police and hospital workers, and the adoptive and foster parents, are also able to tell their stories. For a complete understanding we need to know their motivations and their perceptions as well.

We will attempt to facilitate this rounded history. The National Library of Australia is uniquely placed to undertake this role through its well established, professional and highly regarded oral history programme. We have therefore asked the National Library to investigate the feasibility of a comprehensive oral history project to collect the stories of Indigenous people and others involved in the process of child removals.<sup>14</sup>

<sup>13</sup> *Social Justice Report 1998*, p106.

<sup>14</sup> Senator John Herron, Commonwealth Government response to *Bringing them home*, *op. cit.*, p7.

2.24 The Commission welcomes the initiative to record the stories of all people involved in the removal policies of the past. However, the Commission is concerned that this approach misinterprets the purpose of this recommendation.

2.25 As stated in *Bringing them home*:

In the immediate future... the primary need is to enable people to tell their stories, to have them recorded appropriately and to enable the survivors to receive counselling and compensation. The experience of the Shoah Foundation and of this Inquiry is that giving testimony, which is extraordinarily painful for most, is often the beginning of the healing process.<sup>15</sup>

2.26 Recommendation 1 acknowledges that the stories of forcible removal are the life stories of many Indigenous Australians. The recommendation is aimed at ensuring that Indigenous people are able to tell their stories and have them acknowledged in an appropriate manner, with appropriate support.

2.27 Accordingly, the Commission suggested that the stories of those affected should be recorded in the following manner:

For this reason the recording of testimonies needs to be done in or near each individual's community and by expert Indigenous researchers. Counselling or ready referral to counselling services must be available. Therefore appropriate agencies are likely to include Indigenous family tracing and reunion agencies and the language, culture and history centres proposed elsewhere in this report.<sup>16</sup>

2.28 The National Library of Australia is not an 'appropriate Indigenous agency' to administer and control the recording of the testimonies of those affected by the forcible removal policies. The National Library initiative, while valuable, is inadequate as the sole response to this recommendation.

## **Recommendation 2 – Procedure for implementation**

2.29 Recommendation 2 of *Bringing them home* sets out a four-tiered procedure for implementation and ongoing monitoring and evaluation of the recommendations of the report.

2.30 The first element requires that COAG establish a working party to develop a process for the implementation of the Inquiry's recommendations and to receive and respond to annual reports on the progress of implementation.

---

<sup>15</sup> *Bringing them home*, HREOC, Sydney, 1997, pp21-22.

<sup>16</sup> *ibid*, p22.

- 2.31 The second component is that the Commonwealth fund the establishment of a National Inquiry audit unit within the Commission to monitor the implementation of the Inquiry's recommendations and report annually to COAG on the progress of implementation. The third element, for the Aboriginal and Torres Strait Islander Commission (ATSIC) to fund peak Indigenous organisations to provide submissions to the HREOC National Inquiry audit unit; and fourth, for the Commonwealth, State and Territory governments to report annually to the audit unit. The Federal government has not favoured the audit unit approach and accordingly the recommendation has not been implemented.<sup>17</sup>
- 2.32 In accordance with the first aspect of the recommendation, the issue of monitoring was referred to the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA). On 15 August 1997, MCATSIA agreed to establish a working group to make recommendations on regular monitoring and reporting processes.
- 2.33 The MCATSIA working group first met on 29 July 1999 to examine possible mechanisms for the coordination and monitoring of the implementation of government responses to *Bringing them home*. It was also to make recommendations for consideration by Ministers at a MCATSIA meeting in September that year.
- 2.34 The Commission notes that the effective monitoring of implementation of the recommendations involves two essential elements. The first is to put into place mechanisms that will permit implementation to be monitored. The second, and more fundamental, element concerns the nature of implementation, namely:
- What it is (and who decides what it is), how is it measured, and how different interpretations are dealt with.<sup>18</sup>
- 2.35 The Commission is of the view that the current arrangement with MCATSIA is insufficient, and does not adequately address these issues.
- 2.36 The Commission notes that the MCATSIA working group did not meet until more than two years after the release of the report, and has only met once more since that time. This delay and infrequency in meeting are unacceptable as a response to the recommendation. They indicate that little priority is being given to the scrutiny of implementation, and that there is an underlying lack of commitment to the continuing issues and needs of Indigenous people forcibly removed from their families.
- 2.37 Of greater concern, however, is that the current arrangement with MCATSIA provides that the sole source of monitoring of government

---

<sup>17</sup> *Social Justice Report 1998*, p163.

<sup>18</sup> *ibid.*, p144.

implementation is by a ministerial council of government. The MCATSIA process:

- amounts to information sharing among governments, and accordingly, lacks an evaluation component;
- is not transparent in its operation;
- does not provide an appropriate avenue for peak Indigenous organisations and members of the stolen generation to raise concerns regarding the implementation of the recommendations; and
- does not compel governments to provide detailed information on their progress.

2.38 In no way can the MCATSIA Working Group process be regarded as effectively monitoring implementation of the recommendations.

2.39 The Commission notes that MCATSIA released a status report in 1999.<sup>19</sup> This status report refers to the criticism in the Commission's follow-up project regarding the lack of adequate national and cross-government coordination, and acknowledges that 'there has also been criticism on this issue from members of the Senate's Estimates Committee'.<sup>20</sup> The status report raises the need for developing processes which maximise transparency and offer the opportunity for regular review by the broader community, as well as considering the participation of Indigenous community groups that deal with issues relating to the stolen generations.

2.40 MCATSIA's status report suggests that the coordination and monitoring process could be facilitated through:

- a standing item at MCATSIA;
- annual reporting by jurisdictions; or
- community-based monitoring groups (membership would include representatives from agencies which deal with issues addressed in the *Bringing them home* report).<sup>21</sup>

2.41 The MCATSIA report also states that the Commonwealth's funding initiatives all relate to services which State/Territory Government agencies have responsibility for administering or coordinating. It suggests that:

The development of direct funding agreements, co-operative funding models and integrated service delivery models between the Commonwealth and State/Territory jurisdictions provide the opportunity to put existing

---

<sup>19</sup> Ministerial Council for Aboriginal and Torres Strait Islander Affairs, 1999, *Status report on jurisdictional responses to Bringing them home* (Appendix 4 in Federal Government Submission, Stolen Generations Inquiry).

<sup>20</sup> *ibid*, p5.

<sup>21</sup> *id*.

infrastructure and services to best effect in conjunction with new service initiatives, and to ensure that there is no duplication or overlap in service provision...

Mechanisms to facilitate enhanced co-ordination and collaboration of funding parties and service deliverers could include:

- informal agreements through Ministerial correspondence;
- memorandums of understanding establishing a partnership between key stakeholders; and
- the use of existing bilateral frameworks, such as the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders*.<sup>22</sup>

2.42 The Commission considers that MCATSIA's proposal that monitoring be dealt with through a standing item at MCATSIA, or that there be informal agreements to facilitate coordination and collaboration 'through Ministerial correspondence' do not address the concerns raised above.

2.43 The starting point for developing an appropriate mechanism for responding to the recommendations is recommendation 2 of *Bringing them home*. Any other approaches to monitoring should provide for a standard of monitoring that at least matches the level provided in that recommendation.

### **Recommendation 5a – Acknowledgment and apology (Australian Parliaments)**

2.44 Recommendation 5a of *Bringing them home* states:

That all Australian Parliaments

- 1) Officially acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal,
- 2) Negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies to Indigenous individuals, families and communities and extend those apologies with wide and culturally appropriate publicity, and
- 3) Make appropriate reparation as detailed in the following recommendations.

2.45 There remain just two jurisdictions in which the Parliament has not apologised - the Commonwealth and the Northern Territory. In both cases the reason given for not doing so is the notion that today's generations should not be held responsible for the wrongs of former generations.

2.46 The Prime Minister stated in his speech opening the Australian Reconciliation Convention in Melbourne on 26 May 1997 that

---

<sup>22</sup> *ibid.*, p7.

Australians of this generation should not be required to accept guilt and blame for the past actions and policies over which they had no control'. However, this overlooks 'a fundamental and enduring feature of Australian democracy – namely continuing responsible government'.<sup>23</sup>

- 2.47 On 26 August 1999, a motion of regret was passed in both houses of the federal Parliament, acknowledging past injustices suffered by Indigenous Australians. The motion reads:

That this House:

- (a) reaffirms its wholehearted commitment to the cause of reconciliation between Indigenous and non-Indigenous Australians as an important national priority for Australians;
- (b) recognising the achievements of the Australian nation commits to work together to strengthen the bonds that unite us, to respect and appreciate our differences and to build a fair and prosperous future in which we can all share;
- (c) reaffirms the central importance of practical measures leading to practical results that address the profound economic and social disadvantage which continues to be experienced by many Indigenous Australians;
- (d) recognises the importance of understanding the shared history of Indigenous and non-Indigenous Australians and the need to acknowledge openly the wrongs and injustices of Australia's past;
- (e) acknowledges that the mistreatment of many Indigenous Australians over a significant period represents the most blemished chapter in our international history;
- (f) expresses its deep and sincere regret that Indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many Indigenous people continue to feel as a consequence of those practices; and
- (g) believes that we, having achieved so much as a nation, can now move forward together for the benefit of all Australians.<sup>24</sup>

- 2.48 The Commission believes that it is up to members of the stolen generations to determine whether this statement of regret is sufficient. We note, however, that there was a lack of consultation on the wording of the motion, and that it does not satisfy recommendation 5a of *Bringing them home*. Policies and practices of forcible removal are not mentioned, and the Prime Minister has described the motion as 'generic'.<sup>25</sup>

## Recommendation 10 – Genocide convention

- 2.49 Recommendation 10 states 'that the Commonwealth legislate to implement the *Genocide Convention* with full domestic effect.'

<sup>23</sup> *Social Justice Report 1998*, p113.

<sup>24</sup> *Hansard*, House of Representatives, 26 August 1999, p9205.

<sup>25</sup> The Commission also notes that the assertion in the Federal government's submission to this inquiry that 'the Prime Minister moved a motion... officially acknowledging the responsibility of the Parliament's predecessors for past laws, policies and practices in separating Indigenous children from their families' is incorrect: Federal Government Submission, Stolen Generation Inquiry, p29.

2.50 The Commission notes that this Committee is currently conducting a separate inquiry into the *Anti-Genocide Bill 1999*. The Commission has made a submission to that inquiry which calls for the passage of the *Anti-Genocide Bill*, with amendments.

2.51 The purpose of implementing Australia's obligations under the *Convention on the Prevention and Punishment of the Crime of Genocide* is to ensure that at no time in the future will such a crime be tolerated in Australian law. As stated in the *Social Justice Report 1998*:

The enactment of legislation by the Commonwealth to give effect to the Genocide Convention... would constitute an important part of official recognition and acceptance in Australia of the fact that the separation policies of the past are over and will not be repeated. There are not now, nor have there been, any sound reasons not to enact such legislation following Australia's ratification of the Genocide Convention in 1948. Indeed, such legislation would appear to be required to comply with constitutional convention in Australia, which dictates that ratification only occurs once domestic law is brought into line with the requirements of the international instrument being entered into.

In its response, the only reason provided by the Commonwealth Government for its decision not to enact such legislation amounts to a *non sequitur*. Its proposition that in the *Kruger* case<sup>26</sup> 'the High Court rejected assertions that the Northern Territory law authorised genocide' fails to address the rationale behind the recommendation. The point at issue in the recommendation is not whether past laws governing the forcible removal of Indigenous children from their families authorised or even effected genocide, but rather that the enactment of legislation outlawing genocide or any genocidal action in Australia would help ensure that such an abhorrent phenomenon would not occur today or in the future, whether or not one accepts that it occurred in the past.<sup>27</sup>

2.52 Australia is, and has been for over 50 years, in breach of its obligations under Article 5 of the Convention 'to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III'.

### **Recommendation 30 – Establishment of family tracing and reunion services**

2.53 Link-Up has played a vital role in giving support to Indigenous people affected by policies and practices of forcible removal, and in increasing public awareness and government action in relation to ongoing issues faced by the stolen generations. The largest and most established

<sup>26</sup> *Kruger v Commonwealth* (1997) 71 ALJR 991.

<sup>27</sup> *Social Justice Report 1998*, pp139-140.

Link-Ups are in New South Wales and Queensland. Although funded through a combination of ATSIC and state government funds, Link-Ups play an important role as Indigenous-controlled community organisations perceived as being separate from government, particularly considering the history of government intervention in the lives of many of their clients.

- 2.54 Recommendation 30 of *Bringing them home* calls upon COAG to 'ensure that Indigenous community-based tracing and reunion services are funded in all regional centres with a significant Indigenous population'. No such action has been taken by COAG.<sup>28</sup>
- 2.55 The Commonwealth allocated \$11.25 million over four years 'to expand the existing New South Wales and Queensland services and to establish similar services in other jurisdictions'.<sup>29</sup> These funds are being administered by ATSIC.
- 2.56 At the stage of the follow-up project, the Commission had major concerns about the process of establishing new Link-Up services:

Outside the New South Wales and Queensland institutions, Link-Up services are mostly provided by Aboriginal or Aboriginal and Torres Strait Islander Child Care Agencies. This is far from ideal, as such bodies do not have the funds, personnel or expertise to undertake such a task. The objects of such bodies are, in any case, not necessarily suited for the specific task of providing tracing and reunion services to people affected by separation policies. Such people are now almost invariably adults, even if their relevant experiences occurred when they were children, and therefore the work of a child care agency is ill-suited to their needs. Indeed, it would seem that this very mismatch is one of the reasons why State and Territory governments have not funded them to provide tracing and reunion services.

In some jurisdictions, a Link-Up type service is provided from within a government agency. This is currently the case in South Australia (through the Department of Human Services) and temporarily at least, in Tasmania (through the officer currently employed in the Department of Health and Community Affairs). Debates as to whether it is appropriate to provide such services from within government rather than independent of it are being pursued with vigour in both South Australia and Western Australia.<sup>30</sup>

- 2.57 These concerns remain. Even though the Commonwealth has repeatedly stated that it is responding to the 'key conclusion' in *Bringing them home* 'that assisting family reunions is the most significant and urgent need of separated families', at 31 December 1999, only \$3.738 million of the \$11.25 million allocated had been spent on Link-Up services. Western Australia still does not have a Link-

---

<sup>28</sup> *Social Justice Report 1998*, p128.

<sup>29</sup> Federal Government Submission, *Stolen Generation Inquiry*, p7.

<sup>30</sup> *Social Justice Report 1998*, p130.



Up service and the service in South Australia has only been fully operational since 1 December 1999.<sup>31</sup>

- 2.58 It is crucial that funding for Link-Up services be assigned to appropriate Indigenous-run community organisations, and that the money be specifically designated and monitored so that it directly benefits Indigenous people affected by forcible removal.

### **Recommendations 33 - 36 – health, counselling, well-being and parenting skills**

- 2.59 The findings of *Bringing them home* highlighted the often debilitating physical and mental health issues faced by those Indigenous people affected by past policies and practices of forcible removal. These include immediate and long-term effects of separation for the stolen generations, and the ongoing issues also facing their descendants and communities.

- 2.60 The Commonwealth's response to the health issues raised in *Bringing them home* constitutes by far the largest portion of its total response. At \$39.15 million over four years,<sup>32</sup> it comprises significantly more than half of the response package. This amount was distributed across three principal initiatives:

- engagement and training of 50 new counsellors 'to assist those affected by past policies and for those going through the reunion process' (\$16 million);<sup>33</sup>
- expansion of 'network of regional centres for emotional and social well being, giving counsellors professional support and assistance',<sup>34</sup> with the addition of 3 centres (planned, one each, for New South Wales, Queensland and Western Australia) to the 11 existing centres (\$17.25 million); and
- further development of Indigenous family support and parenting programs funded through the Health and Family Services Portfolio (\$5.9 million).<sup>35</sup>

- 2.61 Commonwealth and state and territory governments have shared responsibility for health issues, and the Commonwealth has now concluded Aboriginal and Torres Strait Islander Health Framework Agreements with every state and territory.<sup>36</sup>

---

<sup>31</sup> Commonwealth Government, *Progress Report on Implementation of Commonwealth Government Response*, 31 December 1999, p1 ( Appendix 2, Federal Government Submission, Stolen Generation Inquiry).

<sup>32</sup> See further, Senator Herron's Budget Statement, 12 May 1998, p.107.

<sup>33</sup> Senator Herron, Commonwealth Government response, *op. cit.*, p4.

<sup>34</sup> *ibid.*

<sup>35</sup> *Social Justice Report 1998*, pp132-133.

<sup>36</sup> The last of which was concluded with the Northern Territory in April 1998. The process of securing all 8 agreements took approximately two years. Typically, each agreement is between the State/Territory Minister for Health, the Commonwealth Minister for Health,

- 2.62 These agreements, like the COAG National Framework from which they have emerged, aim to achieve a health system that is more accessible and responsive to the needs of Aboriginal and Torres Strait Islander peoples, as well as more appropriate services, better linkages between health services and measurable outcomes.
- 2.63 The agreements also envisage:
- joint planning processes which allow for full and formal Aboriginal and Torres Strait Islander participation in decision-making and determination of priorities;
  - improved cooperation and coordination of current service delivery by all spheres of Government, including both Aboriginal and Torres Strait Islander specific services and mainstream services; and
  - increased clarity in the roles and responsibilities of the key stakeholders.
- 2.64 The 50 additional counsellors provided for in the Commonwealth's response are being distributed on a state by state basis under the Aboriginal and Torres Strait Islander Health Framework Agreements. At 31 December 1999 fewer than half of the positions had been filled.<sup>37</sup>
- 2.65 As with the provision of Link-Up services, it is crucial that funding allocated specifically for counsellors for Indigenous people forcibly removed from their families are accessible to those affected. This is not just about location, but also about the appropriateness of the counsellors who are appointed.
- 2.66 There is also concern at the dire need for mental health services in the wider Aboriginal community. Funds specifically allocated to support members of the stolen generations ought not become subsumed into more general programs to meet these needs.

#### **Recommendation 42 – Social Justice**

- 2.67 Recommendation 42 provides 'that to address the social and economic disadvantage that underlie the contemporary removal of children and young people' there be developed and implemented a social justice package for Indigenous families and children, and that those recommendations of the Royal Commission into Aboriginal Deaths in Custody that address underlying issues of social disadvantage be implemented.

---

Chairperson of ATSIC and the Chairperson of the peak Indigenous community health care body.

<sup>37</sup> Commonwealth Government, *Progress Report on Implementation of Commonwealth Government Response*, *op cit.*, p7.

2.68 The Federal government's submission to this inquiry notes that 'the Commonwealth's Indigenous policy is based on providing social justice to indigenous people through addressing key areas of social-economic disadvantage eg health, housing, education and employment.'<sup>38</sup>

2.69 The *Social Justice Report 1999* expresses concerns at limitations in the Commonwealth's approach, as exemplified by the desired aim of moving Indigenous people 'beyond welfare dependency.' It states:

I am... concerned that in calling for a move away from welfare dependency to economic empowerment there is little acknowledgment that integral to this shift is the empowerment of Indigenous Australians through the full recognition and equal enjoyment of their human rights.

What Indigenous people have consistently called for in the shift from the welfare mentality of governments is a move to a rights-based approach. As my predecessor Dr Mick Dodson stated in the 1995 Social Justice Package proposal:

The time has come for a fundamental shift in public policy in respect of Australia's Indigenous peoples... At the basis of this shift must be the transition, too little understood, from the administration of Indigenous welfare to the recognition of Indigenous rights.<sup>39</sup>

Indigenous rights in this context encompass equality or citizenship rights – rights which apply to all people simply by virtue of being human – as well as the distinct, collective rights of Indigenous peoples, or identity rights...

The movement away from welfare dependency is integrally linked to the recognition of the rights of Indigenous peoples. This includes the right to self-determination, to participate in decisions that affect us, as well as having our cultural practices recognised and protected within Australian law.<sup>40</sup>

2.70 Chapter 2 of the *Social Justice Report 1999* also sets out Australia's human rights obligations to redress the disadvantage faced by Indigenous people. The following concerns are expressed:

- The grossly disproportionate rates of disadvantage faced by Indigenous people indicates that they do not enjoy the full spectrum of human rights in a non-discriminatory manner;<sup>41</sup>
- Australian governments are obliged under the International Covenant on Economic, Social and Cultural Rights to demonstrate that they are providing Indigenous people with minimum essential levels of rights and are making every effort to use all resources at their disposition to satisfy,

<sup>38</sup> Federal Government Submission, Stolen Generations Inquiry, p37.

<sup>39</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Volume 1: Indigenous social justice: Strategies and recommendations*, HREOC, Sydney 1995, p5.

<sup>40</sup> *Social Justice Report 1999*, pp6-7.

<sup>41</sup> *ibid*, p56.

as a matter of priority, these minimum obligations. Australia does not attach sufficient priority to redressing this disadvantage;<sup>42</sup> and

- Government funding and programs aimed at redressing Indigenous disadvantage 'are clearly not sufficient to raise Indigenous people to a position of equality within Australian society. International human rights principles provide justification for giving higher priority to Indigenous disadvantage and for taking steps, or further steps, to redress this disadvantage and achieve equality of outcome.'<sup>43</sup>

2.71 The Commission notes that one of the four national strategies for reconciliation identified in the *Roadmap to Reconciliation* by the Council for Aboriginal Reconciliation is aimed at redressing Indigenous disadvantage. The Roadmap for Reconciliation provides a further opportunity for the government to commit to the process envisaged in recommendation 42 of *Bringing them home*.

### **Recommendations 43 – 53: National framework and standards legislation**

2.72 *Bringing them home* recommended the introduction of two forms of national legislation (in addition to legislation that implements the Genocide Convention). First, national *framework* legislation which would have the object of promoting self-determination through consultation and cooperation between governments and Indigenous peoples at community and regional levels in respect of the development and implementation of policy and legislation. Second, national *standards* legislation which would establish minimum and/or 'best practice' standards in government/Indigenous community interrelations in respect of policy and legislative initiatives.

2.73 The specific areas covered under both proposals are broadly the same - namely, child welfare or care and protection, adoption, family law and juvenile justice.

2.74 There has been no consensus among Australian governments to pursue national legislation. The Commonwealth stated in its December 1997 response to the recommendations:

for the Commonwealth to seek to override the legislative and related responsibilities of the states and territories in these circumstances would, I believe, be counter-productive for all concerned.<sup>44</sup>

2.75 The Commonwealth government also noted that:

It was agreed at the August 1997 meeting of MCATSIA that this is a matter for the States and Territories and Commonwealth intervention would be

---

<sup>42</sup> *ibid*, pp57-58.

<sup>43</sup> *ibid*, p63.

<sup>44</sup> Senator John Herron, *Commonwealth Government Response*, op. cit., p10.

inappropriate. Ministers resolved that in developing their responses to the Report, jurisdictions will consider the incorporation of appropriate principles and standards in relation to relevant policies and programs.<sup>45</sup>

2.76 The Commission does not consider this an adequate response to the recommendations. In particular, there are three concerns with this approach:

- It interprets the recommendations as requiring the Commonwealth to override state and territory laws, which is not necessarily so;
- If national legislation did override a state or territory law, it would do so with good reason, namely to ensure compliance with Australia's international obligations; and
- An approach which leaves it to states and territories to incorporate these standards as appropriate into their policies and programs provides opportunity for the importance of these standards to be diminished (as demonstrated by mandatory sentencing laws in the Northern Territory and Western Australia).

2.77 Rather than requiring that the Commonwealth overrides state and territory laws, the recommendations suggest that the Commonwealth lead in the establishment of agreed frameworks and minimum and/or best practice standards.

2.78 *Only* when states or territories deviate from these minimum standards or do not comply with the agreed frameworks could the Commonwealth role be seen as imposing on or overriding the states or territories. The Commission's view is that, in the circumstance where state or territory laws do not meet minimum standards, it is required that the Commonwealth override them.

2.79 As stated in my *Social Justice Report 1999*, in the context of mandatory detention laws, states and territories 'do not have unfettered power to introduce laws that further disadvantage Indigenous Australians.'<sup>46</sup>

2.80 The minimum standards suggested in the recommendations would implement Australia's international human rights obligations in domestic law. The obligation to ensure consistency with Australia's international obligations lies with the federal government, which is accountable for failures of the states to comply with these obligations.

2.81 As the Committee on the Elimination of Racial Discrimination stated in 1994:

---

<sup>45</sup> *ibid*, p37.

<sup>46</sup> *Social Justice Report 1999*, p169.

Although the Commonwealth government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of the states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention and cannot be compelled to change their laws.<sup>47</sup>

2.82 As a consequence of this, and in relation to the treatment of Indigenous Australians, the Committee expressed the view that:

The Commonwealth Government should undertake appropriate measures to ensure the harmonious application of the provisions of the Convention at the federal and state and territory levels.<sup>48</sup>

2.83 In its recent consideration of Australia's 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> periodic reports the Committee reiterated this concern. The Committee expressed:

concern and reiterates its recommendation that the Commonwealth undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with Article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.<sup>49</sup>

2.84 Complying with these human rights obligations should not be left to the discretion of states and territories. As the recent debates on the mandatory sentencing laws of the Northern Territory and Western Australia demonstrate, states or territories will not always ensure that their laws comply with these human rights obligations.

2.85 Recommendation 53 includes the following standards for juvenile justice:

- Rule 13: Custodial sentences to be an option of last resort, with appropriate non-custodial options to be available;
- Rule 14: The sentencer must take into account the best interests of the child, and ensure that removal is to be a last resort; and
- Rule 15: Where a custodial sentence is necessary, the sentence must be for the shortest appropriate period of time. No child is to be given a mandatory sentence.

2.86 The mandatory detention laws in the Northern Territory and Western Australia breach each of these standards.<sup>50</sup> Such laws would breach the national standards legislation proposed in recommendation 53.

<sup>47</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 19 April 1994, UN Doc A/49/18, para 542.

<sup>48</sup> *ibid*, para 547.

<sup>49</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 24 March 2000, Un Doc CERD/C/56/Misc.42/rev.3, para 6.

<sup>50</sup> See further, *Social Justice Report 1999*, Chapter 5; Human Rights and Equal Opportunity Commission, *Briefing paper on mandatory sentencing*, August 1999. The Commission notes

---

that the agreement between the Commonwealth and the Northern Territory in April 2000 regarding the Territory's mandatory sentencing laws does not address these concerns: see further, Human Rights and Equal Opportunity Commission, 'Mandatory sentencing in the NT: some positive reforms but profound disappointment', *Media Release*, 10 April 2000.

### 3 Comments on the Federal government's submission to this inquiry

- 3.1 The Federal government made a submission to this inquiry in March 2000. The submission states that in 'considering the findings and the recommendations of the BTH report, and an appropriate response to them, it is important to note a number of key assumptions on which the report is based.'<sup>51</sup> The submission then rejects various recommendations of the report, on the basis of alleged flaws in the 'key assumptions' that were identified by the government.
- 3.2 The Federal government's submission constitutes a further response to several recommendations of *Bringing them home*. It extends beyond the scope of the government's previous response of December 1997.
- 3.3 Arguments used by the Federal government to support its rejection of Bringing them home recommendations are deeply flawed. The Federal government submission either misrepresents or does not fully comprehend the methodology and recommendations of *Bringing them home*.
- 3.4 Consequently, the government submission reveals serious inadequacies in its response to the recommendations of the report.
- 3.5 In this section, the Commission indicates how the government submission misrepresents the methodology of *Bringing them home*. It then examines the response of the government to the following recommendations of *Bringing them home*:
- **Recommendations 3 and 4:** Components of reparations, and claimants; and
  - **Recommendations 14 – 20:** Compensation issues.
- 3.6 In particular, the Commission highlights the following aspects of the government's submission:
- (a) Compensation through litigation;
  - (b) The principle of reparations;
  - (c) Standards of the day and international human rights standards;
  - (d) Forcible removal as genocide;
  - (e) Forcible removal as racial discrimination; and
  - (f) Compensation.

---

<sup>51</sup>

Federal Government Submission, Stolen Generation Inquiry, p2.



### The methodology of *Bringing them home*

- 3.7 The Commission is concerned that the Federal government's submission misrepresents the methodology of *Bringing them home* in a number of ways.
- 3.8 In particular, the government submission asserts that *Bringing them home*:
- a) Was not based on a critical appraisal of the claims put to the Inquiry, and failed to elicit the views of those involved in administering the policies and practices in question;<sup>52</sup> Accordingly, it argues that 'the report tends to present only one side of the historical record.'<sup>53</sup>
  - b) has contributed to 'a simplistic concept of a 'stolen generation''<sup>54</sup> by creating an 'emotive' image of forcible removal,<sup>55</sup>
  - c) does not distinguish between the various reasons for separation, some of which would today be seen as valid;<sup>56</sup> and
  - d) overestimates the number of children 'stolen' on the basis of 'uncertain guesstimates and shoddy research.'<sup>57</sup>
- 3.9 The Commission rejects these assertions.
- 3.10 The government submission also claims that *Bringing them home* evaluates removal policies and laws against contemporary standards rather than the standards of the day.<sup>58</sup> This issue is dealt with extensively at paras 3.88 – 3.110 below.
- a) That the report is based on uncorroborated evidence and presented 'only one side of the historical record'**
- 3.11 The suggestion that *Bringing them home* was not based on a critical appraisal of the claims put to the National Inquiry misrepresents the process and methodology of the Inquiry.
- 3.12 It is completely false to suggest that *Bringing them home* is 'based' on untested claims and evidence of Indigenous people. The conclusions of *Bringing them home* are based on a thorough examination of federal, state and territory legislation and official documents<sup>59</sup> as well as a thorough examination of common law and international standards

---

<sup>52</sup> *ibid*, p iii.

<sup>53</sup> *ibid*, p23.

<sup>54</sup> *ibid*, p2.

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid*, p3.

<sup>57</sup> *ibid*, p13.

<sup>58</sup> *ibid*, p 111, pp5-12.

<sup>59</sup> *Bringing them home*, Part 2: Tracing the History, pp25 –150.

of the day.<sup>60</sup> As a result of this analysis, *Bringing them home* found that removal policies breached common law standards of the day, were racially discriminatory and genocidal in intent.

- 3.13 The evidence of Indigenous people affected by the removal policies was used to illustrate the resultant harm caused by these laws and policies.<sup>61</sup>
- 3.14 Ironically, the government's submission relies extensively on the uncorroborated testimony of one patrol officer, Colin McLeod,<sup>62</sup> and the unsourced statements of 'patrol officers and carers in institutions for 'half-caste' children.'<sup>63</sup>
- 3.15 The government's submission is also misleading when it suggests that the report was based on 'one side of the historical record' and failed to elicit the views of those involved in administering the policies and practices in question.
- 3.16 *Bringing them home* was the result of an extensive national inquiry process. The National Inquiry published an open invitation to anyone with relevant information on the subject matter to assist. The Inquiry had no subpoena power, so making a submission or giving evidence to the Inquiry was voluntary. Everyone who wanted to be heard by the Inquiry was given the opportunity.
- 3.17 The Commission advertised the Inquiry widely across Australia, requesting and receiving submissions and public evidence from federal, state and territory governments, from church and welfare agencies and institutions, professional experts in the legal and mental health fields, welfare workers and administrators, Indigenous and other community organisations. Confidential evidence was taken from over 500 Indigenous people affected by forcible removal and from adoptive and foster parents.
- 3.18 Significantly, senior officers from every state and territory government produced voluminous material consisting of the relevant laws, reports and files covering the history of forcible removals of children in their respective jurisdictions. These officers also made themselves available to the Inquiry to discuss particular aspects of the material.
- 3.19 State and territory governments, along with the churches, are 'the other side of the historical record.' They were the employers of welfare workers. As noted above, *Bringing them home* is based on a lengthy analysis of the laws and official documents relating to removal policies that were supplied by each government. Each government accepted

---

<sup>60</sup> *ibid*, Part 4: Reparation, pp247-314.

<sup>61</sup> See for example, *Bringing them home*, Pt 3: Consequences of Removal, pp151-246.

<sup>62</sup> See for example, Federal Government Submission, Stolen Generation Inquiry, pp6, 12, 23.

<sup>63</sup> *ibid*, p9.

during the Inquiry process that the laws were racially discriminatory and misconceived.

3.20 The Commission regrets that the Commonwealth was reluctant to assist the National Inquiry. It declined to provide the Inquiry with historical material relating to the Northern Territory, which until 1978 had been under Commonwealth jurisdiction.

3.21 It is understood that the Commonwealth had amassed considerable archival material concerning laws and policies relating to the removal of children in the Northern Territory, including every report of the Administrator of the Northern Territory from 1911 to 1978. This material had been collated for the Commonwealth defence in the *Kruger* case and is still not publicly available.

3.22 Similarly, despite repeated invitations, the Commonwealth did not provide a submission to the Inquiry until after the submission deadline receipt of evidence. Although the National Inquiry took into account all the material the Commonwealth was prepared to provide, it was denied the potential benefit of discussions about the submission with government officials.

**b) That the report has contributed to ‘a simplistic concept of a ‘stolen generation’**

3.23 The government submission argues that *Bringing them home* has contributed to ‘a simplistic concept of a ‘stolen generation.’<sup>64</sup> The arguments that it presents in support of this view are contradictory.

3.24 It argues that the term ‘stolen generation’:

Is an emotive term, conjuring up the image of a small child snatched from the arms of his or her mother, placed in an institution where he or she was mistreated and abused and prevented from having any further contact with his or her family. The BTH report has done much to create this image.<sup>65</sup>

3.25 Yet it also acknowledges that the Commission does not use the term ‘stolen generation’ in *Bringing them home*,<sup>66</sup> and that ‘while the stereotype of the child snatched from his or her mother would fit within the scope of the Inquiry, *it by no means represents the full range of circumstances considered by HREOC.*<sup>67</sup>

3.26 *Bringing them home* is based on an objective, legalistic evaluation of the laws and official documents of the time rather than a personalised, subjective standard as implied by the government’s submission.

---

<sup>64</sup> *ibid*, p2.

<sup>65</sup> *ibid*, p2.

<sup>66</sup> *ibid*, p2.

<sup>67</sup> *ibid*, p3. Emphasis added.

Indeed, the terms of reference of the National Inquiry required the Commission to trace the separation of Indigenous children from their families by virtue of ‘compulsion, duress or undue influence’ and ‘the effects of those laws, practices and policies.’ It is difficult to see how an analysis of whether laws amounted to such forms of removal, and their effect, can be seen as simplistic or leading to the emotive image suggested by the government.

**c) That the report does not distinguish between the various reasons for separation**

3.27 The government submission argues that:

the inquiry did not consistently differentiate between reasons for removal, or treat separately removals which may have been justified whether by child protection standards of the day or by reference to modern understanding of the need to remove children from their homes.<sup>68</sup>

3.28 The reference in this statement to ‘the modern understanding of the need to remove children’ contradicts other arguments raised by the government in its submission, particularly, that any evaluation of the policies of forcible removal should be made against the standards of the day and not those of the present.<sup>69</sup>

3.29 This argument also fails to acknowledge that *Bringing them home* provides detailed discussion of the concepts of compulsion, duress and undue influence. It provides sound argument for its approach in tracing the history of forcible removal. It acknowledges the diversity of circumstances of removal. The report clearly differentiated between removals that were achieved by compulsion, duress or undue influence from those that were truly voluntary or where the child was orphaned.

3.30 The government’s argument must also be read in the light of the findings of *Bringing them home* that children were removed in accordance with laws that were racially based and genocidal. As discussed below at paras 3.119 –139, if there were mixed motives, that does not affect these findings.

3.31 The Commission notes that the government submission draws extensively upon a Joint Select Committee report of the Tasmanian Parliament in suggesting that there was little differentiation made between Indigenous and non-Indigenous children at the time.<sup>70</sup> Yet there is no acknowledgment that Tasmania was the only jurisdiction in which Aboriginal children were removed pursuant to general child

---

<sup>68</sup> *ibid*, p3.

<sup>69</sup> *ibid*, p6 for example: ‘While such policies of general indigenous ‘protection’ and separation, and ‘half-caste’ child separation and assimilation would not be acceptable today, they must be viewed in accordance with the ideas and standards of the day,’

<sup>70</sup> *ibid*, pp9-10.

welfare legislation, rather than laws related specifically to Aborigines, as in all mainland jurisdictions. The critical difference between general child welfare legislation and Aboriginal protection legislation was that under protection legislation, Aboriginal children became wards of the state and their parents had no guardianship rights. Aboriginality was sufficient reason for removal. By contrast, even early child welfare legislation required the authorities to have reasons for intervention and removal.<sup>71</sup>

**d) That the report overestimates the number of children ‘stolen’**

3.32 *Bringing them home* notes that it is not possible to state with any precision how many children were forcibly removed. The report provides details of research conducted into this issue.<sup>72</sup> In particular, the report identified research where Indigenous adults had been surveyed as to whether they were removed in childhood. The results of this research indicated that:

- In the late 1980s, one in four elderly people, and one in seven middle-aged people in the Kimberley region indicated they were removed;
- In the 1970s, one in three adults in Bourke indicated they had been separated for a period of five or more years;
- In the late 1980s in Victoria, 30% of Aboriginal general medical practice patients indicated they had been removed;
- In 1989 a national survey of Indigenous health found that 47% had been removed (though this includes hospitalisation and separation through juvenile justice processes).

3.33 The report also refers to the National Aboriginal and Torres Strait Islander Survey (NATSIS) conducted by the Australian Bureau of Statistics in 1994, which revealed that 10% of people aged over 25 years had been removed in childhood.

3.34 On the basis of this research, *Bringing them home* concludes that a conservative estimate is that between one in 10 and one in three Indigenous children were removed, depending on period and location.

3.35 The government submission states that:

The government has serious reservations as to the accuracy of this estimate and its usefulness in developing policies to deal with the issue of past practices or removing Aboriginal children from their families.<sup>73</sup>

---

<sup>71</sup> The submission’s reference to child migrants is a similar attempt to relativise the unique experiences of Aboriginal children, removed by reason of their Aboriginality, by describing the unfortunate experiences of other children subject to paternalistic intervention.

<sup>72</sup> *Bringing them home*, pp36-37.

<sup>73</sup> Federal Government Submission, Stolen Generation Inquiry, p13.

- 3.36 In terms of the ‘usefulness’ of these estimates in developing policy, the Commission notes that the recommendations of *Bringing them home* do not draw their legitimacy from the conclusion as to how many children were removed, where the number is clearly not insignificant. The estimate of the number of children removed ought not in any way affect the development of policy responses to deal with past practices of removal.
- 3.37 The Commission stands by the estimates of the number of children removed. It remains the most accurate estimate available. Nothing in the government’s submission suggests a better estimate.
- 3.38 We note the following concerns with the reasoning of the government in relation to the NATSIS survey.<sup>74</sup>
- 3.39 The government argues that:
- The BTH report (states that this survey is)... likely to understate the extent of removal because it was not able to record those people who had died before the time of the survey. This argument is misconceived as the survey also excludes deceased people who were not removed.<sup>75</sup>
- 3.40 The government’s argument is misconceived. A 1994 survey would miss most people removed from the 1880s through to 1940 (or even later), ie, the peak period for forcible removals in many parts of the country.<sup>76</sup> As *Bringing them home* and the Royal Commission into Aboriginal Deaths in Custody note, people forcibly removed from their families experience higher rates of incarceration (and are more likely to die in custody), and experience worse health standards than the rest of the Indigenous community. This lower health status and life expectancy would influence the number of people who have survived until 1994.
- 3.41 The government submission acknowledges that the NATSIS survey could not include those people who did not identify as Indigenous at the time of the survey (ie, those people against whom the policy of assimilation had succeeded). The Commission had identified this as a reason why the NATSIS result was an under-estimation.
- 3.42 Yet the government draws the following conclusion from this finding:

---

<sup>74</sup> We focus on the government’s arguments in relation to this survey as its findings constitute the bottom range of the Commission’s estimate of the number of children removed.

<sup>75</sup> Federal Government Submission, Stolen Generation Inquiry, p14.

<sup>76</sup> *Ibid.* The government’s submission partially acknowledges this, as it notes that there was an intensification of removal policies following the adoption of assimilation policies in 1937, ie, 57 years before the survey.

these people would not put themselves within the class of people seeking access to government services for reasons of removal from their families and would not claim compensation.<sup>77</sup>

- 3.43 At no stage was it the purpose of the Commission, researchers or people affected by removal policies to identify the number of children removed so as to gain 'access to government services' and compensation. The Commission considers that the government's reasoning reveals the purpose of its attempts to discredit the number of children removed.

### **The government's response to issues of reparation and compensation**

- 3.44 This section responds to the reasoning in the Federal government's submission that relates to recommendations of *Bringing them home* concerning reparation and compensation.

#### **(a) Compensation through litigation**

- 3.45 The government submission places much reliance on the decision of Justice Abadee of the New South Wales Supreme Court in *Williams v Minister, Aboriginal Land Rights Act 1983*.<sup>78</sup> In this case, Abadee J held that the plaintiff Ms Joy Williams was not owed a duty of care at common law or pursuant to any statutory or fiduciary obligations. Further, if any duty was owed, the facts did not establish any breach of that duty or causation.

- 3.46 In its submission, the Federal government claims that the *Williams* case illustrates the danger of accepting untested claims at face value. The Commission agrees that claims for compensation should be subject to proper scrutiny. It considers that the real significance of *Williams* is the way in which it highlights the difficulties people affected by forcible removal may face in seeking compensation through legal proceedings. Procedural and evidential obstacles – the length of time that has elapsed, the resultant loss of recollection, the lack of records and corroborative witnesses - mean a plaintiff's claim may fail, or never be brought in the first place, irrespective of the justice of their claim. If the Federal government, with extensive resources at its disposal, can claim that 'the passage of time... has resulted in such extensive prejudice to it'<sup>79</sup> as to make fair trial impossible, how much more insurmountable are the problems for plaintiffs.

- 3.47 The *Williams* case is under appeal and is due to be heard by the NSW Court of Appeal in late July 2000. The Commission considers that the uncertainty of the law in this area, and the danger of placing any great

---

<sup>77</sup> *ibid.*

<sup>78</sup> [1999] NSWCS 843 (hereafter *Williams*).

<sup>79</sup> Federal Government Submission, Stolen Generation Inquiry, p40.

reliance on the *Williams* case are underlined by a recent interlocutory decision of another judge of the NSW Supreme Court.

- 3.48 In *Johnson v Department of Community Services, Minister for Community Services and the State of New South Wales*<sup>80</sup>, Rolfe J has indicated that he might not concur with all aspects of the approach taken by Abadee J in the *Williams* case.
- 3.49 Mr Johnson was born at Wilcannia in Western New South Wales in 1968, and removed from the care and custody of his parents and family in 1973. He was committed by an order of a Children's Court at Wilcannia under the *Child Welfare Act 1939* to the care of the Minister for Community Services to be dealt with as a ward and admitted to State control.
- 3.50 In these proceedings, the plaintiff, Christopher Johnson seeks to bring proceedings against the Department of Community Services, the Minister for Community Services and the State of New South Wales for negligence, and breach of statutory and fiduciary duties. At first instance, Master Harrison refused to extend time on the basis that Mr Johnson had not satisfied the requirements of sections 58(2), 60G and 60I of the *Limitation Act 1969* (NSW). On 2 December 1999, Justice Rolfe held the Master was in error in this regard.
- 3.51 Mr Johnson alleges that the respondents were responsible for his care and upbringing from the age of 4 to 18 years and thereafter for his support and the supervision of his progress as an ex-ward until the age of 20. He alleges that in these circumstances the respondents owed duties:
- 1) to care for him and protect him from harm;
  - 2) to act in his best interests in accordance with his long term needs;
  - 3) to ensure that he was well cared for and that his individual interests were preserved and enhanced, while ever he was living in the various institutions and places;
  - 4) to ensure that he was brought up with an appreciation and understanding of his Aboriginality and that all reasonable efforts were made to maintain and/or re-establish contact and meetings between the Plaintiff and his natural family, namely his father, mother, siblings and other close relatives; and
  - 5) to ensure that he has support and supervision and (sic) an ex-ward for two years after he reached the age of 18.
- 3.52 Mr Johnson claims that the respondents breached these duties and, as a result, that he suffers from chronic depression, acute anxiety and post-traumatic stress disorder. He alleges that he was exposed to physical ill-treatment, especially in the foster home, and to sexual abuse at the institutions. As a result, he became violent and

---

<sup>80</sup>

Unreported, [1999] NSWSC 1156 per Rolfe J, 2 December 1999.



predisposed to violence, which contributed to his commission of and conviction and imprisonment for various offences of violence.

3.53 At first instance, Master Harrison had also dealt with the respondents' submission that Mr Johnson did not have a cause of action, and concluded 'It is my view that there is evidence to demonstrate that the plaintiff has a real case to advance.'<sup>81</sup> Rolfe J considered this to be a correct finding.<sup>82</sup> Before Rolfe J the respondents' principal submissions were that Mr Johnson had not established that he was able, at law, to pursue any of the causes of action pleaded.

3.54 It was submitted by the respondent that the facts of Mr Johnson's case were so closely aligned to those in *Williams* that Rolfe J ought, as a matter of comity, follow that decision and hold that there were no such duties owed by the respondents to the appellant. Rolfe J noted that the *Williams* case is the subject of an appeal to the Court of Appeal and that accordingly the law has not been clarified.<sup>83</sup>

3.55 Before Rolfe J, it was conceded by Counsel for the respondents that it was unthinkable that the appeal would not involve a challenge to Abadee J's conclusions that, in the circumstances of that case, there was no duty of care at common law or under statute and no fiduciary duty. Rolfe J expressed concern:

about determining these difficult legal questions at this stage in the absence of factual findings on the evidence adduced on the hearing of this case. It has been made clear in many cases that decisions on difficult and developing questions of law should await findings of fact.<sup>84</sup>

3.56 Counsel for the respondents contended that the decision of Master Harrison ought to be affirmed on different grounds, namely that Mr Johnson's relationship with the respondents did not give rise to any obligation at common law, under statute or in equity. Rolfe J dealt firstly with the common law duty of care. He noted that Johnson's case was not like the *Williams* case in which there were no specific complaints about the way in which Joy Williams was treated.

It is immediately apparent that there is a significant difference from the present case. In this case, the appellant relies upon specific incidents of physical mistreatment, racial abuse and sexual assault in circumstances where, at one stage, a concerned neighbour saw fit to complain about the way in which he was being treated by his foster parents in their home.

---

<sup>81</sup> *ibid*, para 66.

<sup>82</sup> *ibid*, para 72.

<sup>83</sup> *ibid*, para 81.

<sup>84</sup> *ibid.*, para 82.

It may be, at the end of the day, that the evidence does not support the allegations made by the appellant, or that the Court comes to the view that the facts established by the evidence fall within the category of conduct, which does not give rise to a breach of any duty of care. But it seems to me that until the facts are established one cannot characterise the matters as pleaded, and thus far established to the requisite degree, as necessarily, or perhaps at all, giving rise to a situation where there has been no breach of any common law duty of care.<sup>85</sup>

- 3.57 In the course of submissions, Counsel for the respondents referred to Abadee J's statement that '[t]he common law cannot provide a remedy for all life's accidents, which are the fault of no person', and his Honour's observation that even if there is error, not every error is to be equated with a negligent error giving rise to an entitlement to recover damages. According to Rolfe J:

These propositions are not in doubt, but each day the Courts determine whether an accident is the fault of a person and, if it is, whether that fault constitutes a right in the person injured to recover damages.<sup>86</sup>

- 3.58 Rolfe J also referred to the analogy made by Abadee J between 'bad parenting' or 'bad upbringing' by natural parents, and the position of a substitute or a non-biological carer to provide maternal care 'of the type that a natural mother could or might be expected to ordinarily provide':

It seems to me, with respect to the careful submissions made by Mr McCarthy in this regard, that one cannot generalise to the extent which his submissions require me to do and, further, that Williams (No 2) does not provide any support for such generalisation. Each case will have to be decided after its particular facts are determined. It may well be that once the facts are determined the legal principles, which Abadee J applied, will apply to those found facts and deny a plaintiff, and perhaps the appellant in this case, the right to recover. However, one cannot simply assert that because there appears to be some commonality of facts in Williams (No 2) to the present case, that will lead inevitably to the same conclusion to which his Honour came.<sup>87</sup>

- 3.59 In relation to the submission that the relationship between the appellant and the respondents should not 'in these circumstances give rise to a duty of care as alleged', Rolfe J stated:

---

<sup>85</sup> *ibid*, paras 94-96.

<sup>86</sup> *ibid*, para 103.

<sup>87</sup> *ibid*, para 105.

[I]t does not immediately appear to me why, if the appellant is able to establish negligent conduct leading to his psychiatric condition, in the particular circumstances of the case he wishes to bring, the foreseeability test would preclude his recovery. It may or it may not. Whether it does or not will, once again, depend on the findings of fact.<sup>88</sup>

3.60 In relation to the possible existence of a statutory obligation, Rolfe J stated:

I believe that what I have said is sufficient to indicate that it could not be said, on the test applicable to determine whether there is a cause of action for present purposes ... that there is not an arguable case as to whether a statutory duty was owed and breached.<sup>89</sup>

3.61 In relation to the question of whether the relationship of child and guardian gives rise to a fiduciary obligation, Rolfe J concluded:

In the light of the authorities to which I have referred, it is difficult, in my respectful opinion, to say that the relationship of child and guardian does not give rise to a fiduciary relationship or obligation. Of course, in every case it is necessary to examine the content of the duty and the alleged breach of it. ...

I do not consider that in the light of *Williams*... it can be said that there is not, relevantly for present purposes, an available action based on the existence of a fiduciary duty and breach of it.<sup>90</sup>

3.62 And in conclusion:

Finally, I am not satisfied by the submissions of Mr McCarthy that the principles of law for which he contends, namely the absence of any duty in the respondents at common law or under statute or by virtue of a fiduciary duty, irrespective of the findings of fact, is correct. It may be, eventually, that the principles applied by Abadee J in the particular circumstances of *Williams (No 2)* are held, as principles of law, to be correct. However, even if that be so, it does not seem to me that that will necessarily lead to the conclusion that in any given case those principles should be applied without regard to the particular facts of the case. In my view, however, that position has not been reached at the moment. The various authorities to which I have referred show that each area of law is in a somewhat fluid state, and I can see no justification for declining to hold that on those facts pleaded, which were accepted by the respondents as correct, and on the facts proved before the Master to the extent necessary for the application, the appellant does not have an arguable case on each cause of action for which he contends. The same facts are said to give rise, essentially, to each cause of action. As that for breach of fiduciary duty does not require an extension of time, it is difficult to see what prejudice could apply to the hearing of the other causes of action: *Williams (No 1)*.<sup>91</sup>

---

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid*, para 119.

<sup>90</sup> *ibid*, paras 135-136.

<sup>91</sup> *ibid*, para 139.

3.63 This case suggests that it is premature to place too much reliance upon the judgment of Abadee J in *Williams*.

**(b) The principle of reparations**

3.64 The approach of *Bringing them home* to issues of redress is grounded in the international principle of reparations, as reflected in the *van Boven* principles (as prepared by Special Rapporteur van Boven of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities).

3.65 The principle of reparations in international law is wider than that of monetary compensation. As Professor Ian Brownlie states:

reparations refers to all measures expected to be taken by a State which has violated international law, including payment of monetary compensation to victims, punishment of wrongdoers, apology or atonement, assurances of non-repetition, and other forms of satisfaction proportionate to the gravity of the violations.<sup>92</sup>

3.66 The Government's submission notes the heavy reliance in *Bringing them home* upon the *van Boven* principles, and rejects their application in the Australian context for the following reasons:

- (i) That forcible removal of Indigenous children does not amount to a gross violation of human rights and accordingly the principles are of no application. The government claims this is particularly so if it is accepted that the laws were not genocidal;<sup>93</sup> and
- (ii) That the *Van Boven* principles do not have any formal status in international law.<sup>94</sup>

3.67 The first of these arguments is rejected as incorrect under the following headings below: (c) standards of the day and international human rights principles; (d) forcible removal as genocide and (e) forcible removal as racial discrimination.

3.68 The second argument raised by the government misunderstands the status of the *van Boven* principles. These principles are a synthesis of international practice. They reflect *existing* standards rather than create new standards.

3.69 In 1996, the Sub-Commission transmitted the *van Boven* principles to its parent body, the Commission on Human Rights. The Commission described the principles 'as a useful basis for giving priority attention to

---

<sup>92</sup> Brownlie, I, *Principles of Public International Law*, 4<sup>th</sup> Ed., Oxford Clarendon Press, 1990, p485.

<sup>93</sup> Federal Government Submission, *Stolen Generation Inquiry*, p39, pp29-32.

<sup>94</sup> *ibid.*

the question of restitution, compensation and rehabilitation.’ In 1998, the Commission appointed M Cherif Bassiouni to report on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. Pursuant to resolution 1998/43, Cherif Bassiouni is to prepare a revised version of van Boven’s principles, taking into account the views and comments of States, intergovernmental and non-governmental organisations, with a view to its adoption by the UN General Assembly.

- 3.70 In his first report, Cherif Bassiouni commended the excellent work of van Boven, as well as of Louis Joinet, Special Rapporteur of the Sub-Commission on the question of the impunity of perpetrators of violations of human rights. Joinet’s set of principles on the problem of impunity also include principles relating to the question of the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms.<sup>95</sup> Cherif Bassiouni intends to build upon the foundation provided by van Boven and Joinet, noting that in recent years, references to the terms ‘restitution’, ‘compensation’ and ‘rehabilitation’, ‘reparations’ and ‘redress’ relative to human rights violations have appeared in a large number of UN reports, in the Statute of the International Criminal Court and in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
- 3.71 His primary tasks are to harmonise treatment, resolve a certain lack of consistency in terminology, address the coverage of human rights, humanitarian law and responsibility for redress, and to work towards universally acceptable standards through broad consultative process.
- 3.72 The ongoing consideration of the van Boven principles within the UN system in no way diminishes the approach to reparations adopted in *Bringing them home*. The report endorsed van Boven’s general synthesis of well-recognised international practice in relation to reparations in the area of human rights.
- 3.73 The right to redress for human rights violations is recognised in the provisions of numerous human rights instruments. These include:
- Universal Declaration of Human Rights (article 8);
  - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (article 6);<sup>96</sup>

<sup>95</sup> UN Docs E/CN.4/Sub.2/1997/20 and E/CN.4/Sub.2/1997/20/Rev.1.

<sup>96</sup> The Committee on the Elimination of Racial Discrimination adopted General recommendation 26 on the scope of Article 6 on 24 March 2000. The recommendation states that ‘the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of... (racial) discrimination... is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim where appropriate’: Committee on the Elimination of Racial Discrimination, *General Recommendation 26 – Article 6 of the Convention*, 24 March 2000.

- International Covenant on Civil and Political Rights (articles 2(3), and 9(5));
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (article 14(1));
- Convention on the Rights of the Child (article 39);
- European Convention for the Protection of Human Rights and Fundamental Freedoms (articles 50, 5(5));
- American Convention on Human Rights (articles 10, 63(1) 68); and
- African Charter on Human and Peoples' Rights (article 21(2)).

3.74 In summary, the provisions of international human rights treaties support the existence of a threefold obligation on parties to human rights treaties:

- to conduct an independent, speedy and impartial investigation as soon as there is a formal complaint of a violation of human rights, such as torture, homicide or forced disappearance;
- to prosecute the offenders; and
- to repair the damage caused, awarding the victims means of rehabilitation, and where applicable, compensation or economic indemnification.<sup>97</sup>

3.75 The right to reparation is also recognised in a number of texts relating to crime prevention and criminal justice. In particular, the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides:

- victims are entitled to prompt redress for the harm that they have suffered;
- they should be informed of their rights in seeking redress;
- offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights;
- when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation; and
- victims should receive the necessary material, medical, psychological and social assistance and support.

---

<sup>97</sup> Artucio, A, 'Impunity of perpetrators' in Netherlands Institute of Human Rights, *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht, 11-15 March 1992 (SIM Special Report No 12, 1992) 182, p190.

3.76 In adopting its approach to reparations, *Bringing them home* also considered the jurisprudence of the UN human rights treaty bodies connecting claims for reparation and compensation for victims of human rights violations. A review of the case law of the Human Rights Committee, for example, establishes that in appropriate circumstances States parties are under an obligation to provide the following remedies to victims of human rights violations:

- to investigate the facts;
- to bring to justice persons found to be responsible;
- to extend to victims treatment in accordance with the provisions of the ICCPR;
- to provide medical care to victims;
- to pay compensation to victims or to their families for physical and mental injuries suffered; and
- to take steps to prevent the recurrence of such violations.<sup>98</sup>

3.77 The General Recommendation on Violence Against Women, adopted in 1992 by the Committee on the Elimination of Discrimination Against Women, recommends a range of protective, preventive, rehabilitation and compensatory measures, including:

- appropriate protective and support services for victims - para 24(b);
- preventive and rehabilitation measures - para 24 (h);
- effective complaints procedures and remedies, including compensation - para 24(l);
- rehabilitation and counselling - para 24(k);
- accessibility of services to victims living in isolated areas - para 24(o);
- services to ensure the safety and security of victims and rehabilitation programmes - para 24(r); and
- effective legal measures, including compensatory provisions, preventive measures, protective measures (para 24(t)).

3.78 The Inter-American Court of Human Rights has affirmed that under the American Convention on Human Rights, States parties have a responsibility to investigate violations of human rights, to prosecute perpetrators and to compensate victims adequately. In accordance with article 1, States parties undertake to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms recognized in the American Convention, in a comprehensive manner. In the *Velasquez Rodriguez Case* the Court found that the failure to guarantee the rights enumerated in the Convention itself a violation of States' obligations under article 1.

---

<sup>98</sup>

See *Van Boven Report* UN Doc E/CN.4/Sub.2/1993/8, para 56.

This obligation [in article 1] implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the full and free enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violations of the rights recognized by the Convention and moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations.<sup>99</sup>

### 3.79 The Court continued:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.<sup>100</sup>

3.80 In the *Aloeboetoe case*,<sup>101</sup> the Inter-American Court of Human Rights ordered specific non-pecuniary measures as part of a compensatory damages judgment. The Court first determined that the obligation to make reparation is a rule of customary law and 'one of the fundamental principles of current international law.'<sup>102</sup>

3.81 As part of its reparations package, the Court ordered the reopening of a school and clinic in the victims' village so 'that the children be offered a school where they can receive adequate education and basic medical attention.'<sup>103</sup> Significantly, the Court ordered the government to deposit a specified sum of compensation in two non-taxable trust funds for the beneficiaries, one on behalf of the minor children and one on behalf of the adult beneficiaries. The Court also ordered the creation of a fiduciary committee called the 'Foundation' to administer the funds as trustee.<sup>104</sup> Finally, as with the *Velasquez Rodriguez* compensation judgment, the Court determined to supervise compliance with the reparations order before closing the file on the case.<sup>105</sup>

<sup>99</sup> *Velasquez Rodriguez Case*, Inter-American Court of Human Rights, Series C No 4, 29 July 1988, para 166. See further Mendez, J and Miguel Vivanco, J, 'Disappearances and the Inter-American Court: Reflections on a Litigation Experience' (1990) 13 *Hamline Law Review* 507; Mendez, J, 'Position of Americas Watch, a division of Human Rights Watch, on the right of victims of gross violations of human rights to reparations and on measures to prevent such violations' in Netherlands Institute of Human Rights, *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, *op.cit.*

<sup>100</sup> *Velasquez Rodriguez Case*, *ibid*, para 174.

<sup>101</sup> Inter-Am Ct H R 66, OAS/ser L/V/III.29, doc 4 (1993). See generally Padilla, D, 'Reparations in *Aloeboetoe v. Suriname*' (1995) 17 *Human Rights Quarterly* 541; Orentlicher, D, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation', in Henkin, L and Hargrove, J (eds), *Human Rights: An Agenda for the Next Century*, American Society of International Law, Washington DC 1994, 425, at pp450-452.

<sup>102</sup> *Aloeboetoe*, *ibid*, para 43.

<sup>103</sup> Padilla, *op.cit*, p 552.

<sup>104</sup> *Aloeboetoe*, *ibid*, paras 99-108.

<sup>105</sup> *ibid*, para 116(6).



3.82 In two more recent cases, the Inter-American Court has ordered reparations to be agreed upon by the parties themselves within a specified time period, reserving the power to determine reparations if no agreement is reached.<sup>106</sup>

3.83 In summary, the van Boven principles cannot be rejected on the basis that they have no formal status in international law. Their validity is assured by the longstanding acceptance of the existing human rights standards synthesised by Special Rapporteur van Boven.

**(c) Standards of the day and international human rights principles**

3.84 Central to the Federal government's submission is the proposition that policies and practices of forcible removal must be viewed in accordance with the ideas and standards of the day.<sup>107</sup> The Commission fully agrees with this requirement, and notes that this was the basis upon which *Bringing them home* reached its conclusions.

The Inquiry has been careful not to evaluate past actions of governments and others through the prism of contemporary values...

At the same time, it is important to appreciate that there was never only one set of common and shared values in the past... Nevertheless, it is appropriate to evaluate the (legislative and administrative) actions of governments in light of the legal values prevailing at the time those actions were taken.<sup>108</sup>

3.85 The Commission believes that the government's analysis of this issue in its submission is flawed because it disregards significant aspects of the standards of the day.

Those legal values can be found in the common law introduced to Australia by the British colonists and progressively developed by Australian Parliaments and courts.

More recently, they can be found in the international law of human rights to which Australia not only voluntarily subscribed but played a leading role in developing and promoting.<sup>109</sup>

3.86 In particular, the government's submission disregards the significant body of international human rights law that had already been recognised by and was binding upon Australia while the removals were underway.

---

<sup>106</sup> *Neira Alegria Case* (19 January 1995 - disappearance of prisoners following suppression of prison riot by Peruvian military); *El Amparo Case* (18 January 1995 - massacre of fishermen by Venezuelan military forces); cited in Ewing, A, 'Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights' (1995) 26 *Columbia Human Rights Law Review* 751, p792, fn 166.

<sup>107</sup> Federal Government Submission, *Stolen Generation Inquiry*, p6.

<sup>108</sup> *Bringing them home*, p249. See further, pp 249-275.

<sup>109</sup> *ibid*, pp249-250.

- 3.87 This section explains how the principle of racial non-discrimination and the prohibition of genocide were commonly agreed standards of international law by 1950, at the latest. Consequently, they constituted 'standards of the day' against which the removal policies can be evaluated. The next two sections then explain why forcible removal policies breach these principles.

## Genocide

- 3.88 The prohibition of genocide was codified in the *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by the UN General Assembly on 11 December 1948. In article I, contracting parties 'confirm' that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. By 'confirming' that genocide is a crime under international law, article 1 expresses the consensus of the UN General Assembly in 1948 concerning the codificatory nature of the Convention.<sup>110</sup>
- 3.89 The Commission has argued, in its submission to this Committee's Inquiry into the *Anti-Genocide Bill 1999*, that the crime of genocide was recognised by the United Nations as a binding rule of customary international law by at least 11 December 1946.<sup>111</sup> On this date, the United Nations General Assembly adopted a resolution formally recognising that genocide already existed as a crime under international law.<sup>112</sup>
- 3.90 The Commission also notes the recent consideration of this issue by the full bench of the Federal Court of Australia in *Nulyarimma v Thompson*.<sup>113</sup> Justice Wilcox stated:

I accept that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogatable obligation by each nation State to the entire international community. This is an obligation independent of the *Convention on the Prevention and Punishment of the Crime of Genocide*. It existed before the commencement of that convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946.<sup>114</sup>

<sup>110</sup> Meron, T, *Human Rights and Humanitarian Norms as Customary Law*, 1989, p111.

<sup>111</sup> Human Rights and Equal Opportunity Commission, *Submission to the Anti-Genocide Bill Inquiry*, HREOC, Sydney, 2000, pp8-9.

<sup>112</sup> Resolution A/RES/96(I), 11 December 1946. The resolution 'affirms that genocide is a crime under international law which the civilized world condemns.'

<sup>113</sup> [1999] FCA 1192 (1 September 1999) per Wilcox, Whitlam and Merkel JJ.

<sup>114</sup> Wilcox J, para 18. Note that Justice Merkel, at para 78, states that genocide was part of international customary law from at least 1948.

- 3.91 The prohibition of genocide was clearly established as a 'standard of the day' against which those policies of forcible removal which persisted should be evaluated.

### **The prohibition of racial discrimination**

- 3.92 Article 55c of the Charter of the United Nations, adopted in San Francisco on 26 June 1945, states that the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' In accordance with article 56: 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

- 3.93 In 1950, Hersch Lauterpacht commented on the Charter's human rights provisions:

Members of the United Nations are under a legal obligation to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights and freedoms. These provisions are no mere embellishment of a historic document; they were not the result of an afterthought or an accident of drafting. They were adopted, with deliberation and after prolonged discussions before and during the San Francisco Conference, as part of the philosophy of the new international system and as a most compelling lesson of the experience of the inadequacies and dangers of the old. Nothing but most explicit terms of the Charter would justify the conclusion that these Articles were contemplated as being devoid of any effect from the point of view of either the legal obligation resting upon the Members or the duty incumbent upon the United Nations as a whole.<sup>115</sup>

- 3.94 Eminent jurists have repeatedly confirmed the binding nature of the Charter's anti-discrimination and human rights provisions. According to Jessup, for example:

It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties.<sup>116</sup>

- 3.95 Particular emphasis has been placed upon the Charter's imposition of a prohibition of racial discrimination. Partsch, for example, has commented:

---

<sup>115</sup> Lauterpacht, H, *International Law and Human Rights*, London 1950, pp147-148. See also Goodrich, L. and Hambro, E, *Charter of the United Nations: Commentary and Documents*, World Peace Foundation Boston 1949, p323.

<sup>116</sup> Jessup, P, *A Modern Law of Nations: An Introduction* 1968, p91; also Sloan, B, 'Human Rights, the United Nations and International Law' (1950) 20 *NordTIR* 30; Higgins, R, *The Development of International Law through the Political Organs of the United Nations*, London 1963, p118; McDougall, M, 'Human Rights in the United Nations' (1964) 58 *American Journal of International Law* 603, p613.

[T]he non-discrimination clause [in article 55(c)] is worded as a clear legal obligation which is directly applicable without additional implementation ... The non-discrimination clause at the end of the sentence does not have the function of a decoration or interpretation of the preceding passage ... [T]his heterogeneous clause adds a normative element... The non-discrimination rule - referring mainly to race - even exists independently of the general obligation to promote human rights.<sup>117</sup>

- 3.96 In its Advisory Opinion on *South West Africa (Namibia)* of 21 June 1971, the International Court of Justice stated, with reference to the *Charter's* explicit references to distinctions on grounds of race, that the 'denial by [South Africa] of fundamental human rights is a flagrant violation of the human rights provisions of the Charter.'<sup>118</sup> Referring to the *Namibia Advisory Opinion*, Schwelb notes that:

the authority of the [International Court of Justice] is now clearly behind the interpretation of the human rights clauses of the Charter [imposing a legal obligation on UN Members] as presented almost a generation ago by Lauterpacht and others.<sup>119</sup>

- 3.97 As *Bringing them home* notes, the prohibition of racial discrimination soon found further expression in the Universal Declaration of Human Rights, adopted on 11 December 1948 by the UN General Assembly. Article 1 provides: 'All human beings are born free and equal in dignity and rights.' Article 2 provides: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' And in accordance with article 7:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

- 3.98 There exists widespread support for the view that most, if not all, the rights enumerated in the UDHR have attained the status of customary international law.<sup>120</sup>

<sup>117</sup> Partsch, K-J, 'Article 55(c)' in Simma, S, (ed) *The Charter of the United Nations: A Commentary*, Oxford University Press 1994, 776, pp778, 780.

<sup>118</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 267(1970)* [1971] ICJ 16, p57.

<sup>119</sup> Schwelb, E, 'The International Court of Justice and the Human Rights Clauses of the Charter', (1972) 66 *American Journal of International Law* 337, p350.

<sup>120</sup> Generally Meron, T, *op.cit.*.

- 3.99 Some scholarly controversy exists as to the manner by which the UDHR has reached this status.<sup>121</sup> Some contend that its provisions constitute an authoritative interpretation of the binding, albeit brief and general, human rights provisions of the Charter.<sup>122</sup> Others contend that most if not all its provisions have become binding through classical methods of customary law formation.<sup>123</sup>
- 3.100 Whatever the preferred doctrinal basis, there is consensus that most of the provisions of the UDHR and, in particular, the prohibition of racial discrimination possess the status of customary law.
- 3.101 The distinguished international lawyer Professor Ian Brownlie refers to the 'principle of racial non-discrimination' as one of the 'least controversial examples of the class of *jus cogens*.'<sup>124</sup> According to Brownlie, the:
- legal principle of non-discrimination which applies in matters of race (is based)... in part upon the United Nations Charter, especially Articles 55 and 56, the practice of organs of the General Assembly, in particular resolutions of the General Assembly condemning apartheid, the Universal Declaration on Human Rights, the International Covenants on Human Rights, and the European Convention on Human Rights.<sup>125</sup>
- 3.102 It remained for *Bringing them home* to identify the point in time when the prohibition of racial discrimination attained the status of customary international law. On the basis of the United Nations Charter's imposition of an obligation to act to ensure observance of 'respect for human rights for all without distinction as to race' in 1945, early practice, as well as the emphasis placed by the UDHR on the principle of non-discrimination in 1948, *Bringing them home* concluded that the prohibition of racial discrimination had attained the status of binding customary international law no later than 1950.

---

<sup>121</sup> *ibid*, p84.

<sup>122</sup> Sohn, L, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1, p16; Sohn, L, 'The Shaping of International Law' (1978) 8 *Georgia JICL* 1, pp18-22. See also Brownlie, I, *op.cit*, p570; O'Connell, D, *International Law*, 2 ed, London 1970, vol 1, p747; Ramcharan, B, *The Concept and Present Status of the International Protection of Human Rights*, Dordrecht 1989, p58; Shaw, M, *International Law*, Cambridge 1991, p74; Robinson, N, *The Universal Declaration of Human Rights*, New York 1958, p43.

<sup>123</sup> See Meron, T, *Human Rights and Humanitarian Norms as Customary Law*, 1989, p99.

<sup>124</sup> Brownlie, I, *op.cit*, p513.

<sup>125</sup> *ibid*, pp598-599.

3.103 The Commission notes that the government's submission ignores completely the analysis in *Bringing them home* of forcible removals from the perspective of these binding international human rights standards. It merely notes, somewhat casually, that 'the possibility that, on today's standards, these practices could constitute breaches of human rights is not necessarily an indication that they would have been considered as such at the time they occurred.'<sup>126</sup>

3.104 As the analysis in *Bringing them home* and this section demonstrate, the prohibition of racial discrimination was clearly a standard of the day.

3.105 The government's approach also disregards evidence that those responsible for implementing forcible removal policies were aware that human rights violations were being committed. In a letter of 6 July 1949, A R Driver, Administrator of the Northern Territory, wrote to the Commonwealth Department of the Interior:

There are certain restrictions which must remain imposed on Aborigines even though they are at variance with the complete ideals of the Universal Declaration of Human Rights.<sup>127</sup>

3.106 Similarly, on 4 November 1950, the Government Secretary wrote to the Administrator of the Northern Territory of the child removal policy:

I cannot imagine any practice which is more likely to involve the Government in criticism for violation of the present day conception of 'human rights'.<sup>128</sup>

**(d) Forcible removal as genocide**

3.107 One of the most contested areas of *Bringing them home* is its conclusion that the policy of forcible removal could properly be labelled genocidal. The Federal government's submission asserts that 'there is no support for the claim that the policies and practices were genocidal.'<sup>129</sup> The submission states that '[g]enocide is a term with particular legal meaning which does not extend to the adverse impact and disruption of a culture which is said to have occurred as a result of Indigenous child separation.'<sup>130</sup>

---

<sup>126</sup> Federal Government Submission, Stolen Generation Inquiry, p38.

<sup>127</sup> Australian Archives No AA ACT: CRS F1 1943/24.

<sup>128</sup> R S Leydin, Government Secretary, to the Administrator of the Northern Territory; cited in *Kruger*, Plaintiffs' Submissions, p4.

<sup>129</sup> Federal Government Submission, Stolen Generation Inquiry, p30.

<sup>130</sup> *ibid*, p32.

3.108 The government submission continually misrepresents aspects of the scope of genocide. For example, it refers to particular acts that may constitute genocide, for example, ‘the types of conduct (eg murder) which are involved in genocide’<sup>131</sup> or that genocide amounts to being ‘designed for the destruction of a race.’<sup>132</sup> The submission does not in any way grapple with the complex legal issues surrounding the definition of genocide contained in article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* (‘the *Genocide Convention*). Nor does it acknowledge the detailed and careful analysis provided in support of *Bringing them home*’s finding of genocide.

3.109 In particular, there is no reference to the fact that article II defines genocide as *inter alia*:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(e) Forcibly transferring children of the group to another group.

3.110 The commentary of the UN Secretary-General on an earlier draft of article II(e) states that the separation of children from their parents results in:

forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.<sup>133</sup>

3.111 Similarly, in the debate of the Sixth Committee of the General Assembly on the Convention, the representative of Greece noted that the forced transfer of children is as effective as imposing measures intended to prevent births or inflicting conditions of life likely to cause death.<sup>134</sup>

3.112 The representative of the United States asked what difference there was between measures to prevent birth half an hour before birth and abduction half an hour after birth. The US representative noted that from the point of view of the mother, there is little difference between the prevention of birth by abortion and the forcible abduction of a child shortly after its birth.<sup>135</sup>

---

<sup>131</sup> *ibid*, p30.

<sup>132</sup> *ibid*.

<sup>133</sup> *Draft Convention on the Crime of Genocide: Commentary*, UN Doc E/447 (1947), article I(II)(3)(a), p2.

<sup>134</sup> UN Doc A/AC 6/SR 82 (1948), pp186-187.

<sup>135</sup> UN Doc A/AC 6/SR 82 (1948), pp187-189.

3.113 As *Bringing them home* records, the representative of Venezuela summarised the views of those States which supported the inclusion of the forced transfer of children in the definition of genocide:

The forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization... to a highly civilized group ... yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.<sup>136</sup>

3.114 The Federal government's submission correctly notes that the drafters of the *Genocide Convention* decided to exclude the broader notion of 'cultural genocide' from the Convention. The Ad Hoc Committee of the UN Economic and Social Council had defined cultural genocide as 'any deliberate act committed with the intent to destroy the language, religion or culture of national, racial or religious groups.' The 'forced transfer of children' was originally included under the Convention's treatment of 'cultural genocide'. The deletion of cultural genocide occurred during the Sixth Committee's revision of the Ad Hoc Committee's draft.<sup>137</sup>

3.115 However, the forced transfer of children remained in the Convention's definition of genocide. This makes clear that the Convention's definition of genocide extends beyond simply killing members of the group.<sup>138</sup> Further, some of the more serious acts generally regarded within the category of cultural genocide may also constitute the causing of serious mental harm within article II(b).<sup>139</sup> The point is that there is unavoidably a certain degree of overlap between the categories of 'genocide' and 'cultural genocide'. The government's submission takes a restrictive view of the type of conduct involved in genocide – 'eg murder'<sup>140</sup> - which is clearly at odds with the Convention's definition.

3.116 *Bringing them home* provides detailed discussion of the complex issues raised by article II, including motive, extent of destruction, premeditation and intent. With respect to motive, it is clear from the debate in the General Assembly's Sixth Committee that acts of genocide may be animated by a number of motives.

<sup>136</sup> UN Doc A/AC 6/SR 83 (1948), p195.

<sup>137</sup> At its 83<sup>rd</sup> meeting.

<sup>138</sup> See Storey, M 'Kruger v The Commonwealth: Does Genocide Require Malice?' (1997) 4 (3) *UNSW Law Journal Forum* 11, p13.

<sup>139</sup> See Akhavan, A, 'Memorandum on Crimes Against Humanity and Genocide prepared for the International Criminal Tribunal for the Former Yugoslavia', 14 June 1994 at p73; cited Ratner, S & Abrams, J, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Clarendon Press Oxford 1997, p29, note 25.

<sup>140</sup> Federal Government Submission, *Stolen Generation Inquiry*, p30.



3.117 In the Sixth Committee, it was decided not to attempt an enumeration of motives because any such attempt would enable perpetrators of genocide to claim a motive other than one specified. As *Bringing them home* notes, it is clear that in order to constitute an act of genocide, the extermination of a group need not be solely motivated by animus or hatred.<sup>141</sup> Indeed, a benign motive can co-exist with genocidal intent. According to Starkman:

the impetus behind genocidal motives may be a combination of motives... Commentators who have addressed this issue agree that the reasons for perpetrating the crime and the ultimate purpose of the deed are irrelevant. The crime of genocide is committed whenever the intentional destruction of a protected group takes place.<sup>142</sup>

3.118 The government's submission emphasises the essentially benign intent of policies and practices of forcible removal. This misses the point altogether. The fact that policies or the actions of particular officials may, to some extent, have been informed by a misplaced desire to ensure the welfare of individual Aborigines is immaterial. Genocide does not require malice. As Ratner and Abrams have recently noted, most commentators agree that so long as the requisite intent is established, underlying motives are irrelevant.<sup>143</sup>

Of course the acts beneficial to the individuals would have to be carried out with the intent to destroy the group (or part of it). However, while there must be this destructive intent, it does not have to be the sole, or even predominant, motive. Indeed, the primary motive may be a desire to benefit (or act 'in the interests of') the individuals comprising the group.<sup>144</sup>

3.119 The government submission cites the 'minority of children affected (10 per cent or less)' as 'plainly inconsistent with the extravagance of the allegation' of genocide.<sup>145</sup> This ignores the considerable body of opinion cited in *Bringing them home* in support of the proposition that the entire group need not be destroyed. Indeed, the definition of genocide in the Convention does not require the actual destruction of a group, but the 'intent to destroy the group, in whole or in part'. In a commentary published in 1950 Robinson observed:

---

<sup>141</sup> *Bringing them home*, p274.

<sup>142</sup> Starkman, P, 'Genocide and International Law: Is there a Cause of Action?' (1984) 8 *ASILS ILJ* 1, fn 14.

<sup>143</sup> Ratner, S and Abrams, J, *op. cit*, p36.

<sup>144</sup> Storey, M, *op.cit*, p13.

<sup>145</sup> Federal Government Submission, Stolen Generation Inquiry, p30.

According to the [wording of article II], the aim need not be the total destruction of the group. Thus, genocide is not characterized by the intent to destroy a whole group, but to eliminate portions of the population marked by their racial, religious, national or ethnic features .... The intent to destroy a multitude of persons of the same group must be classified as genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial because the aim of the convention is to deal with action against large numbers, not individuals even if they happen to possess the same characteristics.<sup>146</sup>

3.120 There are different views as to the extent of the requisite partial destruction. According to Dinstein:

The murder of a single individual may be characterized as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belongs.<sup>147</sup>

3.121 According to Bryant:

From the ordinary meaning of article II of the Genocide Convention, it would seem that the killing of a single person could be considered genocide if the killing were done with the intent to destroy, in whole or in part, the national, ethnical, racial or religious group of which the victim was a member. On the other hand, without this intent to destroy the group, in whole or in part, mass killings of members of the group would presumably not constitute genocide under the Convention.<sup>148</sup>

3.122 Other commentators, like Robinson and Lemkin, have suggested that 'destruction in part must be of a substantial nature.'<sup>149</sup> Whatever view is taken of the extent of the necessary 'destruction in part', it is clear that an unsuccessful attempt to eradicate a group may be punishable under article II where accompanied by the requisite intent to do so.<sup>150</sup> Practically speaking, as Bryant and Ratner & Abrams have noted, the number of victims may be of evidentiary value with respect to overcoming the hurdles posed by the intent requirement.<sup>151</sup>

---

<sup>146</sup> Robinson, N, 'The Genocide Convention: Its Origins and Interpretation' (1950), reprinted in *Hearings on the Genocide Convention Before a Subcomm. of the Senate Comm. on Foreign Relations*, 81st Cong, 2d Sess 487, p498.

<sup>147</sup> Dinstein, Y, 'International Criminal Law', (1975) 5 *Israel Yearbook on Human Rights* 55, p55.

<sup>148</sup> Bryant, B, 'Substantive Scope of the Convention' (1975) 16 *Harvard International Law Journal* 686, p691.

<sup>149</sup> Letter to the Foreign Relations Committee (1950); published *Hearing on the Genocide Convention Before the Senate Committee on Foreign Relations*, 97 Cong, 1st Sess 78-99; cited in Joyner, C, 'The United States and the Genocide Convention', (1987) 27 *Indian Journal of International Law* 411, p443; le Blanc, L, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding' (1983) 77 *American Journal of International Law* 341, p378.

<sup>150</sup> Webb, J, 'Genocide Treaty - Ethnic Cleansing - Substantive and Procedural Hurdles in the application of the Genocide Convention to alleged Crimes in the Former Yugoslavia' (1993) 23 *Georgia Journal of International and Comparative Law* 377, p391.

<sup>151</sup> Bryant, *op.cit*, p692; Ratner, S & Abrams, J, *op.cit*, p37.

3.123 In her final report as UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, Gay McDougall concluded:

The prosecution need not establish an intent to destroy the entire group on a national or an international basis. The intent to destroy a substantial portion or an important subsection of a protected group or the existence of a protected group within a limited region of a country is sufficient grounds for prosecution for genocide.<sup>152</sup>

3.124 The nub of the Federal government's rejection of the finding of genocide is its denial that past policies and practices were driven by an intent to destroy.<sup>153</sup> Clearly, particular difficulties of interpretation arise with respect to the requirement of intent in article II. These difficulties relate, *inter alia*, to the need to prove intent. Often only indirect or circumstantial evidence is available to establish intent.<sup>154</sup>

3.125 The historic judgment of the International Tribunal for Rwanda in the *Akayesu* case accepted that intent could be established by circumstantial evidence. The Tribunal posed a broad evidentiary standard, stating that:

[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.<sup>155</sup>

3.126 In this connection, UN Rapporteur Gay McDougall has noted:

that the necessary genocidal intent may be inferred from the perpetrator's actions. The Commission of Experts established pursuant to Security Council resolution 780 (1992) to examine violations of humanitarian law in the conflict in the territory of the former Yugoslavia found that in some cases of genocide 'there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent'. [Commission of Experts Report (S/1994/674), para. 313.]<sup>156</sup>

---

<sup>152</sup> *Systematic rape, sexual slavery and slavery-like practices during armed conflict* Final report submitted by Ms Gay J McDougall, Special Rapporteur UN Doc E/CN.4/Sub.2/1998/13, paras 48-49.

<sup>153</sup> Federal Government Submission, *Stolen Generation Inquiry*, p20.

<sup>154</sup> Ratner, S & Abrams, J, *op cit*, p34.

<sup>155</sup> *The Prosecutor v Jean-Paul Akayesu* Case No ICTR-97-23-S, 4 November 1999, para 523; see also Greenawalt, *op cit*, p282.

<sup>156</sup> McDougall, G., *op.cit*, para 50.

3.127 On one view, it is argued that genocide requires a specific intent to destroy a group *qua* group.<sup>157</sup> On this view, negligent or reckless acts which result in the destruction of a group do not satisfy the requirement for specific intent. According to the representatives of Brazil, in the drafting of the Genocide Convention, for example:

Genocide was characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide... [I]t was important to retain the concept of *dolus specialis*.<sup>158</sup>

3.128 On another view, it is sufficient to establish general, rather than specific intent to destroy the group. This view, supported by the weight of authority, is consistent with the proposition of Anglo-American criminal law that an accused cannot avoid liability for the foreseeable consequences of a deliberate course of action. Thus, according to Glanville Williams:

Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else foresight that the result will certainly follow.<sup>159</sup>

3.129 According to Kuper, intent is established if the foreseeable consequences are, or seem likely to be, the destruction of the group.<sup>160</sup> Similarly, a 1985 UN Study argued that, where documentary evidence of intent is lacking, intent should be inferable from *inter alia*:

actions or omissions of such a degree of criminal negligence or recklessness that the defendant must be reasonably assumed to have been aware of the consequences of his conduct.<sup>161</sup>

3.130 For the purposes of the National Inquiry, it was not strictly necessary to conclude whether general or specific intent is required to establish liability for genocide. The evidence submitted to the Inquiry indicated that the forcible removal of Indigenous children from their families was informed by a specific intent to prevent the survival of the group 'as such'.<sup>162</sup> Aboriginal people were removed pursuant to policies designed to produce, as a consequence, the destruction of the Aboriginal race *as such*.

<sup>157</sup> See 'US Reservations and Understandings to the Genocide Convention', (1989) 28 *International Legal Materials* 782; generally Joyner, *op.cit.*, pp422-424; le Blanc, *op.cit.*, p541.

<sup>158</sup> UN Doc A/AC 6/SR 72 (1948), p87 (Mr Armado, Brazil).

<sup>159</sup> Williams, G, *The Mental Element in Crime*, 1965, p20. See general discussion in Greenwalt, A, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259, p2266 ff.

<sup>160</sup> Kuper, L, *The Prevention of Genocide*, Yale University Press, New Haven/London 1985, pp12-13.

<sup>161</sup> *Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by B Whitaker* UN Doc E/CN 4/Sub 2/1985/6, p16.

<sup>162</sup> Genocide Convention, Article II.

3.131 This conclusion is supported by public statements of a range of officials involved in implementation of removal policies. One such official was John William Bleakley, Chief Protector of Aboriginals in Queensland, appointed by the Federal (Bruce-Page) Government to report on Aborigines in the Northern Territory. With respect to 'half-castes', Bleakley noted the need to identify 'how to check the breeding of them and how to deal with those now with us.' His recommendations were:

complete separation of half-castes from the Aboriginals with a view to their absorption by the white race; [and] complete segregation from both blacks and whites in colonies of their own and to marry among themselves.<sup>163</sup>

3.132 The influence of Bleakley's recommendations is apparent in numerous official documents following the delivery of his report:

In the Territory the mating of an Aboriginal with any person other than an Aboriginal is prohibited. The mating of coloured aliens with any female of part Aboriginal blood is also forbidden. Every endeavour is being made to breed out the colour by elevating female half-castes to the white standard with a view to their absorption by mating them into the white population.<sup>164</sup>

3.133 Another such official was the Chief Protector of Aboriginals in Western Australia, Mr A O Neville. According to a report in *The Telegraph* on 5 May 1937:

Mr Neville holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population. Sixty years ago, he said, there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying out. The pure-blood Aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of twenty and upwards. That showed the magnitude of the problem.

In order to secure the complete segregation of the children of pure blacks, and preventing them ever getting a taste of camp life, the children were left with their mothers until they were but two years old. After that they were taken from their mother and reared in accordance with white ideas.<sup>165</sup>

3.134 The government's submission does not engage with statements which evidence a clear intention to destroy the Aboriginal 'racial group', as such, in whole or in part. The intention was to remove:

---

<sup>163</sup> Bleakley, JW, *Report of the Aboriginals and Half-Castes of Central Australia and North Australia*, Commonwealth Parliamentary Paper 21, 1928.

<sup>164</sup> Northern Territory Administrator's Report, 1933, p7.

<sup>165</sup> *ibid*, p82.

half-caste children from the influence of Aboriginal families and Aboriginal reserves as early as possible. Once children were forcibly transferred to the non-Aboriginal group, their parents were discouraged from making contact with them and they to seek contact with their relatives.<sup>166</sup>

3.135 In summary, *Bringing them home* concluded that genocide can occur without physical killing, with mixed motives, some of which may be perceived to be beneficial, and without the complete destruction of the group. The conclusion was reached after the most careful consideration of the *travaux préparatoires*, subsequent practice and learned commentaries. The government's submission fails to acknowledge the existence or relevance of any of this material.

**(e) Forcible removal as racial discrimination**

3.136 With little analysis, the government submission rejects *Bringing them home's* finding of genocide. However, the National Inquiry also found that the laws, policies and practices singled out Indigenous children for removal from their families and communities and were therefore also racially discriminatory (at 266-270). *Bringing them home's* findings in this regard are simply ignored.

3.137 As *Bringing them home* notes, whether policies or practices may have been partially motivated by a benign purpose is immaterial. The effect of such policies was to single out Indigenous children for forcible removal to non-Indigenous families and institutions. In determining whether discrimination has occurred, the purpose or intention of the alleged discriminator is not decisive. In well-established international legal usage, the term 'discrimination' refers to distinctions which have the purpose *or effect* of impairing the enjoyment and exercise, on an equal footing, of human rights.

3.138 Like its earlier response, the government submission to this inquiry offers no acknowledgment of, or comment upon, these issues. Neither response contains the words 'human rights'. Neither apparently accepts the 'wrongs of the past' as violations of human rights. Neither offers any comment on the evidence in *Bringing them home* that removal policies provided for systematic racial discrimination even after Australia had formally accepted obligations under international treaties to end racial discrimination.

**(f) Compensation**

---

<sup>166</sup> *ibid*, pp82-83.

3.139 *Bringing them home* recommended that 'monetary compensation should be payable for harms and losses for which it is not possible to make restitution in kind.'<sup>167</sup>

3.140 Even though the terms of reference given to the Commission required it to report on and make recommendations concerning compensation, the Federal government ruled out compensation before the National Inquiry had completed its deliberations and presented its final report.

3.141 The government submission to this inquiry confirms its rejection of monetary compensation to individuals affected by forcible removal policies. Further, it identifies a number of issues which it regards as 'impediments' to compensation. Among these impediments is the alleged difficulty in quantifying the type of loss forcibly removed children may have suffered:

there is no comparable area within the common law of judicial awards of compensation and no basis for arguing a quantum of damages from first principles. Principles governing the quantification of damages at law can afford guidance...but there would be enormous difficulties applying them in cases such as these.<sup>168</sup>

3.142 The Commission agrees that the quantification of past and future loss may present difficulties but rejects the view that this justifies, in part, the government's position regarding compensation. As the New South Wales Law Reform Commissioner, Professor Regina Graycar, has stated:

Even the most minimal familiarity with the legal frameworks used for compensating various sorts of injuries would make it clear that the Government's argument [that there is no comparable area of compensation] is little more than a rhetorical device. What is, or is not, compensable at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability.<sup>169</sup>

3.143 Graycar identifies numerous contexts in which damages are awarded, either through common law recognition of loss or through statutory compensation schemes. In particular, courts have been called upon to assess the loss to an Indigenous accident victim of their ability to participate fully in cultural life; see for example *Napaluma v Baker*,<sup>170</sup> *Dixon v Davies*,<sup>171</sup> and *Namala v Northern Territory*.<sup>172</sup>

---

<sup>167</sup> *Bringing them home*, p303.

<sup>168</sup> Federal Government Submission, Stolen Generation Inquiry, p48.

<sup>169</sup> Graycar, R, 'Compensation for the Stolen Children: Political Judgments and Community Values' (1998) 4 (3) *UNSW Law Journal Forum* 24, p25.

<sup>170</sup> (1982) 29 SASR 192.

<sup>171</sup> (1982) 17 NTR 31.

<sup>172</sup> Unreported, Northern Territory Supreme Court, 14 May 1996, per Kearney J.

- 3.144 As Graycar notes, numerous statutory compensation schemes operate in Australia. Workers' compensation, criminal injuries compensation, motor accidents compensation, or sporting injuries compensation all exist because of the political judgement that in certain circumstances it is in the public good to provide compensation, irrespective of difficulties associated with liability and the quantification of loss.
- 3.145 Vaccine compensation – for people who have suffered severe disability as a result of vaccination - is another instance where a political judgement can be made about compensability in the absence of legal liability. In the United Kingdom a statutory scheme provides lump sum payments to people who have suffered physical and mental disability as a result of vaccination under routine public vaccination programs. The *Vaccine Damage Payments Act 1987* currently provides a blanket 40 000 pound payment to people who suffer severe damage after vaccination against common childhood diseases such as polio, diphtheria, tetanus, measles and mumps. The payment is intended to assist with the present and future needs of such people, and their families, and does not prejudice their right to sue for compensation. The Act sets a high entitlement threshold - it applies only to cases assessed at 80 per cent disability – but applies to vaccination programs administered from the beginning of Britain's National Health Service in 1948.
- 3.146 The rationale for vaccine payments is simple. While vaccination programs are a highly cost effective public health measure it is accepted that in a small number of cases there may be serious side effects. The provision of vaccine damage payments reflects a policy choice that a person who suffers vaccine damage should receive some measure of prompt assistance without having to establish legal liability.
- 3.147 In Australia, Graycar cites the singular statutory scheme established pursuant to the *Repatriation Act 1920* (Cth) for war veterans seeking compensation for injuries or illness caused by war service. From 1977-1985, the normal standard and burden of proof were reversed. The respondent (the Federal Government) was required to prove *beyond reasonable doubt* (the criminal, not civil, standard of proof) that the injury was *not* caused by war service in order for a veteran to be refused compensation.<sup>173</sup> As Graycar argues, this unique burden and standard of proof for a statutory compensation regime embodied a political choice that supposedly reflected community values:

To argue, as the Commonwealth Government has, that [compensation] is not possible as there is no framework by which to assess damages is disingenuous and ignores the many political choices that are routinely made in deciding which interest, and whose interests, we value in our community.<sup>174</sup>

<sup>173</sup> See discussion in *Repatriation Commission v O'Brien* (1985) 155 CLR 422; *East v Repatriation Commission* (1987) 16 FCR 517 at 518-524.

<sup>174</sup> Graycar, *op cit* p26.



3.148 Similarly, the refusal to consider compensation for Aboriginal people removed from their families as a result of government policy reflects a political choice about that group's lack of entitlement. The Government's position reflects a denial that Indigenous people in Australia have suffered from gross abuses of their human rights.

## 4 Recent international developments

4.1 Australia is not the only country that has had to consider how to respond to the violation of the human rights of particular groups within society. This section provides details of the response of governments to gross violations of human rights in the following countries:

- 1) Canada;
- 2) South Africa;
- 3) Aotearoa/ New Zealand;
- 4) Denmark;
- 5) Norway; and
- 6) United States of America.

4.2 Most of these case studies provide information about developments since the release of *Bringing them home* in May 1997.

4.3 The refusal of the Federal government to apologise for policies and practices of forcible removal, and the failure to acknowledge the importance of providing reparation, is contrary to a world-wide trend. Governments across the globe are increasingly scrutinising the practices of their predecessors and acknowledging the importance of making reparation to victims and their families where human rights violations have occurred.<sup>175</sup>

### 1) Canada

#### a) *Gathering Strength*: the Canadian Government response to the Royal Commission on Aboriginal Peoples

4.4 In January 1998, the Canadian Federal government released *Gathering Strength*,<sup>176</sup> its response to the five volume report of the Royal Commission on Aboriginal Peoples (RCAP).<sup>177</sup> The Canadian government describes *Gathering Strength* as a long term action plan to renew the relationship with the Aboriginal people of Canada. It builds on the principles of mutual respect, mutual recognition, mutual responsibility and sharing which were identified in the report of the RCAP.<sup>178</sup>

<sup>175</sup> Graycar, R, *op cit*, p26.

<sup>176</sup> Available online at: <http://www.inac.gc.ca/strength/change.html>. An update of the government's progress in implementing the plan is available at: [www.inac.gc.ca/strength/pdf/index.html](http://www.inac.gc.ca/strength/pdf/index.html).

<sup>177</sup> *Report of the Royal Commission on Aboriginal Peoples*, 5 volumes, 1996, Ottawa. Available on-line at: [www.inac.gc.ca/rcap/index.html](http://www.inac.gc.ca/rcap/index.html). Also available on CD ROM with back-up studies: RCAP (1997) *For Seven Generations*, The Report of the Royal Commission on Aboriginal Peoples (1996) including Background Reports, Public Works and Government Services (Publishing), Ottawa.

<sup>178</sup> For further information on these principles see RCAP, *Volume 1: Looking forward, looking back*, Chapter 16.

4.5 *Gathering Strength* begins with a Statement of Reconciliation that acknowledges the mistakes and injustices of the past. It includes a Statement of Renewal that expresses a vision of a shared future for Aboriginal and non-Aboriginal people and outlines the following four key objectives for action:

- renewing the partnerships;
- strengthening Aboriginal governance;
- developing a new fiscal relationship; and
- supporting strong communities, people and economies.<sup>179</sup>

4.6 The Statement of Reconciliation includes an apology to the Indigenous peoples of Canada. It is set out in its entirety below:

***Learning from the past***

As Aboriginal and non-Aboriginal Canadians seek to move forward together in a process of renewal, it is essential that we deal with the legacies of the past affecting the Aboriginal peoples of Canada, including the First Nations, Inuit and Métis. Our purpose is not to rewrite history but, rather, to learn from our past and to find ways to deal with the negative impacts that certain historical decisions continue to have in our society today.

The ancestors of First Nations, Inuit and Métis peoples lived on this continent long before explorers from other continents first came to North America. For thousands of years before this country was founded, they enjoyed their own forms of government. Diverse, vibrant Aboriginal nations had ways of life rooted in fundamental values concerning their relationships to the Creator, the environment, and each other, in the role of Elders as the living memory of their ancestors, and in their responsibilities as custodians of the lands, waters and resources of their homelands.

The assistance and spiritual values of the Aboriginal peoples who welcomed the newcomers to this continent too often have been forgotten. The contributions made by all Aboriginal peoples to Canada's development, and the contributions that they continue to make to our society today, have not been properly acknowledged. The Government of Canada today, on behalf of all Canadians, acknowledges those contributions.

Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We

---

<sup>179</sup> For a summary of the government's policy see: Minister for Indian Affairs (Jane Stewart), *Speech – Release of gathering Strength*, 7 January 1998, [www.inac.gc.ca/info/speeches/jan98/action.html](http://www.inac.gc.ca/info/speeches/jan98/action.html).

must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.

Against the backdrop of these historical legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government which have contributed to these difficult pages in the history of our relationship together.

One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School system. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continue to reverberate in Aboriginal communities to this day. Tragically, some children were the victims of physical and sexual abuse.

The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.

In dealing with the legacies of the Residential School system, the Government of Canada proposes to work with First Nations, Inuit and Métis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of this sad era of our history.

No attempt at reconciliation with Aboriginal people can be complete without reference to the sad events culminating in the death of Métis leader Louis Riel.<sup>180</sup> These events cannot be undone; however, we can and will continue to look for ways of affirming the contributions of Métis people in Canada and of reflecting Louis Riel's proper place in Canada's history.

Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future. Working together to achieve our shared goals will benefit all Canadians, Aboriginal and non-Aboriginal alike.<sup>181</sup>

---

<sup>180</sup>

A leader in the Northwest Rebellion who was hanged by the Canadian Government.

<sup>181</sup>

<http://www.inac.gc.ca/strength/declar.html>

- 4.7 A significant aspect of the Federal government's response to the report of the RCAP addresses the issue of the residential school system.<sup>182</sup> According to *Gathering Strength*:

Any attempt at reconciliation would be incomplete without reference to Residential Schools, and dedicated action in support of those Aboriginal people who tragically suffered abuse as children while in these institutions. Concerted efforts are required to help Aboriginal individuals, families and communities in the healing process. In the Statement of Reconciliation, the Government of Canada has said to the victims of sexual and physical abuse that we are deeply sorry. The Government of Canada is also committed to assisting in community healing to address the profound impacts of abuse at Residential Schools. Healing initiatives will be designed in partnership with the Aboriginal leadership and victims groups, and will be delivered in the broadest possible fashion to all Aboriginal people, including Métis and off-reserve individuals and communities that have been impacted by the residential school system.<sup>183</sup>

- 4.8 The residential schools' avowed purpose was the separation of the children from their families, communities and culture and their assimilation into white society. For decades, widespread sexual, physical and emotional abuse occurred in these institutions. For the most part, the abuse was hidden, ignored or denied. It is estimated that approximately 100,000 Indigenous children were placed in residential schools.<sup>184</sup>
- 4.9 The devastating inter-generational consequences of this system - such as repeating cycles of child abuse, spousal violence and family breakdown, substance abuse, suicide, mental disorders and offending - are now well recognised. A cornerstone of the *Gathering Strength* policy is the provision of a \$350 million (Canadian) fund to support community-based healing initiatives for Indigenous people affected by the legacy of physical and sexual abuse in residential schools.
- 4.10 Following wide consultation with Indigenous people, the Aboriginal Healing Foundation was created as the entity to design, manage and implement the healing strategy under the terms outlined in a funding agreement with the Canadian Federal government, signed by both parties on 31 March 1998.
- 4.11 In May 1998 the Aboriginal Healing Foundation began to design a national healing strategy intended to break the cycles of harm and abuse suffered by Indigenous people. It is an independent, not-for-profit corporation controlled and staffed by Indigenous people. It is incorporated under the federal laws of Canada and authorised to

---

<sup>182</sup> For background information on the residential school system see: RCAP, *Volume 1: Looking forward, looking back*, Chapter 10, or background paper: <http://www.inac.gc.ca/strength/school.html>.

<sup>183</sup> <http://www.inac.gc.ca/strength/change.html>.

<sup>184</sup> See note 182 above.

operate in all provinces and territories. Its funding agreement with the federal government requires it to have used its 'best efforts to commit' all of the \$350 million and accumulated interest over a four year period and to have distributed the entire fund within 10 years.

4.12 The Foundation's aim is to support projects that provide holistic and community based healing initiatives, addressing the needs of individuals, families and communities, and which complement existing programs or meet needs that are currently not supported. Four main program themes have been developed:

- **Healing** - community approaches and healing centres;
- **Restoring balance** – projects that focus on the early detection and prevention of the effects of the legacy of abuse on Aboriginal people;
- **Developing and enhancing Aboriginal capacities** – programs which focus on building a sustainable capacity for healing processes, so that appropriate groups and institutions within the community can meet ongoing healing needs; and
- **Honour and history** – the creation of an historical record of the residential school experience, and the need for survivors to acknowledge those students who never returned home (be it physically, mentally, emotionally or spiritually).<sup>185</sup>

4.13 Grants from the Foundation may be for a few thousand dollars or more than \$1 million and are applied to a wide range of initiatives. Projects so far approved include traditional and western therapy programs (such as healing circles and psychiatrists), parenting workshops, adventure retreats, recording the experiences of residential school survivors, training for Indigenous counsellors and social workers, survivor data bases, study groups for children, memorials, commemorative canoe journeys, programs for prison inmates, programs for early detection and prevention of child abuse and the compilation of traditional 'good life' teachings.

**b) *Restoring Dignity: The report of the Law Commission of Canada***

4.14 In November 1997, the Canadian Justice Minister requested the Law Commission of Canada<sup>186</sup> to report on the means for addressing the harm caused by physical and sexual abuse of children in institutions operated, funded or sponsored by government. The Law Commission's report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*<sup>187</sup> was released in March 2000 and deals with historical child abuse that occurred in a variety of Canadian institutions, including residential schools for Indigenous children.

---

<sup>185</sup> For further information see the Foundation's website at: <http://www.ahf.ca>.

<sup>186</sup> The Law Commission is similar in function to the Australian Law Reform Commission.

<sup>187</sup> Available online at <http://lcc.gc.ca>.

4.15 *Restoring Dignity* provides a comprehensive assessment of possible remedial responses and is of considerable value to those grappling with similar issues in Australia.

4.16 In relation to the residential schools system, *Restoring Dignity* states that 'Aboriginal children suffered in a unique and seriously damaging way' and that their experience:

must be singled out for particular study because their presence in residential schools was the result of a policy of assimilation sustained for several decades by the federal government, with the cooperation of many religious organisations. Deprived of their native languages, cultural traditions and religion, many Aboriginal children in residential schools were cut off from their heritage and made to feel ashamed of it. As a result, the residential school system inflicted terrible damage not just on individuals but on families, entire communities and peoples.<sup>188</sup>

4.17 The Law Commission took a broad interpretation of its terms of reference, which focused on the effects of sexual and physical abuse. The needs expressed by survivors persuaded the Law Commission to look not only at physical and sexual abuse but other types of maltreatment such as neglect, and emotional, spiritual, psychological, racial and cultural abuse. The Law Commission considered that to ignore or discount these other types of abuse would be to take the problem of historical physical and sexual abuse of children in institutions out of the larger context in which it occurred.

4.18 As with *Bringing them home*, the perspective of survivors is central to the approach taken by the Law Commission:

What are the needs of survivors? They are as diverse and unique as survivors themselves. Nevertheless, the Commission was able to identify certain recurring themes in the manner these needs were expressed. Survivors seek: an acknowledgment of the harm done and accountability for that harm; an apology; access to therapy and to education; financial compensation; some means of memorialising the experiences of children in institutions; and a commitment to raising public awareness of institutional child abuse and preventing its recurrence.<sup>189</sup>

---

<sup>188</sup> Executive summary, <http://www.lcc.gc.ca/en/forum/ica2000/html/execsum.html>.

<sup>189</sup> *ibid.* Note also the findings of the following consultant report prepared for the Law Commission: Alter, S., *Apologising for serious wrongdoing: Social, Psychological and legal considerations*, Law Commission of Canada, May 1999. The report identifies the following five elements of a meaningful apology: i) Acknowledgment of the wrong done; ii) accepting responsibility for the wrong done; iii) expression of sincere regret and profound remorse; iv) assurance that the wrong will not recur; and v) reparation through concrete measures. See also: Gannage, M., *An international perspective: A review and analysis of approaches to addressing past institutional or systemic abuse in selected countries*, Law Commission of Canada, 1998.

4.19 Having placed survivors perspective at the heart of the report, the Law Commission recognised the diversity of the needs of survivors and acknowledged that survivors ought to have a range of choices available to them to seek redress. Accordingly, the report considers a range of remedial responses that goes well beyond the traditional options of criminal prosecution and civil lawsuit. In assessing these measures, the Law Commission also recognised that:

a process for providing redress should take into account the needs of survivors, their families and communities in a manner that is fair, fiscally responsible and acceptable to the public.<sup>190</sup>

4.20 *Restoring Dignity* sets out the following eight criteria for evaluating existing and potential redress options:<sup>191</sup>

- 1) **Respect, engagement and choice** – does this process respect and engage survivors as well as offer them comprehensive information about the process itself?
- 2) **Fact finding** – can the process uncover the facts necessary in order to validate whether abuse took place and what circumstances allowed it to occur?
- 3) **Accountability** - do those administering the process have the authority to hold people and organisations accountable for their actions?
- 4) **Fairness** – is the process fair to survivors as well as all other parties affected by it?
- 5) **Acknowledgment, apology and reconciliation** - does the process provide for acknowledgment, apology and reconciliation where abuse has occurred?
- 6) **Compensation, counselling and education** – can the process meet the needs of survivors for compensation, counselling and education?
- 7) **Needs of families** - can the process meet the needs of the families of survivors as well as their communities and peoples?
- 8) **Prevention and public education** - does the process contribute to public awareness and prevention?

4.21 The approaches for redress identified and assessed by the Law Commission include:

- 1) **Legal processes** – criminal prosecutions and civil actions;
- 2) **Compensatory processes** –such as criminal injuries compensation and ex gratia payments;
- 3) **Investigatory processes** – such as public inquiries, Ombudsman’s investigations, children’s advocate interventions, and truth and reconciliation commissions;
- 4) **Community and grassroots initiatives**; and
- 5) **Official redress programs**, negotiated directly with survivors.<sup>192</sup>

---

<sup>190</sup> *id.*

<sup>191</sup> Law Commission of Canada, *Restoring Dignity*, pp105-115.

<sup>192</sup> *Ibid*, pp115-346.



4.22 The Law Commission examines each of these options, and concludes that no one single approach fully meets all of the redress criteria. The Law Commission emphasised that:

- there should be no single or exclusive approach to redress;
- a diversity of responses is essential, and all attempts to address the needs of survivors should be grounded in respect, engagement and informed choice; and
- that the effects of institutional abuse simply cannot be ignored:

As a society we cannot simply accept without question and comment the choices made in the past, and leave it to those who suffered to get on with their lives as best they can. We must confront the consequences of those choices and do what is necessary to rectify the wrongs.<sup>193</sup>

4.23 *Restoring Dignity* suggests that redress programs are the most effective official response and in, tandem with community initiatives, have the greatest capacity to meet the broadest range of survivor needs. It recommends that governments should not attempt to monopolise redress processes, but should encourage and fund community initiatives.

4.24 A 'redress program' is defined in the report as a program designed specifically to meet a wide range of needs, including financial compensation and non-monetary benefits. It does not involve legal proceedings but is always undertaken 'in the shadow of the formal justice system.'

4.25 Financial compensation is the cornerstone of most redress programs, either as a lump sum or periodic payment, and although most programs have usually been limited to sexual and/or physical abuse cases, they may include cases involving emotional and psychological abuse.

4.26 Redress programs are considered less adversarial, quicker, and capable of meeting a wider range of needs. Typically they are based on government policy initiative that does not require legislation and can be as large or small, as comprehensive or limited as required by the circumstances of each program. Their underlying objective is to be more comprehensive and flexible, and less formal than existing legal processes.

4.27 *Restoring Dignity* makes a number of recommendations specifically concerning redress programs,<sup>194</sup> including that they:

- Be designed with input from the group it is intended to benefit.

---

<sup>193</sup> *Ibid*, p3.

<sup>194</sup> *Ibid*, pp303-342, pp417- 421.

- Offer compensation and benefits that respond to the full range of survivors needs.
- Offer a wider range of responses than those available through the courts or administrative tribunals. In particular:

*Considerations*

Survivors may require support in the form of services as much as they require financial compensation;

The categories of benefits or services which may be offered through a redress program should not be considered closed. Survivors should have the opportunity of receiving those benefits which are best suited to their needs;

Redress programs should be flexible about how they distribute benefits. The program itself need not provide the benefits directly, but may simply be willing to fund a variety of services in the community so long as they are directly related to survivor's needs.<sup>195</sup>

- Be based on a clear and credible validation process:

*Considerations*

The focus of the validation process should be on establishing what harms were suffered at the institution, the effects of those harms, and the appropriate levels of compensation.

The standard of proof required should be commensurate with the benefits offered...

The onus should be on those organising the redress program to corroborate, to the extent possible, the experiences of those claiming compensation. All possible sources of corroboration should be canvassed, including institutional archives, school performance and attendance records, contemporaneous medical, social service or police records, and the verdicts of criminal proceedings, if any.<sup>196</sup>

4.28 One form of monetary compensation considered by the Law Commission that could appropriately form part of a redress program is *ex gratia* payments. Such a process is recommendation 18 of *Bringing them home*.

4.29 *Restoring Dignity* makes the following recommendations specifically relating to *ex gratia* payments:

- Governments should revise policies on providing compensation by way of *ex gratia* payments to include classes of persons who

---

<sup>195</sup> *ibid*, p418.

<sup>196</sup> *ibid*, pp419-420.

suffered harm, directly or indirectly, as a result of policy decisions later found to have been inappropriate, even when others are potentially liable in a civil action;

- *Ex gratia* payments should be offered in cases where an otherwise meritorious and provable claim cannot be pursued because it falls outside a limitation period, or where liability is uncertain and it is not in the public interest to defer compensation until litigation has concluded; and
- Governments should revise policies on paying compensation so as to provide a mechanism for expedited, interim and 'without prejudice' *ex gratia* payments.<sup>197</sup>

4.30 While initiatives such as the Aboriginal Healing Foundation meet the recommendations of *Restoring Dignity*, the Canadian government is yet to formally respond to the report.

### c) Litigation

4.31 It is estimated that approximately 8,000 former residential school students have filed individual or class action lawsuits against the Canadian Federal Government and those churches that ran the residential schools. In 1997-8, the government settled some 220 claims out of court, paying more than \$20 million to victims of abuse in residential schools. In 1998-9, \$8 million was paid to 70 victims. It has been reported that settlements have ranged between \$20,000 to \$200,000.

4.32 It has also been reported that the Canadian Government is piloting alternative dispute resolution schemes for settling other claims out of court. The schemes being piloted are exploring the possible negotiation of group compensation agreements involving victims who attended the same schools or live in the same communities.<sup>198</sup>

### The decision of the Supreme Court of British Columbia in *Mowatt*

4.33 A recent case of significance is the decision of the Supreme Court of British Columbia in *Mowatt, Sr v Clarke, The Anglican Church Of Canada, The General Synod Of The Anglican Church Of Canada And Ors.*<sup>199</sup> Floyd Mowatt Sr, a residential school student from 1969 to 1976, alleged that his dormitory supervisor, Derek Clarke, repeatedly sexually assaulted him between 1970 and 1973.

4.34 Clarke pleaded guilty to the sexual assault of Mowatt, among other boys at the residence, and was imprisoned. The plaintiff's claim was against the Anglican Church of Canada, the Anglican Diocese of

<sup>197</sup> *ibid*, pp411-12.

<sup>198</sup> See Ottawa Citizen Online [www.turtleisland.org/news/news-residential.htm](http://www.turtleisland.org/news/news-residential.htm).

<sup>199</sup> Unreported, Supreme Court of British Columbia, 30 August 1999 per Dillon J: <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/99/13/s99%2D1341.txt>.

Cariboo and the Crown. He claimed negligence, breach of fiduciary duty, and vicarious liability arising from the parental role undertaken within the school for his care. The defendants denied responsibility for the actions of Clarke.

4.35 The court held that the employer was vicariously liable for the abusive conduct of Clarke, the employee. In determining which of the defendants was liable, the Court rejected an argument for limiting liability on the basis that Clarke's employer was the Church. It stated that the Crown had a statutory obligation to educate Indian children and had chosen the Church as its instrument to fulfil at least part of its statutory obligations. However, the Court found that the arrangement at the school also served to advance the interests of the Church. Accordingly, the Anglican Church and the Crown were held to be jointly vicariously liable for the acts of Derek Clarke.

4.36 In relation to negligence, both the Anglican defendants and the Crown pointed to the other as owing a duty of care to the plaintiff. Both denied that they were in breach of any duty. The Court found both the Crown and the Anglican Church owed a duty of care to Mowatt and that both had breached that duty.

4.37 In relation to apportionment of fault in negligence, the Court held:

Because of the failure of the Anglican Church to disclose Clarke's abuse so that adequate investigation and care could follow, it bears greater fault. Because it was not established what actions the federal authority would likely have taken and because the timing and circumstances of eventual disclosure to the Crown are not clear, the greater fault attributed to the Anglican Church is sixty percent.<sup>200</sup>

4.38 In determining whether the church owed a fiduciary duty to the plaintiff, the Court stated:

The Anglican Church through the principal of the residence was in a position to exercise power over the plaintiff as it pertained to his moral and emotional well-being and dignity. It did so daily by imposing religious practices and influence which involved an interaction that created trust and reliance. The plaintiff absolutely trusted that he would be properly cared for, especially because this was an Anglican institution. The fact of Anglicanism lent a superior moral tone to the residence that created an additional level of assurance. The Bishop of the Diocese knew that dormitory supervisors were in a position to affect the plaintiff's intimate personal and physical interests and encouraged this position of trust through insistence that child care workers be Anglican and follow Anglican practice. When Clarke breached this trust, Harding told the plaintiff that he would bring the matter to the appropriate authorities. The Anglicans took control of the matter and took no action. The Anglicans assumed a duty to act on behalf of the plaintiff in this circumstance and did nothing. Although the behavior of diocesan personnel

---

<sup>200</sup>

*ibid*, para 184.

lacks detailed particularity in this case, the substance of the decisions and who made them are apparent. The Anglican Church was in a fiduciary relationship with the plaintiff when it undertook to look after his interests to the exclusion of the federal Crown following the disclosure of Clarke's abuse.<sup>201</sup>

4.39 The decision is currently under appeal.

## 2) South Africa

4.40 In October 1998, the South African Truth and Reconciliation Commission (herein TRC) published its 5 volume final report. The TRC's approach to Reparation and Rehabilitation Policy is set out in Chapter V of Volume Five:

The right of victims of human rights abuse to fair and adequate compensation is well established in international law. In the past three years, South Africa has signed a number of important international instruments, which place it under an obligation to provide victims of human rights abuse with fair and adequate compensation. The provisions of these instruments, together with the rulings of those bodies established to ensure compliance with them, indicate that it is not sufficient to award 'token' or nominal compensation to victims. The amount of reparation awarded must be sufficient to make a meaningful and substantial impact on their lives. In terms of United Nations Conventions, there is well established right of victims of human rights abuse to compensation for their losses and suffering. It is important that the reparation policy adopted by the government, based on recommendations made by the Commission is in accordance with South Africa's international obligations. The reparation awarded to victims must be significant.<sup>202</sup>

4.41 The report then provides an overview of international law and practice in relation to reparation and compensation. It notes:

- Universal Declaration of Human Rights (article 8);
- International Covenant on Civil and Political Rights (article 3(a));
- the jurisprudence of the UN Human Rights Committee established under the Optional Protocol to the ICCPR;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the jurisprudence of the UN Committee against Torture;
- the Inter-American Convention on Human Rights; and
- the jurisprudence of the Inter-American Court of Human Rights.

4.42 The report particularly notes the decision of the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case, and observes:

---

<sup>201</sup> *ibid*, para 196.

<sup>202</sup> Truth and Reconciliation Commission, *Final report, Volume V*, Chapter 5, para 11.

If we are to transcend the past and build national unity and reconciliation, we must ensure that those whose rights have been violated are acknowledged through access to reparation and rehabilitation. While such measures can never bring back the dead, nor adequately compensate for pain and suffering, they can and must improve the quality of life of the victims of human rights violations and/or their dependants.<sup>203</sup>

Without adequate reparation and rehabilitation measures, there can be no healing and reconciliation, either at an individual or a community level. Comprehensive forms of reparation should also be implemented to restore the physical and mental well being of victims.<sup>204</sup>

4.43 The report of the TRC recommends a five-part approach to reparation, consisting of:

- 1) Urgent interim reparation in the form of assistance to provide people in urgent need with access to appropriate services and facilities;
- 2) Individual reparation grants in the form of an individual financial grant scheme;
- 3) Symbolic reparation encompassing measures to facilitate the communal process of remembering and commemorating the pain and victories of the past (including among other measures, a national day of remembrance and reconciliation, erection of memorials and monuments, and the development of museums);
- 4) Community rehabilitation programs aimed at promoting the healing and recovery of individuals and communities affected by human rights violations; and
- 5) Institutional reform, including legal, administrative and institutional measures designed to prevent the recurrence of human rights abuses.<sup>205</sup>

4.44 The individual financial grants scheme is based on a benchmark figure of R21,700 per annum (or approximately \$6000 Australian dollars per annum). This equates to the median annual household income in South Africa in 1997.<sup>206</sup> This was decided as an appropriate amount to achieve the aims of the individual reparation grant, namely, to enable access to services and to assist in establishing a dignified way of life.<sup>207</sup> The TRC recommended that the annual reparation grant be paid in two payments per year. The report recommends that payments be made for a period of six years.<sup>208</sup>

---

<sup>203</sup> *ibid*, para 19.

<sup>204</sup> *ibid*, para 21.

<sup>205</sup> *ibid*, paras 23-32.

<sup>206</sup> The maximum individual reparation grant claimable is R23 023 per annum for an individual living in a rural area with nine or more dependants.

<sup>207</sup> Truth and Reconciliation Commission, *Final report, Volume V*, Chapter 5, para 69.

<sup>208</sup> *ibid*, para 74.

4.45 The Reparation and Rehabilitation Committee of the TRC was guided by internationally accepted approaches to reparation and rehabilitation. The five aspects of reparation identified by the TRC are similar to those identified in *Bringing them home*. These five aspects are:

- **Redress:** the right to fair and adequate compensation;
- **Restitution:** the right to the re-establishment, as far as possible, of the situation that existed prior to the violation;
- **Rehabilitation:** the right to the provision of medical and psychological care and fulfilment of significant personal and community needs;
- **Restoration of dignity:** the right of the individual/community to a sense of worth; and
- **Reassurance of non-repetition:** the strategies for the creation of legislative and administrative measures that contribute to the maintenance of a stable society and the prevention of the re-occurrence of human rights violations.<sup>209</sup>

### 3) **Aotearoa/New Zealand: settlement of Indigenous rights claims under the Treaty of Waitangi**

4.46 In Aotearoa/New Zealand, the Treaty of Waitangi sets the legal and political framework for the recognition of Indigenous rights. This founding document, signed by Maori and the Crown in 1840, established British sovereignty and recognised the prior occupation and rights of Maori. Indigenous rights claims by Maori are made in the context of the Treaty (ie they are expressed as breaches of rights and obligations created by the Treaty, rather than abuses of human rights). However, in essence, these claims, are based on international human/Indigenous rights norms. They concern sovereignty, discrimination, cultural dispossession and the loss of land and resources, and relate to historical or contemporary events and policies.

4.47 In the early 1990s the New Zealand government began to implement a policy of negotiated settlement of Maori Treaty claims against the Crown. The starting point for the negotiation of a claim is the Crown's acknowledgment that the Maori grievance is well founded and that the Crown's past actions or policies failed to protect Maori land, resources and culture and thereby breached its obligations under the Treaty of Waitangi. In the past five years some of the major historical land claims have been settled. The terms of settlement provide for the return of land formerly held by the claimant tribe (usually only a small portion) and cash compensation. The settlement terms are implemented through acts of parliament and include the Crown's formal apology for past abuses and wrongful acts.

---

<sup>209</sup>

*ibid*, para 37.

- 4.48 One of the first legislated settlements, the *Waikato Raupatu Claims Settlement Act 1995*, gave effect to the settlement of a claim concerning the 1863 invasion of Waikato territory by imperial troops, and the Crown's confiscation of 1.2 million acres of the tribe's land. Redress provided by the Crown included financial compensation and the return of land, to the value of \$170 million, and an explicit apology. The apology is recorded in the following terms:

The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion and at the devastation of property and social life which resulted....

The Crown acknowledges that the subsequent confiscations of land and resources...were wrongful... and have had a crippling effect on the welfare, economy and development of Waikato...

Accordingly the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and... to begin the process of healing and to enter into a new age of co-operation with ...Waikato.

#### 4) Denmark

- 4.49 On 17 September 1999, the Danish Prime Minister apologised to Inuit people relocated in the 1950s in far northern Greenland.
- 4.50 In May 1953, some 100 residents of Uummannaq/Pituffik were ordered to leave their home to make way for a United States Air Force base. Thirty families were relocated to the new settlement of Qaanaaq some 150 kilometres away. In December 1997 the Inuit Circumpolar Conference (ICC) commenced legal proceedings after the failure of earlier efforts and government denials of responsibility. On 20 August 1999, the Danish High Court held that the Danish authorities had acted unlawfully, and that the relocation had been decided and carried out in such a way as to constitute a serious encroachment towards the people. Compensation was ordered and a collective fund was to be established.<sup>210</sup>
- 4.51 On 2 September the Prime Minister of Denmark, Poul Nyrup Rasmussen issued an apology to the President of the ICC, Aqqaluk Lyngé. Rasmussen uttered the word that Greenlanders had been waiting to hear for almost 50 years: 'Utatserqatserpunga'. The apology provided:

On behalf of the Danish State I apologise to the Inuit, the population of Thule, and to the whole population of Greenland for the way the decision about the move was taken and carried out'.<sup>211</sup>

<sup>210</sup> See 'Latest News', *Nunatsiaq News*, 17/9/99 <http://www.nunatsiaq.com>.

<sup>211</sup> See 'ICC president welcomes Danish apology for Thule relocation', *Nunatsiaq News*, 10/9/99 <http://www.nunatsiaq.com>.



- 4.52 On the same day, the Danish Prime Minister and the Premier of Greenland signed an agreement aimed at renewing the relationship between the two governments. It aims to strengthen the participation of the Home Rule Government in foreign policy and security matters that presently lie outside the provisions of the *Greenland Home Rule Act* 1978.<sup>212</sup>

## 5) Norway

- 4.53 On 7 October 1997, in a rare political statement, King Harald of Norway publicly apologised to the Sami people for the repression suffered under Norwegian rule. In opening the third Sami Parliament, he said:

The Norwegian state is based on the territory of two peoples – Norwegians and Sami people. Sami history is closely intertwined with that of Norwegians. Today, we must apologise for the injustice of the Norwegian State once imposed on the Sami people through policies of assimilation.<sup>213</sup>

- 4.54 On 31 December 1999 in a New Year's address, the Prime Minister Kjell Magne Bondevik made an apology to the Indigenous Sami, and stated that the government was considering establishing a compensation fund. In a press release dated 3 January 2000,<sup>214</sup> the government stated that it was of the opinion that compensation should be granted on a collective basis, in order to redress the disadvantage faced by the Sami due to assimilationist policies. A fund is to be established with 75 million Kroner, the interest on that amount to be used principally for the promotion of Sami languages and cultures.

## 6) United States

- 4.55 Almost contemporaneously with the publication of *Bringing them home*, US President Clinton apologised to those who had been subject to medical experimentation in Tuskegee, Alabama, between 1932 to 1972. During that period the US Public Health Service allowed more than 400 African-American men to go untreated for syphilis after offering free medical care. The men were never informed that they were part of the Tuskegee Study of Untreated Syphilis in the Negro Male. The Tuskegee incident became a symbol for African-Americans of government betrayal. Sixty-five years after the experiments began, the few survivors gathered at the White House. President Clinton apologised:

---

<sup>212</sup> *The Greenland Home Rule Act*, Act No 577 of 29 November 1978.

<sup>213</sup> This is an unofficial English translation of the Norwegian text: Aftenposten Interaktiv: <http://aftenposten.no/nyheter/iriks/d21834.htm>.

<sup>214</sup> ODIN, no.01/2000, 3/1/2000: <http://odin.dep.no/html/nofovalt/prmeld/krd/2000/k1/000103.html>.

What was done cannot be undone, but we can end the silence. We can stop turning our heads away, we can look at you in the eye and finally say, on behalf of the American people, what the United States government did was shameful, and I am sorry.

The American people are sorry for the loss, for the years of hurt. You did nothing wrong, but you were grievously wronged. I apologize, and I am sorry this apology has been so long in coming.

To Macon County, to Tuskegee, to the doctors who have been wrongly associated with the events there, you have our apology as well. To the African-American citizens, I am sorry that your federal government orchestrated a study so clearly racist. That can never be allowed to happen again. It is against everything our country stands for.

Today all we can do is apologize, but ... only you have the power to forgive. Your presence here shows us that you have chosen a better path than your government did so long ago. You have not withheld the power to forgive.