## 6. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them home*

**Summary of issue**

- The Human Rights and Equal Opportunity Commission conducted an inquiry into the forcible removal of Aboriginal and Torres Strait Islander Children from their families. The report, *Bringing them home*, was released in May 1997.
- The report identified that:
  - Forcible removal policies saw the removal of between 1 in 3 and 1 in 10 Indigenous children, in the period 1910 to 1970;
  - The effects of such removal were, for most victims, negative, multiple and profoundly disabling;
  - Removal laws were racially discriminatory, and genocidal in intent;
  - For many children removed there were breaches of fiduciary duty and duty of care, as well as criminal actions.
- The report adopted the van Boven principles for reparation for gross violations of human rights as the basis of recommendations for addressing the harm caused.
- The report also considered contemporary forms of separation, and recommended the introduction of national standards and framework legislation incorporating international human rights standards for the treatment of Indigenous children.
- The government responded to the report in 1997 with a $63 million package (including $54 million in new funds).
- The government has rejected recommendations for compensation and other forms of reparation.
- In a recent submission, the government rejects further the basis for reparations and argues that the laws were not genocidal and did not amount to a gross violation of human rights.

**The following section expands on this summary under the following headings:**

- The National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their Families; and
- Government response to the report.

**The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families**

6.1 Between 1995 and 1997, the Human Rights and Equal Opportunity Commission conducted a major inquiry into the historical practice of forcibly removing Indigenous children from their families, and the effects of that removal.

6.2 The terms of reference required HREOC to:

- trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence and the effects of those laws, practices and policies;

- examine the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal and Torres Strait Islander peoples who were affected by the separation under compulsion, duress or undue influence of Aboriginal and Torres Strait Islanders children from their families, including but not limited to current laws, practices and policies relating to access to individual and family records and to other forms of assistance locating and reunifying families;

- examine the principles relevant to determining the justification for compensation for persons or communities affected by such separations; and

- examine current laws, practices and policies with respect to the placement and care or Aboriginal and Torres Strait Islander children and advice on any changes required taking into account the principles of self determination by Aboriginal and Torres Strait Islander peoples.

6.3 The report of the inquiry, *Bringing Them Home*, was tabled in the Commonwealth Parliament on 26 May 1997.

6.4 *Bringing them home* provides detailed analysis of the legislative history of State, Territory and Commonwealth laws applying specifically to Indigenous children, as well as general child welfare and adoption laws. In all Australian States and Territories from around 1900 onwards legislation was enacted which introduced processes by which Indigenous children could be removed from their families and made wards of the State. *Bringing them* home estimates that in the period 1910 to 1970 between 1 in 10 and 1 in 3 Indigenous children were forcibly removed from their families.

6.5 Legal enactments concerning Indigenous child removal were still in operation in the early 1970s, though most had been repealed in the 1960s.

6.6 The report was required to consider the effects of removal on Indigenous people. The report concluded that it is difficult to capture the complexity of the effects for each individual. The report noted, however that:

> For the majority of witnesses to the Inquiry, the effects have been multiple and profoundly disabling. (The effects of removal have to)… take into account the ongoing impacts and their compounding effects causing a cycle of damage from

which it is difficult to escape unaided. Psychological and emotional damage renders many people less able to learn social skills and survival skills. Their ability to operate successfully in the world is impaired causing low educational achievement, unemployment and consequent poverty. These in turn cause their own emotional distress leading some to perpetrate violence, self-harm, substance abuse or anti-social behaviour.[1]

6.7 The National Aboriginal and Torres Strait Islander Survey of 1994 (by the Australian Bureau of Statistics) provides details of the effect of separation on the life circumstances of those who were forcibly removed. It shows that:

- There is no significant difference between those who were removed and those who were not in relation to educational achievement;
- A slight and non-significant tendency for those removed to be less employed than Indigenous people not removed;
- No significant difference in income levels for those removed and those Indigenous people not removed. Though figures demonstrate that those removed are more likely to be the beneficiaries of social security than those not removed;
- Those removed in childhood are twice as likely to have been arrested more than once in the previous five years (with 22% of those removed being arrested more than once, compared to 11% of those not removed).[2]

6.8 The inquiry found that forcible removal laws legislative regimes were racially discriminatory in that they established legal regimes for Indigenous children and their families which were distinct and inferior to those for non-Indigenous children and their families. For example, Indigenous children and their families were commonly denied access to judicial review. The inquiry further found that many of the discriminatory practices that evolved under these specific enactments continued after the enactment of general child welfare legislation in the States and the Northern Territory.

6.9 The inquiry also found that there were a number of other features of these laws that were discriminatory. For example, a number of jurisdictions legislated to remove the parental rights of Indigenous parents. In some States, the chief protector[3], or an equivalent official, was made the legal guardian of all Indigenous children. Moreover, chief protectors and protection boards were not required to consider questions of reasonableness or sufficiency in relation to the confinement of Indigenous children.

6.10 Additionally, the various protectors and protection boards that were made responsible for Indigenous people owed legal obligations of care and

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1 *Bringing them home*, p178.

2 *Bringing them home*, *op.cit*, pp13-15.

3 One of the features of the legislative regimes to oversee the policy of assimilation was that welfare boards pr protectors were established to deal with Indigenous people. These bodies were constituted by officials (often called protectors) who had far reaching powers to deal with Indigenous people within their jurisdiction.

protection to the children who were forcibly removed and place under their control. The inquiry found that protectors and protection boards failed in their guardianship and fiduciary duties to Indigenous wards to whom they had statutory and common law responsibilities. The boards generally failed to provide care to standards of the day, to protect the children from harm and involve Indigenous parents in decision-making about their children. In many cases, the agents or delegates of the State (missions, church institutions, foster carers and employers) also breached their fiduciary duties.

6.11 *Bringing them home* found that the policy of forcibly removing Indigenous children fell within the international legal definition of genocide. The inquiry noted that from 1948 onwards, the date of the *Convention on the Prevention and Punishment of the Crime of Genocide*, there were clear statements on the content of the crime of genocide and its unlawfulness. The Commonwealth of Australia ratified the Convention in 1949 and it entered into force in 1951.

6.12 *Bringing them home* noted that the crime of genocide is not restricted to the immediate physical destruction of a group but includes the forcible transfer of children [article 2(e)] with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. The inquiry noted that the essence of the crime of genocide is the intention to destroy the group. The inquiry concluded that child removal policies were genocidal because the principal aim was the elimination of Australia's Indigenous peoples' distinct identities. The inquiry recommended that the Commonwealth Parliament legislate to give domestic legal effect to the *Convention on the Prevention and Punishment of the Crime of Genocide*.

6.13 The inquiry found that from about 1950 onwards, the continuation of separate welfare laws for Indigenous children was in breach of the international legal prohibition of racial discrimination.

6.14 The terms of reference required the Commission to examine principles for the payment of compensation. The report noted that international human rights law recognises the right of victims of gross violations of human rights to reparation. The inquiry recommended that reparation be made to all who suffered because of forcible removal policies. *Bringing them home* adopted the van Boven principles as a synthesis of international practice regarding reparations.[4] In accordance with these principles, the inquiry recommended that reparation should consist of acknowledgment and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.

6.15 The fourth terms of reference of the Inquiry required the Commission to examine contemporary forms of separation of Aboriginal and Torres Strait Islander children from their families. The report concluded that removals by virtue of incarceration in the criminal justice system or by way of the care

[4] United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Basic principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights* E/CN.4/Sub.2/1996/17.

and protection system constitute a significant form of contemporary removal from family. The report made a number of recommendations dealing with the contemporary forms of removal, and called for a social justice package to redress Indigenous disadvantage, the establishment of national framework legislation to implement the principle of self-determination in relation to Indigenous children, and the establishment of national standards legislation for juvenile justice, care and protection, family law and adoption.

**Government response to the recommendations of the report**

6.16 The government responded to the recommendations of the report on 16 December 1997 with a $63 million package, which included $54 million worth of new funds and programs. The basis of the package was the establishment of family tracing and counseling services, an oral history project and to address other recommendations of the report. The government also rejected other recommendations of the report, including all recommendations dealing with contemporary forms of removal (national standards and framework legislation and the development of a social justice package); and recommendations for the payment of monetary compensation to survivors or their families.[5]

6.17 The Commission has criticized the government for its response to the recommendations of the report as not ensuring effective leadership and coordination of responses; failing to address the human rights analysis that underpins the recommendations; and for failing to ensure adequate consultation with Indigenous people in formulating and implementing the response to the report.[6]

6.18 In April 2000, the government made a submission to the Senate Legal and Constitutional References Committee inquiry into the stolen generation. The government submission rejected further recommendations of the report. It claimed that:

- There is no 'stolen generation';
- The number of people forcibly removed was significantly less than *Bringing them home* had suggested;
- That the methodology of the report was flawed;
- That there is no basis for making reparations, including monetary compensation.

6.19 In rejecting the basis for making reparation the government sated that the van Boven principles are not binding in international law; that the forcible removal of children did not amount to a gross violation of human rights and

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[5] The Commission conducted a follow-up inquiry to collate the various government responses to the report. This report can be downloaded from the Commission's website.The findings of the follow-up project make up Chapter 4 of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Sixth Report at http://www.hreoc.gov.au/social_justice/social_justice/index.html

5 See further: *ibid*, and Human Rights and Equal Opportunity Commission, *Submission to the stolen generation inquiry*, <www.hreoc.gov.au/social_justice/index.html>

was not genocidal; and that the payment of monetary compensation was problematic.

6.20 The Commission has noted that the government's reasoning is flawed as it does not acknowledge that:

- the van Boven principles are a synthesis of international law and practice, which incorporate obligations across a range of international instruments;
- racial discrimination and genocide were 'standards of the day' against which forcible removal policies should be evaluated;
- the definition of genocide in the *Genocide Convention* extends to situations where there are mixed motives, some of which may be perceived as beneficial, and where there is not physical killing, and without the complete destruction of the group; and
- forcible removal policies were racially discriminatory.

6.20 The Commission has stated that the government's suggestion that the payment of monetary compensation is problematic reflects a lack of political will rather than any true impediment.

**Relevance to ICESCR**

6.21 *Bringing Them Home* made it clear that the policies and practices underlying the removal of Aboriginal children from their families were discriminatory. There remains an obligation to redress this past discrimination and to provide effective remedy through competent authorities for any person whose rights or freedoms have been violated. It is also clear that the problems caused by the forcible removal of children are not only matters of history. The profound problems suffered by Indigenous people and communities are on-going, and a failure to address those problems and to implement the recommendations of the Report impact on the present and future generations of Indigenous people.

6.22 *Bringing Them Home* recommended self-determination be implemented in relation to the well-being of Indigenous children and young people through national framework legislation for juvenile justice and care and protection systems. The Commonwealth Government actively rejected these recommendations.

6.23 The past widespread practice of unjustifiable forced removal of Indigenous children from their families, and the present situation where the Government refuses to acknowledge this history through an apology and through the possibility of providing compensation, raises issues of compliance with Australia's obligations under the Covenant, in particular in respect of Article 1, self-determination, and Article 2, non-discrimination. Article 11, the right to adequate housing is also relevant. Paragraph 9 of General Comment 4 notes:

Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

> The removal of Indigenous children, and the ongoing failure to provide an adequate response, would appear to be a violation of the sanctity and privacy of the family.