Stolen Generations Revisited:

Is individual compensation justified?

Allan N Hall – December, 2008*

Précis

The purpose of this article is to revisit Bringing Them Home and the grounds on which the Human Rights and Equal Opportunity Commission recommended reparations for members of the Stolen Generations; to offer an analysis as to why the Commission's Report failed to produce the compassionate response that it deserved; and to offer some thoughts on the principles that, in the writer's view, are relevant to the justification for compensation.

The author argues that the Commission's decision to base its recommendations on alleged legal "wrongs" committed against Indigenous children, rather than on broader principles of social justice, human rights, decency, fairness and compassion, was counterproductive. It enabled the Howard Government to take the hard line that individual compensation would only be paid if legal liability were established before a court of law. However, as the Commonwealth Government was well aware, the prospects of any member of the Stolen Generations succeeding in any such action, particularly after so long a lapse of time, were extremely remote.

It is the author's view that, notwithstanding the Prime Minister's moving national apology in February, 2008, the underlying pain, humiliation, physical and sexual abuse and sense of cultural loss suffered by many Indigenous people removed from their families and communities as children has not been given the consideration it deserves. If one accepts, as Governments around Australia maintain, and as the High Court has since held, that Aboriginal protection laws were intended to operate beneficially, the question has to be asked: - How then did it happen that the effects of forcible removal were so often detrimental, devastating and lasting both for the child removed and for his or her family and community?

The author concludes by arguing that, where the policy of the law can be seen, in so many cases, to have failed so badly, Governments have a moral responsibility to address the harmful consequences of that policy. He traces recent developments in this regard in Tasmania, Queensland and Western Australia, as well as in the Senate, and urges the Rudd Government to reconsider its position on compensation before it is too late.

Introduction

On 11 May, 1995, Michael Lavarch ,the Attorney-General of the then Labor Government, acting pursuant to sections 11 (1)(e),(j) and (k) of *Human Rights and Equal Opportunity Commission Act 1986* ("the HREOC Act"), referred the issue of past and present practices of separation of indigenous children from their families to the Human Rights and Equal Opportunity Commission (HREOC) for inquiry and report. The Inquiry was jointly chaired by Sir Ronald Wilson, the President of the HREOC and Mr. (now Professor) Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner.

By the time the HREOC was ready to deliver its report, entitled "*Bringing Them Home*" in April, 1997, the Labor Government was no longer in power. Hence, the report was delivered to Daryl Williams QC, the Attorney- General in the Howard Government. The timing could not have been worse from the new Government's point of view. As Antonio Buti says in his biography of Sir Ronald Wilson[1]: - "It was a report the government did not want, about an inquiry it did not call, at a time that could hardly have been less welcome."

One of the main reasons for the inopportune timing was that, in December, 1996, the High Court had delivered its decision in the *Wik Case* [2] in which it had held, unexpectedly, that the grant of a pastoral lease did not necessarily extinguish pre-existing native title. As a consequence, the Howard Government had become embroiled in a bitter dispute with the indigenous community (and with many non-indigenes) over its proposals to amend the *Native Title Act 1993* in order to address the Court's decision.

It was into this highly charged political environment that the HREOC delivered its Report. *Bringing Them Home* painted a confronting picture of the forcible removal of "half-caste" indigenous children from their families under the laws, policies and practices endorsed by Governments around Australia starting in the mid 19th century in the eastern States and continuing until late in the last century. It recounted heart-rending stories from all around Australia of trauma, grief, sorrow and lasting hurt and sense of cultural loss suffered by vulnerable Indigenous children and their families as a consequence of these laws, policies and practices. Its immediate impact on the Australian public was considerable.

The Commission made 54 recommendations in all. These included recommendations for the Commonwealth and State Parliaments to formally acknowledge the responsibility of their predecessors, and to apologise, for the laws, policies and practices of forcible removal. There were also extensive recommendations as to the reparations that, in the Commission's view, were necessary and appropriate to redress the consequences of the "wrongs" committed against Indigenous people forcibly removed from their families as children.

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[1] A Matter of Conscience, UWA Press (2007) at 331.
[2] *Wik Peoples v. Queensland* (1996) 187 CLR 1

Every State Parliament responded promptly with an appropriate apology, as did the Parliaments of the ACT and the Northern Territory.[3] Only the Howard Government, for a variety of reasons that, in my view, were quite specious, refused to do so. Happily, on 13 February, 2008, the newly elected Prime Minister, Kevin Rudd acted promptly to offer a symbolic and deeply moving apology to members of the Stolen Generations at the opening of the new Parliament. The apology received widespread public support and was welcomed with gratitude and deep emotion by members of the Stolen Generations, who had waited so long to hear the word "sorry".

Neither the Commonwealth nor any of the States was prepared, initially, to offer individual compensation,[4]. Nevertheless, the Howard Government did put in place measures described as "practical reconciliation", costing $63 million over four years from 1997 to 2001. These measures, which have been characterized as "general reparation,"[5] were designed to assist in reuniting Aborigines with the families from which they had been separated as children, to put in place family support and parenting programs, and to provide professional counselling and other rehabilitation assistance for those who had been separated. They were clearly intended to address some, at least, of the adverse consequences of separation identified in the HREOC Report. In 2001-2, the Howard Government provided a further $53.8 million for LinkUp family tracing and reunion services in each State[6].

Important questions remained, however, as to whether these measures went far enough, whether the funds allocated by the Government had reached their intended targets and whether payment of individual compensation was also justified. Many members of the Stolen Generations felt (and still feel) that their special needs as a discrete group within the wider Aboriginal population have not been properly recognized or addressed[7].

The Rudd Government, like its predecessor, has refused to establish a national compensation scheme.[8] In fact, apart from making an apology, the policy response of the Rudd Government to the *Bringing Them Home* recommendations seems virtually identical to that of its predecessor. It has committed an additional $15.7 million over four years to ensure that LinkUp services, family history programs and Bringing Them Home Counsellors are adequately sourced to meet demand.[9] In addition, however, *t*he new Government has announced that it is focussed on

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[3] In the case of the Territories, apologies were perhaps unnecessary, as the removal of Indigenous children in those Territories occurred before self-government.

[4] The responses of both the former Howard Government and the Rudd Government are succinctly explained in the Report of the Senate Standing Committee on Legal and Constitutional Affairs enquiring into the Stolen Generation Compensation Bill 2008 (delivered on 16 June, 2008), paras. 2.7 to 2.22. Only the Tasmanian Parliament has since enacted legislation to provide limited compensation for members of the Stolen Generations (the *Stolen Generations Aboriginal Children Act 2006 (Tas.))*.

[5] *Healing: A Legacy of Generations, November, 2000, at para. 8.137.*

[6] *Senate Committee Report on the Stolen Generationn Compensation Bill 2008, para 2.3.*

[7] *Healing: A Legacy of Generations*, supra, at paras. 2.37 to 2.44. Cf. the *Senate Committee Report on the Stolen Generation Compensation Bill 2008,at paras 3.81 to 3.87,* where the current concerns are summarised.

[8] Senate Committee Report on the Stolen Generation Bill 2008, paras. 2.12 to 2.14.

[9] Ibid, para.2.17.

closing the 17-year gap in life expectancy between Indigenous and non-Indigenous Australians within a generation[10].

Members of the Stolen Generations refuse to let the issue of individual compensation drop. A number of significant developments that have occurred during the past two years have combined to ensure that their demands for a just and compassionate response to their claims for individual compensation have remained in the public arena.

The first of these was the establishment in 2006 of a limited scheme of compensation for members of the Stolen Generations in Tasmania. The second was the establishment in 2007 of limited schemes for compensation for children in Queensland and Western Australia (including members of the Stolen Generations) who were abused whilst in institutional care. The third was the judgment delivered in August, 2007 in the Supreme Court of South Australia awarding Bruce Trevorrow substantial damages because of his unlawful removal from the care of his indigenous parents. This is the only successful action, thus far, on behalf of a member of the Stolen Generations in which it has been established that an indigenous child was *unlawfully* removed from his parents. The fourth was the symbolic and moving apology by the new Prime Minister, Kevin Rudd, on 13 February this year. The fifth was the private member's Bill introduced into the Senate on 14 February, 2008, by Senator Andrew Bartlett, in which he sought (unsuccessfully) to have a national compensation scheme established for members of the Stolen Generations[11]. The sixth is the private member's Bill introduced into the Senate on 24 September, 2008, by Senator Rachel Siewert[12] in which she is seeking, as an alternative to Senator Bartlett's proposed Bill, to have a Stolen Generations Reparations Tribunal established along the lines proposed by the Public Interest Advocacy Centre (PIAC). I will discuss these developments in more detail later.

Given that both the major parties have made it clear on numerous occasions that they do not support the introduction of a national compensation scheme, there seems little prospect of the new Bill being passed by Parliament, unless the Government can be persuaded to change its mind. The fact is that, despite the considerable initial impact of *Bringing Them Home*, the Report did not ultimately produce the outcome that might have been expected and that its authors intended. In my view, this was due, in no small measure, to the fact that the Commission chose to base its recommendations for reparations primarily on the alleged legal "wrongs" committed against Indigenous children, rather than on broader grounds of social justice, human rights and compassion. The result of this heavy reliance on legal arguments was, I believe, predictable and

[10] Ibid, para. 2. 15.

[11] On 16 June, 2008, the Senate Committee on Legal and Constitutional Affairs recommended that Senator Bartlett's Bill should not proceed. Senator Bartlett, who was a member of that Committee, agreed with that recommendation and advocated the adoption, in its place, of a Bill based on the draft Bill proposed to the Committee by the Public Interest Advocacy Centre (PIAC).

[12] Senator Siewert, a member of the Australian Greens Party, was also a member of the Senate Committee that recommended that Senator Bartlett's Bill should not proceed. As Senator Bartlett has since retired from the Senate, Senator Siewert has taken up the responsibility of introducing the new Bill, entitled *Stolen Generations Reparations Tribunal Bill 2008*.

counterproductive. It gave the Howard Government the perfect excuse to take the hard line that compensation would only be paid if legal liability was established before a court of law.

As the Commission was aware when it handed down its Report in April, 1997,[13] members of the Stolen Generations then had major test cases pending against the Commonwealth before the High Court and the Federal Court in which many of the legal arguments relied on by it in its Report were already being litigated. In two of these cases, *Bray v. The Commonwealth* and *Kruger v. The Commonwealth*[14] the plaintiffs had challenged the validity of the *Aboriginals Ordinance 1918 (NT)* on grounds that mirrored in large measure the constitutional arguments relied on by the Commission in support of its recommendations for reparations. The High Court had reserved its decision in these cases in February, 1996, and the decision was still pending when the Commission delivered its Report. When the High Court handed down its decision on 31 July, 1997, dismissing the plaintiffs' challenge, the grounds for reparations argued by the Commission were significantly weakened.

Two major test cases were then in progress before the Federal Court, in which other legal grounds relied on by the Commission were being litigated by members of the Stolen Generations.[15] Once again, in my view, these close parallels effectively tied the success of the Commission's recommendations to the success of the pending litigation. When those actions failed, and the legal "wrongs" relied on by the Commission were substantially rejected by the courts, the recommendations were left without any clearly articulated alternative justification.

This was, in my view, a tragic and unnecessary outcome, because there was ample material disclosed by the Commission's Report which justified a more compassionate response to the stories of grief, despair, lasting hurt and sense of cultural loss to which the Report gave such eloquent testimony. The legal arguments served to shunt the issues of an apology and compensation up a side alley of sterile litigation and to shift the spotlight away from the underlying human tragedy. What should have been a serious debate about compensation, focused on issues of national conscience, social justice and basic human rights, became mired in a legalistic "winner takes all" contest – a contest, moreover, in which the indigenous claimants had neither the resources nor, in most cases, the evidence with which to succeed against a determined, infinitely better resourced, Government.

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[13] *Bringing Them Home* at 305.

[14] (1997) 146 ALR 126. These cases had been heard in February, 1996. The High Court's reserved decision was handed down on 31 July, 1997, some three months after the Commission delivered its Report. The validity of the Ordinance was upheld (see later).

14[15] *Cubillo v The Commonwealth* and *Gunner v. The Commonwealth* (2000) 20 FCA 1084. These actions had been launched in 1996. There had been an earlier unsuccessful claim for damages instituted in the Supreme Court of NSW in 1994 (*Joy Williams v The Minister, Aboriginal Land Rights Act 1983 and the State of New South Wales* (1999) 25 Fam LR 86; cf appeal (2000) Aust. Torts Reports ¶81-578*).* In this case, the plaintiff sued the NSW Government for damages over her allegedly wrongful removal as a baby from the care of her unmarried aboriginal mother. Her claim was not assisted by the fact that, by the time her case came on for hearing, she was too ill to give evidence on her own behalf. On the available evidence, the trial Judge (Abadee J) was satisfied that the plaintiff 's mother had consented to her baby daughter being placed in the care of the Aborigines Children's Home at Bombaderry, NSW and that the plaintiff had not established any actionable wrong.

Despite the Rudd Government's fulsome apology, it has nevertheless adopted a similar stance to that of the Howard Government, insisting that compensation will not be paid unless legal liability to do so is established before a court of law.[16]

In these circumstances, there is nothing to be gained, in my view, by persisting with demands that the Government should fully implement the Human Rights Commission's recommendations on reparations, unless a different rationale justifying compensation can be found. The Rudd Government, like its predecessor, has rejected the grounds on which the Commission's recommendations were based and the Court decisions thus far handed down have supported the Government's position[17]. As a consequence, any persuasive effect that the Commission's recommendations might have had has been lost.

Purpose of this Paper

If the Government is to be persuaded to change its mind, a different approach, I suggest, is needed. The purpose of this paper, therefore, is to revisit *Bringing Them Home* and the grounds on which the Commission recommended reparations*;* to offer an analysis as to why the Commission's Report failed to produce the compassionate response that it deserved; and to offer some thoughts on the principles that, in my view, are relevant to the justification for compensation and that should have been relied on by the Commission. Hopefully, it may not be too late for the Rudd Government to reconsider its attitude.

Terms of Reference

> So far as presently relevant, the Commission's Terms of Reference required it to "(a) 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;" and
> "(c) examine the principles relevant to determining the justification for compensation for persons or communities affected by such separations."

In its Report,[18], the Commission explained its approach to identifying "the principles relevant to determining the *justification* for compensation" as follows: -

> "In any legal consideration of a claim for compensation there are two steps. First a wrong (or wrongs) is identified. Second the harm to the victim is identified and 'measured' to the best of the court's (or other decision-maker's) ability using established principles."[19]

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[16] See *Senate Committee's Report on the Stolen Generation Compensation Bill 2008, at paras.2.12 –2.13*

[17] The Trevorrow decision, earlier referred to, is the only case, thus far, in which the plaintiff has established that the decision to remove him from his parents was unlawful. It may not be an isolated case; but neither, in my view, is it representative of the majority of cases referred to in *Bringing Them Home.* (See later)

[18] *Bringing Them Home,. Chapter 13, Grounds for Reparation, at 249-276.*

[19] *Ibid, at 249*

The Commission first set about identifying what it said were the "wrongs involved in the forcible removal of indigenous children from their families", which provided the "justification" or "grounds" for reparations, and then went on to define the "principles" that, it recommended, "would be appropriate to employ to remedy the harms caused by those wrongs".[20]

The Keating Government had actually asked the Commission to identify "the principles relevant to determining the *justification* for compensation". This term of reference, in my view, required closer analysis than the Commission appears to have given it. The Government was not asking the Commission to provide a legal opinion on whether or not the Government was liable for damages. Where a liability for compensation exists in law, there is no need to identify "principles" relevant to the "justification" for that compensation. The law itself provides all the justification that is required.

By seeking the guidance that it did, the Keating Government, in my view, was quite reasonably assuming that, at least in the majority of cases, decisions as to the removal of indigenous children from their families would have been made according to the laws that authorized such removal at the relevant time. As we shall see, this was, in fact, exactly what the Commission did find[21].

If a child was lawfully removed, there could be no question of legal action for damages against the Government in respect of the act of removal, as such.[22] Thus, in my view, what the Government was asking for, in effect, was guidance as to the principles that it should have regard to in determining the "justification" for compensation, *notwithstanding that the removal of the children may have been lawful at the time it was carried out.* [23] This is not the way the Commission saw its task.

The Commission's Findings

The Report identified two distinct periods in the laws and policies that applied to Indigenous children[24]. The first was the period of segregation of "full bloods" for their "protection" and the removal of "half-castes" for genetic absorption (i.e. "breeding out" the aboriginal blood). The Commission found that this began as early as the mid 19th Century in the eastern States and continued until the late 1930s. The second was the period following the first Commonwealth-State Native Welfare Conference in 1937 at which the policy of assimilation of half-castes into the white community was adopted nationally. This policy continued until the 1970s. .

[20] Ibid, *Chapter 14 –Making Reparation – at 277 - 314.*
[21] Ibid at 277
[22] Other issues arise, as I will later explain, where a child suffered physical or sexual abuse or other harm at the hands of those to whose care he or she was committed.
[23] Cf. *Healing; A Legacy of Generations, at 1.35.*
[24] *Bringing Them Home at 250.*

Although the Commission acknowledged that it was not possible to state with precision how many children were forcibly removed, it nevertheless found that: -

"Nationally, we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time, not one indigenous family has escaped the effects of forcible removal…"[25]

The principal findings by the HREOC as to the "wrongs" on which its "grounds for reparations" were founded, were summarised in its Report as follows: -

"Denial of common law rights

The Inquiry has found that the removal of Indigenous children by compulsion, duress or undue influence was usually authorised by law, but that those laws violated fundamental common law rights which Indigenous Australians should have enjoyed equally with all other Australians. As subjects of the British Crown, Indigenous people should have been accorded these common law liberties and protections as fundamental constitutional rights.

Breach of human rights

The Inquiry has further found that from about 1950 the continuation of separate laws for Indigenous children breached the international prohibition of racial discrimination. Also racially discriminatory were practices which disadvantaged Indigenous families because the standards imposed were standards which they could not meet either because of their particular cultural values or because of imposed poverty and dependence.

Finally, from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide. From this period many Indigenous Australians were victims of gross violations of human rights.

Other victimisation

The Inquiry has found that many individuals were victims of civil and/or criminal wrongdoing. These wrongs were perpetrated by `carers' and typically ignored by government-appointed guardians. They compounded the initial harm and damage caused by the children's separation and the denial of access to their families, communities and culture[26]."

[25] Ibid at 37.
[26] *Bringing Them Home, Chapter 14*

In making these findings, the Commission seemed to treat alleged wrongs committed under Australian domestic law as of the same nature and as having the same legal consequences as alleged breaches of international law. As a general rule, however, this is not correct. Whilst breaches of domestic law will normally give rise to some legal cause of action for redress or punishment, breaches of international law do not do so, unless the relevant international law has been incorporated as part of the domestic law of this country.

In the circumstances, I propose to deal, first, with the domestic law arguments relied on by the Commission (Denial of common law rights/Other victimisation), and then with the arguments based on international law (Breaches of human rights/Genocide/Racial discrimination). Hopefully, this will serve to highlight the significance of the distinction between alleged breaches of domestic law, on the one hand, and international law, on the other, as well as the different policy issues that arise in this context.

Breaches of Domestic Law

(a) The right to equality of treatment before the law

The finding by the Commission that "the removal of Indigenous children by compulsion, duress or undue influence was *usually authorised by law*", was, in my view, of critical importance. As earlier mentioned, where the removal was so authorised, no action for damages in respect of the act of removal, as such, could succeed. Governments do not normally pay compensation for acts that were authorized by law at the time they were done. The policy implications of paying compensation in such cases are obvious. Once the Government starts down this track, the floodgates for claims from people allegedly harmed by governmental actions that were lawful at the time may be opened up[27]. Thus, it needs very powerful countervailing considerations (or "principles") to convince the Government that payment of compensation is justified in such circumstances. It was the principles relevant to the determination of this issue that, in my view, the Commission had been asked to examine under Term of Reference (c).

Rather than addressing this issue directly, however, the Commission sought to nullify the finding that the removals were "*usually authorized by law*" by going on to find that the laws authorizing such removals "violated fundamental common law rights which Indigenous Australians should have enjoyed equally with all other Australians,"[28] to which, as subjects of the British Crown, they were entitled "*as fundamental constitutional rights"*.[29] If that finding had

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[27] Compare the Government's treatment of would-be asylum seekers who were "lawfully" imprisoned in isolated Australian or foreign detention centres in breach of Australia's obligations under international law on the treatment of refugees. Are they entitled to compensation for the harm inflicted as a consequence of their "lawful" confinement?

[28] The Commission also found that deprivation of parental rights of guardianship was "contrary to established common law which safeguarded parental rights".

[29] *Bringing Them Home,* at 277. Cf. at 256, where the Commission simply referred to these laws as authorising "what would *otherwise* have been gross breaches of common law rights". The later assertion that the laws failed to

been correct, it would have followed that the laws were invalid and that every child removed under those laws would have been unlawfully removed and potentially entitled to compensation for false imprisonment.

The Commission had earlier found that the laws authorizing the removal of Indigenous children did not accord the same protections as did the child welfare laws that applied to the non-Indigenous community. In most cases, decisions as to removal of an Indigenous child were made administratively, with no requirement for judicial supervision or approval

This was a valid criticism of the discriminatory nature of those laws, and was one of the "principles" relevant to the payment of compensation on which the Commission could have relied. However, in finding that Indigenous people were entitled to equality of treatment before the law as a matter of constitutional right, the Commission, in my view, pressed the argument too far and, in the process, diverted attention from the discriminatory nature of the laws.

Arguments based on alleged fundamental constitutional rights that are not expressed in the language of the *Constitution*, but rather are implied from its text and structure or from common law doctrines said to be too deeply embedded in the law to be abridged by Parliament are highly controversial and, with one exception not presently relevant[30], have not commanded widespread judicial support. Some High Court Judges had sought to imply a constitutional right to substantive equality of treatment before the law and to due process (i.e. a right to a court hearing before basic rights can be taken away) from the *Constitution* [31]. However, as Sir Ronald Wilson, a former High Court Judge, must have been aware, there was no decision of a majority of the High Court, as at the date of the Commission's Report, that clearly established that any such rights existed.

Moreover, as the Commission was also aware[32], the argument that the *Aboriginals Ordinance 1918 (NT)* was invalid on the ground that it breached implied constitutional rights to substantive equality of treatment before the law and due process had already been presented to the High Court in February, 1996, in the test cases instituted by Kruger and Bray. On 31 July, 1997, only three months after the Commission delivered its Report, the High Court rejected the

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accord to Indigenous people their "fundamental constitutional rights" changed the nature of this argument completely.

[30] In *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106 the High Court held (with some qualifications) that freedom of political communication was impliedly protected under our Constitution.

[31] See *The Oxford Companion to the High Court of Australia (2001)* ed. by Blackshield, Coper and Williams at 335-6; cf. 427-429. The argument that some common law rights are too deeply embedded in the law to be abridged by Parliament had been canvassed in 1992 in the case of *Leeth v. The Commonwealth* (1992) 174 CLR 455. . Deane and Toohey JJ held in their minority judgments that there is an implied constitutional guarantee of substantive equality of treatment before the law. But their opinion was not supported by the majority of the Judges in that case. In *Kruger* and *Bray* , the plaintiffs sought unsuccessfully to persuade the Court to adopt the minority views of Deane and Toohey JJ in *Leeth.* See(1997 146ALR 126 at 155 (DawsonJ); at 194 (Gaudron J); at 218 (McHugh J) and at 226-8 (Gummow J).

[32] The Commission was aware of the pending High Court decision in these cases. See *Bringing Them Home at 305.*.

challenge, holding that there are no such implied rights in the *Constitution.* [33] This was a serious blow to the credibility of the Commission's findings.

(b) Guardian's Duty of Care

The Commission also found that Aboriginal Protectors and Aboriginal Protection Boards had failed in their guardianship (fiduciary) duties towards indigenous wards or children to whom they had responsibilities. In many cases, the Commission said, governmental agents or delegates (missions, church institutions, foster carers and employers) also breached their fiduciary duties, by failing to provide contemporary standards of care to indigenous children, in the same way as to non-indigenous children in similar circumstances; by failing to protect the children from harm; and by failing to involve indigenous parents in decision-making about their children.[34]

Once again, however, the Commission sought to support its findings, in part, on legal arguments that pushed existing law too far. Very similar arguments were already being canvassed in cases before the Supreme Court of New South Wales[35] and the Federal Court[36]. Later decisions in those cases confirmed that the law, as it existed at the time of the HREOC Report, was that the *fiduciary* duty owed by a guardian to his ward does not extend beyond protecting the ward from *economic* harm (e.g. harm to the financial or property interests of the ward). It does not include a duty to protect a ward from physical, sexual and emotional abuse.

This does not mean, of course, that a child under guardianship is without protection by law from abuse. At least in theory, both the criminal and the civil law (the law of torts or "civil wrongs") provide appropriate sanctions against, and remedies for, such conduct. The reality is, however, that Indigenous children who suffered abuse whilst in care had virtually no prospects of achieving any redress[37].

In my view, by raising unsustainable legal arguments the Commission made it easier for the Government to focus its attention on refuting those arguments in court, rather than addressing the underlying human rights issues in a compassionate manner.

(c) Other Victimisation

As already mentioned, the Commission found that many Indigenous children who had been placed in institutions or foster homes "were victims of civil and/or criminal wrongdoing".

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[33] *Kruger v. The Commonwealth* and *Bray v. The Commonwealth* (1997) 146 ALR 126. The Court held, by a 5-1 majority, that a guarantee of equality of treatment before the law could not be implied from the *Constitution*. Only three Judges (Dawson, McHugh and Gaudron JJ) found it necessary to consider the argument that there is an implied constitutional right to due process of law (i.e. the right to a judicial hearing) before a person can be detained in non-punitive custody. They rejected the argument.

[34] *Bringing Them Home* at 260

[35] *Joy Williams v. The Minister, Aboriginal Land Rights Act 1983 and the State of New South Wales (1999) 25 Fam.LR 86. An appeal to the NSW Court of Appeal was dismissed (2000) Aust Torts Reports ¶81-578*

[36] *Lorna Cubillo v The Commonwealth* and *Peter Gunner v. The Commonwealth* (2000) 174 ALR 97.

[37] See next heading "Other victimisation".

These "wrongs", it said, were perpetrated by "carers" and were typically ignored by government-appointed guardians. They compounded the initial harm and damage caused by the children's separation and the denial of access to their families, communities and culture[38].

There is no doubt, in my mind, that shocking physical and sexual assaults were perpetrated on vulnerable, defenceless Indigenous children who were placed in care around Australia. What is not as clear, however, is whether the Governments under whose laws the children had been removed and placed in care, were legally responsible for the abuses committed by so-called carers. This was one of the issues in the *Cubillo* and *Gunner* litigation. The Commonwealth successfully argued that it was not legally liable for the actions of the Director of Native Welfare nor for actions of the staff employed by the Aborigines Inland Mission at the Retta Dixon Home in Darwin or by the Church of England's Australian Board of Missions at St Mary's School near Alice Springs where Lorna Cubillo and Peter Gunner had suffered physical and sexual abuse.

The Commission found that children who had been removed from their families experienced very harsh conditions in the missions, government institutions and children's homes to which they were committed; that they often received only the most basic education: and that they often experienced brutal physical punishment, were at risk of sexual abuse, and were not adequately protected from such abuse[39]. Even allowing that, in earlier times, community attitudes towards corporal punishment of children were vastly different from what they are today, the stories of physical abuse recounted to the Commission portrayed assaults that, in my view, far exceeded the bounds of any acceptable punishment. Moreover, sexual abuse, wherever it occurred, was absolutely repugnant. It is, in my view, a matter of national shame that such abuses took place.

All of these findings were relevant to, and provided compelling support for, the justification for compensation. In my view, however, what was lacking was an analysis of the principles relevant to determining the justification for that payment given that the Government in whose jurisdiction the abuses occurred may not, on strict legal analysis, be legally liable for the actions of the perpetrators.

Breaches of Human Rights under International Law

As we have seen, the Commission found that "from about 1950 the continuation of separate laws for Indigenous children breached the international prohibition of racial discrimination. Also racially discriminatory were practices which disadvantaged Indigenous families because the standards imposed were standards which they could not meet either because of their particular cultural values or because of imposed poverty and dependence."

[38] *Bringing Them Home,* at 278.
[39] The Commission's findings in this regard are conveniently summarised in the *Guide to the Findings and Recommendations of the Human Rights and Equal Opportunity Commission at 14 to 21*

More controversially, the Commission also found that, "from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide. From this period, many Indigenous Australians were victims of gross violations of human rights."[40]

These findings, it should be noted, were based primarily on international conventions ratified by Australia after the Second World War[41]. These included the *United Nations Charter (1945)* and the *Universal Declaration of Human Rights (1948*),[42] the *Convention on the Prevention and Punishment of the Crime of Genocide (1948),*[43] and the *International Convention on the Elimination of All Forms of Racial Discrimination (1965).*[44]

In considering these findings, it is of fundamental importance, in my view, to bear in mind that until such time as an international treaty or Convention is incorporated into our domestic law by appropriate legislation, it cannot operate as a direct source of individual rights and obligations in Australia.[45] In other words, no action for damages based on the alleged breach of an international Convention can be entertained by an Australian court *unless* the Convention has been incorporated into domestic law.

Whilst the Commonwealth may be subject to international censure if it fails to implement treaties or conventions that it has ratified, or if it acts in a manner inconsistent with its international obligations,[46] it cannot be sued domestically for damages for such breaches[47] The Report, in my view, does not make this distinction clear. On the contrary, it appears to treat alleged "wrongs" committed under international law as of the same character as alleged "wrongs" committed under our domestic law.

Moreover, although the Commission said that, in conducting its inquiry, it had been careful not to evaluate past actions of governments and others "through the prism of contemporary values",[48] the reality, in my view, was otherwise. As the Senate Committee which inquired into the implementation of the Commission's recommendations later reported, the effect of assessing past as well as present legislation from an international law and human rights

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[40] *Bringing Them Home, at 277-8.*
[41] *Ibid at 266 - 275.*
[42] Although both of these international Conventions have been ratified by the Commonwealth, we still do not have a Bill of Rights under Australian domestic law.
[43] This Convention was ratified by Australia in 1949 but, as at the date of the HREOC Report, had not been incorporated as part of our domestic law.
[41] This Convention was ratified by Australia on 30 October, 1975, and, on the next day, was incorporated into our domestic law pursuant to the *Racial Discrimination Act 1975 (C'wth).*
[45] *Teoh's Case* (1995) 183CLR 273; cf. *Kruger v. The Commonwealth* (1997) 146 ALR 126, *per Dawson J* at 161.
[46] The former Howard Government was frequently criticised by the UN Human Rights Commission and Amnesty International over its treatment of Indigenous peoples and refugees.
[47] See *Cubillo v The Commonwealth (No.1) (1999) 89 FCR 528* where, in preliminary proceedings, the Court ordered that claims based on alleged breach of international principles concerning the advancement and protection of human rights should be struck out.
[48] *Bringing Them Home, at 249*

perspective, was "to view past actions from a standard that was not a well-integrated part of either domestic or international values at the time. Consequently, the picture of Australian law and action in respect of Indigenous people that was presented in the report was alien to many." [49]

(a) Genocide

The Commission's controversial finding of cultural genocide sent shockwaves through the nation and sparked a vigorous, and at times acrimonious, debate in academic and wider community circles as to the justification for such a finding[50]. In the process, it alienated many ordinary Australians who were otherwise sympathetic to the cause of reconciliation[51] and attracted considerable opprobrium internationally.

Professor Dodson is reported to have initially opposed the labeling of past removal practices as genocide[52]. He was rightly worried about the political ramifications of such a finding. It put the Howard Government even more on the defensive and served (as Sir Ronald himself ultimately acknowledged) to distract attention from the human suffering to which *Bringing Them Home* attested.[53]

The Commission found that, "from 1946, laws and practices which, with the purpose of eliminating indigenous cultures, promoted the removal of indigenous children for rearing in non-indigenous institutions and households were in breach of the international prohibition of genocide."[54] It found that indigenous children removed from their families were discouraged from making family contact and were taught to reject their aboriginality and their aboriginal customs, language and heritage.[55] The forcible transfer of aboriginal children from their own racial group into another group (i.e. white society), allegedly with intent to destroy the indigenous group in whole or in part, was said to amount to "cultural genocide" as defined in the 1948 Convention.[56]

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[49] *Healing: A Legacy of Generations, November, 2000, at para.1.35.*

[50] Some of this debate is reviewed in *Sir Ronald Wilson, A Matter of Conscience, supra, at 353.* The finding of genocide is strongly supported by Professor Colin Tatz in his article. *Genocide in Australia* published by the *Australian Institute of Aboriginal and Torres Strait Islander Studies.*

[51] See *The Australian*, 18 July, 2005, p.8. Editorial "A Brave Campaigner for the Less Fortunate" (obituary of Sir Ronald Wilson).

[52] *A Matter of Conscience, supra, at 324-5; cf. 354.*

[53] Ibid at 375.

[54] *Bringing Them Home, supra, at 270-5; cf. 278.* This finding, it should be noted , covered the post World War II period, when the earlier policy of "genetic absorption" had been replaced by the policy of assimilation into the white community.

[55] Ibid, at 154-8.

[56] Ibid. At 273, the Inquiry noted that its finding on genocide was not supported by Commissioner Elliott Johnston in the final report of the Royal Commission into Aboriginal Deaths in Custody. Commissioner Elliott's finding was that child removal policies (in WA) were adopted "not for the purpose of exterminating a people, but for their preservation". However, the Commission claimed that its findings were based on much more wide-ranging research.

As at the date of the Commission's Report, there was no offence of "cultural genocide" under Australian law. The allegations of genocide were based on international conventions that had not, at the date of the Commission's Report, been incorporated into Australian law.

Although opinions on questions of law expressed by Sir Ronald Wilson, a former High Court Judge, are entitled to respect, they were not opinions expressed by him in the exercise of the judicial power of the Commonwealth. Thus the findings of genocide were in no way binding on the Commonwealth, which was entitled to reject them if it considered them to be wrong.

In my view, no Australian Government of any political persuasion was likely to accept such a damning finding, especially when all the relevant issues had not been fully investigated, and when the Governments involved had not had the fullest opportunity to defend themselves against the accusations. The HREOC, it must be recalled, had conducted an inquiry, not a full-scale Royal Commission. It had neither the necessary investigative powers, nor the financial and human resources, to properly investigate the circumstances of, and the reasons for, each case of alleged forcible removal that was before it.[57] In the circumstances, the Commission was always going to be open to the response that its findings were flawed.[58] If the intention was to shame the Commonwealth Government into acting on the Commission's recommendations, that intention was not realized. As an exercise in the art of persuasion, it was counterproductive.

Although alleged breaches of the Genocide Convention were not actionable, as such, before an Australian court, the issue of genocide was nevertheless canvassed in the test cases instituted in the High Court by Kruger and Bray to which I earlier referred.[59] An important part of the argument in support of their claim that the *Aboriginals Ordinance 1918 (NT)* was invalid was that it was genocidal in intent and, as such, was beyond the constitutional powers of the Commonwealth under s. 122 of the *Constitution*. The Keating Government, although basically well-disposed towards reconciliation with, and justice for, Indigenous Australians, had nevertheless strongly defended the Government against these accusations[60].

In its decision handed down on 31 July, 1997, the High Court rejected the arguments on the grounds (amongst other things) that the Ordinance was not, on the face of it, genocidal in intent[61]. On the contrary, its intent was plainly beneficial. In the circumstances the Court did not need to address the question whether a law authorizing genocide would have been in excess of the Commonwealth's legislative powers under s.122 of the *Constitution*. However, as the Court was deciding no more than the constitutional issues that had been raised and, as it had heard no

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[57] Its budget was initially set at $1.3 million, later expanded to $1.8 million.

[58] The controversy over some of the major findings in *Bringing Them Home* soon became subsumed within the larger "History Wars" – the battle of ideas, assertions and conclusions about Aboriginal and non-Aboriginal history in Australia; *A Matter of Conscience, supra,* at 356-358.

[59] *Kruger v. The Commonwealth* and *Bray v. The Commonwealth* (1997)146 ALR 126.

[60] The Howard Government also strongly rejected the finding of genocide and of "gross violations of human rights": *Healing: A Legacy of Generations, at 8.6 to 8.9.*

[61] The Court also rejected the argument based on the International Convention dealing with Genocide, because the Convention did not come into force until 1951, more than 30 years after the Ordinance was promulgated in 1918.

evidence regarding the circumstances in which indigenous children were removed from their families, it left open the question as to how the Ordinance had been *administered.*

This issue was at least partially resolved, so far as the Northern Territory was concerned, in the Federal Court cases of *Lorna Cubillo v. The Commonwealth* and *Peter Gunner v. The Commonwealth*[62]. In these actions, instituted in 1996, the claimants sought damages for their alleged wrongful removal from their families under the *Aboriginals Ordinance 1918 (NT)* on the grounds (amongst other things) of gross violations of human rights, wrongful imprisonment and deprivation of liberty, breach of a statutory duty of care, negligence and breach of fiduciary duty of care. As earlier noted, these legal claims mirrored, in important respects, the grounds for reparations relied on by the HREOC in *Bringing Them Home.* However, it should be noted that this Report was neither tendered in evidence, nor referred to by Counsel during the hearings.[63]

Essentially, both actions failed because the applicants could not overcome the hurdles (i) of proving that they had been wrongfully removed from their families; (ii) of proving that the Commonwealth was legally liable for the trauma and abuse that they had suffered as a consequence of their removal and (iii) of satisfying the Court that it was appropriate to extend the time for the institution of proceedings against the Commonwealth. The trial Judge did not doubt that both applicants had suffered harm by reason of their removal, including having suffered assaults at the hands of those to whose care they had been committed. However, on technical legal grounds, his Honour held that the Commonwealth was not legally liable for these injuries [64] and that, in any event, the claims were statute barred. An appeal to the Full Court of the Federal Court was subsequently dismissed and, on 3 May, 2002, the High Court refused special leave to appeal against the Full Court decision.

One of the principal arguments relied on by the claimants was that the decisions as to their removal from their families were unlawful because they were not based on a proper consideration of the individual circumstances of each case, but rather on a general administrative policy of removing half-caste children from their families regardless of their circumstances. This general policy, it was said, was unlawful because it was intended to destroy the child's association with his or her mother, family and culture; to assimilate part-Aboriginal children into non-Aboriginal society; to provide domestic and manual labour for Europeans and to breed out "half-caste" Aboriginal people so as to protect the primacy of the Anglo-Saxon community.[65] These arguments, although not expressly alleging "cultural genocide", nevertheless mirrored, to a considerable extent, the Commission's findings as to the genocidal intention of the child removal policies.

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[62] (2000) 174 ALR97 – decisions delivered on 11 August, 2000.
[63] Ibid at 133-4.
[64] The Commonwealth was held not to be vicariously liable for the actions of the Director of Native Affairs (who exercised an independent discretion in deciding whether or not to remove a child from its family); nor was the Commonwealth directly or vicariously liable for the abuses committed by employees of the church missions into whose care the children had been entrusted.
[65] Ibid at 452-4.

O'Loughlin J rejected the arguments. So far as presently relevant, His Honour held that at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of all part-aboriginal children, irrespective of the personal circumstances of each child. On the contrary, His Honour found that the " number of (mixed-blood) children (in the Northern Territory) far exceeded the ability of the Commonwealth to implement such a policy of indiscriminate removal".[66]

His Honour pointed out that the Administrator of the Northern Territory had reported in 1951 that 42 children had been removed during the preceding two years; including 23 from a "full-blood aboriginal camp" and 12 at the request of the parent. Another witness had given evidence that, between 1946 and 1951, only 45 boys and 65 girls were institutionalised. This did not suggest, his Honour said, "a large-scale policy of forced removals"

Significantly, although his Honour found that the destruction of family and cultural associations may have been a *consequence* of post-war Commonwealth policy, he was satisfied that that was not its *intention*.[67] In the result, the decision failed to support the Commission's findings (at least so far as the Northern Territory was concerned) that Aboriginal protection laws and policies were genocidal in intent. [68].

By raising the issue of genocide, all that the Commission ultimately achieved, in my view, was to shift the focus of debate from the *consequences*, or the "effects", of removal, which was what it had been asked to consider[69], to the *intent* behind the laws, policies and practices of the past[70]. Even if one accepted that the Government's intent was benign, the consequences of separation had in far too many cases been quite devastating to the removed children, their families and communities. These consequences alone provided powerful justification for compensation.

As Sir Ronald Wilson later conceded[71]: -

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[66] Ibid at 203; cf. 196-8..
[67] Ibid at 453, 507.
[68] As to the position in NSW, historian Keith Windschuttle, in an article published in "*The Australian*" on 9 February, 2008, strongly disputes the claim by the HREOC, based on the research of Professor Peter Read, that large numbers of Indigenous children in NSW were removed from their families simply because they were "aboriginal". Out of 800 files that he inspected relating to the removal of Indigenous children in NSW, Windschuttle claims that only one showed the reason for removal as "Being an aboriginal". Two others, he said, had the single word "aboriginal".
[69] See the first Term of Reference and the request for the Commission to trace the "effects" of past laws, practices and policies.
[70] Sir Daryl Dawson, a former High Court Judge and close friend of Sir Ronald, later described this aspect of the Report as "an aberration on Ron's part". Sir William Deane, also a former High Court Judge, whilst supporting the report overall, expressed his surprise that Sir Ronald, who had always displayed a cautious judicial approach to labelling and language, would have used the term (genocide). *Sir Ronald Wilson, A Matter of Conscience, supra, at 342-3*
[71] *A Matter of Conscience, at 375.*

"No one challenges that dreadful consequences followed from these (removal) policies. Once you latch onto the term 'genocide' you're arguing about the intent and we should never have used it… "

(b) .Systematic Racial Discrimination

The Commission's findings on racial discrimination mirrored, to a large extent, its findings as to the failure of aboriginal protection laws, policies and practices to accord equality of treatment before the law to Indigenous children who were forcibly removed from their families. These laws, it said, "established a legal regime for those children and their families which was inferior to the regime which applied to non-Indigenous children and their families."[72] There was no requirement for a pre-removal court hearing so as to provide basic protection, and even if there had been, it would almost certainly have been ineffectual due to the cultural bias of the courts and the unavailability of legal aid at the time. The legislation, the Commission found, was racially discriminatory and contrary to the international prohibition on racial discrimination recognised since the establishment of the United Nations in 1945 and reaffirmed in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

The Commission was critical of the failure of the Commonwealth and State Governments to move quickly after 1945 to ensure that aboriginal protection laws were amended to eliminate racial discrimination. It should be noted, however, that the Commission had also found that the discriminatory laws were progressively repealed between 1954 and 1965.[73]

It is true that the Commonwealth could have changed the law in the Northern Territory at any time of its choosing.[74] However, its power to legislate nationally under the "external affairs " power[75] in order to implement the provisions of a convention, such as that on Racial Discrimination, as part of the domestic law of this country, was not clearly affirmed by the High Court until 1983 in the *Tasmanian Dam Case*[76]. Nevertheless, in 1975, the Commonwealth had enacted the *Racial Discrimination Act 1975,* the effect of which was to invalidate any State law inconsistent with its provisions[77]. By then, however, the State and Territory laws that provided discriminatory regimes for dealing with the removal of Indigenous children from their families had already been repealed and replaced.

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[72] *Bringing Them Home, at 266.*

[73] Ibid, at 269. Discriminatory legislation continued until 1954 in Western Australia, 1957 in Victoria, 1962 in South Australia, 1964 in the Northern Territory and 1965 in Queensland. The Commission claimed, however, that even after the discriminatory laws were repealed, welfare departments continued to implement the same discriminatory policies.

[74] The Commonwealth's power to make laws for the Government of any Territory under s.122 of the *Constitution* is not subject to the same limitations as is its power to make laws for the peace order and good government of the Commonwealth under s.51.

[75] Section 51 (xxix) of the *Constitution*.

[76] *The Commonwealth v. Tasmania (1983) 158 CLR 1.* Sir Ronald Wilson, one of the 3 dissenting Judges, held that the Commonwealth lacked the power to pass a law implementing a treaty, the subject matter of which was not truly international.

[77] See s.109 of the *Constitution.* See *Mabo v. Queensland (No.1) (1988) 166CLR 186.*

Importantly, the Commission found that the welfare laws targeted the poverty and homelessness of Indigenous peoples as grounds for removal of a child from its family. At best, the Commission said, these laws were "unfair and unconscionable in light of the history of colonial dispossession, segregation and control. Most Indigenous families had been forced into poverty, dependence on handouts and inadequate housing. They were then expected to attain standards of living which were effectively denied to them."[78] Quite apart from any alleged breaches of international law, these considerations were, in my view, all relevant to the question of compensation.

In conclusion, on this aspect of its Inquiry, the Commission found that, as a consequence of these breaches of international law, Indigenous children forcibly removed from their families had been victims of "gross violations of human rights". The Commonwealth strongly rejected these findings and, as earlier noted, refused to accept that it was under any obligation to pay individual compensation unless legal liability was established through "a proper process of claim assessment"[79].

The Bruce Trevorrow Case

There has, thus far, been only one successful action for damages against a State or the Commonwealth for the wrongful removal of an Indigenous child from its parents. On 1 August, 2008, in the Supreme Court of South Australia, Bruce Trevorrow was awarded substantial damages against the State of South Australia for wrongful deprivation of liberty as a consequence of his *unlawful* removal from his family. The trial Judge (Gray J) found that the relevant Government agencies had been guilty of deception and deliberate abuse of administrative power by placing Trevorrow, as a child, in foster care without the knowledge or consent of his parents. Thus, the decision stands as an exception to the finding by the HREOC that the majority of aboriginal children were *lawfully* removed from their families.

On 25 December, 1957, the plaintiff's father, Joseph, who lived with his de facto wife Thora and their children in Meningie, south of Tailem Bend in S.A., arranged to have his infant son Bruce, aged 13 months, taken to the Adelaide Children's Hospital for medical treatment for a stomach upset. Unbeknown to his parents, the child quickly recovered and, by 6 January, 1958, was well enough to be discharged. However, instead of returning Bruce to his parents, representatives of the Aborigines Protection Board (APB) and the Aborigines Department arranged, without lawful authority and without the knowledge or consent of the parents, to place Bruce in foster care where he remained for nearly 10 years. At no stage was the mother informed that the APB had formed the view that she was not a fit and proper person to care for her child or that, as a consequence, Bruce had been placed with a foster family.

[78] *Bringing Them Home, at 266-7.*
[79] *Healing: A Legacy of Generations,* at 8.5 to 8.18

Despite repeated enquiries about her child, it was not until 1967, that Bruce was finally returned to live with his mother and siblings, his father having since died. However, after 14 months, his mother could no longer cope with his serious behavioural problems. She requested the APB to have him admitted to an institution for care.

The Court found that, as a consequence of his separation from his natural family, the plaintiff had suffered a troubled childhood and adolescence, and had struggled throughout his adult life with ongoing and serious depression. Compared to his siblings, who had spent their early lives at home with their parents, his Honour found that the plaintiff had been left scarred for life by his experiences.

His Honour held that the State was liable for the actions of the APB and departmental officers who had arranged his placement in foster care; that the State was in breach of the duty of care it owed the plaintiff; that the plaintiff was falsely imprisoned and had been the victim of abuse of power. Notwithstanding that the relevant causes of action had arisen over 40 years previously, his Honour was also satisfied, despite the strong opposition of the State Government, that he should exercise his discretion to extend the time for institution of legal proceedings. He awarded the plaintiff $525,000 in damages, plus substantial interest and costs.

The Government launched an appeal against the decision in order, it said, to clarify its legal position in relation to other pending actions. At the same time, the Government has said that, no matter what the outcome of the appeal, the plaintiff will be able to retain the damages, interest and costs that had been awarded.[80] The future of this appeal may now be in doubt, as Mr Trevorrow died on 20 June, 2008.[81]

The Trevorrow decision is obviously important, but it is not typical of most cases where aboriginal children were *lawfully* removed from their families. It may well not be an isolated case, but neither should it, in my view, be regarded as the norm. Thus, contrary to some recent claims, I see no basis on which it should be regarded as setting the benchmark for the majority of cases in which removal was authorised by law[82].

There have been newspaper reports that up to 40 indigenous Australians are preparing compensation claims against the Victorian Government[83]. In addition, lawyers in Perth are said to be considering legal action in some 600 cases of alleged forcible removal of aboriginal children in Western Australia. I am unaware of the current status of any of these claims.

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[80] On 28 February, 2008, the South Australian Attorney-General announced the appeal. See; -- www.ministers.sa.gov.au/news.php?id=2838&print=1. The decision to allow the plaintiff to retain the damages awarded, even if the Government wins the appeal, is unusual and may have repercussions in the event of any future claims for damages in South Australia that succeed at trial, but are then subject to appeal.

[81] Reported in *The Weekend Australian,* 21-22 June, 2008.

[82] See Senate Committee Report on the Stolen Generation Compensation Bill 2008; paras 3.50 to 3.53; cf. 3.25.

[83] Melbourne "Herald-Sun", 15 February, 2008

In my view, however, the prospects of any significant numbers of Indigenous people succeeding in recovering damages before a court of law, on the grounds that they were unlawfully removed from their families, are extremely remote. Moreover, those who suffered under the practices of the past are aging fast. Time is not on their side. That is why I believe that an alternative approach to the issue of the justification for compensation is imperative.

Recent developments

In the absence of any response by the Commonwealth to demands for leadership in establishing a national compensation scheme, three of the States have acted independently to establish limited schemes to compensate at least some members of the Stolen Generations.

Tasmania

Despite initially refusing to consider payment of compensation, Tasmania is the first, and thus far the only, State to introduce a limited scheme for individual compensation for members of the Stolen Generations. Under the *Stolen Generations Aboriginal Children Act 2006,* which came into operation on 15 January, 2007, the Tasmanian Parliament established a fund of $5million to be made available by way of ex gratia payments for eligible members of the stolen generations in that State or, where an eligible claimant was deceased, for their children. Ex gratia payments, of course, are act of grace payments made without any admission of legal liability.

To be eligible for an ex gratia payment under s.5 (1) of the Act, the applicant had to be an aboriginal (or the biological child of a deceased aboriginal), who had been admitted as a ward of State under Child Welfare legislation; had remained as such for a continuous period of 12 months or more; and had not been in the care of an Aboriginal family during that period.

The applicant also had to be a person who, when under the age of 18 years, was removed from his or her family during the period from 1 January 1935 to 31 December 1975 and who was removed from his or her family by the active intervention of a State Agency, either without the approval of a parent or guardian of the applicant or under duress or undue influence.

151 applications were received. Of these, 45 claims were rejected, whilst 106 applicants were found to be eligible for payment. 84 eligible living members of the Stolen Generations each received $58,333.33. The remaining 22 successful applicants, who were the children of deceased members of the Stolen Generations, received either $5,000 or $4,000 each, depending on the number of people in the family group[84].

The Tasmanian activist and lawyer Michael Mansell is reported as saying that many of Tasmania's 8000 indigenous inhabitants had accepted that they were not eligible for compensation under the scheme, even though they were removed from their families as children.

[84] Senate Committee Report, Stolen Generation Compensation Bill 2008, paras. 2.23, 2.24.

If this is correct, it may be that the Tasmanian scheme will not have resolved all issues as to compensation in that State.

Queensland

The need for a more compassionate, less legalistic, approach to cases of child abuse has recently been recognized by the States of Queensland and Western Australia, both of which have established Redress schemes to provide limited compensation to those people (whether Indigenous or non-Indigenous) who suffered abuse as children in institutions to which they were committed. This is a lead that, at the very least, the Commonwealth should follow in relation to Indigenous children placed in institutional or foster care during the Commonwealth's administration of the Northern Territory

On 31 May, 2007, the Queensland Government announced that it was establishing a Redress Scheme (with funding up to $100 million) to provide ex gratia payments of between $7,000 (minimum) and $40,000 (maximum) to eligible people who experienced abuse or neglect as children in specified Queensland institutions (but not in foster care). The level of any payment beyond the base level of $7,000 will depend on an independent assessment of the severity of the abuse or neglect.

This scheme was established in response to the Report of the Forde Inquiry (2002) appointed by the Queensland Government to enquire into allegations of abuse of children in State institutions. Eligible applicants include those who were placed in detention centres or licenced institutions in Queensland, and had been released from care and had turned 18 on or before 31 December, 1999. It does not apply to children placed in foster care. Unlike Tasmania, the Queensland scheme does not provide compensation for members of the Stolen Generations, as such. However it is evidently broad enough to include members of the Stolen Generations who suffered abuse whilst in institutional care in Queensland.[85]

The time for lodgement of applications for compensation began on 1 October, 2007, and closed on 30 June, 2008. It is estimated that approximately 6,000 people may be eligible to claim payments under the scheme. The receipt of any such payment is subject to the execution of a Deed of Release releasing the Government from all other claims.

Western Australia

On 17 December, 2007, the West Australia Government announced a scheme, called "Redress WA",.with funding of up to $114 million, to provide compensation for both indigenous and non-indigenous West Australians who, as children, were abused while in the care of the State

[85] Ibid, para 2.26.

of Western Australia. The scheme covers Stolen Generations members who were abused while in care.[86] Applications for redress opened on 1 May, 2008 and close on 30 April, 2009.

Eligible individuals can apply for an *ex gratia* redress payment of up to $10,000 if they show they experienced abuse while in State care, or up to a maximum of $80 000 where there is medical or psychological evidence of loss or injury as a result of that abuse. The amount of the *ex gratia* payment will depend on the severity and impact of the abuse suffered. Assessors will review all applications and, where the claim is successful, will determine the level of payment. Like the Queensland Scheme, eligible applicants must execute a Deed of Release before they can receive an ex gratia payment.

Other States and Territories

So far as I am aware, none of the remaining States of NSW, Victoria and South Australia proposes, at this stage, to establish a compensation fund. As neither the Northern Territory nor the Australian Capital Territory had self-government at the relevant times, there is no suggestion that either Territory Government should pay compensation to the "Stolen Generations".

The Commonwealth

(i) Stolen Generations Compensation Bill 2008

Private Member's Bill - Senator Andrew Bartlett (Australian Democrats Party)

In the absence of any action by either of the major political parties to establish a national compensation scheme, Senator Andrew Bartlett, introduced into the Senate on 14 February, 2008, a Private Member's Bill entitled the *Stolen Generation Compensation Bill 2008*, which sought to establish a national scheme for the making of ex gratia payments to members of the Stolen Generations[87]. The Bill, as drafted, had many inadequacies.[88] Not the least of these was that the definition of members of the "stolen generations" was so broad as to entitle any Aboriginal or Torres Strait Islander to compensation under the Bill if he or she had been *subject to* a law that "permitted forcible removal of children from their families". It was not necessary to prove actual removal. This was plainly far too broad a definition; it did not, in my view, address the special needs of members of the Stolen Generations. However, it is unnecessary to pursue this issue, as the Senate Standing Committee on Legal and Constitutional Affairs, to which the Bill was referred for inquiry and report, recommended that the Bill should not proceed.[89]

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[86] Extract from letter dated 21 April, 2008, from the Premier of Western Australia to the Senate Inquiry into the Stolen Generation Compensation Bill 2008. Submission No. 81.

[87] Senator Bartlett's term of office as a Senator came to an end on 30 June, 2008.

[88] *Senate Inquiry into the Stolen Generation Compensation Bill 2008* , para. 3.3; cf 3.125. .See Submission No.85 in which I expressed the view that the Bill was so poorly drafted that it would require substantial amendment before it could be enacted.

[89] Ibid, para. 3.125

The Committee was of the view that "a holistic nationally consistent approach is the most appropriate means of addressing the specific needs of members of the stolen generation and of actively promoting an effective model of healing. "[90]. It also concluded that the issue of reparations needed to be addressed "as a matter of urgency" and recommended that the Government establish mechanisms to facilitate the implementation of the outstanding recommendations of *Bringing Them Home.* Time was running out, it said, to recompense the increasingly elderly members of the stolen generations.[91]

In a section of the Report entitled "Legal and moral rationales for compensation,"[92] the Committee outlined some of the arguments placed before it as to the legal, social and moral obligations to provide compensation. Some groups had emphasised the right to reparation for abuses of human rights as a "recognised principle in international law,"[93] Others argued that reparation and compensation is a "humanitarian and moral obligation" requiring compassionate recognition of "the seriousness of the hurt and harm as a common experience".[94] Yet others continue to press the genocide argument, notwithstanding that both the Howard and the Rudd Governments have firmly refused to accept it and that the cases thus far decided have given the argument no support. Thus, for example, some claim that compensation is justified because the "intent of the legislation was to remove cultural identity";[95] others because the "attempted destruction of Indigenous peoples was far more systematic, long lasting and cruel than any other committed against people in Australia's history, and these acts were committed against Indigenous people by the authority of government."[96] These submissions reveal the deep sense of injustice still felt by many Indigenous people as a consequence of policies condemned by them as discriminatory and unjust.

(b) Stolen Generations Reparations Tribunal 2008

Private Member's Bill - Senator Rachel Siewert (Australian Greens Party)

One of the compensation models considered by the Senate Committee was a scheme proposed jointly by the Public Interest Advocacy Centre (PIAC) and the Australian Human Rights Centre (AHRC), which built on the model that PIAC had placed before the earlier Senate Committee that had inquired into the implementation of *Bringing Them Home* in 2000.[97]. This proposal has now been picked up by Senator Rachel Siewert who, on 24 September 2008, introduced the *Stolen Generations Reparations Tribunal Bill 2008* into the Senate.

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[90] Ibid, *para. 3.122*
[91] Ibid, para. 3.127. There were two other recommendations that I do not need to pursue at present as they do not relate directly to the issue of individual compensation.
[92] Ibid, paras.2.5 to 3.21.
[93] For example, the submissions from the Australian Lawyers Alliance and the Sydney Centre for International Law. Ibid, paras 3.6 to 3.3.12.
[94] Ibid, Paras3.14
[95] Ibid, para 2.15
[96] Ibid, para.3.20.
[97] *Healing: A Legacy of Generations, November, 2000, at paras 8.49 to 8.70.*

The new Bill provides for the establishment of a Stolen Generations Reparations Tribunal which, if the Bill is enacted by Parliament, will have a much broader basis for reparations than the Compensation Tribunal proposed by Senator Bartlett. As a basic recognition of the fact of removal, the Tribunal may award a "common experience" ex gratia payment of $20,000 plus $3,000 for each year that a child was separated from its family under the age of 18 years (s.29). In addition, the Tribunal has wide-ranging powers to award reparations, including monetary compensation for claimants "who prove that they suffered particular types of harm, such as physical or sexual assault"(s.28(4)). This compensation is in addition to any ex gratia payment and is not subject to any statutory limit as to amount. Wide ranging powers are also provided to the Tribunal to award reparations that will enable a more "holistic" approach to addressing the needs of individuals, families and communities affected by child removal practices of the past. These include a controversial requirement to have regard to the so-called "van Boven " principles for the making of reparations for victims of "gross violations of human rights"[98].

The persons eligible to seek reparations under the Bill include not only an Indigenous person who was removed from his or her family as a child but also, where that person has died, the living descendants of that person, and members of Indigenous communities that suffered detriment as a consequence of such removals (s.30). If the Tribunal is satisfied that the removal of a child was in his or her "best interests", the Bill would appear to allow the making of a "common experience" ex gratia payment in such cases, but not reparations (s.30 (2).

I acknowledge that this brief outline does not do justice to the extensive provisions of the Bill. However, for present purposes, I do not need to pursue the detail further, as it is clear, in my view, that the Bill will not be passed without Government support. If that occurs, it will be a cruel outcome indeed, as the Senate Committee Inquiry into Senator Bartlett's Bill, and the new Bill recently introduced by Senator Siewert, have doubtless stirred renewed hopes of compensation on the part of members of the Stolen Generations. In these circumstances, I return to the question with which I started, namely; –what are the "principles relevant to determining the justification for compensation" which the HREOC could, and in my view should, have identified having regard to the evidence and other material available to it in its Report?

Principles relevant to the Justification for compensation

At the outset, I suggest there needs to be greater recognition of the fact that it was not mandatory for the Commonwealth or any of the State Governments to accept the Commission's recommendations[99]. Whilst many members of the Stolen Generations may be disappointed and upset at the failure of Australian Governments to implement all the Commission's

[98] The HREOC put forward a similar proposal in *Bringing Them Home; cf. Healing: A Legacy of Generations. Paras. 8.1 to 8.48.* The former Howard Government disputed the relevance of these principles because they were no more than "draft principles" that had no formal status in international law. Moreover, the Commonwealth rejected the claims of genocide and did not concede that any "gross violations of human rights" had occurred.
[99] Cf. *Healing: A Legacy of Generations, at 1.31*

recommendations on reparations, the fact is that the grounds, or the "principles", relied on by the HREOC failed to persuade either the former Howard Government or the new Rudd Government that payment of individual compensation is justified. In these circumstances, little is to be gained, in my view, by reiterating a demand for implementation of recommendations that were based on legal grounds that have been rejected by the previous and the present Government and, in key respects, by the courts.

Having found that the forcible removal of Indigenous children from their families was "usually authorized by law", I believe that, instead of trying to get around this finding by resort to contentious, and ultimately unsustainable, legal arguments, the Commission should have acknowledged, at the outset, that the inescapable consequence of this finding was that, where the removal of a child from its family was so authorized, no actionable legal "wrong" was committed[100]. This would have obliged the Commission to examine more closely the "principles" or "considerations" relevant, in its view, to determining the justification for payment of compensation in respect of the forcible removal of a child notwithstanding that, in most cases, Governments were under no legal liability to do so.

The starting point in this exercise, in my view, is to recognise that Governments have an entrenched reluctance towards paying compensation in respect of an action that was lawful at the time it was done. The policy implications of so doing are obvious. Once a Government starts down this track, the floodgates for claims from people allegedly harmed by governmental actions lawfully done in the past may be opened up[101].

There were, however, powerful countervailing "principles", or considerations, of social justice and human rights that emerged from the Commission's Report on which it could have based its recommendations had it been so minded. Unfortunately, in my view, these principles became lost in the findings of legal "wrongs' on which the Commission ultimately based its recommendations.. Some of those principles are as follows:-

1. The laws under which aboriginal children were forcibly separated from their families were racially discriminatory, paternalistic and unfair because they denied to aborigines the same basic rights and protections as were accorded to the non-indigenous community under child welfare legislation. In most jurisdictions, Indigenous children could be removed from their families and confined in institutions, based on an administrative decision, without the safeguard of judicial scrutiny. There was no need to prove neglect in a court of law before a child could be removed[102].

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[100] The only case in which abuse of power has thus far been established is that of Bruce Trevorrow. The many cases of alleged physical, sexual and psychological abuse disclosed in *Bringing Them Home* raise different considerations to which I will shortly refer.

[101] Compare the former Government's treatment of would-be asylum seekers who were "lawfully" imprisoned in isolated Australian or foreign detention centres in breach of Australia's obligations under international law on the treatment of refugees. Are they entitled to compensation for the harm inflicted as a consequence of their "lawful" confinement?

[102] The HRC Report found that, many children were removed for no better reason than that they were aboriginal (at 252-3) This finding was not supported by the evidence presented in the Cubillo and Gunner cases. Historian Keith

2. Aborigines had no say whatever in the formulation of the laws, policies and practices that were applied to them. They lacked any political power, being for the most part denied the right to vote, being disregarded as part of the Australian population for census purposes, and being treated as persons of such inferior education and mental capacity as to be incapable of participating in the normal democratic processes of government.

3. Where children were seen as "neglected", they were usually judged according to non-indigenous middle class standards with which their aboriginal parents, through imposed poverty and discrimination, had little hope of complying. Having been driven off their tribal lands; having been denied access to adequate housing, health services, employment opportunities and wages; having been subjected to racial discrimination and prejudice; and having been marginalised in Australian society, aborigines were condemned for not living up to the standards of the non-indigenous society from which they had effectively been excluded[103].

4. Where children were "lawfully" removed, that removal often occurred in circumstances that were cruel or inhuman, inflicting unnecessary pain, grief or other trauma on the removed child, his or her parents and wider family and community. There was a failure to recognize the serious impact upon Indigenous children of their separation from the indigenous environment in which they had grown up and of their placement in the alien, often unloving, environment of institutionalized care in non-Indigenous society.

5. Once removed from their families, indigenous children were discouraged from making family contact and were taught to reject their aboriginality. The consequences for these children and for their families and communities were frequently devastating and lasting. The effects of removal, as such, included loss of parental love and affection; loss of aboriginal culture, language, lore and traditions; loss of parenting skills; loss of native title land rights and, in many cases, lasting psychiatric and psychological damage[104].

6. From the perspective of those aborigines removed in childhood, the laws, policies and practices of governments around Australia were based on the grossly unfair premises that there was nothing of value in aboriginal culture and traditions; that aboriginality was a cause for shame; and that aboriginal mothers and their children were somehow different from non-Indigenous parents and their children, and would quickly forget each other once separated.

7. Children placed in institutional or foster care were frequently subjected to harsh treatment, including serious physical, sexual, psychological and other abuse or neglect, with lasting deleterious effects upon their health and wellbeing. Such abuse compounded the trauma of their separation.

Windschuttle claims that the finding was based on research conducted by Professor Read in relation to child removals in NSW, and that this research has since been shown to be erroneous. See *The Australian*, 25 May, 2008 "Don't let facts spoil the day".

[103] *Bringing Them Home, at 266-7.*
[104] Ibid at 265, 278.

8. In contrast to the act of removing a child from its family (which was usually authorised by law), many of these assaults undoubtedly constituted criminal offences or were otherwise actionable at law, at the time. Typically, however, complaints were ignored, or worse, were seen as a cause for punishment. Not infrequently, the only avenue for redress was by making a complaint to the person responsible for the abuse.

9. Moreover, because of poor education, lack of understanding of the legal system, the absence of legal aid, the entrenched prejudice against aborigines, the belief that they were congenital liars and, in the case of aboriginal girls, sexually promiscuous, aboriginal children who were victims of crime had virtually no prospect of themselves securing redress for wrongs committed against them. As the most politically, economically and socially deprived group in the Australian community, aborigines were powerless to seek redress for these injustices.

10. Many aborigines, who suffered serious abuse in their childhood and adolescent years, continue to suffer the consequences of that abuse. It is unreasonable, at this late stage, to expect them to seek redress through the courts for crimes or actionable wrongs committed so long ago, and to expect them to endure the trauma and stress of reliving their experiences, with little (if any) prospect of success.

11. Children forcibly removed from their families were frequently exploited by their carers or employers and treated as slave labor, without proper wages or working conditions.

12. All these abuses occurred under a legislative scheme intended to be beneficial and to provide for the care and protection of aboriginal children who were thought to be at risk if left in their tribal environment. Yet, in many cases, the abuses to which children were subjected whilst in care were far worse than anything that they were likely to have experienced if left with their families.

13. In the Northern Territory, for example, the Commonwealth was content to utilize the services of under-funded, inadequate church institutions in order to house and educate children separated from their families. In those circumstances, the Government should not walk away from the consequences of removal, hiding behind technical legal defences, denying responsibility for the actions of Government officials exercising independent statutory discretionary powers[105]. or blaming the church-based institutions to whose care the children were entrusted.

14. It is a matter of national shame that such abuses occurred as a consequence of the Government's intervention in the lives of those children, ostensibly for their benefit.

The "principles" that I have attempted to enunciate are based, for the most part, on findings contained in the Commission's Report. They do not purport to be exhaustive. There may

[105] In the *Cubillo and Gunner* cases, the Commonwealth was found not to be legally liable for the actions of the Director of Aboriginal Affairs or of the missions in whose care the claimants had been placed

well be others. However. I have long believed that the formulation of "principles" along these lines may have facilitated a much prompter national apology. Moreover, by clearly identifying the different policy issues arising in cases of forcible removal, as such, where the removal was "usually authorised by law", and thus did not give rise to any action for damages, as opposed to cases of physical and sexual abuse, which constituted crimes or actionable wrongs, the groundwork for a clearer analysis of the issue of compensation would have been more securely laid. As Senators Payne and Coonan said in their Dissenting Report in the Senate Inquiry in 2000 into the Implementation of *Bringing Them Home*, [106] the HREOC Report "fails to provide clear guidance to policy makers both in terms of the problem to be addressed and the policy responses it considers would be appropriate".

The basic problem to be addressed, in my view, emerged very clearly from the Commission's Report. If, as Governments around Australia maintained, and as the High Court later found, the underlying policy or intention of aboriginal protection laws was beneficial, how did it happen that the effects of forcible removal were so often detrimenatal, devastating and lasting, both for the child removed and for his or her family and community? This is not to deny, as the Report itself acknowledged, [107] that there were children who benefited by receiving loving care and attention, a good education and who made a success of their lives in the wider community. But even in these cases, assimilation usually came at the price of losing contact with the child's aboriginal family, culture, language and traditions.

The policy response of the former Howard Government was to refuse to pay individual compensation, whilst at the same time emphasising its policy of practical assistance for members of the Stolen Generations[108]. It considered that it was more important to provide practical measures, rather than to provide monetary compensation to those affected by the policies of forced seaparation. The practical measures put in place included facilities for family reunions, indigenous family support and parenting programs, indigenous culture and language maintenance programs and health and counselling services to assist those affected by past policies and those going through the reunion process,. The former Government committed almost $117million to these projects prior to its defeat at the last elections. The Rudd Government has added a further $15.7 million to support these services. Thus, up to date, the Commonwealth has committed approximately $133 million to general reparations for members of the Stolen Generations.

In my view, despite the criticisms levelled against the response of the Howard Government (with most of which I agreed), these measures should be acknowledged as addressing some at least of the adverse consequences of forcible removal. The question remains whether the measures go far enough and, in particular, whether individual compensation is also justified.

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[106] *Dissenting Report of Government Senators to the Inquiry into the Stolen Generation, November,2000* at para. 3.1
[107] *Bringing Them Home* at pp169-170
[108] Senate Committee Report on the Stolen Generation Compensation Bill 2008, para 2.9.

The latter question undoubtedly gives rise to difficult policy issues, given that, in most cases, there is no legal liability on the part of Government to pay such compensation. However, Tasmania has shown that it is possible, without cataclysmic consequences, to provide a scheme for compensation that does acknowledge the moral obligation of Government to make at least a symbolic gesture of reconciliation through a scheme of ex gratia payments.

Whilst the approach taken by the Queensland and Western Australian Governments has been more limited, its importance for present purposes lies in the clear acknowledgement that physical or sexual abuse of children in institutional care is simply not acceptable and should be subject to appropriate redress by the Governments responsible for placing the children in an institution where they were subjected to abuse. The leadership shown by these States should not be ignored by the Commonwealth Government.

Conclusion

The measures of "general reparations" put in place by the Howard Government (and continued by the Rudd Government) in response to the HREOC recommendations were, in my view, appropriate, although questions remain whether they went far enough or have achieved their intended purpose. By contrast, the response of the Howard Government to the Commission's recommendations on individual compensation for members of the Stolen Generations was, in my view, far too legalistic,

The Government knew full well that the vast majority of members of the Stolen Generations would have little, if any, prospect of successfully suing for damages in respect of actions that had occurred so long ago and that were mostly authorized by law[109]. Moreover, those who suffered physical and sexual abuse as children at the hands of their "carers" had virtually no prospect, at the time these offences were committed, of obtaining redress against either the perpetrators of that abuse, or their employers. The long lapse of time since these events occurred has effectively washed these causes of action away. The Government also knew that it held the whip hand in any litigation against it. It had far greater resources available to defend itself than did the plaintiffs to substantiate their claims. Moreover, it had the Statute of Limitations to rely on. In these circumstances, it was, in my view, unreasonable and callous to expect Indigenous people who had been so traumatized by the events of their childhood to relive their experiences in the mostly vain hope of securing legal redress through the courts.

It is disappointing that the Rudd Government, which professes a strong commitment to social justice, has not been prepared, thus far, to respond in a manner that is in keeping with the Prime Minister's moving apology in Parliament on 13 February, 2008. In offering an unconditional apology, the Prime Minister spoke quite correctly of the need "to remove a great stain from the nation's soul". He then continued (in part): -

[109] The Trevorrow Case is the only case, thus far, in which unlawful removal has been established.

"We apologise for the hurt, the pain and suffering we, the parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied. We offer this apology to the mothers, the fathers, the brothers, the sisters, the families and the communities whose lives were ripped apart by the actions of successive governments under successive parliaments."

In making this apology, the Prime Minister was not admitting legal liability for the damaging effects of child separation. What he was acknowledging, however, was the failure in so many cases of the "beneficial" policy said to underpin the former aboriginal protection laws that were imposed by Parliaments on Indigenous people around Australia. Given the devastating consequences of that failure on so many lives, Governments, in my view, have a moral responsibility to respond compassionately in order to redress those consequences, as far as possible, and to enable those affected to feel some sense of closure in respect of this sorry chapter in our national history. As a nation, we need to be reconciled with those first Australians who as a consequence of earlier laws, policies and practices, that were said to be for their benefit, suffered so much trauma and pain.

Up to date, consideration of the issue of compensation by the Commonwealth Government has been dominated by legal arguments that have obscured the underlying policy issues. That is why, in my view, the Rudd Government needs to put these legal arguments aside and focus instead on the broader considerations of national conscience, social justice, decency, fairness and compassion that *Bringing Them Home* so clearly exposed. These are the very principles that Kevin Rudd invoked so eloquently in his moving national apology. They are epitomized in our national ethos of a "fair go' for all Australians.

If, as a matter of principle, the Rudd Government were to accept that there are "principles" of social justice to be found in *Bringing Them Home* that justify the payment of compensation to members of the Stolen Generations, there are a number of models available to the Government as to how best to respond. There is, of course, the Private Member's Bill introduced into the Senate by Senator Siewert. However, that Bill is built, in large part, on the van Boven principles for reparations in respect of "gross violations of human rights" – principles, the status and relevance of which both the Howard and Rudd Governments have previously refused to acknowledge. If this Bill is not supported, the Rudd Government should, I suggest, look more closely at the initiatives taken by the Tasmanian, Queensland and Western Australian Governments.

In my view, there is a need for a national response to the issue of compensation, not the current fragmented and piecemeal approach taken by individual States. There is a strong case, in my view, for a "common experience" payment as a symbolic acknowledgement of the failure, in many cases, of the "beneficial" policy said to underpin Indigenous child removal laws and policies of the past and as symbolic redress for the pain and trauma of separation. However, whatever else may be done, it is way past time, in my view, for the Commonwealth, and the State Governments that have not already done so, to compensate those Indigenous people who, having suffered the trauma and anguish of being forcibly removed from their families as children, then

had that trauma and anguish compounded by the physical and sexual assaults to which they were subjected at the hands of their "carers".

There were far too many harrowing stories of such abuse recounted in *Bringing Them Home*, reflecting similar experiences suffered by Indigenous children all around Australia. One story, that has seared itself into my mind, is that of a young aboriginal girl who had been committed to the Cootamundra Girls' Home in New South Wales in the 1940s[110] : -

"I've seen girls naked, strapped to chairs and whipped. We've all been through the locking up period, locked in dark rooms. I had a problem of fainting when I was growing up and I got belted every time I fainted and this is belted, not just on the hands or nothing. I've seen my sister dragged by the hair into those block rooms and belted because she's trying to protect me ... How could this be for my own good? Please tell me**."**

That anguished plea needs, in my view, to be answered compassionately before it is too late.

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Allan N Hall AM LL.B - December, 2008*
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[110] *Bringing Them Home, Chapter 13* at 161. Confidential evidence 8.