PAY UP NOW

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I Compensation for the Stolen Generations in Australia

It has been 10 years since the *Bringing Them Home* Report was published.[1] Among other things, the Report called for an official apology and for compensation to be paid to those ripped from their families. It was a horrible social disaster that cost so much for so many.

Since the Report's publication, apologies have been given by each of the State and Territory Parliaments. Only one State, Tasmania, has paid compensation.[2] John Howard, in power federally since the Report was completed, has refused to apologise for the harm caused to Aboriginal children and their families by officials acting with state-backed authority. His refusal to condemn the racist policy of removing Aboriginal children implies that he and his Government cannot see anything to condemn or feel sorry for.

Governments that have apologised recognise that the taking of the children was a racist, social disaster of ethnic cleansing. It was attempted genocide. An apology serves as a moral statement recognising the wrongfulness of wholesale Aboriginal child removals – apologies made so far by Australian governments mark an official end to that policy. To apologise offers healing to those who have suffered, and acts as a genuine gesture of regret.

The *Bringing Them Home* Report's author, Sir Ronald Wilson, died before he saw a Prime Minister either apologise on behalf of the nation or compensate the believed 10 000 or more children taken. The failure of the major parties to give compensation the high priority it deserves means many of the children taken will never see compensation in their lifetimes. It is a travesty of justice.

Attempts to get national compensation remain disorganised and sporadic. Ten years after the *Bringing Them Home* Report, only the Tasmanian Government has paid compensation.[3] There has been only one successful case of litigation, the South Australian case of *Trevorrow v South Australia (No 5)*.[4] The New South Wales Victims Compensation Tribunal awarded $35 000 to Mrs Valerie Linow, a member of the Stolen Generations. That award was not, however, for being taken but for being abused while in care.[5] We know that many of the seventy Aborigines whose claims were considered for an ex gratia payment for the abuse they suffered while in State care in Tasmania were members of the Stolen Generations, but again those payments were made for demonstrated abuse, not for the fact of their initial removal.[6]

In *Trevorrow*, the South Australian Supreme Court ruled that the State owed a duty of care to the plaintiff Bruce Trevorrow at the time of his removal, fostering and subsequent return to his natural family. The State breached its duty of care to the plaintiff with the result that, as a child, Bruce Trevorrow was falsely imprisoned. This decision opens up further possible legal actions against State and Federal Governments for removing Aboriginal children.

The legal avenue for compensation had taken a nasty turn earlier in the case of *Cubillo v Commonwealth*,[7] in which the Federal Court rejected the compensation claims of Lorna Gunner and Peter Cubillo. It was the same result in the New South Wales case of *Williams v The Minister, Aboriginal Land Rights Act 1983 (No 2)*.[8] In *Kruger v Commonwealth*,[9] the High Court also ruled against the plaintiffs, holding that laws based on the standards of the past cannot be overruled by application of the standards of today. Brennan CJ stated:

> Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention. Therefore, it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken.[10]

This is a patent nonsense. Before *Mabo v Queensland (No 2)*,[11] established Australian law relating to dispossession of Aboriginal lands had, for two centuries, taken the view that Australia was peacefully settled; that title to the whole country legitimately belonged to the Crown because Australia was *terra nullius* when the whites came. However, in *Mabo (No 2)* the High Court rightly rejected the racist legal fiction of *terra nullius* used by Australian courts and governments to justify the theft of Aboriginal lands. The Court overturned this racist legal fiction by applying a more realistic account of historical facts that brought Australian law into the 20th century.

In doing so, the Court in *Mabo (No 2)* did not simply impose contemporary standards on past generations. The wrongfulness of European powers killing Indigenous peoples and taking their lands has been debated for centuries. Indeed, the whole question of racism – slavery is an example – has in the past had wars fought over it and brought nations to heel.

In the same way, notions of racial superiority, inherent in the removal of the Stolen Generations, were equally evident in the invasion of Australia by whites and in the original provisions of the Australian Constitution that excluded Chinese people and Aborigines. The very aim of the past removal of Aboriginal children, assimilation, is the same as the aim motivating current policies directed at assimilation. Which so-called contemporary standard, then, was the High Court in *Kruger* applying against which era?

To now argue that compensating Aboriginal people for suffering under past racist acts cannot be challenged is at odds with *Mabo (No 2)* and stinks of convenience. In tune with the extreme conservative thinking of John Howard, the 'wise monkeys' approach by the judges in *Kruger* reflects their eagerness to wash their hands of any responsibility for the consequences of legalised genocide. In doing so, they implicitly condone the removals.

In an environment where social policy is subordinated to the drive for economic prosperity and full employment, it is hard to get social and moral issues heard. It is even harder when some of our own promote the view that it is a waste of time dealing with dispossession or Stolen Generations compensation.

Noel Pearson is a prime culprit. With use of language that even the best academics find unnecessarily pompous, it is plain his rantings are aimed at a white audience. His message – that white Australia is not responsible for dispossession and all its consequences – is a poor attempt at giving expiation without burden. Absolving white Australia of responsibility for rectifying the damage whites caused is calculated to attract a personal following among those that feel enough has been done – the conservative, intolerant sections of Australian society. No wonder John Howard likes him.

Increasingly there is a trend to blame the victim and cleanse white society of any responsibility. The trend makes it much harder to get any form of justice. It has certainly made it harder to get compensation.

We also point out that those who are well funded by government and who are personally on very big salaries that are not disclosed to the public are the ones calling for the income of the disadvantaged to be taken by the state.

We think the reason for our success in achieving a compensation scheme in Tasmania is that we never gave up. Whole families taken under the racist policies of Tasmania were never judged by the Tasmanian Aboriginal Centre as being some distant group to be talked about sympathetically without lifting a finger to redress their suffering. They are part and parcel of our people.

Constant letter writing directly to the Tasmanian Government and to opposition parties, a lot of media attention and marches in the street were the simple ingredients that provided a $5 million compensation package in Tasmania. It has helped to have friendly leaders in government like the late Jim Bacon and his successor, Paul Lennon. Tasmania was not always like that – most Tasmanian politicians hated us for decades and would have nothing to do with us.

We persisted. The first land rights legislation in Tasmania in 1995 was delivered by Liberal Premier Ray Groom, who for years had avoided responsibility by repeating that land

rights was a mainland Aboriginal issue, not an issue for Tasmania. Ray Groom turned out to be more than just a friend of Aboriginal people: he is now the Labor Government-appointed Stolen Generations Assessor for the Tasmanian compensation scheme.

We persist. We do not get selfish and comfortable with security of job tenure. If we on staff and committees cannot deliver for our people, we will move aside and let others do it better.

It would be better to have a national compensation fund so that some do not miss out because they are judged by where they live rather than on what they endured. We applaud the Democrats for initiating the *Stolen Generation Compensation Bill 2008* (Cth), which puts compensation on the table, albeit limiting payments to $30 000. Payments offered to the Stolen Generations must not be so low as to trivialise their suffering. Bruce Trevorrow successfully sued for $500,000 compensation.[12] The South Australian Supreme Court judged the amount to be fair. Anything less than a $4 billion national package, we think, is not enough to compensate the believed 10 000 or more members of the Stolen Generations.

There are some salient points to be made about the Tasmanian legislation, the *Stolen Generations of Aboriginal Children Act 2006* (Tas), that might have a bearing on similar legislative packages on mainland Australia. They are as follows:

- In *Cubillo and Gunner* the Federal Court ruled that there was no duty of care owed by the Commonwealth towards the Aboriginal applicants (and, even if there was, it had not been breached).[13] By contrast, the criteria for claims against the compensation fund in the Tasmanian legislation are based on the existence of a duty of care. The duty owed by the Tasmanian Government towards Aboriginal children was to make sure all reasonable steps were made to get Aboriginal children back to the Aboriginal community within 12 months.[14]
- The Tasmanian legislation does not place the onus of proof on applicants to show that the laws under which they were taken were racist or that officials acted without authority. This contrasts with the High Court's view in *Kruger*. Tasmanian applicants are required to show, among other things, that they are Aboriginal, were removed by the active intervention of the Government, and were kept from their family for 12 months or more.[15] The onus is then on the Government to show that there was no other choice but to remove the applicant (eg the removal was strictly related to commission of offences).[16]
- Even where the Government argues consent was properly given to the removals, the Tasmanian legislation provides for the Assessor to look at duress and undue influence being a factor affecting consent.[17] We would have thought that the symbolic 'X' on some consent forms – made by people of a different culture and language who were required by white authorities to mark a formal document – was enough evidence of a lack of real consent.

II A New Generation of Removed Aboriginal Children

Do an apology and compensation ensure there will not be a repeat? Experience within Tasmania shows that, at the very same moment the Tasmanian Government is compensating Aboriginal children for suffering under a removals policy driven by white authorities, Tasmanian officials are continuing with policies and attitudes strikingly similar to those of the dark old days.

Consider a few actual examples from Tasmania.

A Family 1

Four children were removed from their mother after one of the children suffered injury from an undetermined source. One child was placed with her white father, and the baby was placed with his other white father. The other two children were placed with white foster carers.

Almost immediately, one of the white foster carers did her best to make the child her own and deny contact with the child's Aboriginal family. The child's hair was cut in the same style as the foster mother's. The mother's weekend access was denied, as was the access for other Aboriginal carers who had previously spent a lot of time with the child. The child's school was changed, making it harder to arrange contact with other siblings. Then white professionals were brought into the picture. Psychologists performed tests in their rooms, not in environments with which the child was familiar. They affirmed a diagnosis of 'anxiety disorder' on which the foster parent proceeded to base her case for ever more stringent restrictions on the time the mother can

spend with her child. After turning up for child protection court appearances intermittently for three years, the mother succumbed and agreed to the child being made a ward of state until the age of 18 with a promise that, if she stops using substances and keeps to her commitments, it may be possible for her to get her children back 'one day'.

Today, the child is seven years old and has not lived with her mother for five years. A senior consultant with the Tasmanian child protection authority recommended recently that the child's access to her family and Aboriginal community 'be balanced with ensuring her social and educational needs as well as her long-term stability'. Contact with the child's 'aboriginal [sic] links' is to be maintained by encouraging the foster carer to have 'involvement' in the Aboriginal community.[18] How are the attitudes of these white professional do-gooders any different from those that created the Stolen Generations?

B Family 2

Three children were removed from their Aboriginal parents after domestic violence incidents brought the children to the attention of police. The children were placed with different white families. The Department of Health and Human Services has refused to allow even day access with aunts and uncles without police checks. Participation in organised Aboriginal cultural events is confined to day-only attendance.

The contact of these three children with the Aboriginal community has therefore been minimal for the last five years. The oldest child is now aged 13. All three children would be entitled to Stolen Generations compensation under the Tasmanian scheme if they were aged 18 or older.

C Family 3

A young mother had all five of her children removed from her by child protection authorities on separate occasions because of continued violence in a relationship and drug use. After another incident of violence and without warning, the Department of Health and Human Services removed the mother's youngest child. The mother then refused to see any of her children even though she managed to end the violent relationship. The Department could not find a carer with whom to place all the children, most of whom are now placed separately far from their original place of residence.

D Family 4

A mother came to the attention of the Department of Health and Human Services when police were called on several occasions to incidents of domestic violence. When the mother went to hospital, the Department took the opportunity to remove all five children, including a newborn baby. Assurances of a new relationship, new and stable accommodation and a voluntary commitment to testing for drug use, all supported by an Aboriginal family support agency, would not change the resolve of the Department to seek a 12 month order for removal of the children. A few days before the court case for a long-term order was to be contested, the Department relented and withdrew its application. In the meantime, none of the children had seen their mother or anyone else they knew for over one month. The 'anxiety disorder' so often found by the experts these days may well be the result.

As a consequence of the *Family Violence Act* 2004 (Tas), many more Aboriginal children are coming to the notice of the Department of Health and Human Services in Tasmania. Police officers, amongst others, must notify the Secretary of the Department of a child who is an 'affected child', defined as one whose safety, psychological wellbeing or interests are affected or likely to be affected by family violence.[19] In practice, police officers find it easier to report all children of parties involved in domestic violence incidents. Departmental policy seems to be to remove all such children unless and until they are convinced that the mother has separated from the man with whom she has been in dispute. Such a policy has no concern for cultural issues or past policies that caused more harm than good.

On another general point, if we accept that the evil underlying the Stolen Generations saga was the attempt to make Aboriginal children 'whiter', then the blind faith we have in sending Aboriginal children to white schools, run by white people, teaching a white curriculum based on white values, needs a review.

III The Way Forward

If we want to gain justice for the Stolen Generations, both litigation and political lobbying for legislation need to be taken up. The more success in litigation, the more pressure there is on governments to legislate to keep the bills down. While the various Aboriginal legal services around Australia are neither equipped nor motivated to take up the Stolen

Generations cause, they do have money and applications for external briefs should be made. Since *Trevorrow*, litigated claims are now categorised as straightforward civil actions for personal damages, not 'test cases'. This means that the various Aboriginal legal services, which are funded to pay the costs of civil actions, should be able to provide financial assistance to prospective claimants.

In terms of lobbying, an Aboriginal body in each State and Territory should lobby government for a compensation package for members of the Stolen Generations. That package should adopt a number of basic principles. First of all, payments of $100 000 should be available to each successful applicant. Also, the onus of proof in each claim should be on the respective government. The claim would be that the government in question failed to take active measures to seek to place the removed child back with their family or people. Finally, compensation would not only be payable to Stolen Generations survivors but to the children of deceased Stolen Generations members.

Endnotes

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

2 See the *Stolen Generations of Aboriginal Children Act 2006* (Tas).

3 Ibid.

4 (2007) SASC 285 ('*Trevorrow*').

5 The decision was not officially reported. See Alexis Goodstone, 'Stolen Generations Victory in the Victims Compensation Tribunal' (2003) 5 (22) *Indigenous Law Bulletin* 10.

6 Ombudsman Tasmania, *Listen to the Children: Review of Claims of Abuse From Adults In State Care As Children* (2004); Ombudsman Tasmania, *Review of Claims of Abuse From Adults In State Care As Children: Final Report – Phase 2* (2006). Since this paper was presented the Western Australian Government has established Redress WA, a scheme designed to provide financial and non-monetary redress to people (including members of the Stolen Generations) who were abused while in State care. See Redress WA, <http://www.redress.wa.gov.au/>.

7 (2000) 103 FCR 1 ('*Cubillo and Gunner*').

8 [1999] NSWSC 843 (Unreported, Abadee J, 26 August 1999).

9 (1997) 190 CLR 1 ('*Kruger*').

10 Ibid 36–7.

11 (1992) 175 CLR 1 ('*Mabo (No 2)*').

12 *Trevorrow* (2007) SASC 285.

13 (2000) 103 FCR 1, 368–9 (O'Loughlin J).

14 See *Stolen Generations of Aboriginal Children Act 2006* (Tas) ss 5(1)(d), 5(2)(c).

15 *Stolen Generations of Aboriginal Children Act 2006* (Tas) s 5.

16 *Stolen Generations of Aboriginal Children Act 2006* (Tas) s 5(4).

17 *Stolen Generations of Aboriginal Children Act 2006* (Tas) s 5(2)(d)(ii).

18 This information was detailed in a report from Child Protection workers to the Tasmanian Aboriginal Centre.

19 *Family Violence Act 2004* (Tas) s 4; *Children, Young Persons and Their Families Act 1997* (Tas) s 14(2)(a).