MOVING BEYOND THE APOLOGY: ACHIEVING FULL AND EFFECTIVE REPARATIONS FOR THE STOLEN GENERATIONS

Chiara Lawry

On 13 February 2008, former Prime Minister Kevin Rudd formally apologised to the Stolen Generations on behalf of the Parliament and Government.[1] During the Apology, Rudd remarked, '[t]he time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward'.[2] The true value of the Apology however, will not be realised until it is offered as part of a comprehensive reparations scheme. Indeed, more than a mere apology is required for Australia to move forward.[3]

Fully effective reparations as defined within the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law* ('*Basic Principles*')[4] should be provided to the Stolen Generations, which would require: restitution, compensation, rehabilitation, satisfaction (including a public apology) and guarantees of non-repetition.[5] Academics, activists and advocacy groups have long called for reparations for the Stolen Generations. In 1997, the landmark Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('*Bringing them Home*') recommended that reparations, as outlined by the 'van Boven Principles',[6] be awarded to those affected by the forced removal of Aboriginal children.[7] Although drafted more than a decade ago, the *Bringing them Home* recommendations continue to offer valuable guidance on the provision of effective reparations for the Stolen Generations.

The policies which lead to the Stolen Generations have had enduring social implications and were acknowledged in the Senate Legal and Constitutional Affairs Committee Report as a 'serious blight on Australia's history'.[8] The practice of removing Aboriginal children from their families began with the colonisation of Australia[9] and continued until the 1970s.[10] In 1981, historian Peter Read introduced the term 'Stolen Generations' to identify the Aboriginal children removed from their families during this period.[11]

The Apology settled much of the debate surrounding the history of Aboriginal child removal by acknowledging the existence of the Stolen Generations. However, it simultaneously re-ignited other debates, particularly the issue of reparations.[12] In the media, this has been portrayed simply as an issue of compensation and money. However, reparations are a much more comprehensive concept. Since the Apology, two private members' Bills have been tabled in the Senate, which respond to the 'unfinished business' of reparations. Senator Bartlett[13] introduced the Stolen Generation Compensation Bill 2008 (Cth), which was referred to inquiry, where it was recommended that the Bill not proceed in its existing form.[14] Subsequently, Senator Siewert[15] introduced the Stolen Generations Reparations Tribunal Act 2008 (Cth). Senator Siewert's Bill has not been referred for inquiry, nor has it been debated or voted on. Despite the significance of reparations, the Bill has failed to attract the attention of the media, the public, or the academic community.

International law provides a firm foundation for reparations claims. This article will draw on the emerging customary international law and the Australian government's 'in-principle' commitment to reparations, to assert that the Commonwealth should provide comprehensive reparations for the Stolen Generations. The States and courts have been unable to provide reparations and as such a national reparations tribunal should be established to ensure that adequate reparations are provided for the Stolen Generations.

Miller and Kumar argue that 'reparations [are] an idea whose time has come' and that the solution to present-day

inequalities must include reparations programs targeted at redressing historical injustices.[16] While the Apology was a crucial step towards a reconciled future for Australia, it is only one of the many steps that must be taken to provide effective reparations.

I Reparations Theory

The word *reparations* is derived from the Latin verb *reparare,* meaning, to 'make ready again' and is used in reference to attempts to achieve 'restoration to a proper state.'[17] Historically, financial compensation has been the basis of reparations. For example, in the post World War I *Treaty of Versailles*,[18] reparations were stipulated in purely financial terms. However, since World War II, the understanding of reparations has widened to include comprehensive schemes aimed at acknowledging past injustices by seeking to improve the lives of victims in the future.[19] While courts assess each case on its own merits, reparations schemes respond to a wider and more 'complex universe of victims'.[20] Reparations schemes can therefore include aims of acknowledgment, solidarity, and importantly for Australia, reconciliation.

II Reparations within International Law

The theory of reparations, and its standing within international human rights law is contained primarily within the *Basic Principles*[21] and the *United Nations Declarations on the Rights of Indigenous Peoples* ('UNDRIP').[22] There are two circumstances in which reparations are provided for under international law:[23] inter-state claims based upon state responsibility;[24] and human rights claims brought by victims directly against the responsible state.[25] The second situation is applicable to Australia, where members of the Stolen Generations are seeking reparations from the state and, as such, it is the *Basic Principles* that outline the applicable international law.

For those seeking redress for historical injustice, international human rights norms provide a framework through which demands for reparations can be made.[26] The right to a remedy and reparations is an essential part of international human rights law and is contained in global and regional human rights treaties and other international legal instruments. The relevant provisions include art 8 of the *Universal Declaration of Human Rights*;[27] art 2 of the *International Covenant on Civil and Political Rights*;[28] art 6 of the *International Covenant on the Elimination of All Forms of Discrimination*;[29] and art 39 of the *Convention on the Rights of the Child*.[30] Within regional instruments, relevant provisions include arts 10 and 14 of the *American Convention on Human Rights*[31] and art 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[32] Most international and regional human rights instruments guarantee both the procedural right of access to a fair hearing and the substantive right to a remedy.[33] The van Boven Report[34] examined international human rights law and drew the conclusion that 'the violation of any human right gives rise to a right to reparations'.[35]

As noted, the *Basic Principles* define reparations broadly as encompassing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[36] Importantly, the *Basic Principles* have been adopted by consensus in the United Nations ('UN') General Assembly, the UN Economic and Social Council and the UN Human Rights Commission, affirming their value.[37] Regarding the form of reparations, theorists such as Waldron posit that apologies accompanied by compensation are most appropriate because '[t]he payments give an earnest of good faith and sincerity to [the] acknowledgement.'[38] In contrast, some theorists and legal commentators define reparations as referring only to financial compensation, leading them to argue that reparations fail to provide the 'symbolic value of apologies'.[39] These concerns illustrate the need for fully effective reparations as defined in the *Basic Principles*.[40]

The *Basic Principles* require that the provision of reparations be 'proportional to the gravity of the violations and the harm suffered'.[41] It is therefore essential that reparations schemes are context-specific. While international and comparative law can provide guidance, reparations have an *ad hoc* nature, which makes it difficult to draw firm conclusions about how reparations schemes should be designed. Although international reparations practice is unable to provide strict guidance, it does serve to affirm the general obligation to provide reparations.[42] Governments should therefore work to develop context appropriate reparations schemes that are informed by the international law principles of reparations.

III Reparations for Indigenous Peoples

Charters argues that the right, specifically of Indigenous peoples, to reparations is based on 'soft' international law instruments,[43] such as the UNDRIP.[44] This argument strengthens the overall case for reparations for the Stolen Generations, because the obligations to provide reparations

specifically for Indigenous peoples exists in addition to the general international law reparations principles. Adopted by the UN General Assembly on 13 September 2007, Art 8 of the UNDRIP[45] provides that Indigenous peoples have a right not to be subjected to forced assimilation or destruction of their culture, and when this does occur, that states must provide effective mechanisms for redress. Article 8 is relevant to the case in Australia because it prohibits the practices that led to the Stolen Generations and provides for redress.

Although Australia voted against the UNDRIP in the UN General Assembly[46] the Australian Government formally endorsed it on 3 April 2009.[47] While Declarations are not binding, they are important, as they contribute to the development of customary international law.[48] In his recent visit to Australia, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, when asked about the Stolen Generations, commented that 'reparations should be forthcoming,' and that 'without reparations there is a continuation of the wrong'.[49] By not complying with the terms of the UNDRIP the Australian Government is failing to meet its in-principle commitment to Indigenous rights expressed in its endorsement of the UNDRIP. Importantly, a state that denies remedial rights commits a further breach of international law.[50]

IV International Law: The Challenges

In practice, as in other areas of international law, there is an 'implementation gap'[51] in the provision of reparations. As noted by Anaya, it is one thing for international law to develop norms and 'quite another for the norms to take effect in the actual lives of people'.[52] A practical challenge of relying on international law, as a basis for reparations, is that it generally only has prospective force.[53] This difficulty arises in Australia, as the Stolen Generations began before the incorporation of the relevant human rights treaties into domestic law. Furthermore, it has been noted that Australian law does not presently include a right to reparations for violations of human rights.[54] However, there is international precedent for the development of a legislative domestic right to reparations, such as the *Alien Torts Claim Act* of the United States.[55]

It should also be acknowledged that the obligation to provide reparations found in international legal instruments is often 'difficult and cumbersome to implement'.[56] The *Basic Principles* however, now provide a clear compilation of the international human rights law on reparations and specific guidance on the implementation of these obligations. Importantly, the obligations contained within the *Basic Principles*, although not binding, do contribute to a growing 'reparations ethos'[57] and subsequently, to the development of customary international law. The *Basic Principles* should be complied with not only because they are likely to crystallise as customary international law, but also because states, as voluntary actors in the international legal system, should act consistently with the principles they develop. Australia, has contributed to the development of international law reparations norms by becoming a signatory to the major international human rights instruments, by endorsing the UNDRIP,[58] and by consenting to a no-vote adoption of the *Basic Principles* in the relevant UN bodies.[59] The Australian government should therefore uphold its in-principle commitment to reparations.

V The Stolen Generations and the Grounds for Reparations

In Australia, the removal of Indigenous children remains one of the least understood aspects of postcolonial history.[60] Disagreement continues over how many children were removed and in what circumstances.[61] *Bringing them Home* concluded that the forcible removal of Indigenous children from their families breached international prohibitions of systematic racial discrimination and genocide.[62] It was also alleged that removals led to criminal victimisation including physical and sexual assault.[63]

The devastating consequences of removal and its continuing effects on members of the Stolen Generations are widely acknowledged beyond *Bringing them Home*.[64] Raphael has reported that children who were removed from their families have displayed symptoms similar to holocaust victims.[65] In the case of *Marriage of B and R* the Family Court acknowledged the devastating effects of placing Aboriginal children in non-Aboriginal environments.[66] The justifications for the removal of children were diverse, but 'at its most pernicious the practice was a result of theories such as eugenics and assimilation'.[67] The ultimate goal was to absorb the 'half-caste' children into the white community with the hope that the full-blooded Aboriginal people would die out as quickly as possible.[68] In 1912, the Western Australian Minister for Aboriginal Affairs, Rufus Underwood, told the Legislative Assembly that '[t]he sooner the aborigines died out in Western Australia the better it would be for all

concerned'.[69] Dr Cecil Bryan, advocating for the policy of biological absorption, gave evidence to the Moseley Royal Commission in 1934 that steps should be taken to breed out the 'half-castes'.[70] Such racially discriminatory thinking and policies were the catalyst for the Stolen Generations.

Bringing them Home considered the grounds for reparations as including infringement of parental rights, deprivation of liberty, abuse of power, and breach of guardianship and fiduciary duties.[71] These alleged breaches of human rights law are of key significance to the legal argument for the existence of a right to reparations for the Stolen Generations. Removing children on the basis of race is a breach of international human rights obligations under the *Universal Declaration of Human Rights*,[72] and the *Convention on the Elimination of All Forms of Racial Discrimination*.[73] The removal of children is also a breach of obligations arising under the *Convention on the Rights of the Child*.[74] For example, art 9 of the Convention requires that children not be separated from their parents except when it is in the best interests of the child. Although there is no positive international legal obligation to provide reparations for these human rights violations, there is undoubtedly a soft law and emerging customary international law obligation that should be voluntarily complied with in the interests of genuine reconciliation.

Reparations for historical injustices and specifically for human rights abuses are of fundamental importance. As Brooks asserts, despite the many complex questions surrounding reparations, 'one thing seems clear beyond peradventure: where [a] government commit[s] acts of grave injustice against innocent people, it should make amends.'[75] International human rights law provides guidance on how reparations should be provided and outlines the importance of comprehensive reparations. As recommended in *Bringing them Home*, reparations should be provided in conformity with the *Basic Principles*. The human rights violations suffered by the Stolen Generations should not be ignored any longer.

VI Litigation and the Stolen Generations

Litigation is fundamentally ill-suited to providing reparations to the Stolen Generations. Courts are limited to awarding compensation and are consequently unable to provide comprehensive reparations. A survey of Stolen Generations case law demonstrates the inadequacies of litigation and victims of crimes applications. The barriers faced by Stolen Generations litigants, which include limitations periods and an inability to access evidence, demonstrate the need for an appropriate and accessible reparations scheme.

A The Case Law

Following the success of *Mabo*,[76] confidence in litigation increased within the Indigenous community and in the following years, Stolen Generations litigants instigated legal actions in tort, equity and constitutional law. Since the early 1960s, approximately 2000 claims have been lodged in the Northern Territory alone;[77] however, success in these cases has been extremely limited. The cases discussed here have been selected from the small number that have progressed to judgement. Despite their infrequency, Stolen Generations decisions have been subject to extensive commentary.[78] This analysis is consequently pithy, and will focus on the ineffectiveness of Stolen Generations litigation.

The High Court's first Stolen Generations case was *Kruger*[79] in 1997. Arguments challenging the constitutionality of the 'protection' legislation were raised and dismissed. While the court found that the government had the power to enact laws such as the *Aboriginal Ordinance 1918* (NT), space for future litigation was left open by Brennan CJ's observation that 'a power which is to be exercised in the interests of another may be misused.'[80] Following *Kruger* there was a noticeable shift in the focus of Stolen Generations actions to the misuse of power. In *Cubillo*[81] arguments were raised about the negligence of the administrators as well as breach of fiduciary and statutory duties owed to Aboriginal children. Although the Federal Court rejected the Commonwealth's strike out application,[82] it decided against the plaintiffs on the merits of the case,[83] despite O'Loughlin J finding that the removal of the plaintiffs from their families resulted in 'terrible pain'.[84] The Full Federal Court dismissed an appeal[85] and the plaintiffs were denied leave to the High Court.[86]

In 2007, the South Australian Supreme Court ('SASC') heard the first successful Stolen Generations case, awarding Mr Trevorrow $775 000 in compensation for pain, suffering, and false imprisonment.[87] This decision was upheld in an appeal to the full bench of the South Australia Supreme Court.[88] Following the appeal the South Australian government announced that it would not seek leave to appeal to the High Court.[89] As the first and only successful Stolen Generations case, *Trevorrow* has generated renewed optimism in litigation. However, this case will be difficult for future litigants to rely on, as Gray J's decision was highly dependent on the

specific circumstances surrounding Trevorrow's removal and subsequent treatment. Importantly, Gray J found that the Aboriginal Protection Board knowingly acted unlawfully in placing Trevorrow in foster care[90] and that the state could be held vicariously liable for the unlawful actions of its entities and officials.[91] In making these findings Gray J noted the significance of the evidence available, stating that 'the documentation tendered at trial clearly established that Trevorrow's mother did seek contact and the return of the plaintiff and that she did so repeatedly over a period of years.'[92] This evidence was essential to Gray J's finding that Trevorrow had not been abandoned.[93] By contrast, Stolen Generations litigants do not usually have access to sufficient admissible evidence to bring their case.[94] There is also anecdotal evidence to suggest that members of the Stolen Generations have, in some circumstances, negotiated settlements out of court on undisclosed terms.[95] These arrangements though, only benefit those directly involved, as their secretive nature prevents other litigants relying on them in future negotiations.

VI Victims of Crime Compensation

Members of the Stolen Generations have had some success accessing victims of crime compensation,[96] but these schemes are limited in scope and cannot provide reparations or even compensation to all members of the Stolen Generations.[97] Victims of crime compensation cannot provide adequate redress for the Stolen Generations, as their removal is not considered a crime. Following her successful application for compensation, Valerie Linow stated '[i]t's a big shock, because I am the only one out of thousands of members of the stolen generations who got through'.[98] This brave observation highlights the importance of an accessible and comprehensive reparations scheme.

VII The Barriers to Litigation

Historically, Stolen Generations litigants have been widely unsuccessful due to the often insurmountable barriers they face. An analysis of these barriers demonstrates that litigation is ineffective, thereby highlighting the need for a reparations scheme and specifically, the advantages of a reparations tribunal.

A Admissibility of Evidence

The evidentiary requirements of litigation present particular challenges to members of the Stolen Generations, because they are often unable to access evidence of their removal and treatment.[99] This inability to access evidence arises from a lack of documentation and the reliance on oral traditions in Indigenous culture, which the courts have held to be 'inherently unreliable.'[100] Files on Aboriginal child removal were often not well kept and did not usually include correspondence from family members or other evidence of unjust removal. In *Williams*, Studdert J noted that the relevant material records were either incomplete or missing, including those from the Aboriginal Welfare Board.[101]

There has been extensive discussion of the disadvantages suffered generally by Indigenous Australians giving evidence in court proceedings.[102] These disadvantages are heightened in Stolen Generations litigation where plaintiffs are subject to extensive cross-examination. In their discussion of the evidentiary burden of Stolen Generations litigation, Cunneen and Grix note the irony of the litigation process requiring claimants to establish that they suffered damage when the same damage can effectively preclude claimants not only from participating in, but achieving successful outcomes from litigation.[103] In *Cubillo*,[104] O'Loughlin J found Gunner, the second plaintiff, to be a poor witness as he was 'slow thinking and easily confused'.[105] This negative impression of the plaintiff led to some of his evidence being considered inadmissible. The trauma suffered by Stolen Generations litigants and the long periods of time which elapse before trial can exacerbate the challenges of admissibility. Although O'Loughlin J found that there was insufficient evidence to establish a general removal policy,[106] the Apology has now refuted this finding by affirming the existence of a general policy of removal.

B The Defendant

Stolen Generations litigants will inevitably have to defend their claims against the Commonwealth or State governments who have chosen to vigorously defend these actions. The Commonwealth and State resources in these actions often swamp those of the litigant, who are generally reliant on *pro bono* and community legal support. In South Australia, both the Commonwealth and State Governments have denied the Aboriginal Legal Rights Movement funding for Stolen Generations litigation.[107] This experience is not unique; rather, community legal centres struggle to fund Stolen Generations litigation across Australia.[108]

The legal costs incurred by the Commonwealth in defending the *Cubillo* case alone are estimated at more than $10 million.[109] This expenditure has been criticised by reparations advocates who argue that the funds used defending Stolen Generations litigations could and should be used to establish a reparations scheme.[110] In addition to the plaintiff's costs, it is worth noting the risk of a costs order. In the Stolen Generations case of *Williams*, Abadee J ordered the plaintiff to pay the costs of the defendant.[111] A reparations tribunal would avoid these obstacles by operating with limited procedural requirements, thereby eliminating applicant costs by removing the need for legal representation.

C Statutory Limitations

Statutory limitation periods stipulate the time in which an action must be commenced.[112] Every Australian jurisdiction has a statute of limitations.[113] Limitations periods may be extended but the grounds for an extension differ between the jurisdictions.[114] Statutory limitations have been a major barrier for Stolen Generations litigants who often do not become aware of their right to bring legal action until after the expiration of the relevant statutory period. Even when aware of their right to litigate, members of the Stolen Generations are often unable to do so because they lack the means or knowledge as a result of the continuing effect of their removal. In most instances the Commonwealth has sought to have applications struck out on the basis that they are frivolous and/or vexatious because they are statute barred.[115] Although the Court in *Cubillo* deferred making a decision on limitations until after the substantive issues had been considered, it was ultimately decided that there would be 'irremediable prejudice' to the defendant if the limitations period were extended.[116] A reparations tribunal would ameliorate this difficulty, as it would not be subject to limitations periods.

D Inappropriateness of Litigation

According to the Public Interest Advocacy Centre ('PIAC'), when Stolen Generations litigants succeed in litigation, it is unrelated to the underlying justice of the situation, and is instead based on the availability of witnesses and documentation.[117] Likewise, the cases that are dismissed often fail because of the barriers previously discussed, irrespective of the merits of the case. Following *Cubillo*, O'Connor concluded that 'litigation is a poor forum for judging the big picture of history.'[118] PIAC argue that litigation is undesirable because individual claims lead to arbitrary and inequitable outcomes, and this undermines the value of outcomes.[119] By contrast, reparations schemes are designed to respond to a class of victims and are provided equitably.

The courts have also raised concerns about determining Stolen Generations cases. In *Williams*, the court held that 'policy' reasons, particularly in relation to concerns about 'floodgate' litigation, militated against imposing a duty of care in institution-child relationships.[120] A similar sentiment was presented in *Cubillo* by O'Loughlin J, who stated that '[t]he removal ... of Aboriginal children has created racial, social and political problems of great complexity...[and] it must be left to the political leaders of the day to arrive at a social or political solution to these problems.'[121] The courts' reluctance to make Stolen Generations policy decisions strengthens the case for a reparations scheme and, specifically, a reparations tribunal with a mandate for addressing the harm suffered.

Despite the overwhelming challenges faced by Stolen Generations litigants, legal actions still continue because they are the only existing means of seeking redress. The Aboriginal Legal Rights Movement is currently providing support to Stolen Generation litigants for six actions against the South Australian Government.[122] Defending these actions will exact a huge cost on the State, the plaintiffs and the organisations representing them. As has been the experience of past litigation, these cases are unlikely to be resolved for many years, and in the meantime the plaintiffs will be forced to relive their experiences, potentially to their detriment, and with no guaranteed outcome.

VIII State Based Reparations

The Australian State Governments have responded to the Stolen Generations in an *ad hoc* manner. All states have apologised for the Stolen Generations[123] however only Tasmania has provided further redress. In 2006, Tasmania established a compensation scheme for members and descendants of the Stolen Generations. In Western Australia ('WA') and Queensland, 'Redress' has been established to award compensation to children who were abused and neglected while in state care, however these schemes are not specifically designed to respond to the Stolen Generations. A review of the State Governments' reparations efforts demonstrates the necessity of a Commonwealth reparations scheme.

IX The Tasmanian Experience

The Tasmanian compensation scheme was the first of its kind in Australia and is the only statute-based response to the injustices suffered by the Stolen Generations. Due to the paucity of commentary, this review relies on the limited material produced by the State governments and, as such, the limited scope of this material should be acknowledged.

The scheme provides for *ex gratia* payments to be made to members of the Stolen Generations and their descendents from a $5 million fund. Additionally, applicants to the scheme were provided with counselling when necessary and access to their record.[124] However, the scheme is limited in that it is primarily focused on the provision of compensation rather than reparations. The *Basic Principles* and *Bringing them Home* do not stipulate how compensation should be calculated. Rather, they emphasise the need for comprehensive reparations. Notably, the compensation scheme does not allow for public hearings at a local level[125] or other means of public disclosure as required under the *Basic Principles*.[126] When the Assessor tabled his final report in the Tasmanian Parliament, it failed to reveal the claimants' experiences; instead the report provided a review of the scheme itself.

A The Application Period

The legislation specified strict timeframes with applications open for only six months from the commencement of the Act.[127] This period was unnecessarily short; other Australian compensation schemes have had an application period of at least 12 months.[128] The short operational timeframe did allow for efficient and prompt processing of applications. The *Basic Principles* require that administrative procedures provide prompt access to justice.[129] Adequate application time and prompt processing therefore require careful balancing. The duration of the scheme is also relevant to its awareness raising and educational capacity, the six-month application period adopted by the Tasmanian scheme was too short to achieve these aims.[130] A Commonwealth scheme should be designed to have a longer application period, in order to ensure community awareness and accessibility.

B The Act and the Procedures

The Act did not set out detailed procedures; rather, the Assessor was given discretion to determine the scheme's processes. The approach adopted was non-adversarial and informal.[131] The simplicity of the application process was positive. Specifically, it required the Office of the Assessor to obtain any necessary reports and documentation, rather than requiring applicants to provide these themselves, which may have been burdensome. In order to ensure potential applicants are not dissuaded from accessing the scheme, the informal nature of Tasmania's application process should be replicated at the Commonwealth level.

C Challenges Identified by the Assessor

The challenges identified in the Assessor's report included the determination of Aboriginality, specifically, the requirement of communal recognition.[132] Some applications were rejected on the basis that the Assessor did not believe the applicant was Aboriginal. Although there is only minimal reference to the requirement of Aboriginality in the Assessor's report, it is worth noting that defining 'Aboriginality' has long been a contentious issue, particularly in Tasmania.[133] The Act incorporates the three-part test set out in the *Aboriginal Lands Act 1995* (Tas), which has been upheld by the High Court,[134] but is not free of criticism.[135] The 'communal recognition' requirement contained within the three-part test[136] is particularly problematic for the Stolen Generations. In a number of applications, pre-existing communal recognition could not be established because children had been removed entirely from their Aboriginal community at a young age. In his report, the Assessor noted that 'the Aboriginal community took a very fair approach to this issue.'[137] While this fairness is to be commended, it remains an unsatisfactory predicament that applicants are reliant on communal recognition to establish their Aboriginality, when their removal may preclude them from being able to gain such recognition.

In *Shaw v Wolf*,[138] Merkle J questioned the appropriateness of attempting to legally define Aboriginality. He did however acknowledge the necessity of establishing a criterion to define the beneficiary group for the laws enacted to 'redress some of the wrongs of the past as well as to assist Aboriginal persons'.[139] Although the debate on how to best define Aboriginality is likely to continue, Merkle J's observation is significant, in that Aboriginality must be defined to provide Stolen Generations reparations. The application of the Aboriginality definition should therefore be flexible to allow for the difficulties associated with removal and asserting Aboriginality. Where claimants are unable to satisfy the communal recognition requirement due to the circumstances

surrounding their removal, reparations schemes could allow them to instead swear an affidavit. This would ensure that members of the Stolen Generations are not unreasonably discriminated against because of the circumstances surrounding their removal.

D Determination of Awards

In the Assessor's consideration of applications, the treatment of removed children was irrelevant to the amount awarded. The scheme is in this regard incompatible with the *Basic Principles*, which require that reparations be 'proportionate to the gravity of the violation and the harm suffered.'[140] The treatment of removed children varied greatly from one case to another, ranging from severe neglect and abuse to some positive experiences.[141] It is therefore inappropriate that applicants with such diverse experiences should be awarded the same amount.

In his report, the Assessor did note the ease and simplicity created by the stipulation of entitlements within the Act.[142] By contrast, in his reflection on the 9/11 compensation scheme, Kenneth Feinberg noted the challenge of determining individual payments.[143] The 9/11 scheme calculated compensation on the basis of economic loss following the death of 9/11 victims, thereby inciting animosity amongst claimants who perceived that the life of their family member was being undervalued. In distinction, any diversity in compensation awarded to Stolen Generations victims would correspond to the degree of harm suffered and would therefore be less contentious.

In his reflections, the Assessor concluded that the Act was well drafted and that he was 'sure that all 151 applications were genuine'.[144] The benefits received by both successful and unsuccessful applicants included the opportunity, although not publicly, to tell their story, gain access to their files and learn about their families and heritage.[145] Some applicants were consequently able to make contact with their family for the first time since their removal.[146] A Commonwealth reparations scheme should seek to replicate these processes while expanding on the Tasmanian model to allow for public hearings and reparations awards that correspond to the harm suffered. Notably, the entire scheme cost less than the Commonwealth's legal expenses in the *Cubillo*[147] case alone.[148] It is worth acknowledging that Tasmania has the smallest Aboriginal and Torres Strait Islander population outside of the Australian Capital Territory, comprising less than 3.4 per cent of Tasmanian's total population.[149] The small numbers involved in the compensation scheme not only allowed it to operate at a relatively low cost, but also over a shorter period of time.

X Redress Schemes in Western Australia and Queensland

Both WA and Queensland have established a Redress scheme to compensate children abused while in state care. First established in Queensland, the Redress scheme was prompted by the recommendations of the Forde Inquiry.[150] As part of the 2007/2008 budget, the Queensland Government's Appropriations Bill included $100 million to establish the scheme.[151] The scheme provides for eligible applicants to receive an *ex gratia* payment ranging from $7000 to $40 000. During the 15-month application period, 10 218 applications were received. A breakdown of the types of applications according to age, gender, and geographical locations is available online.[152] There is not, however, information available regarding how many applicants were members of the Stolen Generations.

In December 2007, the WA Government announced that $114 million would be allocated to establish 'Redress WA'.[153] Premier Carpenter has described the scheme as a 'humane alternative to the common law claims system'.[154] Since 1920, an estimated 55 000 children in WA have been under state care. Among these, between 3000 and 4000 were Stolen Generations children.[155] When the scheme closed on 30 April 2009, over 10,000 applications had been received.[156] As with the Queensland scheme, there is no information available regarding the number of Stolen Generations applicants. It is estimated that all applications will be processed by mid 2011, with provision for interim payments to be made to terminally ill claimants.[157]

The payments available under the Redress schemes are awarded based on the severity and impact of the abuse suffered, determined from the information provided by the applicants and obtained from departmental records. The correlation between harm suffered and payment is a strength of this scheme. Its greatest weakness, however, is that it fails to identify wrongful removal as a cause of harm. Consequently, members of the Stolen Generations who were not neglected or abused after their removal are excluded from the Redress schemes. It is difficult to determine what proportion of the Stolen Generations would be precluded from reaping the

benefits of these schemes due to the requirement of having suffered 'neglect or abuse'.

XI The Other States

Although the Victorian, South Australian, New South Wales and Northern Territory Parliaments have offered apologies,[158] there have been no comprehensive reparations schemes implemented in these states. There are some Commonwealth funded reparations programs such as 'link-up' operating in the states, which aim to reunite removed Aboriginal children with their families. For the most part however, the *Bringing them Home* recommendations remain largely unimplemented across Australia. It is therefore essential that a Commonwealth reparations scheme be established in order to facilitate reconciliation.

While the Tasmanian, WA and Queensland schemes are worthy, the action to date falls short of the reparations guidelines set out in the *Basic Principles* and does not satisfy the *Bringing them Home* recommendations. Reparations for the Stolen Generations and compensation for all children who were abused and neglected while in state care should not be perceived as an 'either-or' policy decision. The effort to address the abuse and neglect suffered by children in Queensland and WA is laudable; however, it cannot be a substitute for reparations for all members of the Stolen Generations. Notably, these schemes fail to acknowledge the harm inflicted by the act of removing Aboriginal children, which is distinct from the harm that was often suffered by children while in state care. A Commonwealth reparations scheme should be developed to build on the existing state schemes and their operational experience. In particular, a Commonwealth scheme should allow for a flexible interpretation of 'Aboriginality' and compensation payments that correspond to treatment, while also acknowledging that removal is the basis for compensation.

XII The Commonwealth

The Commonwealth's response to *Bringing them Home* and the campaign for reparations has been characterised predominately by inaction. Under the Howard Government, denial dominated Stolen Generations policy and the *Bringing them Home* recommendations remained largely unimplemented. Under the Rudd Government there was a significant policy shift with the acknowledgement of the Stolen Generations and the Apology. However, full and effective reparations have still not been achieved. The Commonwealth should establish a Stolen Generations Reparations Tribunal in order to achieve full and effective reparations.

XIII Beyond the Apology

Howard's refusal to apologise to the Stolen Generations precipitated the development of a powerful apology campaign amongst Stolen Generations advocates. It was therefore profoundly significant that Rudd offered his apology in the first sitting period of his term as Prime Minister. Disappointingly, the Apology was not delivered as part of a comprehensive reparations package. Noting the significance of the policy shift required to facilitate the Apology, it was an opportune time to deliver a comprehensive reparations package. Since the Apology, there have been numerous calls for compensation as a key element of effective reparations and an outstanding recommendation from *Bringing them Home*.[159] Despite these calls, the Federal Government has clearly stated that its policy is not to create a compensation scheme.[160] Instead, it is focusing on 'making restitution by closing the 17-year gap in life expectancy between Indigenous and non-Indigenous Australians'.[161] While the 'Close the Gap' policy is commendable, it fails to respond specifically to the needs of the Stolen Generations and cannot be a substitute for effective reparations. Indeed the health, housing and education services associated with the Close the Gap policy are 'entitlements which all Australians should enjoy.'[162]

As the majority party in the 2000 Senate Inquiry into the Stolen Generations, the Australian Labor Party (ALP) expressed strong opposition to the Howard Government's response to *Bringing them Home*. The Committee recommended the establishment of a reparations tribunal based on the PIAC model. This model has since been tabled as a Bill[163] by Senator Siewert, but has not received the support of the Government or Opposition.

XIV Options for Reparations

In their 1997 Briefing Paper, PIAC proposed that there are three options for reparations: litigation, a compensation fund/board or a reparations tribunal.[164] As discussed, litigation is an unsatisfactory option because it is slow, traumatic, expensive and difficult to access for members of the Stolen Generations. Even if these practical barriers could

be addressed, litigation is still unable to provide reparations and is instead limited to providing compensation.

A National Compensation Fund was recommended in *Bringing them Home*.[165] Although preferable to litigation because it would be more accessible than the courts and not subject to limitations periods, a compensation fund cannot provide full reparations. As with litigation, a compensation fund is limited to providing financial compensation, which cannot alone provide reparations.

A reparations tribunal is an ideal model for providing reparations because it addresses the limitations of a compensation fund and litigation and allows for the provision of comprehensive reparations. The *Moving Forward Project*[166] found that compensation awarded to individuals by the courts was considered divisive and that reparations were considered capable of offering a more collective response to the Stolen Generations.[167] The advantages of a reparations tribunal as opposed to litigation include expeditious determinations that avoid claimants and respondents incurring substantial costs, avoidance of unduly formal procedures and the provision of reparations in line with the *Basic Principles*.[168]

XV Legislative Proposals

Following the Apology, Senator Bartlett introduced the Stolen Generation Compensation Bill 2008 (Cth). The Bill was referred to the Senate Legal and Constitutional Affairs Committee, which recommended that the Bill not proceed in its existing form.[169] The chair of the Committee, Senator Crossin, noted that the overwhelming evidence from witnesses during the hearings was 'applause for Senator Bartlett's initiative in introducing the Bill'.[170] In his additional comments to the Committee Report, Senator Bartlett acknowledged that in introducing the Bill, he was not aiming to propose a definitive model for providing reparations, but rather was aiming to put the issue back on the agenda and provide a forum for the proposal of new and more viable reparations schemes.[171]

Senator Siewert's Stolen Generations Reparations Tribunal Act 2008 (Cth) was introduced following Senator Bartlett's Bill as a comprehensive legislative basis for reparations. The Bill draws on the submissions made to the Inquiry into Senator Bartlett's Bill and seeks to address the weaknesses identified. It primarily seeks to implement the reparations model developed by PIAC and the Australian Human Rights Centre (AHRC). Senator Bartlett has 'applauded this model'[172] which PIAC has advocated for since 1997. The Bill has yet to be subjected to comprehensive parliamentary or academic review. Although the Bill *prima facie* provides a solid basis for the implementation of the international law reparations norms, comprehensive review would be valuable to ensure that, if adopted, the Tribunal is established according to best practice.

PIAC's model tribunal was developed with reference to the *Basic Principles* and the *Moving Forward Project* (a national Stolen Generations consultation). The *Moving Forward Project* consulted with 150 members of the Stolen Generations, representatives of Indigenous Communities and every Stolen Generations organisation in Australia.[173] The PIAC and AHRC model is strengthened by the contributions gathered during the *Moving Forward Project*, as they ensure that it is responsive to the interests of the Stolen Generations. In their submission, PIAC argue that the strength of a reparations tribunal is its ability to serve the 'dual objective of redressing past harm and creating measures of reparation that offer enduring social, cultural and economic benefit'.[174]

Senator Siewert's Bill is distinguished from Senator Bartlett's by its broader understanding of reparations. Senator Siewert's Bill retains limited *ex gratia* payments, but also allows for the tribunal to determine appropriate reparations on a case-by-case basis. Reparations under the Bill include monetary compensation for specific harm and funding for the provision of services such as counselling.[175] The provision of compensation on the basis of harm suffered, as discussed in the critique of the Tasmanian scheme, is advantageous and compliant with the *Basic Principles*. In contrast to the Redress schemes, the Bill also provides for *ex gratia* payments to be awarded to claimants and their descendents for their removal, which in itself entails an acknowledgment of the harm associated with removal. The *ex gratia* payments are to be awarded at a base rate of $20 000 with an additional $3000 awarded for each year of institutionalisation.[176] The Bill is focused on the provision of communal as opposed to individual reparations, such as access to healing centres, language and culture training.[177] The Bill also provides that reparations should be 'guided by the van Boven principles',[178] which were subsequently developed and adopted by the UN General Assembly as the *Basic Principles*. Although these principles were not

altered substantively before their adoption, it would be more appropriate for the Bill to make reference to the *Basic Principles*, in light of the developments in international law.

Importantly, the Bill acknowledges the intergenerational harm suffered as a result of the Stolen Generations and provides for reparations to be accessible to the family members, communities and descendants of those removed.[179] Furthermore, in addition to determining appropriate reparations, the Tribunal is designed to provide a 'forum and process for truth and reconciliation'.[180] It therefore addresses a key concern identified in relation to the Tasmanian scheme, where such a forum was not provided. Aboriginal and Torres Strait Islander persons are identified under the Bill as anyone who identifies as such, as per the *Aboriginal and Torres Strait Islander Act 2005* (Cth). As discussed with reference to the definition of Aboriginality adopted by the Tasmanian scheme, the Stolen Generations should not be expected to satisfy strict requirements to establish their Aboriginality. Rather, the Bill should stipulate that the definition of Aboriginality be interpreted flexibly to allow for the difficulties associated with removal and asserting Aboriginality.

In her Second Reading speech, Senator Siewert noted that '[i]n the same way the national apology was long overdue, so is a reparations scheme.'[181] Notably, neither the government nor the opposition challenged this assertion. The proposal for the establishment of a Stolen Generations Reparations Tribunal is not radical. Similar models of redress have existed in Australia for decades, such as statutory compensation tribunals and schemes for victims of crime and war veterans.[182] Political will is the only substantive barrier to the establishment of a reparations tribunal and the provision of effective reparations.

XVI The Commonwealth and the State Schemes

In evidence presented to the 2000 Senate Inquiry, witnesses emphasised the need for the Commonwealth to take the lead on reparations.[183] The significance of the Commonwealth's role in reparations was apparent prior to the Apology, when despite all of the states having already apologised, reparations advocates continued their apology campaign. The Commonwealth, as opposed to the States, is the appropriate body to establish a reparations tribunal. Members and descendants of the Stolen Generations should not be denied access to reparations because of their place of residence or because they were removed between states, as sometimes occurred. The Commonwealth has the authority and means to establish a tribunal and to ensure that fully effective reparations are provided equitably.

A Commonwealth reparations tribunal would also be best placed to consider the relevance of compensation already received from the existing state schemes. In his submission to the Senate Inquiry into the Stolen Generation Compensation Bill, Premier Carpenter asserted that 'it would be unfair' for claimants to be precluded from Commonwealth reparations because they had received compensation under a state scheme.[184] He also recommended that claimants be able to apply for the difference between state and Commonwealth compensation awards. With reference to the proposed Reparations Tribunal, the Bill should stipulate that the Tribunal be required to consider reparations already accessed by claimants when determining their eligibility.

A Commonwealth scheme is the only practical means by which fully effective reparations can be provided to the Stolen Generations. While Senator Bartlett's Bill was not intended to be a comprehensive model for reparations, the Bill introduced by Senator Siewert is a feasible proposal. Based on the PIAC and AHRC model submitted to the Inquiry into Senator Bartlett's Bill, Senator Siewert's Stolen Generations Reparations Tribunal Act 2008 (Cth) is a comprehensive model for reparations. This Bill should be subjected to parliamentary review and considered as the foundation upon which a full and effective reparations scheme can be built. The establishment of a reparations tribunal by the Commonwealth will facilitate the implementation of the remaining *Bringing them Home* recommendations and the provision of reparations that are in line with international human rights law standards.

XVII Conclusion

Reparations for the Stolen Generations and the attainment of genuine reconciliation should not be deferred any longer. At the turn of the millennium approximately 250 000 people walked across the Sydney Harbour Bridge in support of reconciliation.[185] While reconciliation transcends the Stolen Generations, it will not be achieved until the injustice of the Stolen Generations is adequately addressed. According to Manne, 'the quest for what we have come to call reconciliation... [and] the issue of the stolen generations, [has] become altogether intertwined'.[186]

The plight of the Stolen Generations has been of political, social and academic concern since at least the 1980s, when individuals and organisations first began calling for an inquiry into the removal of Aboriginal children.[187] Since the release of *Bringing them Home* in 1997 and the subsequent Stolen Generations litigation, the Stolen Generations have attracted the attention of the media and the Australian people. The Commonwealth, however, has not yet heeded the importance of fully effective reparations for the Stolen Generations. According to Shelton, 'remedies ... affirm, reinforce and reify the fundamental values of a society'.[188] As a society in which reconciliation is proclaimed to be a core value,[189] it is essential that reparations be provided for the Stolen Generations.

Within international law, there is both an emerging customary international law right to reparations and clear guidelines detailing how reparations should be implemented. Analysis of the Stolen Generations litigation highlights the inappropriateness of litigation as a means of achieving reparations due to the barriers faced by litigants. Furthermore, the courts only have the capacity to provide compensation, and as such are unable to deliver reparations. It is also apparent that the states have not provided effective reparations, thereby demonstrating the need for an equitable and comprehensive Commonwealth reparations scheme.

The greatest barrier to reparations is lack of political will. Nobles argues that the 'most successful reparations claims against governments have been achieved through legislation ... and are the products of extraordinary political movements'.[190] Other commentators agree with the important role of governments, commenting that legislatures are better suited to determining reparations because they are not bound by precedent and legal doctrine and can formulate equitable remedies.[191] The *Stolen Generations Reparations Tribunal Act 2008* (Cth) provides the framework for the establishment of a fully effective reparations scheme. It will, however, require public pressure to be enacted. The political will necessary for providing reparations is less significant than that which was needed to acknowledge and apologise to the Stolen Generations. It is therefore conceivable that this political shift will occur and, as such, it is valuable that Senator Siewert's Bill has been drafted to provide a basis for considering the provision of reparations.

Although some human rights advocates contend that combating current injustices is more important than pursuing reparations for historical abuses, the two are intrinsically linked. Reparations for the Stolen Generations are pivotal to reconciliation, as acknowledged by Sir William Deane:

> Theoretically there could be national reconciliation without any redress at all of the dispossession and other wrongs sustained by the Aborigines. As a practical matter, however, it is apparent that recognition of the need for appropriate redress for present disadvantage flowing from past injustice and oppression is a pre-requisite of reconciliation.[192]

In order to achieve reconciliation and move forward as a nation, fully effective reparations must be provided to the Stolen Generations. It is time for Australia to move beyond the Apology.

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

2 Ibid 170.

3 See, eg, Patrick Dodson, 'After the Apology' (Speech delivered at the National Press Club, Canberra, 13 February 2008).

4 *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, UN Doc A/Res/60/147 (2005) ('*Basic Principles*').

5 Ibid art 18.

6 Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, UN Doc E/CN.4/Sub.2/1996/17 (1996) ('The van Boven Principles'). The van Boven Principles were developed over 15 years and were adopted by the UN General Assembly as the *Basic Principles*, above n 4.

7 Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 651.

8 Senate Legal and Constitutional Affairs Committee (Senate Committee), Parliament of Australia, *Stolen Generation Compensation Bill 2008* (2008) 18.

9 Henry Reynolds, *With the White People* (Penguin Books, 1990) 165-166.

10 Although there has been much debate about when the practice of forced removal ended, the 1970s was the period accepted and referenced in the Apology. See above n 1, 170.

11 Peter Read, 'The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969' (Occasional Paper No 1, NSW Ministry of Aboriginal Affairs, 1981).

12 In the Senate, the Australian Greens moved an amendment to the Apology; to provide compensation. It was voted against by all other parties. See, Commonwealth, *Parliamentary Debates*, Senate, 13 February 2008, 162 (Bob Brown, Leader of the Australian Greens).

13 Andrew Bartlett was an Australian Democrats Senator for Queensland from 1997 until 2008.

14 Senate Committee, above n 8, ix.

15 Rachel Siewert is an Australian Greens Senator for Western Australia.

16 Jon Miller and Rahul Kumar, *Reparations: Interdisciplinary Inquiries* (Oxford University Press, 2007) v.

17 John Simpson and Edmund Weiner (eds), *The Oxford English Dictionary* (Oxford University Press, 2nd ed, 1989) volume XIII, 629.

18 *Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles)* opened for signature 28 June 1919, 11 Martens Nouveau Recueil Des Traites (3d) 323, Part VIII (entered into force 10 January 1920).

19 Alfred Brophy, *Reparations: Pro & Con* (Oxford University Press, 2006) 9.

20 Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press, 2006) 451, 454.

21 The *Basic Principles* were formulated from the international human rights law on reparations. They were initially developed by UN Special Rapporteur Theo van Boven and were further developed by Independent Expert, M Cherif Bassiouni.

22 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/ Res/ 61/295 (2007).

23 Dinah Shelton, 'Reparations for Indigenous Peoples: the Present Value of Past Wrongs' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples* (2008) 47, 58.

24 International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 6th plen mtg, UN Doc A/Res/56/83 (2001).

25 See, the *Basic Principles*, above n 4.

26 Chris Cunneen, 'Reparations and Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Civil Society* (2001) 83, 97.

27 GA Res 217 (III) UN GAOR, 3rd sess, 177th plen mtg, UN Doc A/ Res/ 216 (1948).

28 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

29 Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

30 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

31 Opened for signature 22 November 1969, 1144 UNTS 123, (entered into force 18 July 1978).

32 Opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953).

33 Shelton, above n 23, 114. On access to justice see, eg, Jeremy McBride, 'Access to Justice and Human Rights Treaties' (1998) 17 *Civil Justice Quarterly* 235.

34 Theo van Boven, UN Special Rapporteur, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report*, UN Doc E/CN.4/Sub.2/1993/8 (2 July 1993).

35 Ibid 7.

36 The *Basic Principles*, above n 4, art 18.

37 The UN General Assembly, above n 5; the UN Economic and Social Council, Res 2005/30, UN ESCOR, 14th sess, 38th plen mtg, UN Doc E/CN.4/2005/30 (9 March, 2005); the UN Commission on Human Rights, Res 2005/35, 61st sess, UN Doc E/CN.4/2005/35 (11 March 2005).

38 Jeremy Waldron, 'Superseding Historical Injustices' (1992) 103(1) *Ethics* 4, 7.

39 See, eg, John Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (2006) 49.

40 The *Basic Principles,* above n 4, art 18.

41 The *Basic Principles,* above n 4, art 15.

42 Richard Falk, 'Reparations, International Law, and the Global Justice: A New Frontier' in Pablo De Grief (ed), *The Handbook of Reparations* (2006) 478, 491.

43 'Soft' international law includes non-binding treaties and voluntary obligations. It is important because it contributes to the development of customary international law. See, eg, Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

44 Claire Charters, 'Reparations for Indigenous People: Global International Instruments and Institutions' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples* (2008) 163, 163.

45 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/ Res/ 61/295 (13 September 2007) art 8.

46 Vote on the *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September, 2007) 19.

47 Jenny Macklin MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Statement Delivered at Parliament House, Canberra, 3 April 2009).

48 Ian Brownlie, *Principles of Public International Law* (5th ed, 1995) 5.

49 James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples' (Speech delivered at the Australian United Nations Association Conference, Queensland Parliament House, 28 August 2009).

50 Shelton, above n 23, 173.

51 Charters, above n 44, 164.

52 James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 185.

53 James Crawford, 'International Law and the Rule of Law: The James Crawford Biennial Lecture Series on International Law' (2003) 24 *Adelaide Law Review* 3, 4.

54 See, eg, Barbara Anna Hocking and Margaret Stephenson, 'Indigenous Australians, Proprietary and Family Reparation' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples* (2008) 477, 485.

55 28 USC § 1350 (1789).

56 Falk, above n 42, 485.

57 Ibid.

58 Macklin, above n 47.

59 The UN General Assembly; UN Economic and Social Council; UN Human Rights Commission, above n 37.

60 Linda Briskman, *The Black Grapevine* (Federation Press, 2003) 5.

61 For a discussion of this debate see, Robert Manne, *In Denial: The Stolen Generations and the Right* (Schwartz Publishing, 2001) 24-28.

62 HREOC, above n 7, 266. The Report's allegation of genocide has sparked fierce debate. See, eg, A. Dirk Moses (ed) *Genocide and Settler Society: Frontier Violence and the Stolen Indigenous Children in Australian History* (Berghahn Books, 2004). The validity of genocide assertions do not need to be resolved in order to establish the case for reparations and will therefore not be discussed. Genocide was only one part of the claim concerning breach of international human rights and was only one of five bases for reparations in *Bringing them Home*.

63 HREOC, above n 7, 277-278.

64 See, eg, Commonwealth, Royal Commission Into Aboriginal Deaths in Custody, *Indigenous Deaths in Custody 1989 - 1996* (1996) vol 1.4.

65 Beverly Raphael, 'The Way Forward' (Speech delivered at the WA State Mental Health Conference, Perth, 20 November 1995).

66 (1995) 19 Fam LR 594, 602.

67 Public Interest Law Clearing House, *The Stolen Generation: A Legal Issues Paper for Lawyers and Other Advisers* (1997) 5.

68 Anna Haebich, *For Their Own Good* (University of Western Australia Press, 2nd ed, 1992) 149.

69 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 November 1912, 3804 (Rufus Underwood, Minister for Aboriginal Affairs).

70 Western Australia, Royal Commissioner Appointed to Investigate, Report and Advice Upon Matters in Relation to the Condition and Treatment of Aborigines (Moseley Royal Commission) Report (1935) 8.

71 HREOC, above n 7, 249-265.

72 GA Res 217 (III) UN GAOR, 3rd sess, 177th plen mtg, UN Doc A/ Res/ 216 (1948) art 2.

73 Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

74 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

75 Roy Brooks, 'Reflections on Reparations' in John Torpey (ed), *Politics and the Past: On Repairing Historical Injustice* (Rowman and Littlefield, 2003) 103, 112.

76 *Mabo v Queensland* (1992) 175 CLR 1.

77 Mark Champion, 'Post-Kruger: Where to Now for the Stolen Generation' (1998) 4(12) *Indigenous Law Bulletin* 9, 10.

78 See, eg, Martin Flynn and Sue Stanton, 'Trial by Ordeal: The Stolen Generation in Court' (2000) 25(2) *Alternative Law Journal* 75; Robert Van Krieken, 'Is Assimilation Justifiable? Lorna Cubillo and Peter Gunner v Commonwealth' (2001) 23 *Sydney Law Review* 239.

79 *Kruger v Commonwealth* (1997) 190 CLR 1 (*'Kruger'*).

80 Ibid 36.

81 *Cubillo v Commonwealth [No 1]* (1999) 89 FCR 528 (*'Cubillo [No 1]'*); *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 (*'Cubillo [No 2]'*); *Cubillo v Commonwealth [No 3]* (2001) 112 FCR 445 (*'Cubillo [No 3]'*).

82 *Cubillo [No 1]* (1999) 89 FCR 528, 599.

83 *Cubillo [No 2]* (2000) 103 FCR 1, 483.

84 Ibid 148.

85 *Cubillo [No 3]* (2001) 112 FCR 445, 579.

86 Transcript of proceedings, *Cubillo v Commonwealth* (High Court of Australia, Gleeson CJ, 3 May 2002).

87 *Trevorrow v South Australia* (2007) 98 SASR 136 (*'Trevorrow'*).

88 State of South Australia v Lampard-Trevorrow [2010] SASC 56

89 AAP, 'SA govt will not appeal Trevorrow case', *Sydney Morning Herald* (Sydney), 17 April 2010.

90 *Trevorrow* (2007) 98 SASR 136, 171.

91 Ibid 261.

92 Ibid 178.

93 Ibid 336.

94 See discussion below on the evidentiary challenges of litigation, 18.

95 See, eg, Chris Cunneen and Julia Grix 'Stolen Generations Litigation 1993-2003 [Chronology]' (2003) 5(23) *Indigenous Law Bulletin* 14, 15.

96 Members of the Stolen Generations in Victoria have successfully made claims under the Criminal Injuries Compensation scheme, receiving approximately $4000 each. See, eg, Public Interest Advocacy Centre ('PIAC'), *Restoring Identity*: *Final Report of the Moving Forward Project* (2nd ed, 2009) 48.

97 For example, Valerie Linow. See Alexis Goodstone, 'Stolen Generations Victory in the Victim's Compensation Tribunal' (2003) 5(22) *Indigenous Law Bulletin* 10.

98 Cunneen and Grix, above n 95, 15.

99 Public Interest Advocacy Centre, Submission to the Senate Legal and Constitutional Affairs Committee, Commonwealth, *Inquiry into the Stolen Generations Compensation Bill* (April 2008) 16-17.

100 See, eg, Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 1, AIATSIS, 2004) 23.

101 *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86, 103-104 (*'Williams'*).

102 See, eg, Diana Eades (ed), Languages in Evidence (1995).

103 Cunneen and Grix, above n 100, 30.

104 *Cubillo [No 1]* (1999) 89 FCR 528; *Cubillo [No 2]* (2000) 103 FCR 1; *Cubillo [No 3]* (2001) 112 FCR 445.

105 *Cubillo [No 2]* (2000) 103 FCR 1, 271.

106 Ibid 358.

107 Aboriginal Legal Rights Movement, 'South Australian Justice Issues' (A Paper Prepared for the South Australian Council of Social Services, 2009) 1.

108 See, evidence to the Senate Legal and Constitutional Affairs Inquiry on Access to Justice (December 2009).

109 PIAC, above n 96, 47.

110 See, eg, Lowitija O'Donoghue, Foreword to PIAC, above n 96.

111 *Williams* (1999) 25 Fam LR 86, 298.

112 Stephen Colbran, et al, *Civil Procedure* (3rd ed, 2005) 174.

113 *Limitation Act 1985* (ACT); *Limitation Act 1969* (NSW); *Limitation Act 1974* (NT); *Limitation of Actions Act 1974* (Qld); *Limitation of Actions Act 1936* (SA); *Limitation Act 1974* (Tas)*; Limitations of Action Act 1958* (Vic); *Limitation Act 2005* (WA).

114 In NSW, Tas and Vic, 'just and reasonable grounds are required, in Qld 'material facts of a decisive nature' are necessary for an extension. For further discussion see, Colbran, above n 112, 190-217.

115 Champion, above n 77, 11.

116 *Cubillo [No 2]* (2000) 103 FCR 1, 443.

117 PIAC, above n 96, 16.

118 Pam O'Connor, 'History on Trial: Cubillo and Gunner v The Commonwealth of Australia' (2001) 26 *Alternative Law Journal* 27, 30.

119 PIAC, above 96, 18.

120 *Williams* (1999) 25 Fam LR 86, 249-50, 260.

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122 Aboriginal Legal Rights Movement, 'South Australia's Stolen Generation Takes Action' (Press Release, 7 August 2009) 1.

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124 Department of Premier and Cabinet Tasmania, *Report of the Stolen Generations Assessor* (2008) 18.

125 Ramona Vijeyarasa, 'Facing Australia's History: Truth and Reconciliation for the Stolen Generations' (2007) 7 *International Journal on Human Rights* 127, 137.

126 The *Basic Principles*, above n 4, art 22(b).

127 *Stolen Generations of Aboriginal Children Act 2006* (Tas) s 6(3).

128 See, eg, The Queensland Redress scheme, which had a 12-month application period that was subsequently extended. See, Queensland Government Department of Communities, *Redress Scheme Application Guidelines* (Revised ed, 2008) 3.

129 *Basic Principles*, above n 4, art 2(b).

130 Vijeyarasa, above n 125, 138.

131 Department of Premier and Cabinet Tasmania, above n 124, 9.

132 Department of Premier and Cabinet Tasmania, above n 124, 14-16.

133 See, eg, Heather McRae, *et al*, *Indigenous Legal Issues* (Thomson Reuters, 4th ed, 2009) 67-68.

134 *Commonwealth v Tasmania* (1983) 158 CLR 1.

135 See, eg, Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture,* Final Report (2006) 61-63.

136 *Aboriginal Lands Act 1995* (Tas) s 3A(1)(c).

137 Department of Premier and Cabinet Tasmania, above n 124, 15.

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141 See, eg, HREOC, above n 7, Chapter 10.

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145 106 applications were determined to be eligible for payment, Ibid 12.

146 Department of Premier and Cabinet Tasmania, above n 124, 18.

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