Reparations, Justice Theories and Stolen Generations

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Reparation measures for historical injustices have generated debate and criticism. This article explores the theoretical underpinnings for the awarding of reparations particularly in relation to the 'Stolen Generations'. The author argues that restorative justice theory has the most to offer but that the majority of reparation measures by the Australian government (both the Howard and Rudd governments) for the Stolen Generations have been framed in distributive justice terms.

THE term 'reparations' has many possible meanings but basically it refers to restoring justice, atoning and making amends for a wrong. It is possible that the wrongdoing group may not have a responsibility in a strict legal sense, or be legally compelled to make reparations. The obligation may centre on a political and moral, rather than a legal, basis. In fact, some commentators specifically exclude legal compulsion (for example, a judicial order) from their definition or analysis of reparations.[1]

Since World War II, and in particular since the early 1990s, there has been an escalation of demands for reparations for historical injustices. As John Torpey writes:

> The proliferation of demands that states, churches, and private firms be compelled to pay reparations to those whom they are said to have wronged in the past, or

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1. EA Posner & A Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia L Rev 689, 692.

> at least pressured to apologize for such wrongdoing, represents one of the more striking developments in recent international affairs.[2]

Many in the Australian public and media have become aware of the term 'reparations' in the last ten years largely due to the 'National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families'[3] (the 'National Inquiry') and its subsequent report, *Bringing Them Home*.[4] The removed children have become known as the 'Stolen Generations'.[5]

In addition to the demand for extra-judicial reparations, some members of the Stolen Generations have sought redress through the courts. The litigation pathway

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2. J Torpey, *Making Whole What Has Been Smashed* (Cambridge: Harvard UP, 2006) 8. See also J Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (Lanham: Rowman & Littlefield, 2003); E Barkan, *The Guilt of Nations: Restitutions and Negotiating Historical Injustices* (Baltimore: John Hopkins UP, 2001). For further examples of reparations measures, see Y Danieli, 'Preliminary Reflections from a Psychological Perspective' (Paper presented at *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms Seminar*, University of Limburg, 11–15 Mar 1992); CM Quiroga, 'The Experience of Chile' (Paper presented at *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms Seminar*, University of Limburg, 11-15 Mar 1992); A Buti, 'Canadian Residential Schools: The Demands for Reparations' (2001) 5 FJLR 225; J Torpey, 'Making Whole What Has Been Smashed': Reflections on Reparations' (2001) 73 J Mod History, 333; S Garkawe, 'The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights' (2003) 27 MULR 334; PE Andrews, 'Reparations for Apartheid's Victims: The Path to Reconciliation', (2004) 55 DePaul L Rev 1155; P de Greiff, 'Addressing the Past: Reparations for Gross Human Rights Abuses' (Paper presented at *Repairing the Past: Confronting the Legacies of Slavery, Genocide, and Caste Conference*, Yale University, 20–27 Oct 2005); P O'Connor, 'Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment', (2000) 6 AJHR188.
3. In 1995, the Commonwealth Attorney-General Michael Lavarch commissioned the Australian Human Rights and Equal Opportunity Commission ('HREOC') to conduct the national inquiry. It had four terms of reference: tracing the history and effects of Aboriginal child removals; examining the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal people separated under compulsion, duress or undue influence from their families; examining the principles relevant to determining the justification for compensation for persons or communities affected by the separation process; and examining current laws, practices and policies with respect to child placement and care of Aboriginal children and recommending appropriate changes, taking into account the principle of self-determination. The compensation term of reference was not originally part of the inquiry: it was added after Aboriginal representations to the Commonwealth government. .
4. HREOC, *Bringing Them Home* (Canberra, 1997).
5. An Australian historian coined this term in relation to his historical study of New South Wales: P Read, *The Stolen Generations: The Removal of Aboriginal Children in NSW, 1883 to 1969* (Canberra: Ministry of Aboriginal Affairs, 1981). Although the term 'Stolen Generations' has attracted criticism, it has gained common usage. By 2001, the term had gained an entry in *The Australian Oxford Dictionary*: 'the Aboriginal people who were removed from their families as children and placed in institutions or fostered by white families'. See B Moore, *The Australian Oxford Dictionary* (5th edn, 2001) 1087–8.

had been most unsuccessful[6] until the 2007 South Australian Supreme Court *Trevorrow* decision.[7] This article does not traverse the litigation pathway.[8] The focus here is on non-judicial reparations.

Reparations measures have generated criticism. In addition to the potential for heated debate over 'historical truth', reparations talk and demands are potentially divisive for another reason – reparations measures require decisions about resource allocation and priorities, which can result in perceptions of 'winners and losers'. This article does not seek to engage in a detailed critique of these arguments and criticisms – that requires a separate article or series of articles.[9] Rather this article examines another aspect of the reparations debate – that is, which justice theory is best suited to providing a theoretical underpinning for the awarding of reparations and which theory or theories best describes or 'fits' the Australian government's (both the Howard and Rudd governments) responses to the National Inquiry reparation demands.

The justice theories most commonly referred to in a reparation context are corrective justice, distributive justice and restorative justice. These are discussed in more detail later but for now it is sufficient to state the following. Corrective justice involves the wrongdoer repairing wrongful losses, often in the form of monetary compensation.[10] Distributive justice involves allocating resources to a person or group according to some predetermined distributive criteria, often based on concepts of welfare, equality and egalitarianism.[11] Restorative justice also looks at redressing the wrong committed but it goes further than classic corrective justice in that it not only seeks to repair the loss or injury, but also to reconcile the wronged with the perpetrator.[12] It will be argued that the theory of restorative justice

6. See eg *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam L R 86; [2000] Aust Torts Reports 81-578, 64,136; *Kruger v Commonwealth, Bray v Commonwealth* (1997) 190 CLR 1; *Cubillo v Commonwealth, Gunner v Commonwealth* (2000) 103 FRC 1; (2001) 112 FCR 455.
7. *Trevorrow v South Australia (No 5)* [2007] SASC 285.
8. For more of the *Trevorrow* decision and litigation for the Stolen Generations, see A Buti, 'The Stolen Generation and Litigation Revisited' (2008) 32 MULR 382.
9. For examples of critiques on reparations, see Posner, above n 1; Torpey, 'Making Whole What Has Been Smashed': Reflections on Reparations', above n 2; J Waldron, 'Redressing Historic Injustice' (2002) 52 Toronto LJ 135; RL Brooks, 'Getting Reparations for Slavery Right: A Response to Posner and Vermeule' (2005) 80 Notre Dame L Rev 251; PH Schuck, 'Slavery Reparations: A Misguided Movement', in PH Schuck, *Meditations of a Militant Moderate* (New York: Rowman & Littlefield, 2006) 43.
10. See KD Logue, 'Reparations as Redistribution' (2004) 84 Boston L Rev 1319, 1326.
11. See J Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972) 55; P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 Iowa L Rev 515, 535; Logue, ibid 1328, 1342–3.
12. See Brooks, above n 9, 255; C Cuneen, 'Exploring the Relationship Between Reparations, the Gross Violation of Human Rights, and Restorative Justice', in D Sullivan & L Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (New York: Routledge, 2006) 335, 356. Restorative justice has some commonality with therapeutic justice jurisprudence which examines law as a therapeutic agent: see DB Wexler & BJ Winick (eds), *Law in a Therapeutic Key: Development in Therapeutic Jurisprudence* (Durham: Carolina Academic Press, 1996).

is the most dynamic and effective theory of reparations. Restorative justice, unlike corrective and distributive justice, encourages communication between wrongdoer and victim, which is capable of empowering the victim and performing important symbolic functions for a society stained with past injustices. An examination of the features of restorative justice theory ultimately draws attention to the limitations of the other theories of justice in terms of their ability to address the entire context of historical human rights abuses.[13]

THEORIES OF JUSTICE

A significant part of the jurisprudential and political debate on reparations relates to different forms of justice, namely, corrective, distributive and restorative justice. However, the demarcation lines between these different 'justices' are not always clear.[14] For, as Benson writes in relation to corrective and distributive justice:

> Over the centuries, writers have proposed different conceptions of corrective and distributive justice. Thus, Aristotle and Thomas Aquinas understood them in one way, Hobbes and Grotius in another, and Kant and Hegel in still another. And the same is true of contemporary legal and political theory.[15]

Corrective justice

Corrective justice theories of reparations are most closely associated with a tort-like action, whether it be a traditional tort action such as negligence or assault, or some other wrong like breach of contract or unjust enrichment. Corrective justice is guided by the principle that wrongfully caused harms ought to be repaired.[16] Those who should repair the losses are those who were responsible for the wrongful harms[17] or someone else who has 'inherited' the duty to repair. In many respects, corrective justice is the theory that most closely resembles an orthodox court action for compensation.[18]

Corrective justice has usually been thought of as comprising those principles that directly govern private transactions between individuals'.[19] However, there

13. JJ Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice' (2002) 52 Toronto LJ 253, 291.
14. Theories of justice, particularly corrective and distributive justice, are often credited back to Aristotle. See Aristotle, *Nicomachean Ethics* (Martin Ostwald trans, 1962) 120–3; Logue, above n 10, 1326, n 19; K Cooper-Stephenson, 'Reparations: Theoretical underpinnings for Reparations: A Constitutional Tort Perspective' (2003) 22 Windsor Year Book Access Justice 3, 5.
15. Benson, above n 11, 515.
16. Logue, above n 10, 1326.
17. JL Coleman, 'The Practice of Corrective Justice', in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 53.
18. R Pierik, 'Reparations for Luck Egalitarians' (2006) 37 J Social Philosophy 423, 434.
19. Benson, above n 11, 515.

is no theoretical or doctrinal barrier to its relevance for reparative claims against governments, particularly within an extra-judicial context. In the U.S. slavery context, theories of corrective justice have been at the forefront of arguments put forward by many reparations scholars.[20] Nonetheless, in (judicial or political) actions against governments, the overall 'justness' of drawing on community resources to 'correct' a historical wrong must take into account and balance the demands of currently disadvantaged groups and society in general.

This point about competing interests is not without significance and has two main components. The first is the issue of the equitable interests of the current general populace (and by logical extension future generations). Foremost among the theorists concerned with the effect of historical based claims on 'supersession' is Jeremy Waldron.[21] His concerns are focused on reparations measures for dispossession of land. Waldron queries whether it is 'fair to expropriate the land of an immigrant who purchased the land in good faith and whose ancestors had nothing to do with the injustice, in order to end the continued injustice of the expropriation of indigenous people's lands?'[22] The crux of his argument is that reparations claims must be assessed in the context of the existing situation, which may make it unjust to the current population to award reparations. For example, Waldron states that Aboriginal claims for the return of land that was 'stolen' from them (or their ancestors) must be assessed in relation to the current situation. This is because land is scarcer now than when the land was stolen. It would not be just for Aborigines to have exclusive use of the land that was taken from them many generations ago when land was plentiful. It needs to be shared with others in a more densely populated nation. However, in the Australian context, one may argue with some merit that, given the vast tracts of unoccupied land in Australia, the relevance of Waldron's argument is somewhat diminished.[23]

Waldron also notes that those in possession of the land now may have been bona fide purchasers of the land from previous bona fide purchasers and so on. It may be necessary to go back four to six generations until we reach the stage when we find the person who 'took' the land from the Aboriginal group.[24]

A counter argument to Waldron's thesis is clear: if there has been an unjust enrichment as a result of the wrongful annexation of Aboriginal land, restitution is justified. Further, not all reparations demands relate to land. For example, in relation to the Australian Aboriginal Stolen Generations, reparations claims are

20. Logue, above n 10, 1323.
21. Bradford labels these theorists 'justice as supersession theorists': see W Bradford, 'Beyond Reparations: An American Indian Theory of Justic*e*' (2005) 66 Ohio State LJ 1, 52.
22. J Waldron, 'Superseding Historic Injustice' (1992) 103 Ethics 4, 26–7.
23. Of course, there would be greater demand for some areas of land.
24. Waldron, above n 22; see also above n 9.

not generally being argued on the basis that the non-Aboriginal population was unjustly enriched due to the policy and practice of removal.[25]

The second concern goes to comparative group 'victimhood' claims in the social-political 'market place'. In opposing reparations for American slavery, Yale law professor Peter Schuck argues that inevitably there will be a competition for 'greatest victimhood'. That competition is 'inevitable both for political reasons and for a legal one; standard equal protection doctrine invites such comparisons in order to determine the appropriate standard of review'.[26] This may be the case in jurisdictions such as the U.S, which has a constitutional equal protection doctrine (14th Amendment), but not in others such as Australia, where the Commonwealth Constitution has no express equal protection clause or doctrine.

Schuck states that victimhood competition may not be 'an edifying sight'.[27] Again, this may be more relevant in some countries than in others. In contrast to the numerous and varied reparations claims in the United States,[28] there have been

25. Although, for some members of the Stolen Generations, access and linkage to traditional lands is an issue. Moreover, there is another issue that is slowly gathering some interest in Australia, namely 'Stolen Wages'. This relates to the era of the Stolen Generations when it was normal practice for the wages of Aborigines paid by the employer (many Aborigines worked as farm hands and domestic servants) to be gathered by the various Native Welfare or Aboriginal Affairs departments but then not passed onto the Aboriginal workers. Some of these Aborigines are members of the Stolen Generations while others are not. See *Bligh, Coutts, Coutts, Foster, Lenoy, Sibley, Sibley and Palmer v Queensland* [1996] HREOC 28; *Baird v Queensland* [2006] FCA 162; Senate Standing Committee on Legal and Constitutional Affairs, *Unfinished Business: Indigenous Stolen Wages* (Canberra, 2006).
26. Schuck, above n 9, 47.
27. Ibid.
28. US academic W Bradford claims that reparations have consumed 'more energy, emotion and resources' in the US than in any other nation, noting apologies or monetary compensation 'to Japanese-American internees, native Hawaiians, civilians killed in the Korean War, and African-American victims of medical experiments, racial violence and lending discrimination'. See Bradford, above n 21, 3–4. Additionally, there has been a dramatic increase in reparations scholarship in the US, particularly in relation to reparations for Black Slavery and Jim Crow laws. Since the release of the seminal book (BI Bittker, *The Case for Black Reparations* (New York: Random House, 1973)), the literature on reparations for blacks has been ever growing. A few examples of the voluminous American 'Black reparations' scholarship include: V Verdun, 'If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans' (1993) 67 Tulane L Rev 597; R Westley, 'Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?' (1998) 19 Boston College LJ 429; JR Feagin, *Racist America: Roots, Current Realities and Future Reparations* (New York: Routledge, 2000); R Robinson, *The Debt: What America Owes to Blacks* (New York: Penguin Putman Inc, 2000); LA Harris, '"Reparations" as a Dirty Word: The Norm Against Slavery Reparations' (2003) 33 Memphis L Rev 409; SA Ifill, 'Creating a Truth and Reconciliation Commission for Lynching' (2003) 21 Law & Inequality 263; CJ Ogletree, 'Repairing the Past: New Efforts in the Reparations Debate in American' (2003) 38 Harvard Critical Race-Critical Legal L Rev 279**;** CJ Ogletree, 'The Current Reparations Debate' (2003) 36 California Davis L Rev 1051; RA Winbush (ed), *Should Americans Pay? Slavery and the Raging Debate on Reparations* (New York: Amistad Press, 2003); AL Brophy, 'Reparations Talk: Reparations for Slavery and the Tort Law Analogy' (2004) 24 Boston College Third World LJ 81; RL Brooks, *Atonement and Forgiveness: A Model for Black Reparations* (Berkeley: Uni California Press, 2004).

few group or large-scale reparations claims in Australia. Apart from issues relating to Aboriginal land dispossession, the Stolen Generations and the more recent 'Stolen Wages', there have been few other significant large scale group reparations demands. Probably the most prominent non-Aboriginal reparations group demand has come from the 'British Child Migrants'.

The British Child Migrants were unaccompanied children, generally under the age of 16 without relatives in Australia, brought to Australia from the United Kingdom under schemes approved by the various Australian governments. Many of these children were subjected to institutional physical and sexual abuse. The British Child emigration scheme was based on 'classism', not racism. It was not centred on an inherent biological inferiority but on the perceived social inferiority of the working class or destitute class of children. Even so, it was deplorable. Demands for reparations have been made and reparative measures initiated, mainly in the form of counselling services and funding of family reunions.[29]

In countries such as Australia where large group reparations demands have been infrequent, the 'danger' of an unedifying battle is less likely.[30] However, even accepting the problems of victimhood competition, that alone is not sufficient to preclude reparations being granted. Reparations justified on legal and/or moral grounds (reparations is, ultimately, a moral issue) do not become unjustified because of possible adverse 'victimhood' competition. Nevertheless, the victimhood issue must be considered when deciding on reparations – good public policy demands it.[31]

Another possible challenge to the corrective justice model relates to legality/illegality. If the alleged wrong was lawful when it was committed, there is an obvious problem if one is seeking to claim reparations through the court system. By analogy, this also creates difficulties when seeking extra-judicial reparations based on tort theory and corrective justice, because if the matter proceeded to court the government could have argued statutory authority for their activities.[32]

29. See Health Committee (UK), *Report on Welfare of Former British Child Migrants* (HMSO, 1997–1998) 755; Australian Senate Community Affairs Reference Committee, *Lost Innocents: Righting the Record* (Canberra, 2001). There have also been demands for reparations in relation to institutional child abuse in general. Refer to Senate Community Affairs References Committee, *Forgotten Australians: A Report on Australians who Experienced Institutional or Out-Of-Home Care as Children* (Canberra, 2004); R Atkinson, 'Denial and Loss: The Removal of Indigenous Australian Children from Their Families and Culture' (2005) 4 QU Law & Justice J 4.
30. One may seek to argue that successful reparations claims may encourage 'copycats'. While it is not possible to predict the future with accuracy, it is submitted that in the Australian context, there is currently no reliable or substantial evidence to support such an argument. Although not all claims by the Stolen Generations or British Child Migrants have been granted, reparations have been made to these two groups. This has not seen a 'flood' or even an increased 'trickle' of other such reparations claims for historical injustices in Australia.
31. Retention of a 'victimhood' status or mentality may inhibit rehabilitation. This should be considered in the design of the reparation program or scheme.
32. Cooper-Stephenson, above n 14, 17.

However, seeking extra-judicial redress, even through a corrective justice tort model, means that if there is a political will, the lawfulness of an impugned activity is not an absolute barrier to reparations. Boris Bittker in his seminal work on black reparations argued that a historical injustice (even if so classified only in hindsight) that was legal when done 'is surely not a reason to refrain from making amends'.[33]

Similarly, the 'standard of the time' defence, which was reiterated in *Kruger*,[34] is on shaky ground, at least morally, if the impugned policies and practices are later viewed as violating fundamental freedoms and human rights.[35] As stated by Julie Bessant:

> The idea, for example, that one could legitimately appeal to the 'community standards of the day' principle when considering, for instance the German case of medical killings of disabled children and psychiatric patients (1939-41) which had widespread expert and community support would not receive support.[36]

Even ignoring the 'standard of the time' defence, corrective justice may not be able to adequately address conditions of oppression that have persisted for centuries. American philosopher Margaret Urban Walker is critical of corrective justice for presupposing a 'moral baseline of acceptable conduct'.[37] In so doing, corrective justice commands 'correction of what are presumed to be discrete lapses from that prior or standing moral baseline' when, in reality, the injustice most likely consists of 'radical *denial* of moral standing or in relentless enforcement of *degraded* moral status of individuals, especially when these are systemic conditions and persist over extended periods of time'.[38] It will be argued below that the theory of restorative justice avoids the same artificiality by introducing the concept of rebuilding relationships, which can appropriately address historical injustices.

The 'requirement' of causation also presents a challenge. Under corrective justice theory, the orthodox position is that if the state is to inherit responsibility to 'repair' continuing harms due to a historical injustice, there must be a causal link between the historical wrong and current harm.[39] But, such a causal link is often difficult to prove because of evidentiary issues, the tide of history, and the problem of contingency. The longer the period between the historical wrong and the subsequent claim the more difficult it is to establish the causal link.

33. Bittker, above n 28, 22.
34. *Kruger v Commonwealth* (1997) 190 CLR 1, 36–7, 52–3.
35. Breaches of fundamental freedoms have long been scorned by the international judiciary bodies. See *Z v United Kingdom* (2002) 34 Eur Ct HR 97.
36. J Bessant, 'Procedural Justice, Conflict of Interest and the Stolen Generations' Case' (2004) 63 AJPA 74, 76.
37. M Urban Walker, 'Restorative justice and reparations' (2006) 37 J Social Philosophy 377, 378.
38. Ibid.
39. Pierik, above n 18, 434.

The degree of difficulty in relation to the evidentiary and the tide of history issues will depend on the actual historical injustice under consideration. This is also the case in relation to problems of contingency, but this issue is arguably not amenable to logical resolution.

Problems of contingency relate to an obvious question: what would have happened if the historical injustice had not occurred?[40] Take for example, the Stolen Generations situation: an Aboriginal child may have been removed from their parents under mainstream child welfare policy (in a non-discriminatory manner); the parents themselves may have decided to remove their children from their Aboriginal culture; a Stolen Generations member who is now suffering harm may not have avoided such harm even if they had remained with their families; or myriad other injustices committed against Aborigines may have contributed to their current economic, social and cultural degradation. However, if too much (or undue) weight is given to contingency arguments, reparations are unlikely ever to be awarded. Unless an appropriate comparison can be made between the group subjected to the injustice and groups subjected to other contingent injustices or for that matter no injustices, no certain prediction can be made about the possible outcomes from different contingencies. However, this could only be done under a scientifically controlled 'laboratory' experiment. Of course, this will not happen, nor should it happen.[41] Thus, there is no logical solution to the contingency problem. In the end it will come down to whether there is the political will to disregard the contingency issue, based on the position that the crucial issue is the historical injustice itself. For, as international law expert Diane Shelton comments: 'harm is implicitly contained in the illegal character of the act and that the violation of a norm always disturbs the interest it protects as well as the right(s) of the person(s) having the interest'.[42]

Corrective justice approaches to reparations for historical injustices throw up many challenges but in an extra-judicial setting, none need be fatal. Nevertheless, a corrective justice approach to reparations can be limiting. Corrective justice grounds for reparations are 'backward looking'[43] and in essence look at rectifying a historical wrong.[44] While it is important to focus on the past injustice and seek

40. On the issue of contingency in general, see Waldron, above n 22, 8–9.
41. Although, a 'control group' was arguably present in the *Trevorrow* case, above n 7. In 1957, the 'authorities' took 13-month-old Bruce Trevorrow from his family without their consent, and placed him with a foster mother. His siblings remained with their parents. The circumstances provided an almost clinical setting in which the effect of family deprivation on Bruce's achievements in life could be measured against those of his siblings. In effect, the siblings became the test control group. The siblings grew up to become respected members of their community with meaningful employment. Arguably they fulfilled their potential. Bruce did not, suffering substance abuse, imprisonment and significant relationship problems. See further Buti, above n 8.
42. D Shelton, *Remedies in International Human Rights Law* (Oxford: OUP, 1999) 102.
43. Brooks, above n 9, 255.
44. Posner, above n 1, 691.

to redress that past, it may not necessarily provide the best process for ensuring a better future for the wronged party, or for national unity.

Distributive justice

Distributive justice deals with the 'fair' allocation of resources by the state generally in accordance with values of merit and need,[45] and possibly responsibility and democratic equality. It is often associated with principles or concepts of welfare, equality, and egalitarianism.[46] In contrasting corrective justice with distributive justice, Kyle Logue writes:

> Corrective justice [is] about restoring the status quo, requiring A to compensate B for some wrong that was done by the former to the latter. By contrast, distributive justice is about fairness of the overall distribution of scarce societal benefits and burdens within a society and typically calls for reducing certain types of societal inequality.[47]

Thus, under corrective justice, the obligation to restore the status quo (or as closely as possible) remains, irrespective of any initial inequalities between wrongdoer and the victim. With distributive justice, the obligation to ensure the 'fair' sharing of societal resources is not dependant on any specific historical injustice.[48] But the crux of the distinction between distributive and corrective justice is not that corrective justice takes history into account whereas distributive justice does not, but rather what history is deemed relevant. In contrast to distributive justice, corrective justice does not seek to identify the reason for a purported injustice.

But, it may be otherwise when one seeks to utilize a distributive theory to justify reparations for a historical injustice. This is because when one associates reparations with distributive justice, the reasons for the current inequalities need to be identified. Only morally relevant inequalities need to be rectified.[49]

The distinction between corrective justice and distributive justice becomes blurred when associated with reparations, particularly when one is expecting the state to provide the reparations. The corrective justice theory seeks to rectify a past wrong with current societal resources. This is in part driven by the distributive justice obligation of sharing resources on fair and equitable grounds.[50] Moreover, in determining the content of the corrective justice reparations, distributive justice

45. Cooper-Stephenson, above n 14, 17.
46. See Rawls, above n 11, 55; Benson, above n 11, 535; Logue, above n 10, 1328, 1342–3.
47. Logue, above n 10, 1328.
48. Ibid.
49. R Dworkin, *Sovereign Virtue* (Cambridge: Harvard UP, 2000) 73-8; Logue, above n 10, 1344.
50. BP Dauenhauer & ML Wells, 'Corrective Justice and Constitutional Torts' (2001) 35 Georgia L Rev 903.

concerns about the allocation of resources between the members of society and groups within that society may become important.[51]

Distributive justice does have some appealing features. It deals with current inequalities (forward looking) and justifies policies to alleviate them by identifying how some of the inequalities came about (backward looking).[52] By addressing current inequalities of resource allocation, it provides the opportunity for a greater number of programs for a greater number of people than would normally be the case for reparations measures based on tort-like corrective justice principles. However, the reparative value of distributive justice is often reduced because it will invariably resemble a social welfare program that arguably should be in place in a 'civil society' regardless of any prior historical injustice. As stated by Albert Mosley:

> Nor can welfare be considered a means of compensating for past injustices. When the means are available, most people believe that their community has a moral obligation to provide for its members who are unable to provide for themselves…. When the community provides aid without assuming it is the cause of the affliction, it seeks to relieve, its action is a reflection of its generosity, rather than its obligation. It is in no way an admission of responsibility for the affliction being addressed. Welfare is a form of charity, not restitution.[53]

Restorative justice

Restorative justice has been most closely linked to the criminal justice system, in which programs are established with the aim of repairing the injuries caused by the wrong, and assisting the victim, the perpetrator and their communities to find a lasting solution to the conflict. In relation to the criminal justice process, Galaway and Hudson argue that restorative justice has three elements:

> First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders and their communities to find solutions to the conflict.[54]

This three-phase definition does not fully reflect the restorative justice underpinnings of reparations for human rights abuses. Here we must deal with a plethora of human rights abuses by a state or its agents, not by a private individual.[55]

51. Cooper-Stephenson, above n 14, 11.
52. Pierik, above n 18, 436.
53. A Mosley, 'Affirmative Action as a Form of Reparations' (2003) 33 Memphis L Rev 353, 358.
54. B Galaway & J Hudson (eds), *Restorative Justice: International Perspectives* (New York: Criminal Justice Press, 1996) 2.
55. C Cunneen, 'Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights', in H Strang & J Braithwaite (eds), *Restorative Justice and Civil Society* (Cambridge:

In some respects, restorative justice has similarities with corrective justice in that both seek to address the past wrong and to the extent possible place the victim back in the position they would have been in but for the wrong – a 'backward-looking' approach. But, restorative justice, having a strong 'forward-looking' approach, seeks to do much more in areas such as reconciliation, redemption and moral restoration.[56] U.S reparations scholar Roy Brooks associates restorative justice with the 'atonement model', which centres on the rehabilitative aspects of reparations.[57] The crux of Brooks' 'atonement model' is the requirement of an apology to the victims of a past injustice, made more effective by monetary or other additional reparations. It should also be noted that reparations measures based on restorative justice may have a distributive justice effect on current inequalities between different sectors of society. However, this is a consequence, not the underlying rationale of reparations under the restorative justice model. But, what this discussion shows is that the lines between different theories of justice and reparations are blurred and interconnected and not mutually exclusive.

The theory of restorative justice is far broader in scope than either of the other theories that could potentially inform the making of reparations for past acts. Whereas the corrective justice and distributive justice theories are primarily concerned with the notion of a material transfer, restorative justice encompasses an array of measures – including, but not limited to, monetary compensation – to address historical wrongs. The theory implicitly recognises that victims of historical wrongs have material, emotional and moral needs,[58] and that compensation may even be insulting '[w]ithout a surrounding framework of respectful acknowledgment, responsibility, and concern'.[59]

As its name suggests, restorative justice theory is concerned with the restoration of relationships between human beings and, more specifically, with the 'restoration of social relationships of equality'.[60] It follows that 'disregard or violation of acceptable human relationships … stands at the core of its agenda, practically and philosophically'.[61] Thus, the aim of restorative justice is not simply to restore the relationship to the state it was in before it was ruptured because 'often the wrongdoing itself is the result of an existing inequality'.[62] John Braithwaite notes that a favourable restorative justice model will, inter alia, ensure non-domination; empowerment and respectful listening; restore human dignity, damaged human relationships, communities, stable emotions, freedom, peace and civic duty; and

CUP, 2001) 83. Also refer to H Blagg, 'Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia' (1998) 10 Current Issues in Criminal Justice 5; Cunneen, above n 12, 355.

56. Brooks, above n 9, 254–5.
57. Ibid, 272–84.
58. Urban Walker, above n 37, 383.
59. Ibid, 385.
60. Llewellyn, above n 13, 289–90.
61. Urban Walker, above n 37, 382.
62. Llewellyn, above n 13, 290.

prevent future injustices.[63] Martha Minow, a professor of law at Harvard Law School, characterises restorative justice as 'building connections and enhancing communication between perpetrators and those they victimized'.[64] One of the defining features of the restorative justice approach is that it seeks to set up a conversation between the wrongdoer and the victim where the injustice and its consequences are discussed. Victims are thereby given the opportunity to ask the wrongdoer exactly what happened and why. Such information 'is often critical to victims' own understanding, peace of mind, and sense of blamelessness'.[65] According to Canadian law professor Jennifer J Llewellyn:

> Truth-telling in the form of an admission of responsibility for what happened on the part of a wrongdoer is a precondition for a restorative process, and truth-telling in the form of an honest relating of one's story and experience by all parties is a fundamental part of a restorative justice process.[66]

By engaging in an open and authentic dialogue with the wrongdoer, victims do not need to rely solely on receipt of an arbitrary monetary figure to reclaim a sense of their place in the community. Rather, victims are empowered and emotional harm may be healed simply by affording them the opportunity to have their stories of past injustice heard.[67] This is seen 'as a starting point toward healing the hurts of injustice and transforming the conditions that allowed the injustice to flourish'.[68] Margaret Urban Walker observes that:

> As injustices grow in magnitude, violence, and historical duration, the reality, nature, intent, and seriousness of violations become predictably contested, and the need for a careful and detailed articulation of the full story of violence, oppression, terror, or subjugation becomes both a reparative activity and a measure of the adequacy of other measures of repair.[69]

Restorative justice process seeks to avoid the domination of one party over the other party or parties. When the restorative justice process is dealing with the state as the perpetrator of the wrong, it is necessary to reconsider the degree to which the state, as a stakeholder in the process, is to be granted equal concern. The need to address the adverse consequences for the victim of the historical injustice must take precedence, but not to the absolute exclusion of the state and the wider community. Indeed, restorative justice proponents stress the importance

63. J Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 British J Criminology 563, 569.
64. M Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) 92.
65. Urban Walker, above n 37, 384.
66. Llewellyn, above n 13, 293–4.
67. K Pranis, 'Democratizing Social Control: Restorative Justice, Social Justice and the Empowerment of Marginalized Populations' in L Walgrave & G Bazemore (eds), *Restoring Juvenile Justice: An Exploration of the Restorative Justice Paradigm for Reforming Juvenile Justice* (New York: Criminal Justice Press, 1999) 564.
68. Braithwaite, above n 63, 564.
69. Urban Walker, above n 37, 386.

of community participation in restorative justice programmes. This is particularly so if one of the aims of reparations is national or community reconciliation.

The tendency of the state to dominate proceedings is great, particularly as it will play a central role in the allocation of resources for the implementation of any reparations measures. Care must be taken to restrain the state using its significantly superior political and economic power to unduly dominate the restorative justice process to the exclusion or disrespect of the victims' views. Victims' voices may be protected by the use of the legal profession as facilitators of the discussion between victims and other stakeholders.

Even acknowledging its potential challenges and complexities in the context of reparations for systematic historical injustices, restorative justice has much to offer as a theoretical underpinning for any such reparations. For all the reasons stated by John Braithwaite (noted above), restorative justice as a reparations theory is attractive. It provides both a process and a value framework for the awarding of reparations.[70] It places particular emphasis on the principles and aims of human dignity, strong relationships, and morality. This allows a more holistic approach to reparations.

Moreover, restorative justice stresses a civic duty of society to atone for the injustices of the past that transcends the attribution of guilt to the wrongdoer, which often is the focus of corrective justice and retribution. This is particularly attractive if the original wrongdoer no longer exists. As Brooks notes, in matters of reparations claims, the powerful influence of morality may come to the fore to place a responsibility on the successors of the original wrongdoer to make good with reparations.[71] At the very least, 'others must acknowledge the wrong and harm done to victims and accept the legitimacy of victims' demands for recognition and redress'.[72]

This sense of community morality is established by the implementation of a new national narrative of the past.[73] By encouraging communication between 'those who have done, allowed, or benefited from wrong and those harmed, deprived, or insulted by it',[74] restorative justice processes perform an important educational function that is not readily apparent in either corrective justice or distributive justice. Truth commissions, for example, aim to publicly reveal the truth about past atrocities by allowing narratives of hurt and harm to be told. This hopefully provides a transformative understanding of a society's past and its future.

70. J Braithwaite & H Strang, 'Introduction: Restorative Justice and Civil Society', in Braithwaite & Strang, above n 55, 1, 1.
71. Brooks, above n 9, 279.
72. Urban Walker, above n 37, 383.
73. C Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Annual Review of Law & Social Science 161, 169.
74. Urban Walker, above n 37, 384.

Thus a restorative justice approach hopes to overcome the objection of many in the community who feel disconnected from the acts of their predecessors. To paraphrase one of the theory's founders, past human rights abuses generate needs and responsibilities not only for the direct victims and offenders but also for the larger community in which the injustice occurred.[75] At a minimum, exposure to past wrongs and their public condemnation may increase perceptions of the need for respect for historically subjugated minorities. Restorative justice aims to –

> create the conditions to *leverage* responsibility, that is, to move people from a minimal or peripheral sense of connection and responsibility to a richer and more demanding perception of what harms the wrong does and how they might be related to it.[76]

The attractiveness of a restorative justice theoretical framework for reparations is further enhanced by the fact that there are a number of international human rights instruments that provide a 'value' guide for the restorative theory process. The Preamble of the Universal Declaration of Human Rights (UDHR) commences as follows: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace'.[77] The UDHR proclaims a number of civil, political, economic, social and cultural rights which have been enshrined in the International Covenant of Economic, Social and Cultural Rights (ICESCR)[78] and the International Covenant of Civil and Political Rights (ICCPR),[79] which are consistent with the ideas and items that the restorative justice process seeks to protect and restore.[80]

An even more significant 'value' can be found in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[81] For instance, the Declaration includes articles on 'compassion' (article 4), redress (article 5), and 'restoration of the environment' (article 10). Furthermore, the Declaration provides for 'restoration of rights' (article 8) and most interestingly, article 7 refers to 'Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices' which 'should be utilized where appropriate to facilitate conciliation and redress for victims'. Furthermore, the restorative justice model is consistent with the reparations

75. H Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002).
76. Urban Walker, above n 37, 385.
77. UDHR, GA Res 217A, UN Doc A/810, 71 (1948).
78. ICESCR, GA Res 2200A (XXI), 993 UNTS 3, ATS 1976 No 5, UN Doc A/6316 (1966) (entered into force 3 Jan 1976).
79. ICCPR, GA Res 2200A (XXI), 999 UNTS 171, ATS 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 Mar 1976).
80. Eg UDHR, art 3 (right to life, liberty and security of the person), art 17 (protection of property from arbitrarily extinguishment), art 21 (right to democratic participation), art 25 (right to health and medical care): see Braithwaite, above n 63, 568.
81. GA Res 40/34 (1985). Interestingly this declaration has two definitions of 'victim' which includes 'direct' and 'indirect' victim. To be characterised as a victim the perpetrator need not necessarily have to be 'identified, apprehended, prosecuted or convicted': see ss 1–-2.

recommendations of the 'Van Boven-Bassiouni' principles, which seek to 'codify' the international legal obligations to provide reparations for gross violations of human rights and humanitarian law.[82] That is, the measures of acknowledgment and apology, restitution, rehabilitation, and monetary compensation provide a guarantee against repetition.

In sum, restorative justice provides a persuasive theoretical rationale for reparations. It has an appeal from a process and value perspective.

I now turn to a specific reparations situation – that of the Stolen Generations, the National Inquiry and the Australian Government's responses.

NATIONAL INQUIRY

The National Inquiry was the first attempt at non-litigious reparations for the Stolen Generations.[83] The National Inquiry traversed the continent hearing from those who had been removed from their families, their family members, Aboriginal organisations, government representatives and professionals from relevant areas including law, medicine, psychiatry and social work. *Bringing Them Home*, the National Inquiry report, made 54 recommendations which constitute measures of reparations. These reparations measures are based upon the 'Van Boven principles':[84] acknowledgement and apology;[85] restitution;[86] compensation;[87]

82. See T van Boven, *Basic Principles and Guidelines on the Right toReparation for Victims of Gross Violations of Human Rights and Humanitarian Law* (revised; UN Human Rights Commission, Sub-Commission decision 1995/117, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996); M Cherif Bassiouni, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,* Final Report (UN Doc E/CN4/2000/62, 19 Jan 2000).

83. As previously mentioned, apart from the *Trevorrow* case (above n 7), the litigation pathway has not brought joy to members of the 'stolen generations' (for a list of some of the cases, see above n 6). However, note the claim of V Linow in the NSW Victims of Crime Compensation Tribunal pursuant to the Victims Support and Rehabilitation Act 1996 (NSW): this was an alternative to the orthodox litigation pathway, which allowed a member of the Stolen Generations to claim monetary compensation ($35,000) for harm resulting from ill treatment while under State care: see V Linow, NSW Victims of Crime Compensation, Notice of Determination (Feb 2002).

84. At the time of the report, the Van Boven principles had not be modified or developed further by the Bassiouni principles.

85. An apology by the state provides an opportunity for a nation to come to terms with past injustices and bring about reparations: see J Thompson, *Apology, Justice, and Respect: A Critical Inquiry into Apologies of State* (unpublished, 2003).

86. Restitution by its very nature is not elucidated to the same extent as the other forms of reparation but it is nevertheless a recognised component of 'redress', 'reparation' and 'just satisfaction': see eg Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, arts 8-11, 19, GA 40/34, annex, 40 UN GAOR Supp (No 53), 214, UN Doc A/40/53 (1985); FM Deng, *Guiding Principles on Internal Displacement: Human Rights, Mass Exoduses and Displaced Persons*, Report, UN Doc E/CN4/1998/53/Add2, Principle 29.

87. See eg American Convention on Human Rights arts 10, 63(1), 1144 UNTS 123 (entered into force 18 Jul 1978); ICCPR art 9(5), 999 UNTS 171 (entered into force 23 Mar 1976); International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) arts 15(2), 16(5), 72; ILO Official Bull 59 (entered into force 5 Sep

rehabilitation;[88] satisfaction and guarantees of non-repetition.[89] Although the report does make recommendations which impose obligations on the state and territorial governments, churches and the police force, the overwhelming bulk of the recommendations are addressed to the Commonwealth government, who had initiated the National Inquiry.

Howard government's response

In total, the Howard government allocated $63 million in response to the National Inquiry reparations recommendations. In releasing the government's response on 16 December 1997, Senator John Herron, the then Minister for Aboriginal and Torres Strait Islander Affairs, stated that the package was to provide practical assistance in areas of family reunions, health, and other linked services.[90] The Howard government argued that such a reparations package was more appropriate than individual compensation because of the widespread inter-generational effects of the removal policies and practices.[91]

The Howard government's response was carefully crafted to avoid any specific recognition that it agreed with the National Inquiry and its findings or that the government should be held morally or legal responsible for historical policies and practices (of previous Commonwealth, State and Territory governments) that when the removals occurred were considered appropriate and reasonable. Prime Minister Howard did not mention the historical practice of removing Aboriginal

1991); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power arts 12–13, 19, GA 40/34, annex, 40 UN GAOR Supp (No. 53), 214, UN Doc A/40/53 (1985).

88. See eg CAT art 14(1), GA res 39/46, annex, 39 UN GAOR Supp (No 51), 197, UN Doc A/39/51 (1984) (entered into force 26 Jun 1987); CROC art 39, GA res. 44/25, annex, 44 UN GAOR Supp (No 49), 167, UN Doc A/44/49 (1989) (entered into force 2 Sep 1990); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power arts 14-17, 19, GA 40/34, annex, 40 UN GAOR Supp (No 53), 214, UN Doc. A/40/53 (1985).

89. See eg ICERD art 6, 660 UNTS 195 (entered into force 4 Jan 1969); ILO 169 art 16(4); 72 ILO Official Bull 59 (entered into force 5 Sep 1991).

90. However it should be noted that part of the $63 million has already been committed to existing Indigenous projects and the Howard government had cut the budget of the Aboriginal and Torres Strait Islander Commission by approximately $400 million the year before.

91. Senate and Constitutional References Committee, *Healing: A Legacy of Generations: The Report of the Inquiry into the Federal Government's Implementation of Recommendations made by the Human Rights and Equal Opportunity Commission in Bringing them Home* (Canberra, 2000) 227, 232. In Senator J Herron's submission to the Senate Inquiry, who were looking into the Commonwealth's government's implementation of the National Inquiry's reparations recommendations, he stated: 'The Commonwealth Government's response has focused on the second category of recommendation, i.e. assisting separated persons reunite with their families. The BTH report itself identified family reunions as 'the most significant and urgent need of separated families' and emphasized that 'reunion is the beginning of the unraveling of the damage done to indigenous families and communities by the forcible removal policies.…The Government has delivered a comprehensive programmatic response to the traumatic effects of child separation practices, composed of a package of initiatives totaling $63 million over four years, which will facilitate family reunion, and assist Indigenous people to cope with the stress and trauma of family separation'. J Herron, Submission No 26, (18 Aug 2000).

children from their families in his parliamentary 'Motion of Reconciliation' on 26August 1999.[92] Indeed, he and his government steadfastly refused to apologise for these past policies and practices.

Similarly, the Howard government refused to award monetary compensation, because to do so would be specifically to recognise the historical wrong and resulting harm.

The Howard government's determination not to give preference or special consideration to the Stolen Generations was reinforced by its arguments that it would be divisive or damaging for community harmony because the removal policies and statutes were merely one example of legislation that has been subsequently discredited. Yet, no other group has been so targeted by government because of race. No other racial group has been subjected to a policy and practice so fundamentally inimical to the group's identity and existence. No other racial group has been so egregiously denied the right to bring up its own children; and impart to them a sense of the culture of the group. No other racial group of children has been subjected to the same range and extent of human rights abuses.[93]

In response to the National Inquiry, the Howard government sought to place its commitment to improved delivery of support programs and services within its general Aboriginal affairs policy. Senator Herron said this was consistent with this policy direction, which 'was to address directly the effects of severe socio-economic disadvantage suffered by indigenous people through improved outcomes in health, housing, education and employment'.[94] In fact, only two projects, the family reunion and the oral history projects, had been designed specifically for members of the Stolen Generations.[95] Moreover, the Howard government did not consult with Stolen Generations members in deciding its response to the National Inquiry report or the programs and funding it proposed.[96]

In seeking to provide a theoretical justification for the Howard government's position and strategy, that which fits most closely (if not ideally) is the concept of distributive justice - that is, more equitable sharing of societal resources and burdens.[97] Distributive justice has the advantage for a 'recalcitrant government' that it can commit to alleviating contemporary inequalities or disadvantages of

92. J Howard, 'Motion of Reconciliation' (26 Aug 1999), www.pm.gov.au/news/speeches/1999/reconciliation2608.htm.
93. As previously mentioned, there have been other groups of children that were removed from their parents and subjected to abuse, but race was not the basis of the removal or discrimination. See eg above n 29.
94. M Payne & H Coonan, *Dissenting Report of Government Senators to the Inquiry into the Stolen Generation: Senate Legal and Constitutional References Committee* (Canberra, 2000) 6.
95. P O'Brien & J Bond, *Are we Helping them Home? Surveys of Progress in the Implementation of the Bringing them Home Recommendations* (Canberra, 2002) 24.
96. Ibid 12.
97. Logue, above n 10, 1328.

Aborigines without having to admit or accept that wrongs were committed against the Stolen Generations. Of course, this is an oversimplification of distributive justice theory, because when one associates reparations with distributive justice, the reasons for the current inequalities need to be identified. Dworkin's egalitarianism position is that the only morally relevant inequalities are those caused by unchosen circumstances, namely, those caused by membership of one's race.[98]

However, Australian political reality under the Howard era was that there was no need specifically to link current inequalities with the Stolen Generations. The Howard government believed it had no moral or legal obligation to 'atone' for the historic injustices of the Stolen Generations policies and practices.

Rudd's apology

On 13 February 2008, in his first significant parliamentary statement as Prime Minister, Kevin Rudd apologised to the Stolen Generations. Although he did refer to past injustices to Aboriginal people in a general sense, the Prime Minister, unlike his predecessor, referred specifically to the Stolen Generations:

> We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.
>
> We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.
>
> For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.
>
> To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.
>
> And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.[99]

Arguably the process that resulted in the parliamentary apology had elements of restorative justice. The Indigenous Affairs minister, Jenny Macklin, consulted widely with the Aboriginal community in relation to the apology and as Father Frank Brennan comments: 'A cross section of the Stolen Generations sat down with the new government to tell their stories and assist with appropriate words'.[100] Rudd also spoke to Aboriginal people prior to settling on the form of words. Thus

98. Dworkin, above n 49. As noted by Pierik, this differs from a Rawls' position, which 'defends egalitarian policies for the worst-off in society, regardless of the reason why they are worst-off': see Pierik, above n 18, 440, n 61.

99. K Rudd, 'Apology to the Stolen Generations' (13 Feb 2008), www.dfat.gov.au/indigenous_background/national_apology.html.

100. F Brennan, 'Stolen Generations Apology "About Right"' (14 Feb 2008), www.eurekastreet.com.au/article.aspx?aeid=5206.

here we had a process of consultation between the 'victims' and the state (inheriting the responsibility for past wrongs) over the content of a reparation measure. Presumably members of the government and/or their servants or agents would have also undertaken some consultations with non-Indigenous Australia but there is no doubt that the views of the Aboriginal community and particularly members of the Stolen Generations were given greater weighting by the government. To this extent, the process and the content of the apology was reflective of a restorative justice approach to reparations.

However, the same cannot be said in relation to compensation. Many Aboriginal people and members of the Stolen Generations have long argued that there should be an apology and monetary compensation paid by government to Stolen Generations members and their families.[101] While not all members of the Stolen Generations demand monetary compensation,[102] it is a priority for many.[103] The National Sorry Day Committee and the Stolen Generations Alliance have advocated that all the National Inquiry recommendations, including monetary compensation, should be implemented.[104] But neither the Prime Minister nor his Indigenous Affairs minister has been receptive to the wishes of the Stolen Generations and their supporters on the issue of compensation.[105] On this point the Rudd government differs little from the Howard government.

Prime Minister Rudd and Minister Macklin have both repeatedly ruled out a compensation scheme, arguing that the Commonwealth government's focus will be on funding programmes that assist in narrowing the health, education and employment gap between Indigenous and non-Indigenous Australians.[106] This can be seen as a distributive justice process but its reparative value for the Stolen Generations is debatable as many members of the Stolen Generations called for a Commonwealth compensation scheme.[107] The Commonwealth government

101. W Jonas, *Social Justice Report* (Aboriginal and Torres Strait Islander Commission, 1998); O'Brien & Bond, above n 95.
102. Jonas, ibid.
103. O'Brien & Bond, above n 95.
104. Australians for Native Title and Reconciliation, 'Compensation and the Bringing Them Home Report Recommendations' (2002) www.antar.org.au/node/174; Australians for Native Title and Reconciliation, 'Stolen Generations' (2008) www.antar.org.au/issues_and_campaigns/stolen_generations.
105. Ibid.
106. P Robson, 'Rudd Must Abolish Racist Policies', *Green Left On Line* (18 Jan 2008), www.greenleft.org.au/2008/736/38102.
107. In contrast, under s 5 of the Stolen Generations of Aboriginal Children Act 2006 (Tas), ex gratia individual payments of up to $5,000 per individual and $20,000 per family have been made available to Stolen Generations members. Also the WA government has established a $114 million scheme for adults who, as children, were abused while in the care of the State of WA. Eligible claimants, which will include members of the Stolen Generations but will not be restricted to this class, will be entitled to $10,000 if they can establish that in all likelihood they were subjected to abuse or neglect while in the care of the state and up to $80,000 where there is medical and/or psychological evidence of loss or injury resulting from abuse. See Redress WA: 'Acknowledging the Past' (1 May 2008), www.redress.wa.gov.au.

is intent on providing increased funding to improve the living standards and future economic opportunities of all Aborigines, regardless of whether they are members of the Stolen Generations or not. Obviously it is commendable that the Commonwealth government have this focus but the obvious statement to be made is that programmes to improve the living, economic and social conditions of Indigenous Australians should be implemented in any case, and should not be justified as a reparative measure. In fact it would appear that this is what the Rudd government are doing, rather than utilising concepts of reparations to implement programmes for Aboriginal betterment. But this begs the question: 'What reparative measures are being implemented for the Stolen Generations by the Rudd government?' The answer: 'Only the apology'. The distributive justice element of the Rudd government's initiatives in Aboriginal public policy is not focused on reparative justice to the Stolen Generations but on non-reparative distributive justice for all Aborigines.[108]

CONCLUDING COMMENTS

As Canadian law professor Ken Cooper-Stephenson indicates, arguments favouring reparations can be aided by examination of theoretical constructs that 'lie within and behind established rules' and by analysing philosophical issues and the 'politics of law'.[109] This article has examined the theories of corrective justice, distributive justice and restorative justice as they relate to reparations for historical injustices, particularly in relation to the Stolen Generations. There are similarities between all three justice theories, and all three have attractive features. However, it is argued here that the 'qualities' of a restorative justice model probably outweigh the two other theories examined. The restorative justice model, while seeking to address a historical wrong (backward-looking), is a forward-looking approach to reparations, involving goals of reconciliation, redemption, and moral restoration. Indeed, restorative justice provides a persuasive theoretical rationale for reparations, having appeal from process and value perspectives that create an appropriate cultural framework for establishing a reparations package.

Of critical importance is the existence of a holistic and culturally relevant approach that allows a space and process for the voices of the victim. For reparations to be most effective in addressing a historical injustice (particularly those based on racial discrimination), the normative framework of the reparations process and

108. It may be possible that there is an element of reparative distributive justice for all Aborigines by arguing that all Aborigines have suffered from past injustices but the Rudd government's language makes it difficult to mount such a case. The Rudd government's policy initiatives seem to be motivated by the need to improve the current disadvantage of Aboriginal people, regardless of how that disadvantage has come about.

109. Cooper-Stephenson, above 14, 40.

content must be informed by the victim's cultural values.[110] However, this is not the whole story.

Restorative justice seeks to provide space not only for the victims' voices but also for a dialogue between victims and perpetrators (whether a government or some other identity). While restorative justice focuses on the victim, it also has the benefit of not allowing any one party to dominate the reparations process. It heeds the concerns of the perpetrators (especially important when a government is the perpetrator), but nevertheless acknowledges the paramountcy of the needs of the victims.

The Howard government's reparations response to the National Inquiry was framed in distributive justice terms which allowed the government to avoid specifically connecting its measures with reparations for the Stolen Generations. This attests to the political attractiveness of distributive justice for governments unwilling to accept the need to provide reparations for historical injustices. It may also attest to the fact that it could be easier to persuade the public to accept programmes that are enveloped in a distributive justice framework than those which have a corrective or restorative justice paradigm, particularly if the reparative measure relates to monetary compensation. Perhaps the Rudd government was mindful of this by agreeing to a Stolen Generations specific apology but saying 'no' to monetary compensation.

110. R Tsosie, 'Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations' (Paper presented at the *Taking Reparations Seriously Conference*, University of San Diego, 18 March 2006) 13.