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Reparation for Australia's Removed Aboriginal Children: Defining the Wrong

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REPARATION FOR AUSTRALIA'S REMOVED ABORIGINAL CHILDREN: DEFINING THE WRONG

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Many nations are now facing demands for reparation for past violations of human rights, including those inflicted upon their own citizens. In some cases the wrongs were visited upon a discrete group already clearly defined by their race, status or location (e.g., Jews, or the intellectually disabled). In other cases the class of victims is defined only by the common experience of having suffered a systematic wrong, for example, those suffered by the comfort women at the hands of the Japanese army.

Australia's "stolen generation" falls into the latter category. All were indigenous, and therefore belonged to an already abused group, but form a minority of indigenous people. No one knows how many indigenous children were taken from their families and raised in institutions and foster homes, but Australia's Human Rights and Equal Opportunity Commission (HREOC) has estimated that nationally this happened to between 10% and 30% of indigenous children in the period 1910 to 1970.[1]

These are the people who call themselves the "stolen generation," although in fact the period of removals spanned several generations.[2]

I. WHO ARE THE STOLEN GENERATION?

Up to now it has not been necessary to identify precisely the victim group known as the stolen generation, because the forms of reparation offered have not included redress for individuals. Measures of reparation provided to date have been directed to the group as a whole, and have

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1 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families* (HREOC, Sydney, 1997) (*Bringing Them Home*), pp 36-7. Note that the responsible Commonwealth Minister estimates the national figure at closer to 5%, or 39,250 children nationally for the same period: *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs pp 570, 622-3 cited in Senate Legal 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, Parliament of Australia, November 2000, ("Senate Committee Report') p 233, fn 43.

2 The removals period is generally considered to have ended in the late 1960's, although indigenous children continue to be over-represented in institutions and placements as a result of interventions by the child welfare and juvenile justice systems. The complex reasons for the high rate of contemporary separations is discussed in the *Bringing Them Home* report, ibid, Part 6.

included apologies, acknowledgment of the harm caused by past policies and practices, guarantees against repetition, commemorations such as an unofficial "National Sorry Day," and the delivery of government programs.[3] Federal programs have been of two kinds: programs to redress disadvantage in the indigenous community generally, and programs to provide indigenous services of a kind required by the stolen generation, such as family link-up, counselling and oral history projects.[4] Little attempt has been made to target either type of program to members of the stolen generation. A recent Senate Committee report found that the Commonwealth's response had been "misdirected as it addresses issues relating to the indigenous community in general rather than to the stolen generation."[5]

Defining the victim group will assume greater significance if the Commonwealth Government accepts the recommendation of the Senate's Legal and Constitutional References Committee to establish a Reparation Tribunal. In its report delivered in November, 2000 the Committee endorsed a proposal by the Public Interest and Advocacy Centre, New South Wales ("PIAC') for the establishment of a statutory tribunal with power to hear applications from individuals and groups and to order or recommend all forms of reparation, including monetary compensation. The proposed scheme provides two tiers of monetary compensation: a fixed lump sum awarded to any individual who as forcibly removed, and additional payments to individuals or groups upon proof of particular types of harm.[6]

So long as the existence of a stolen generation of indigenous children was seen as a social problem, little attention was given to defining the victim group. But now that a scheme has been proposed that will provide reparation for individuals, legal concepts of who is a victim are competing with broader sociological understandings. Two major issues require resolution. First, since the stolen generation is defined by the common experience of having suffered wrong, what is the precise nature of the wrong? Second, given the widespread and continuing effects on families and communities of the removed children, how far should the circle of victims extend? In this paper I have chosen to focus on the first question

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3 *An inventory of the measures taken in response to the National Inquiry's recommendations for reparation is to be found in Human Rights and Equal Opportunity Commission, Office of the Aboriginal and Torres Strait Islander Commissioner, Sixth Report 1998* (Sydney 1999), Chapter 4.

4 The Commonwealth Government allocated AUD$63 Million over four years for provision of its programs such as family link-up, oral history projects and counseling as its response to the *Bringing Them Home* report.

5 *Senate Committee Report, at supra* note 1, para 9.21.

6 *Senate Committee Report, supra* note 1 at para 8.57.

only. For a discussion of how far international law extends the circle of victims of human rights abuses, see the paper in this volume by Rombouts and Vandengiste.

Up until now it has been generally accepted that the wrong that defines the stolen generation as a victim group is the experience of having been "forcibly removed" as indigenous children from their parents pursuant to racially discriminatory laws and practices. What I seek to show in this article is that this definition of the wrong, if made the test of eligibility for reparation, will tend to produce unjust and anomalous results. I propose an alternative formulation of the wrong, and discuss the conceptual and practical difficulties of defining the victims eligible for reparation.

II. The History of Child Removals

A reparation scheme for the stolen generation was first proposed by an executive inquiry commissioned by the Commonwealth Government and carried out in 1995-6 by the HREOC. The National Inquiry's terms of reference required it, first, to trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families, and the effect of the separations. Second, the Inquiry was to examine whether there were appropriate and adequate services for those affected by the separations, including access to records and family reunion services. Third, the Inquiry was directed to examine the principles relevant to determining the justification for compensation for persons or communities affected by separation. Fourth, the Inquiry was to examine current laws, practices and policies on the placement and care of indigenous children and advise on any changes required to take account of the principle of self-determination.

As management of indigenous affairs in Australia was the responsibility of each colony until Federation in 1901 and thereafter of each State, the National Inquiry separately examined the history of removals in each State and Territory.[7] While there were regional variations in laws and practices, the Inquiry discerned the existence of general policy periods affecting each jurisdiction's administration of indigenous affairs. These policy shifts correspond to the "protection." "assimilation" and "self-determination"

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[7] The two territories, the Northern Territory and the Australian Capital Territory, were under Commonwealth administration for the greater part of the period covered by the Inquiry.

periods that have been noted as parallel developments in indigenous social policy in Australia, New Zealand and Canada.[8]

From the 1870s until the 1930s the dominant policy objective was one of "protection" of indigenous people who were assumed to be dying out. In Australia these policies were implemented by the enactment of "Protection of Aborigines" statutes between 1869 and 1911, which established special government agencies with extraordinary powers to govern and control indigenous persons. In some States and in the Northern Territory the official Protector of Aborigines was the statutory guardian of every Aboriginal child, with extensive rights to control the child's location, education and welfare. Indigenous children were removed to mission and government institutions in this period, with the objective of merging children of mixed descent into the non-indigenous population.

By the 1930s, it was becoming apparent that the indigenous populations were recovering from the catastrophic decline in their numbers in the early settlement period. Once Australian governments realised that indigenous people were not going to die out, the focus of policy shifted to assimilating them.[9] From the 1940s, the protection era legislation was progressively dismantled and removals of indigenous children came to be governed by general child welfare laws.[10] Although the grounds for removing a child were ostensibly non-discriminatory, indigenous children continued to be treated differently from non-indigenous children, both before and after removal. During the 1950s and 1960s, even greater numbers of Aboriginal children were being removed from their families than in the protection era.[11]

The National Inquiry found that the removals in the protection and assimilation eras had substantial effects on the removed children and on their families and communities. Among the effects of separation and institutionalisation were the deprivation of family relationships and normal family contact, lack of the parental bonding necessary for healthy psycho-

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8 ANDREW ARMITAGE, COMPARING THE POLICY OF ABORIGINAL ASSIMILATION: AUSTRALIA, CANADA AND NEW ZEALAND (1995) 185.

9 An assimilation policy objective was formally adopted nationally at the 1937 Commonwealth-State Native Welfare Conference, but the assimilation period had already started in a less systematic fashion from about 1930: *Bringing Them Home*, *supra* note 1 at 31-3. The assimilation period gave way to the self-determination period in the late 1960s.

10 Victoria, Tasmania and New South Wales removed indigenous children under general child welfare laws, applied in a discriminatory manner , while the remaining jurisdictions did not dismantle their separate administrative and legislative provisions for indigenous children until the late 1950s and early 1960s. *Ibid.* 250.

11 *Ibid.*, at 34.

social development and for the learning of social and parenting skills, denigration and loss of the children's language, culture and Aboriginal identity, and poor education. Some children also suffered particular harms such as economic exploitation and sexual, physical and emotional abuse, usually perpetrated by "carers" to whom they were entrusted. The Inquiry found that many of those removed in childhood continue to suffer the effects throughout their lives.[12]

III. Reparation: Recommendations of the National Inquiry

The legal basis on which the National Inquiry recommended measures of reparation for the stolen generation was that the removals breached internationally recognised human rights as well as the "colonial legal standards" of the contemporary common law. The Inquiry found that from about 1950, racially discriminatory laws and practices with respect to indigenous children breached the international prohibition of racial discrimination.[13] It further found that from 1946 laws and practices which were directed to eliminating indigenous cultures and which promoted the removal of indigenous children for rearing in non-indigenous homes and institutions were in breach of the international prohibition of genocide.[14] These were the principal and defining breaches of human rights suffered by the victim group, although the Inquiry noted that many of the removed children were also victims of civil and criminal wrongs perpetrated by carers.

The duty to provide effective remedies and reparations for breaches of human rights arises under a number of international instruments, including some to which Australia is a party, and has also been recognised as a principle of customary international law.[15]

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12 *Ibid.*, at Chapter 11.

13 *Bringing Them Home, supra* note 1 at 266-70, 277. By 1950 the prohibition of systematic racial discrimination was recognised as a rule of international law binding on all nations that were members of the United Nations. Australia ratified the United Nations Charter in 1945.

14 Australia ratified the Convention on the Prevention and Punishment of Genocide in 1949. The Genocide Convention defines "genocide" as, including the forcible transfer of children of an ethnic or racial group to another group with intent to destroy the group in whole or in part: Article 11. The National Inquiry concluded that the forcible removal of indigenous children in Australia amounted to genocide within this definition. This conclusion has been repudiated by the Commonwealth Government, which maintains that the intent of the removals was one of misguided benevolence: *Senate Committee Report supra* note 1, paras 4.13, 8.9.

15 *Bringing Them Home, supra* note 1 at 279-81. International instruments to which Australia is a party that provide a right of compensation for breach of human rights include the *International Covenant*

The National Inquiry based its recommendations for measures of restitution upon the 1996 revised draft BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW prepared by Professor Theo Van Boven for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities ("the Van Boven principles").[16]

The principles, like the Bassiouni principles which build upon and refine them,[17] synthesize the decisions and general comments of the treaty bodies and the Inter-American Court of Human Rights, international law publicists, state practice and other sources.

The five specific measures of reparation recommended by the National Inquiry derive from item 7 of the Van Boven principles and cover acknowledgment and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and provision of monetary compensation. Although the third item of the Inquiry's terms of reference required it to consider the justification for compensating those affected by the separations, the *Bringing Them Home* report does not include any discussion of why the reparation package should include monetary compensation. The National Inquiry simply accepted the draft Van Boven principles as an authoritative and comprehensive statement of the forms of reparation that should be provided for violations of human rights.

It is unfortunate that the justifications for including monetary compensation in the package were not explained by the National Inquiry, as this item has attracted the least support from government. The Commonwealth Government argues that a reparation package that includes delivery of support programs and services is a more appropriate response than compensation for individuals, given the widespread communal and inter-generational effects of the removals.[18] It further argues that "financial

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on Civil and Political Rights (1966) (Art 2,3), the *International Convention on the Elimination of All Forms of Racial Discrimination* art 6 and the *Convention on the Rights of the Child* art 39.

16 The principles are set out at Appendix 8 of the Report, *Ibid.* at 649.

17 At the time of the National Inquiry's report, the 1996 draft of the Van Boven principles was the most recent draft. In 1998 the UN Commission on Human Rights appointed a consultant, Mr Cherif Bassiouni to prepare a revised version with a view to their adoption by the General Assembly. Mr Bassiouni presented his final report to the Commission in 2000: E/CN.4/2000/62.

18 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs at 591, 611-2, 629 cited in Senate Committee Report, *supra* note 1 at paras 2.21, 8.11, 8.25. Government members of the Senate Committee who supported the Government's position cited the statement in the *Bringing Them Home* report (at 37) that no Aboriginal family was untouched by the effect of the removals: Senate Legal and Constitutional References Committee, *Dissenting Report of Government Senators to the Inquiry into the Stolen Generation* (November 2000) at 6.

compensation was not the most important issue as far as indigenous people were concerned."

Recognition of the differential impact of the wrongs on individuals is at the forefront of the case for including monetary compensation in the reparation response. In 1999 the Australian Senate gave its Legal and Constitutional References Committee a reference to examine the adequacy and effectiveness of the Commonwealth Government's response to the recommendations of the National Inquiry. The Committee received many submissions from members of the stolen generation who felt that there had been insufficient recognition of their individual suffering above and beyond the effects of the removals on indigenous communities generally.[19]

IV. Defining the Wrong - Forcible Removal

Since the victim group known as the stolen generation is defined not by their indigenous status alone but by their common experience of wrong, it is necessary to define the wrong. The wrong need not be one that is cognizable under the municipal law of Australia, if it is one for which international law provides a duty of reparation. Item 7 of the Van Boven-Bassiouni principles refer to the duty of States, under international law, to adopt special measures, where necessary, to permit expeditious and full reparation for violations of human rights.

The National Inquiry identified the wrong as "forcible removal" when it recommended that reparation be made "to all who suffered because of forcible removal policies" and that monetary compensation be provided "to people affected by forcible removal."[20] The term "forcible removal" did not appear in the terms of reference but was coined by the National Inquiry to define the removals that were the object of its study.

It defined "forcible removal" to encompass all removals of indigenous children "by compulsion, duress or undue influence," in contrast to those that were "truly voluntary, at least on the part of parents who relinquished their children, or where the child was orphaned and there was no indigenous carer to step in. Removal "by compulsion" encompassed the use of force or coercion whether legally authorised or not. Removal "by duress" occurred where the removal was procured without the actual application of force but involved the use of illegally applied compulsion, such as threatening to take away a woman's other children if she did not relinquish a particular child.

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19 Senate Committee Report, *supra* note 1 paras 1.67-1.75.

20 *Bringing Them Home*, *supra* note 1 at paras. 1.67-1.75, Recommendations 4 and 14.

Removal "by undue influence" meant putting improper pressure on a parent to induce the surrender of a child, such as where the person inducing the surrender is an employer, spiritual adviser, superintendent of a reserve or is otherwise in a position of influence in relation to the parent.

V. JUSTIFIED REMOVALS

Notably absent from the National Inquiry's definition of "forcible removal" is any recognition that the removal of a child might have been justified on general welfare grounds, such as that the child was at risk of injury, abuse or neglect. This raises the possibility that a removal may be deemed to be "forcible" even though it might be justified under the non-discriminatory child welfare standards of today. The reason given by the National Inquiry for excluding general welfare grounds is that they are likely to be ex post facto justifications for decisions that were actually made for less worthy reasons.[21]

These concerns do not justify deeming a removal to be "forcible" if it was actually made for sufficient and non-discriminatory welfare reasons. Such cases may be exceptional, and it may be difficult to judge whether the justifications offered are actual or ex post facto. But if instances are found to exist, they should be excluded from the category of forcible removals. To do otherwise would undermine current child welfare policies and practices.

The Senate Committee had other concerns about the National Inquiry's definition of "forcible removal." It thought the definition was too wide, and would embrace almost all removals "regardless of any apparent measure of acquiescence."[22]

They believed the definition of forcible removal used in *Bringing Them Home* may result in the inclusion of many people who, for example, required medical treatment, whose parents did genuinely agree that they move for education purposes, who moved with a sick family member, or who may have been at serious risk. Many people today must still move from communities for medical treatment - it is one of the consequences of distance and small and isolated populations. To classify such actions as forcible is to be quite unaware of the restrictions and limits faced at the time by much of the Australian population.

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21 *Bringing Them Home*, *supra* note 1 at 10-11.

22 Senate Committee Report, *supra* note 1 at para 1.40.

The remarks in the Senate Committee Report appear to have been intended to moderate the National Inquiry's criticism of government officials rather than to redefine the wrong. Despite its concern about the width of the term "forcible removal," the Committee's Report did not discuss alternative ways of defining the wrong or the victim group. It side-stepped the question of which removals were forcible, declaring that the more pertinent question was the needs for services and programs that resulted from the removals. The Committee ultimately endorsed the PIAC proposal for a Reparation Tribunal, which used the National Inquiry's term "forcible removal" to designate the persons eligible for reparation.[23]

The Committee was right not to be unduly concerned about the possible over-reach of the proposed eligibility criterion in cases of purported consent. The proposed Reparation Tribunal will be called upon to make some difficult assessments about whether an apparent parental consent was voluntary, but this is insufficient reason to restrict the scope of forcible removal. Courts and tribunals are already called upon to assess the validity of consent in situations as diverse as adoption, consent to medical treatment, guarantee for debt and sexual offences. Undue influence and duress are widely recognised as factors capable of negating apparent consent, and are not lightly applied.

VI. Forcible Removal - Problems of Proof

The principal difficulty with using the formula of forcible removal to test eligibility for reparation is lack of evidence about the circumstances of removal. Since many of the stolen generation were removed as long ago as the 1940s or 1950s, it is likely that a substantial proportion of the parents, relatives and the officials involved in the removals are dead, infirm or unable to be found. The removed children themselves would have no personal knowledge of the reasons for their removal. They may remember their sadness and trauma at the separation, and may even have tried to avoid being taken. Some may believe themselves to have been "forcibly removed" because they were taken against their will. The question, though, is not whether the child consented but whether the removal was "truly voluntary" in the sense explained in the *Bringing Them Home* Report. This means that in each case, the circumstances of the decision to remove the child must be established.

One consideration that led PIAC to propose a Reparation Tribunal is that in common law litigation, the lack of evidence concerning the reasons for removal is a barrier to the stolen generation and a shield for the government.

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23 *Ibid.*, Recommendations 7 and 8, pp xvii-iii.

An applicant who sues the government for wrongs arising from forcible removal (such as wrongful imprisonment or breach of statutory duty) carries the burden of proof of each element of the cause of action. This is illustrated in the case of *Cubillo v Commonwealth*,[24] in which two Aboriginal persons from the Northern Territory unsuccessfully sued the Commonwealth Government for various wrongs in connection with their removal from their families and communities, their placement in the care of missionaries, and the abuses and neglect that they suffered during their detention.

One of the applicants, Mr Peter Gunner, had been removed in 1956 from his mother at Utopia Station when a child of eight years, and placed in St. Mary's Hostel. His father was described as an "unknown European." The Commonwealth relied upon a form of consent, written in formal English and purporting to bear his mother's thumbprint, which requested the Director of Native Affairs to take him into care and admit him to St Mary's Hostel so that he "may derive the benefits of a standard European education."[25]

It was known that Mr Gunner's mother was a tribal Aboriginal woman who was illiterate and spoke little English. Furthermore, there was evidence that most of the mothers and children at Utopia Station were in the habit of fleeing and hiding at the sight of a patrol officer, which the court took as indicating a fear that the children would be taken away from them.

Despite these dubious circumstances, the court found that Mr Gunner had been removed with his mothers consent.[26]

She was dead and could give no evidence about what she understood, and no one could identify the officer who was responsible for getting her thumbprint on the document. The court reasoned that there was no basis for assuming that because Mr Gunner"s mother was a tribal Aboriginal, she did not know what she was agreeing to. If the document had not been explained to her, then it was of no legal effect, but it was also possible that it was carefully and properly explained to her.[27]

Since Mr Gunner, not the Commonwealth, bore the onus of proof, the absence of evidence about the circumstances in which the thumbprint was

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24 (2000) 174 ALR 97 (Federal Court of Australia, O'Loughlin J). This decision was affirmed on appeal: *Cubillo v Commonwealth of Australia* [2001] FCA 1213 (31 August 2001)

25 *Ibid.*, paras 782-3.

26 *Ibid.*, para 787.

27 *Ibid.*

placed on the document led the court to reject his claim that he was taken without consent.[28]

The Peter Gunner case is far from unusual. Evidence was given in the Cubillo case that, from about 1952, increasing emphasis was placed on obtaining the mother's consent to the removal of indigenous children in the Northern Territory.[29]

At a time when the child removals were causing some controversy, the Minister and the Administrator of the Territory directed officers to attempt to obtain maternal consent where possible.[30]

In the Cubillo case the Commonwealth Government presented extensive documentary and oral evidence concerning its administration of native welfare in the 1950s. The Court rejected the Commonwealth"s claim that forced non-consensual removals were rare in the period, but noted that "there are very few writings that have been tendered as evidence in this trial that established a lack of consent."[31]

The government stands in a position of advantage in these cases. All it has to do is to produce a form of consent purporting to be from the child's parent or guardian. The applicant will then need to be able to point to some evidence capable of negating the consent. Even if the surrounding circumstances raise a suspicion of fraud, misrepresentation, duress or undue influence, the question will be what effect those circumstances had on the mind of the parent when he or she gave apparent consent. In many cases the supervening death of the parent will preempt any challenge to the consent.

Even in cases where no parental consent was given, a removal will not be treated as "forcible" within the National Inquiry's definition if the child was an orphan and had no indigenous carer. In practice, the concept of "orphan" would have to be extended to the situation of a child whose Aboriginal mother was dead and who had been deserted by his or her non-indigenous father. It might seem a straightforward question whether the orphan had an indigenous carer at the time of removal, but the extended

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28 On appeal, the Full Court of the Federal Court said that, contrary to the impression that may have been given in the trial judge's summary of reasons, the finding that Mr Gunner's mother had consented was not based solely on the form of consent but was supported by other contemporary documentation: *Cubillo v Commonwealth* [2001] FCA 1213 (31 August 2001) para 168.

29 *Ibid*, para 249.

30 *Ibid.*, paras 229-267.

31 *Ibid.*, para 248.

kinship patterns of Aboriginal families can blur the question of who is responsible for the child's care. Many years after the removal, witnesses from the community may give different answers to the question of who was caring for the child at the relevant time.[32]

VII. AN ADMINISTRATIVE SCHEME?

Would the problems of proof be solved by establishing a statutory scheme under which an administrative tribunal or agency grants reparation to applicants? In administrative proceedings the decision maker is not bound by the rules of evidence but may inform itself as it sees fit.[33]

This means that evidence that may be inadmissible in court, such as hearsay and opinion evidence, can be heard and considered.[34]

Another advantage of an administrative scheme is that the common law rules regarding onus of proof do not strictly apply unless the legislation provides for it.[35]

An administrative tribunal or agency may be under a limited duty to make its own inquiries,[36] which could relieve the burden of proof on applicants.

There have been various proposals for administrative schemes to provide monetary compensation. The National Inquiry proposed that a minimum lump sum payment of compensation from a National Compensation Fund be payable to "an indigenous person who was removed from his or her family during childhood by compulsion, duress or undue

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32 This occurred in the *Cubillo* case, where there was conflicting evidence about whether Mrs Cubillo, then aged seven years, was in the care of her grandmother or her maternal aunt at the time she was removed: *Cubillo v Commonwealth Ibid.*

33 Unless statute provides otherwise. Legislation establishing administrative agencies and tribunals commonly state this common law rule expressly, for the avoidance of doubt: *Saverio Barbero v Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5.

34 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at p 41 per Brennan J.

35 Although there may be a "common sense" onus in that an applicant who fails to offer any proof in support of his or her assertions is likely to lose unless the tribunal can obtain the proof from another source: *McDonald v Director-General of Social Security* (1984) 6 ALD 6.

36 The extent of the duty is presently unclear, and courts have been reluctant to impose it upon tribunals who are not furnished with the powers and resources to conduct investigations. For examples of where the duty was imposed, *see Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, *Adamou v Director-General of Social Security* (1985) 7 ALN N203.

influence." The responsible government would have a defense if it could establish that the removal was in the best interests of the child.[37]

A second tier of monetary compensation, to be assessed in accordance with general common law standards, would be payable to any person "suffering particular harm and/or loss resulting from forcible removal."[38]

The particular harms and losses, called "heads of damage," were racial discrimination, arbitrary deprivation of liberty, pain and suffering, abuse (including physical, sexual and emotional abuse), disruption of family life, loss of cultural rights and fulfillment, loss of native title rights, labour exploitation, economic loss and loss of opportunities.[39]

These "heads of damage" include some actions that are themselves civil or criminal wrongs and/or breaches of human rights.

Under the National Inquiry's recommendations, the tribunal or agency responsible for awarding the compensation would need to be satisfied that an applicant for a lump sum award had been removed "by compulsion, duress or undue influence," and that an applicant for second tier compensation had been "forcibly removed". If the evidence available to the tribunal or agency left it in a state of doubt about those matters, it would have to refuse compensation because the statutory preconditions for making an award were not satisfied.[40]

In a case such as that of Peter Gunner, the outcome would probably be the same as that reached in the litigation process.

The Reparation Tribunal proposed by PIAC provided for a similar test of liability to that in the Bringing Them Home report, namely, a two-tier monetary compensation scheme for indigenous people who can establish that they were forcibly removed.[41]

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37 *Bringing Them Home*, *supra* note 1, Appendix 9, Recommendation 18.

38 *Ibid.*, Recommendation 19.

39 *Ibid.*, Recommendation 14.

40 Where the evidence is insufficient to make a finding either way, the tribunal must carefully analyse the statute to see what it is required to do: *McDonald v Director-General of Social Security* (1984) 6 ALD 6 at p 11 per Woodward J.

41 The PIAC proposal for a Reparation Tribunal is detailed in the *Senate Committee Report*, *supra* note 1 at paras 8.55-8.70

"Forcible removal" would have the same meaning as that proposed by the National Inquiry. PIAC added a new element to its proposal, namely, that there should be strict liability for the harm suffered as a result of forcible removal.[42]

This would enable claimants to be compensated for harms flowing from forcible removal without having to establish that the government breached any duty of care. There is nothing further in the PIAC model to overcome the problem of lack of proof that a removal was effected "forcibly." A claimant such as Peter Gunner would fare no better under the PIAC model.

The problem, in sum, is that many of those who believe themselves to be members of the stolen generation cannot, or can no longer, point to evidence that their removal was "by compulsion, duress or undue influence." A reparation scheme which set such a criterion for eligibility would have lead to the refusal of many claims. Success or failure of claims might depend on fortuitous events, such as whether the claimant's parent was still living and whether an official who procured a purported parental consent has left a written record of the negotiations. Such a scheme might "be as much responsible for denying rights to members as providing them,"[43] and, like common law litigation, would tend to produce arbitrary and inequitable outcomes.[44]

VIII. "SEPARATED" AND STOLEN" CHILDREN

The Senate Committee found that indigenous people separated from their families fell into various categories. Some were "forcibly removed" in the National Inquiry's sense. Some were removed on general welfare grounds but believe that if they were not indigenous, some other solution would have been found for their poverty and neglect. Others regard themselves as belonging to the Stolen Generation because, having been separated from their families for medical, educational or other reasons, they too suffered loss of culture, identity and contact with family and community. The Committee found that there were some tensions within indigenous communities over who should be recognised as belonging to the stolen generation. As the Karu Aboriginal Child Care Service expressed it:

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42 *Ibid.* para 8.53.

43 *Submission 11, Retta Dixon Home Aboriginal Corporation at 186, quoted in Senate Committee Report, supra* note 1 at para 8.78.

44 *See* criticisms of litigation outcomes by PIAC, Submission No 68, *quoted in Senate Committee Report Ibid.* at para 8.49.

"there is the notion that those who were the most 'stolenest' should be the only ones to benefit."[45]

There is an important question of policy to be decided: whether the reparation scheme should be provided to the wider group of "separated" indigenous persons who suffered loss of Aboriginal culture and contact with family and community, or whether it should be confined to the "stolen" children who were forcibly removed. The Bringing Them Home report failed to acknowledge this distinction, as it appeared to assume that nearly all the removals were forcible. The Senate Committee raised the issue, but reached no clear conclusion.[46]

It did, however, note that the crucial elements of loss of culture and loss of contact with family and community were common to all the groups.[47]

It would be difficult to exclude the "separated" children from reparation without also excluding those who may have been forcibly removed but can no longer prove it. The PIAC and National Inquiry proposals would exclude both groups. This means that the excluded groups would obtain no compensation for the loss of identity and culture, the deprivation of family, the exploitation of labour, the sexual, physical and emotional abuse, and the racial discrimination that many of them suffered along with the "stolen" children.

The alternative approach, to extend the reparation scheme to include the "separated" children, would have the effect of redefining the wrong that marks out the victim group. Instead of a single common wrong of "forcible removal," we would recognise a cluster of related and systematic wrongs visited upon indigenous children, of which forcible removal would be but one.

IX. An Alternative Definition Of The Wrong

We seem to have two choices. First, to confine reparation to those indigenous persons who were removed in childhood by means that can be shown to have been "forcible." This is the basis of the PIAC Reparation Tribunal model and the National Inquiry Recommendations.

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45 Senate Committee Report, *Ibid.*, para 1.83.

46 *Ibid*, para 8, 101-103.

47 *Ibid.* para 1.78.

The second option is to provide reparation to those who were separated in childhood, whether forcibly or not, and who suffered one or more of a list of wrongs. The listed wrongs might include arbitrary deprivation of liberty, having been removed by compulsion, duress or undue influence, wrongful denial of contact with family and community, denigration and deprivation of a child's Aboriginal culture, language and identity, sexual abuse, physical abuse, exploitation of labour and other forms of racial discrimination. Access to the reparation process would be subject to a standing-type requirement which might impose cumulative conditions such as indigenous status, separation from one's Aboriginal parent, family or community during childhood, and racial discrimination in the removal, placement or care.

Under the first option, a lump sum award in a standard amount would be paid to all who established that they had been "forcibly removed." Under the second option, satisfying the standing-type requirement would give recognition of the person's membership of the victim group (an important benefit in itself), but access to reparation would require a further step of establishing one or more of the listed wrongs. This would answer any objection that the standing test was too wide.

The second option would enable access to reparation by those who may have been forcibly removed but cannot prove it, as well as those who were "separated," provided that they suffered one or more of the listed wrongs. A person such as Peter Gunner, who was the victim of 'perverted conduct' perpetrated by a missionary employed at St Mary's Hostel ,[48] could obtain reparation for those abuses even though he can no longer challenge the government's claim that he was removed at his mother's request.

X. Difficulties With the Wider Formulation of Wrong

One objection that might arise to the second option is that it downgrades forcible removal from the single defining wrong to one of a cluster of wrongs. This may be seen as obscuring the special nature of the group that were forcibly removed. The Senate Committee noted that evidence to this Committee suggested that the "stolen generation" group was quite distinct within a broader group of "separated" people.[49]

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48 As found by O"Loughlin J in *Cubillo v Commonwealth supra* note 25, and *see Cubillo v Commonwealth* [2001] FCA 1213 (31 August 2001) para 165

49 Senate Committee Report, *supra* note 1 at para 1.75.

Members of this group feel that their distinctness has been insufficiently recognised in the delivery of programs such as family link-up services.[50]

But while the group may perceive itself as distinct, it is no longer possible in many cases to determine who was "stolen" and who was "separated." A reparation scheme that is premised on such a tenuous distinction would engender frustration and division within indigenous communities.

Recognition of the distinctness of those who were stolen can occur within the proposed second option, without denying reparation to the "separated" persons who shared their fate after removal. Individuals would be able to have their claim to being a stolen child heard and determined, and the Reparation Tribunal could be empowered to order special forms of reparation for those found to have been forcibly removed, such as special commemorative arrangements and monetary awards.

Opposition to the second option might also come from government. First, by widening the class of wrongs this option would increase the numbers eligible for monetary compensation. Second, government will likely resist any obligation to compensate for wrongs done to children in church institutions or by foster or adoptive parents,[51] and even for wrongs done by its own employees, such as supervisors in children's institutions.[52] Third, they will argue that to hold governments responsible for lapses of parental duty towards State wards would be contrary to public policy, because it would discourage welfare authorities from taking charge of children who are at risk of abuse or neglect.[53]

Whether these arguments ultimately prevail will depend on whether governments are prepared to be guided by international law principles, as reflected in the Van Boven-Bassiouni principles, or whether they continue

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50 *Ibid*, paras 1.82-3.

51 The Senate Committee heard that some churches were willing to contribute to a reparation scheme, if government took the initiative: *Ibid.*, paras 8.129-8.135.

52 The Commonwealth Government claims that it is not legally responsible for the removals of indigenous children in the Northern Territory by its employees, since they were exercising an independent discretion: *Senate Committee Report, Ibid.*, para 8.21. This argument was accepted by the Federal Court in *Cubillo v Commonwealth supra* note 25, and on appeal: *Cubillo v Commonwealth* [2001] FCA 1213 (31 August 2001) paras 288-94, 324

53 *X (Minors) v Bedfordshire County Council [1995] 2 AC 633, cf Barrett v Enfield London Borough Council [1999] 3 WLR 79 (House of Lords).* This argument of public policy has also found favour with Australian courts: *Cubillo v Commonwealth* (2000) 174 ALR 97, paras 1222, 1256; *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)* [2000] NSWCA 255, para 170 (NSW Court of Appeal).

the present policy of "no compensation without establishment of legal liability."[54]

XI. CONCLUSION

Australians have generally accepted that the members of the stolen generation are a discrete group with a strong claim to measures of reparation. The Parliaments of all six States (although not, as yet, the Commonwealth) have offered apologies to the group generally; most have also acknowledged that indigenous children were removed forcibly in accordance with past policies and practices. Commemorations such as the National Sorry Day and signing of the Sorry Book have attracted considerable support from the public and from Members of Parliament. But the nation has yet to address the provision of measures of reparation to individuals — those who were removed in childhood and those who were affected by the removals.

This article reviews the reparation models proposed by the National Inquiry in its 1997 Bringing Them Home report, and the Public Interest and Advocacy Centre whose proposal for a Reparation Tribunal has been adopted as a recommendation of the Senate Legal and Constitutional References Committee in its 1999 report: *Healing: A Legacy of Generations.* Both models would confine eligibility for reparations to indigenous persons who can show that they were forcibly removed in childhood. This criterion was selected because the National Inquiry believed that almost all the removals were carried out by compulsion, duress or undue influence, and that the experience of forcible removal was the common wrong that defines the victim group. There was little challenge to this definition of the victim group so long as reparation consisted of non-targeted, general measures such as apologies, commemorations and indigenous social programs.

I have argued that to use forcible removal as the test of eligibility under the reparation scheme will deny reparation to many who shared the experience of the stolen generation but who cannot prove the actual circumstances of their removal, as well as those who were "separated" rather than "stolen" but shared the post-removal treatment meted out to the stolen children. I have proposed an alternative scheme which will define more broadly the wrongs for which reparation may be provided to those who meet the standing requirement. This proposal would admit both "stolen" and "separated" indigenous people to eligibility, while recognising the

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54 This was the position taken by the Commonwealth Minister in his submission to the Senate Committee: *Senate Committee Report, supra* note 1 at para 8.17.

differential impact of the wrongs on individuals. The dilemma is that widening the definition of the wrong would remove the anomalies of the PIAC and National Inquiry models, at the cost of making the proposed reparation scheme much less attractive to government.