Remedying atrocity crimes in Australia

A submission to the inquiry in support of the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024*

by

Remedy.org.au

May 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
P.O. Box 6100
Parliament House
Canberra ACT 2600

27 May 2024

Dear Secretary,

re: **Inquiry into the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024**

We welcome the opportunity to contribute to the Committee's inquiry with the following submission by Olivia Ball on behalf of Remedy Australia, paying sincere respect to the Wurundjeri people of the Kulin Nation, on whose unceded lands we live and work.

Remedy Australia is a non-governmental organisation dedicated to monitoring Australia's compliance with decisions of United Nations human rights treaty bodies in response to individual complaints. Remedy Australia advocates for the right to an effective remedy, including for this human right to be protected in Commonwealth, state and territory legislation. An effective remedy encompasses substantive remedies for individual and groups, as relevant, as well as non-repetition measures to prevent violations recurring.

We submit there is an arguable case that genocide has occurred in Australia since the Genocide Convention entered into force in 1951, and that Australia has failed to prosecute or prevent it, both before and since atrocity crimes were added to the Criminal Code in 2002. The reforms proposed in the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024* would aid Australia in fulfilling its obligations under the Genocide Convention and the Rome Statute.

Yours faithfully,

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There are numerous causes of the dramatic fall in the First Nations populations of this continent since colonisation, including massacres, poisonings, introduced disease, dispossession and mass transportation, controlled reproduction, poverty, racial discrimination and the harsh repression of the oldest surviving culture in the world.

We should be concerned that acts such as these may constitute genocide or other atrocity crimes. Taken singly or together, is there evidence of a "coordinated plan of different actions aiming at the destruction of essential foundations of the life" of Australia's First Peoples or Nations, including their political and social institutions, culture, language, 'national feelings,' religion and economic existence? Have they suffered the destruction of their "personal security, liberty, health, dignity and even [their] lives" for reason of their membership of a group?[1]

For present purposes, we take our reference from the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention) of 1948, which Australia ratified in 1949 and which entered into force in 1951.[2] As international law binding on all State Parties, the Genocide Convention is not retroactive, but neither does it have statutory limitations.[3] On that basis, all actions since 1951 should be justiciable in Australian courts.

Of the acts that legally constitute genocide, as set out in Article 2 of the Convention, if genocide has occurred in the period since 1951, perhaps the most documented act is the forcible transfer of Aboriginal and Torres Strait Islander children to be raised in non-Indigenous contexts. Other acts of genocide may have occurred, but if we can satisfy the Inquiry that there is a prima facie case to answer in the matter of forcible child transfer, post-1951, that is sufficient grounds to support the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024*.

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[1] R. Lemkin, *Axis Rule in Occupied Europe: Laws of occupation, analysis of government, proposals for redress* (Carnegie Endowment for International Peace, Washington 1944), p79.

[2] The principles underlying the Genocide Convention are "part of customary international law which binds all states" (D.F. Orentlicher, 'Genocide' in R. Gutman & D. Rigg (eds) *Crimes of War: What the Public Should Know* (WW Norton New York 1999), p156), reflecting an Advisory Opinion of the International Court of Justice describing the principles underlying the Convention as "recognised by civilised nations as binding on States, even without any conventional obligation." As such, it's impossible to say exactly when genocide became illegal.

[3] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (1968)

To destroy a group

Raphael Lemkin, a Polish Jew who coined the term *genocide* and campaigned for its prohibition in international law, imbues it with multiple complex meanings. For him – and in the terms of the Genocide Convention and Australia's Criminal Code – genocide is not necessarily or exclusively a special form of mass murder. He writes of genocide as constituting the destruction of group members' "personal security, liberty, health, dignity and *even [their] lives*."[4]

In legal terms, the Genocide Convention's prohibition of 'serious mental harm,' 'forced transfer of children' and the imposition of 'measures intended to prevent births' make it clear that physical genocide extends beyond killing and may occur even without killings. *Physical genocide* is acts intended to eliminate "in whole or in part" the actual existence of a group *qua group*. Elimination may occur through denying the group the means of self-perpetuation, that is, the physical reproduction of group members and/or "the continuation of the features that define the group as a group, distinct from the broader community."[5] Thus genocide can be perpetrated by "forcibly transferring children of the group to another group" (Article 2e).

Forcible transfer of children to another group

> *"In a genocide, attacks on women and children are not unfortunate by-products ... on the contrary, woman and children are direct targets, since they ensure the future of the group*."[6]

Earlier drafts of the Genocide Convention made explicit reference to cultural genocide or ethnocide: the destruction of a group "through forcible assimilation into the dominant culture."[7] While forced assimilation did not make it into the final draft of the Convention, forcible removal of children did.[8]

In 1996, the Australian government commissioned an inquiry into the practice of forcible child transfer. Its concluding report, called *Bringing Them Home*,[9] was the most widely read report of its kind, moving hundreds of thousands of Australians to record

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[4] Lemkin, *op. cit*., p79, emphasis added.
[5] M. Storey 'Kruger v The Commonwealth: Does genocide require malice?' in *UNSW Law Journal* <www.law.unsw.edu.au/unswlj/stolforum/storey.html>.
[6] International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, 'Genocide in the 20th Century' in *Special Report* (Organisation of African Unity <http://www.oau-oua.org/document/ipep/report/rwanda-e/EN-01-CH.htm> 7 July 2000), para. 1.6.
[7] Orentlicher, *op. cit*., p154.
[8] and was reclassified as a form of physical genocide (Ad Hoc Committee draft Art III).
M. Lippman, 'The drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 *Boston University International Law Journal* 1.
[9] R. Wilson & M. Dodson *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (HREOC Sydney 1997).

their personal responses to the report in public 'Sorry Books,' and established on the public record the truth of the Stolen Generations.

As documented in the report, Aboriginal and Torres Strait Islander children were forcibly removed from their families from virtually the start of European settlement, though not initially as a matter of policy.[10] Removal of children of mixed descent became formal Commonwealth government policy in 1937.

In most Australian states, government assumed legal guardianship of all Aboriginal and Torres Strait Islander children from about 1911, supplanting the rights of parents. Most First people were forced to live in designated reserves or 'missions' away from white settlements – some forcibly transported to missions thousands of kilometres away from their people and Country[11] – where nearly all aspects of their lives were controlled by the state. To encourage the adoption of Christian beliefs and 'lifestyle,' children as young as four were housed together in dormitories within the reserves, with restricted access to their family.[12]

The Aboriginal reserves, whether run by state authorities or on their behalf by churches, were hopelessly under-funded. This affected food supply, basic infrastructure and the standard of medical treatment available, reducing residents' life expectancy.[13] In Lemkin's framework, deliberate government policies causing premature death constitute *physical genocide*, akin to what he observed in occupied Poland.[14] Directed against a particular group, they constitute "conditions of life calculated to bring about its physical destruction in whole or in part:" a breach of the Convention (Article 2c).

Aboriginal and Torres Strait Islander children presumed to be of mixed descent were forcibly removed from the reserves altogether and placed in 'training' institutions run by the states or churches. Into the 1950s and '60s, children were removed in increasing numbers and increasingly fostered or adopted by white families as institutions became overcrowded. Unlike white children who were adopted or institutionalised, contact between First Nations children and their families – and thereby their culture – was restricted as much as possible. Many had no idea of their cultural or familial origins.

[10] Wilson & Dodson, *ibid*., p27.

[11] which may constitute ethnic cleansing – "the forced removal of a victim group from a territory," though beyond the scope of the present inquiry. (T. Dunne & D. Kroslak 'Genocide: Knowing what it is that we want to remember, or forget, or forgive' in K. Booth (ed.) *International Journal of Human Rights*, Special Issue: *The Kosovo Tragedy: The Human Rights Dimensions* vol. 4.3 (Frank Cass, London 2000) p36).

[12] The practice was to be echoed by the Khmer Rouge in the 1970s; it broke up minority families within communes, housing children together in dormitories and "preventing adults from passing on their culture to the children." E. Becker, *When the War was Over: Cambodia's Revolution and the Voices of Its People* (Simon & Schuster New York 1987), p263.

[13] Wilson & Dodson, *op. cit*., p31.

[14] Lemkin, *op. cit*., pp87-88.

The 1967 referendum gave the Commonwealth government – a party to the Genocide Convention – concurrent power over Aboriginal affairs alongside the states. Funding for Aboriginal welfare increased, but the forcible transfer of children continued at 'very high rates.'[15] In 1972, the Whitlam Government was elected on a policy platform of self-determination for Aboriginal and Torres Strait Islander people. It provided legal aid to families to challenge attempts to remove their children and the numbers removed consequently dropped. But the forcible transfer of children did not end completely until the 1980s.

The *Bringing Them Home* inquiry estimated that between 10% and 33% of all Aboriginal and Torres Strait Islander children were removed between 1910 and 1970. It concluded that "most [First Nations] families have been affected, in one or more generations, by the forcible removal of one or more children."[16]

Forcible child transfer shows how genocide can be a 'social process;'[17] a "composite of different acts of persecution and destruction."[18] It involved the destruction of the 'national pattern' of the victimised group and the imposition of that of the oppressor.[19]

The forcible transfer of Aboriginal and Torres Strait Islander children has been shown to have had a detrimental effect on their education, employment prospects, income, health, relationships, incidence of alcohol and other drug use and adverse contact with the (white) justice system.[20] As is made abundantly clear in the *Bringing Them Home* report, separating children from their communities caused life-long anguish for both children and their families, which may also constitute the "serious mental harm" prohibited in Article 2(b) of the Genocide Convention.

A group, as such

Aboriginal people have long sought to have their experience of child removal recognised as genocide.[21] To meet the legal definition of genocide, a perpetrator must seek to "destroy, in whole or in part, a national, ethnical [sic.], racial or religious group, as such" (Article 2). Aboriginal and Torres Strait Islanders are many nations, and might be considered a distinct religious group, but their religion, though suppressed, was not the primary reason for their persecution.

[15] Wilson & Dodson, *op. cit*., p35.
[16] Wilson & Dodson, *ibid*., pp36-37.
[17] G.J. Andreopoulos (ed.) *Genocide: Conceptual and Historical Dimensions* (Pennsylvania UP, Philadelphia 1994), p2.
[18] Lemkin, *op. cit*., p92.
[19] Lemkin, *ibid*., p79.
[20] Wilson, & Dodson, *op. cit*.
[21] e.g., *Kruger & Ors v The Commonwealth of Australia* (or the 'Stolen Generation case') heard by the High Court in 1997.

Proof of 'neglect' was not required before First Nations children could be 'stolen' – "their Aboriginality would suffice."[22] Clearly, the practice was based on 'race', and families were targeted for being members of that race, as defined by the perpetrators.[23] In removing children from their families, state policy made a distinction between children of 'mixed descent' and those presumed to be of 'full descent.'[24]

By the late nineteenth century, colonial administrators deemed the number of full-descent First people to be decreasing, but those of mixed descent to be increasing. It was assumed the 'race' was 'naturally' dying out and would ultimately disappear. To maintain their segregation, while removing and assimilating those of mixed descent into a lowly strata of white society would take the latter group off government rations and meet a need for cheap labour.[25] It was assumed that paler-skinned children would be more readily 'absorbed' into the white community, without any regard for the discrimination they would face. That people of mixed descent did not identify as European was not a concern of the day. Once again, the perpetrators' labels prevailed.

That children of mixed descent were targeted for removal is not to say that the *group* subject to genocide comprised only those of mixed descent. The forcible removal of children affected their entire community and the transmission of culture down the generations. As the perpetrators believed the full-descent population was dying out, it was clearly their intent that First Nations as a distinct group should do likewise.

Intent

Legally, genocide is committed with *intent* to destroy the group, in whole or in part (Genocide Convention, Article 2). Brazil has attempted to deny that crimes committed against Amazonian Indians were genocidal because they were "committed for exclusively economic reasons, the perpetrators having acted solely to take possession of the lands of their victims."[26]

However, records of the drafting process show that the Convention's use of the term 'intent' is not synonymous with 'motive.'[27] Rather, the drafters recognised that those

[22] Wilson & Dodson, *op. cit*., p11. Most witnesses to the 1996 inquiry refuted the suggestion that they were neglected or abused by their parents.

[23] Chalk ('Redefining Genocide' in Andreopoulos *op. cit*.) and Ignatieff (*Blood and Belonging: Journeys into the New Nationalism* BBC Books London 1993) support this view of genocide in which targeted groups and their membership are necessarily defined by the perpetrator; though more than 67 definitions of Aboriginality have been identified in various legislation (Wilson & Dodson, *ibid*., p30).

[24] First Nations generally do not make such distinctions and may find them offensive.
(Law Society of NSW, 'The Stolen Children: Abducted by aliens' www.lawsocnsw.asn.au/legalhelp)

[25] Wilson & Dodson, *op.cit*., p29.

[26] Permanent Representative of Brazil quoted by Minority Rights Group, 'Genocide against indigenous peoples' in *Report No. 53* (MRG 1984) p5.

[27] Orentlicher, *op. cit*., p156.

committing genocide might have a number of underlying motives. "Reasons for perpetrating the crime and the ultimate purpose of the deed are irrelevant. The crime of genocide is committed whenever the intentional destruction of a protected group takes place."[28] That is, we should not be asking, *What was their intent?* so much as, *Was the destruction intentional?*

Australian authorities responsible for stealing generations of Aboriginal and Torres Strait Islander children – whether governments, churches or other NGOs – claim they had other, even honourable motives, such as the welfare of the children. There was also the social Darwinist attitude that Aboriginal peoples had shown themselves to be less 'fit' for survival, whether in combat with Europeans, competition for resources or resistance to disease, and were inevitably doomed as a race. Governments and missionaries sought to 'smooth the dying pillow.'[29] That nothing was done to attempt to prevent the decline of the 'full-blooded' populations is clear from government practices in the reserves and elsewhere, where government funding of Aboriginal affairs was £1 per person per annum.[30] On the contrary, these practices, as we have seen, may themselves constitute physical genocide.[31] Intent is evident in the "pattern of purposeful action."[32]

As for the state removing children, the Stolen Generations inquiry found that the 'ultimate purpose' of the practice was to control the reproduction of Aboriginal and Torres Strait Islander people[33] – defined by Lemkin as *biological genocide* – with a

[28] P. Starkman, 'Genocide and International Law: Is There a Cause of Action?' (1984) 8(1) *Association of Student International Law Societies (ASILS) International Law Journal* 1 at fn 14.
[29] Wilson & Dodson, *op. cit*., p28.

[30] compared with £42/10s p.a. provided for non-Indigenous pensioners and the Governor-General's annual salary of £10,000 (Wilson & Dobson, *ibid*, p31).

In the case of *Lubicon Lake Band v Canada* heard by the UN Human Rights Committee in 1984 (no. 167, UN Doc. A/45/40), First Nations Canadians accused the province of Alberta of 'non-deliberate genocide' in effect by "permitting the degradation of the environment to such an extent that it was now impossible for the tribe to survive as a people." The UN Committee found a violation of Article 27 of the ICCPR and ordered the Canadian government "to pay $45 million compensation, to set aside a reserve for the tribe and to sustain its separate existence with special community services" (Robertson *op. cit.*, pp147-48). Though deliberate intent is necessary to meet the Genocide Convention definition, the UN Human Rights Committee made clear that an Indigenous reserve ought to be supported by the state in accordance with the human rights of minorities.

[31] States party to the Genocide Convention undertake to prevent and to punish crimes of genocide and, obviously, to avoid committing it. Attempted genocide, conspiracy to commit genocide, incitement of genocide and complicity in genocide are also punishable under current international law (Orentlicher, *op. cit*., p154). States may accuse each other of genocide before the International Court of Justice, while allegations of individual responsibility can be heard in domestic law, where it exists, or before the imminent International Criminal Court in the Hague.

[32] H. Fein 'Genocide, terror, life integrity and war crimes: The case for discrimination' in Andreopoulos, *op. cit*., pp95-107.
[33] In addition to their physical removal, it was hoped that forcing First Nations girls to perform long hours of exhausting labour, usually domestic, would curb their presumed sexual promiscuity. (Wilson & Dodson, *op. cit*., p31) At the same time, First Nations marriages were also controlled by the state.

view to complete biological and cultural assimilation of First Nations *qua* group into the non-Indigenous population.

But even benevolent motives, where they existed, are irrelevant. Genocide "does not require malice,"[34] merely intent to destroy. In the case of Australia's Stolen Generations, there was evident intent to destroy Indigenous populations *qua* group insofar as they should be fully assimilated and/or die out and cease to exist as a distinct racial or cultural group. The state intended that the group as such should cease to exist.

Willingness to investigate and prosecute

> *"Genocide being of such great importance, its repression must be based not only on international and constitutional law but also on the criminal law of the various countries*." – Raphael Lemkin[35]

Genocide has been an international crime since at least 12 January 1951 when the Genocide Convention entered into force in accordance with Article 13. At that point, Australia had already signed and ratified the Convention without reservation, and so was legally bound to prevent and punish genocide from (at least) 1951. That it could voluntarily sign an international treaty that prohibited "forcibly transferring children of [one] group to another group" and continue doing exactly that, for decades, seems extraordinary.

Over 50 years later, in 2002, the Howard Government ratified the Rome Statute creating the International Criminal Court (ICC), and introduced legislation to make its obligations under the Genocide Convention unequivocally enforceable in domestic courts.[36] But the Attorney-General's fiat (s 268.121) means no atrocity crime can be punished in Australia without the written consent of the government. Withholding of consent by the Attorney-General is non-appealable (s 268.122). This structural impediment written into section 268 of the Criminal Code suggests an unwillingness on the part of the Australian Government to investigate and prosecute allegations of genocide; an unwillingness for which the International Criminal Court exists: to provide an alternative recourse to achieve justice and effective remedies for the most egregious of crimes (Article 17 of the Rome Statute).

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[34] Storey, *op. cit*.
[35] Lemkin, *op. cit*., p93

[36] Prior to the 2002 amendment to the Criminal Code, Australian legislation only covered atrocities committed in Europe during World War II. Even in this domain, Australia failed to prosecute successfully or deport any Nazi war criminals within its jurisdiction, despite the Government's own finding that more than 500 settled in Australia after the war. (P. Barkham, 'Australia accused of sheltering war criminals' in *The Guardian Weekly*, 31 May - 6 June 2001, p7).

But rather than oblige victim-survivors and their families to exhaust domestic remedies and refer the matter to the ICC Prosecutor – which only has jurisdiction over atrocity crimes committed since 1 July 2002 – Australia should demonstrate its willingness to ensure genocide and other atrocity crimes are prevented and punished by revoking the Attorney-General's fiat, as proposed in the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024*.

Passage of this Bill would not solely address accusations of atrocity crimes occurring on our own soil. In addition to harbouring Nazi war criminals, Australia is also thought to be home to 'hundreds' of others responsible for atrocities in the Balkans, Cambodia and Afghanistan, as well as dozens of Pinochet's secret service police.[37]

Human rights commissioners Mick Dodson and Ron Wilson recommended in 1997 that the Commonwealth,

> "legislate to implement the Genocide Convention with full domestic effect."[38]

We contend the 2002 amendments introducing genocide provisions to the *Criminal Code* do not give *full domestic effect* to the Genocide Convention. The Attorney-General's fiat renders section 268 of the Criminal Code ineffective in practical terms and denies justice for the worst of crimes.

We ask the Inquiry and the parliament to implement the *Bringing Them Home* recommendations in full and in good faith, pass the *Criminal Code Amendment Bill* and end impunity for atrocity crimes in Australia.

[37] Barkham, *Ibid*.
[38] Wilson & Dodson (1997), *op. cit*. Appendix 9 Recommendation 10 <https://humanrights.gov.au/our-work/projects/bringing-them-home-appendix-9-recommendations>.

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