

Submission to Senate Legal and Constitutional Affairs Committee

Inquiry into the Stolen Generation Compensation Bill 2008

I have only recently learned of this enquiry. This submission is short as a consequence. Perhaps that is to the good.

I strongly support the Bill. My view on the subject has been shaped in large part by my involvement as counsel for Bruce Trevorrow, in his action against the State of South Australia. He sued successfully for damages for the injury he suffered as a result of having been removed from his family at the age of 13 months.

Whether removal of children causes harm was one of the many factual issues in Trevorrow's case.

Justice Gray said in his judgment:

“[885] I find that it was reasonably foreseeable that the separation of a 13 month old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks. ... ”

That finding accords with commonsense. We all have an instinct that it is harmful to children to remove them from their parents. The finding was based on extensive evidence concerning the work of John Bowlby in the early 1950s, which showed that it is intrinsically harmful to remove a child from his or her parents, in particular when this occurs after nine months of age.

Removal of children above the age of 9 months approximately causes harm. The literature has been clear on this since the early 1950s.

I note the submission of the Ngarrindjeri Regional Authority Incorporated, prepared by George Trevorrow. George is Bruce Trevorrow's brother. George was not removed: he grew up with his parents on the Coorong. Anyone who is skeptical about the effects of removal should take time to meet George and his other brother Tom Trevorrow. Then meet Bruce. The differences between them are quite startling. George and Tom are resilient and resourceful and have built successful lives for themselves. By contrast, Bruce struggles with every adversity, and has been crushed by life's vicissitudes.

Governments around the country knowingly inflicted harm on children by removing them from their parents. No doubt there were cases where removal was justified in order to avoid greater harm which would be caused by the child's circumstances. No doubt there were some cases (probably very few) where children were removed with the fully informed consent of the parents. For the rest, removal was likely to cause harm, and governments knew it or should have known it.

To harm children knowingly is a terrible wrong. Indigenous children who were taken from their parents without demonstrably good welfare reasons and without the informed consent of their parents should be recognized as having suffered a terrible wrong. It was a wrong which the parliament and the public recognized on 13 February 2008. It was a wrong which was foreseeable at the time.

The most elementary instinct for justice tells us that when harm is inflicted by acts which are morally wrong, then there is a moral, if not a legal, responsibility to answer for the damage caused.

If the system recognises the occurrence of a terrible moral wrong but denies an effective remedy then the system has failed us.

Saying sorry is a good and decent thing to do. To acknowledge the wrong and the damage and to deny compensation is simply unjust.

Seeking compensation through the courts is difficult and brutal. Litigation against a Government is not for the fainthearted. Governments fight hard. It took Trevorrow's case eight years to get to court, and the trial ran from November 2005 to April 2006. If he had lost the case, Bruce would have been ruined by an order to pay the Government's legal costs. Most members of the stolen generations do not have the resources or the resilience to take on the government in court.

If members of the stolen generations have to bring legal proceedings to vindicate their rights, the proceedings will occupy lawyers and courts for years, and will run according to the circumstances of the case and the accident of which State or Territory is involved. The worst outcome will be that some plaintiffs will end up the way Lorna Cubillo and Peter Gunner ended up eight years ago: crushed and humiliated. Or they might succeed, as Bruce Trevorrow did. Either way, it is a very expensive exercise for the State, and a needlessly gruelling experience for the plaintiff.

The scheme proposed in the Bill appears sensible. The amounts of compensation seem appropriate. I note that Bruce Trevorrow received damages and interest totalling \$800,000, and the State of South Australia incurred something in the order of \$4 million in legal costs. Litigation is not an efficient way of dealing with an acknowledged wrong.

Ideally, the compensation scheme should be simple, co-operative, lawyer-free and should run in a way consistent with its benevolent objectives.

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