The University of Sydney

Faculty of Law

Dr Thalia Anthony
173–175 Phillip Street
Sydney NSW 2000
Australia

DX 983, Sydney

Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200

9th April 2008

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Dear Secretary

Re: Submission into the Senate Committee Inquiry into the Stolen Generation Compensation Bill 2008

Thank you for the opportunity to make a submission to this most valuable inquiry into the Stolen Generation Compensation Bill and various compensation models.

This submission arises from a forum that The University of Sydney Law School and Amnesty International NSW Legal Network hosted. The forum was entitled, 'The Apology to the Stolen Generations – where to now?' on 2 April 2008 in the Law School Assembly Hall. In attendance were 130 members of the public, practitioners, students, academics and members of the stolen generations.

Four speakers gave presentations on the following topics:

- Ms Helen Moran – the ongoing impact of stolen generations policy and the new hope with an apology
- Father Frank Brennan – the consultative process that emerged in the lead-up to the apology; the current policy in Indigenous people and the importance of consultation and community involvement
- Mr Jack Rush QC – the difficulties of litigating damages to the stolen generations, the overwhelming costs of litigation and need for a statutory process for compensation stolen generations victims.
- Ms Sam Mostyn – the need for understanding about the stolen generation and injustices against Indigenous people to have ongoing action and dialogue.

Given the expertise of the speakers and quality of the presentations, a member of the audience moved that their speeches be put in a submission to this Senate Inquiry. The motion was moved by acclamation.

This submission encapsulates the speeches that were delivered by Ms Helen Moran, Father Frank Brennan and Mr Jack Rush QC. The authors of the submissions would also welcome the possibility of answering questions at the Committee's public hearings. Their details appear at the beginning of their contribution.

Yours sincerely,

Dr Thalia Anthony
University of Sydney Law School
Chair of the Forum

Speech by Ms Helen Moran
Phone: (02) 62491277
Mobile: 0413246470
Address: 33 Foveaux St Ainslie, ACT 2602
Email: shadesofbrindle@hotmail.com

Good Evening, I wish to honour the traditional owners and custodians of the land on which we stand, the Gadigal people of the Eora Nation.

I acknowledge their Spiritual Ancestors, their Elders both past and present, and their descendants.

I would also like to invite you all to take a moment to reflect and remember all of the Aboriginal children who were removed, all of the mothers and fathers who lost those children and all of the families and communities whose lives, futures, cultural and social structure was so deeply torn as a result of the forced removal policies.

The removal of Aboriginal children under the forced removal policies that were enacted in this country for around 100 years, have seen the removal of over Sixty Thousand Children, some eight or so generations.

These policies have brought about the deepest and most profound fracturing of spiritual, physical, psychological and intellectual development of my people. The extension of which includes my first hand personal experience, to that of my family, my community, the Aboriginal nations from which I descend and to all of Aboriginal Australia.

I feel that it is important to also acknowledge the secondary effect of these removal policies on non-Indigenous Australia.

Weather we can appreciate it or not, the fact remains, that we have all been acutely impacted upon, by these Policies and their effects.

The challenge for Aboriginal Australia has been to survive, which they have successfully done.

The issues we are faced with today are the long term affects from how they have survived, and how we now need to deal with the trans-generational and inter-generational effects of this.

Along with the challenge of recovering from the devastation from the attempted genocide and the resulting ethnocide against their race:

is to deal with the racial discrimination, negative stereotyping and inequality that continues to exist toward the first nations of this continent.

The delivery of a formal Apology by Prime Minister Rudd on behalf of the Australian Parliament to the Stolen Generations two months ago created an incredible wave of healing, unity and hope and a sense of relationship and respect toward our Prime Minister and the new government, Something that was a new experience for so many Australians and something that was never possible under the control of the former Howard Government.

People both Black and White have been saying for the first time in their lives, that they are proud to be Australian.

The symbolic gesture of the Apology has offered a positive experience for many, and symbolic gestures have their place and they certainly do present this opportunity on an emotional level.

However the reality is, that this is all the Apology has offered.

The question that needs to be asked is, “when the good feelings have worn off, and we go back to our lives, and when we return to our communities, what difference will the symbolic gesture make to the heart ache experience by those Stolen Generations who are still looking for their families?

What about the Mothers, Fathers, Grandparents, Aunts, Uncles, Cousins and Siblings who still haven’t found their families?

What about those who still don’t know their true identity, their place of belonging, and for some even their real name,

and what about those who never will, because they have died?”

How will the Apology give back the lost love and support of their families, the lost traditional land, the lost identity, lost heritage, lost ancestry, lost and denied inheritance, lost Native Title.

How will this symbolic gesture resolve the depression, alcohol and drug addictions, the dysfunctional lifestyles?

How will it give back the lost culture and language?

How will it give back the lost records, correct the false records, record the truth for the first time?

How will it give restitution, prevent it from happening again, rehabilitate those who need it?

How will the symbolic gesture of the Apology pay the compensation to these thousands of victims who as children, personally suffered so many crimes against humanity?

How will it give back the human rights that were denied and continue to be denied to these children, their families and communities.

How can a Symbolic Gesture compensate for the suffering, racism, physical and sexual abuse and discrimination experienced by these children whilst detained in institutional, fostered and adopted care?

The answer unfortunately is that: “It Won’t, It Doesn’t and It Can’t.”

All the Apology can do is say “Sorry”, and give a sense of acknowledgment to those being apologised to. This in its’ self makes us all feel good for a while.

It has been asserted by the Prime Minister that the Apology is a new beginning and an opportunity to initiate something more, and that it is a “Bridge of Respect”.

This is why the Government cannot be allowed to back away from its promise to implement a comprehensive response to the *Bringing them home* report.

The Rudd Government so far has offered $15 million for 40 new Bringing Them Home counsellors when what is really needed is many more Link Up case workers, and a great deal more funding.

Link Ups through out Australia are being shut down and main streamed into the medical services. Whilst Close the Gap is being offered as the solution.

The *Close the Gap* campaign, which is clearly needed, and I commend the Government for its' implementation, never the less it is not the solution to the issues of the Stolen Generations,

Although the Stolen Generations will benefit from the broader efforts to *Close the Gap* in Indigenous life expectancy and health status.

The focus on closing the gap will not be sufficient in itself to address the outstanding needs of the Stolen Generations.

There should be a specific response to the particular circumstances of those forcibly removed which is different and distinct from the circumstances of Indigenous peoples more generally.

The Government has a responsibility and basically no choice but to *Close the Gap*.

If there was one thing that the NT intervention brought to the worlds attention,

It is the undeniable fact that Indigenous Australia has been suffering through nothing less than sheer neglect and the negligence of previous Australian Governments.

The Rudd Government has inherited the obligation and responsibility to correct this injustice and raise Indigenous Australia's Basic Humans Rights, living standards, medical services, education and equality to that of non-Indigenous Australia

Close the Gap relates to less than one third of the 54 recommendations of the BTH report.

Close the Gap does not support the continued assertion by Prime Minister Rudd, that the Apology is **"A Bridge of Trust"** or that it is a real or believable first step in a process of delivering justice to the Stolen Generations.

This can only be done through the full implementation and fulfilment of the *Bringing them home* report recommendations, and will only be accomplished through the Labor Governments' promised of a "Comprehensive Response" to the BTH Report.

Recommendation 5a,

I like to call the APOLOGY RECOMMENDATION.

It is presented in three parts and so requires in it's entirety that all Australian Parliaments

1. Officially acknowledge the responsibility of their predecessors for the laws, policies and practices of forced removal;

2. Negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies to Indigenous individuals, families and communities and extend those apologies with wide and culturally appropriate publicity; and
3. make appropriate reparations as detailed in the following recommendations.

Parts 1 & 2 have been exercised by the present Government

whilst part 3 is yet to come.

Let me repeat it for you

Make Appropriate Reparations As Detailed In the Following Recommendations

Reparations as defined by the Von Bovann Principles and stipulated in the BTH report, include: Apology and Recognition, Measures of Restitution, Measures or Rehabilitation, Guarantees against repetition and Monetary Compensation.

There are three key elements that I believe will ensure the full implementation of the BTH report as a follow up and validation of the Apology:

1. Adopting a partnership approach with leading Stolen Generations NGO's and Advocacy
groups, as well as Link Ups and other services.

2. Adopting a whole of government approach; and

3. Working across governments to address issues between jurisdictions.

The challenge set for the Rudd Government now is to show that it will extend its' promise beyond the Symbolic gesture of the Apology

And to demonstrate that:

As stated by the Government, "the Apology is a first step" and "a new beginning"

To uphold it's' promise for a comprehensive response to the *Bringing them home* Report

And to move away from the continued implication that Closing the Gap is the answer to responding to the needs of the Stolen Generations.

I am personally committed to supporting the new Government in meeting this challenge with respect, honour, transparency and integrity.

Thank you

Helen Moran
Stolen Generations Survivor
Descendant of the Wiradjuri and Wongaibon Nations

Speech by Father Frank Brennan
Phone: 612 9739 2450
Fax: 612 9739 2455
Email: frank.brennan@acu.edu.au
Address:
Institute of Legal Studies
Australian Catholic University
MacKillop Campus
Level 4, 23 Berry St, North Sydney 2060
PO Box 968, North Sydney 2059

I join with previous speakers in acknowledging that we stand on Gadigal land of the Eora nation. We honour the ancestors and their descendants. Helen Moran has starkly highlighted the many issues which will not be resolved overnight simply because our Parliament has now said sorry to the stolen generations. But the process leading to the apology and its content provide lessons and hope for the future.

When the Rudd government was elected, there were many complex questions to be addressed on the apology, including timing and compensation. On timing, should it be done quickly at the commencement of the new Parliament or should it be done later on a significant anniversary such as 26 May (Sorry Day) or 27 May (the anniversary of the 1967 referendum)? Or should it be delayed some years until all issues of compensation had been addressed? Given the complexity of the compensation issues, was it best to make the apology and then let the compensation issues play themselves out at the Commonwealth and State levels? All these questions were resolved by sensitive and detailed discussions between government and members of the Stolen Generations, between Minister Macklin and her staff and members of the Stolen Generations who were seen to be representative of their people and who were able to liaise readily with those most affected by these decisions.

The process leading up to this apology was right. The compassionate Jenny Macklin had consulted widely in the Aboriginal and Torres Strait Islander community. There was a cross section of the "Stolen Generations" who were prepared to trust the new government, to sit down, tell their stories and assist government with appropriate words. Not only did the Prime Minister touch all necessary institutional consultative bases, he took the time to sit down with Mrs Nanna Nungala Fejo and her family, heard her story and then shared it reverently with the nation. This "elegant, eloquent

and wonderful woman in her 80s full of life, full of funny stories, despite what has happened in her life journey" became the emblematic human face for the nation trying to get right this gesture of reconciliation.

1. **The apology was not just an apology by the Rudd Government, but more importantly an apology by the Commonwealth Parliament with all parties supporting it – and so we must maintain a bipartisan approach**

The parliament replete with galleries packed with indigenous Australians and their supporters carried the pain, the stories, the apology, and the gratitude that at last the word "Sorry" had resounded in the chamber, with support on both sides of the aisle. Only once before, in 1990 with the institution of the Council of Aboriginal Reconciliation, was there a show of bipartisan support in the parliament. This time it was not left just to the ministers. The Prime Minister and the Leader of the Opposition shook hands across the despatch box while all members present stood.

Many Australians in the public squares stood and turned their backs on Brendan Nelson. Some members of the Stolen Generations were offended. With great respect, I beg to differ. I think he did well. He had brought the Liberal and National Parties with him, ensuring they did not rain on the national parade as they had in 1988 and again in 1997. He trusted both the government and its indigenous advisers sufficiently that he was prepared to lock in his side of the Chamber even though they were not to receive the actual wording of the apology until the previous afternoon. He was able to assert his new leadership sufficiently to indicate unqualified acceptance of the Prime Minister's offer to set up a joint policy commission led by both of them in an attempt to work co-operatively for future Aboriginal well being.

Some have taken offence that Nelson referred to the situation of indigenous children today in need of protection. No matter what our moral clarity now about the policies of the past, we are still bereft of solutions in addressing the desperate plight of many indigenous children who are still removed from families at staggering rates even though all government agencies are now committed to removal only as a last resort, always seeking placement with other indigenous families wherever possible.

It is one of the tragic ironies that the apology was being delivered just two hours before the Queensland Court of Criminal Appeal started hearing the Attorney General's appeal against sentence for the "Aurukun nine" - boys and young men aged between 13 and 25 who had been convicted of the multiple rape of a 10 year old girl between 1 May and 12 June 2006. Reviewing the court appeal papers, I was troubled to note that the surnames of a number of the children were known to me. Their relatives were the respected and proud leaders of the Aurukun community who used to come to Brisbane to deal with Sir Joh Bjelke Petersen in the bad old days. Some of them appeared regularly on national television at the time of the showdown between Joh and Malcolm Fraser over the Aurukun takeover when the Uniting Church was withdrawing from the mission. The government brief in that appeal states:

> It is evident that the offences were committed against a disturbed 10 year old girl who lived in a community in which a girl of that age could be subjected to repeated rapes without any intervention by responsible adults. The offences were committed by men and boys who, on the tendered facts, recognised her gross susceptibility to them as sexual predators and who were prepared to ignore her tender age in favour of their gratification or, in some cases, their disinclination to disappoint their peers.

"Without any intervention by responsible adults" – these are frightening words. Some of these accused come from the establishment families of a once proud community. Aurukun is one of only two large Aboriginal communities which have been singled out for special attention and assistance by Noel Pearson's Cape York Policy Institute chaired by Professor Marcia Langton. What will be said of all of us in two generations' time when the historians start debating the morality and utility of what was being attempted with full indigenous co-operation in the Cape York communities and with unilateral intervention in the Northern Territory while we took time to get right our apology for past wrongs?

There were things in Brendan Nelson's speech which on the day would have been better left unsaid. But his side of the Chamber was only ever going to come on board with an apology in the terms: "We are sorry, BUT…" As a nation we are sorry, BUT we are still perplexed about where to from here. We need only tap into the genuine confusion of those well meaning non-indigenous Australians who wonder what is next when they hear prominent Aboriginal leaders calling for boarding school

education for all students on remote communities. How are we to respond to these calls without creating another stolen generation? How real would the parental informed consent for "removal" be if there were no alternative education provided?

2. **The apology was not just politicians' business, and neither should the follow-up be**

At the 1997 Reconciliation Convention in Melbourne, the *Bringing Them Home Report* was launched, highlighting the plight of those indigenous children removed without lawful authority and without consideration of their best interests. Prime Minister John Howard made a personal apology the day before, and it was not limited to the stolen generations. He said:

> Personally, I feel deep sorrow for those of my fellow Australians who suffered injustices under the practices of past generations towards indigenous people. Equally, I am sorry for the hurt and trauma many here today may continue to feel, as a consequence of these practices.

Summing up that day of the conference, I as rapporteur was asked by the planning committee to announce that on the following day we who were not indigenous might offer our own personal apologies to those indigenous persons around us. There was no suggestion that such apology would be limited just to the stolen generations.

Next day the *Bringing Them Home* Report was launched at the Convention. The report recommended:

> That all Australian parliaments:
> 1. officially acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal;
> 2. negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies to Indigenous individuals, families and communities and extend those apologies with wide and culturally appropriate publicity; and
> 3. make appropriate reparation as detailed in following recommendations.

In my closing address at the Convention, I then said:

As we indicated yesterday, we will take the opportunity, not waiting for government, not chastising government, but taking the responsibility ourselves. So this morning, just for a minute or two, those of us who are not Indigenous Australians, let's turn to those Indigenous people around us, to those who want to offer their hands. To them, let us offer a personal apology. If for nothing else, let us apologise that even when we act with the best of intentions we still so often get it wrong. Let's apologise.

Then at the end of that address, the participants made a public apology and commitment in the following terms:

Fr Frank Brennan: I would like to ask Mr Patrick Dodson to join me at the podium and invite those of you who are not Indigenous Australians, and feel so disposed, to join with me to collectively express an apology, the words of which are on the screen before you.

All non Indigenous Australians standing:

"We who are recent migrants who have come to this land, having attended the Australian Reconciliation Convention, thank you, the Aboriginal people gathered at this conference, for your tolerance of us, our cultures and aspirations. Also, we apologise for the hurt done to you, your ancestors and your lands by our ancestors, our presence and our actions on this land over the last 209 years."

Mr Patrick Dodson: If you would all stand and complete this apology with the following words:

All Indigenous and non Indigenous Australians, standing:

"Committed to walk together on this land, we commit ourselves to reconciliation and building better relationships so that we can constitute a united Australia, respecting the land, valuing the Aboriginal and Torres Strait Islander heritage and providing justice and equity for all."

The next week, on 2 June 1997, Prime Minister John Howard when asked by the Leader of the Opposition about an apology in the wake of the *Bringing Them Home* Report told Parliament:[1]

I have already expressed, as many others have, my deep sorrow about injustices suffered by Aboriginal Australians under the policies and practices of earlier generations. I know that these feelings of sorrow, regret and, indeed, sadness are shared by most Australians. My government does not support a formal national apology. It believes that to do so is to indicate in some way that present generations of

[1] 1997 CPD (HofR) 4559, 2 June 1997

Australians are responsible and can be held accountable for the errors, wrongs and misdeeds of earlier generations.

Apologising for something clearly implies some direct personal responsibility. An unwillingness to deliver a formal apology in no way connotes insensitivity or lack of sympathy. Rather, it is a statement of the obvious. Present generations of Australians are not responsible for the errors of earlier generations, particularly when the act involved was sanctioned by law and believed at the time to be for the benefit of the people affected.

I wrote to the Prime Minister on 5 August 1997 in the following terms:[2]

Thank you for the personal apology you made to the 'Stolen Generations' at the Australian Reconciliation Convention. In your consideration of the government's response to the report *Bringing Them Home*, would it be possible for your government to sponsor a resolution of the Parliament reflecting the sentiments of your apology? I would suggest the following:

The Senate/House of Representatives expresses its deep sorrow for those Australians who suffered injustices under the practices of past generations towards Indigenous people, and especially for the hurt and trauma many Australians continue to feel, as a consequence of these practices.

This wording was simply a stylistic modification of the Prime Minister's personal apology at the Reconciliation Convention. Eventually, on 24 October 1997, Senator Herron, the Minister for Aboriginal Affairs, replied on behalf of the Prime Minister, saying:

The Prime Minister acknowledges and thanks you for your support for his personal apology to indigenous people ... However, the government does not support an official national apology. Such an apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations; actions that were sanctioned by the laws of the time and that were believed to be in the best interests of the children concerned.

Meanwhile, Aboriginal leaders like Patrick Dodson had been led to believe that the door was still open, and that some form of apology might now be possible. On 4

[2] See F. Brennan, "The Prospects For National Reconciliation Following The Post-Wik Standoff Of Government And Indigenous Leaders", [1999] UNSWLJ 14

March 1998, Senator Herron answered a question on notice in the Senate in identical terms to his response to me four months earlier:[3]

An apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations, actions that were sanctioned by the laws of the time, and that were believed to be in the best interests of the children concerned.

3. Compensation Has Always Been an Issue

The question of compensation remains unresolved. Mr Rudd was right to put the apology now and to separate it from the issue of compensation. Most removals occurred before 1967 when the Commonwealth had no power to deal with Aborigines in the states. Most of the living now affected by removals were not themselves stolen but their parents were. Though they would not be eligible for individual financial payments, they ought to be eligible for programs and services designed to overcome some of the pain and loss their families have experienced. As for those who were stolen, to date, only one test case has succeeded in the courts. Tasmania and Western Australia have already set up compensation schemes. It will be sensible for the other states and territories to set up administrative arrangements for assessing the claims of those who were removed without parental consent and in circumstances where their removal was not judged appropriately to be in their best interests. So Brendan Nelson was wrong to insist that there should not be any compensation fund in the future.

When *Bringing Them Home* was launched to great fanfare and heightened emotions at the Reconciliation Convention, the Labor Party Opposition moved promptly to apologise in the Australian Parliament. The Leader of the Opposition proposed a motion that the Parliament "unreservedly apologises to Aboriginal and Torres Strait Islander Australians for the separation policies; and calls upon Federal and State governments to establish, in consultation with the Aboriginal and Torres Strait Islander community, appropriate processes to provide compensation and restitution, including assistance for the reunification of families and counselling services"[4]. The Howard government would have no part of it.

[3] Senate, *Debates*, 4 March 1998, p.435.
[4] 1997 CPD (HofR) 4276; 28 May 1997

The issue festered for two years whereupon an Aboriginal Australian for only the second time in history was elected to the Australian Parliament. John Howard immediately sat down and negotiated a motion with Aboriginal Senator Aden Ridgeway stating that the parliament "acknowledges that the mistreatment of many indigenous Australians over a significant period represents the most blemished chapter in our international history and expresses its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of those practices".

Howard said he would not have Parliament apologise as this would entail an acknowledgment of inter-generational guilt for the wrongs of the past being judged according to the standards of today. This became the firm policy position of the conservative parties. Many of their members who came from the countryside often pointed out that it was the European parents of the stolen generations who themselves were often the individual wrongdoers, and that there were many recent migrants to Australia who were unrelated to members of the stolen generations who had nothing for which they needed to say sorry.

The Labor Party Opposition moved an unsuccessful amendment to the 1999 Howard resolution noting that the Parliament "unreservedly apologises to indigenous Australians for the injustice they have suffered, and for the hurt and trauma that many indigenous people continue to suffer as a consequence of that injustice; and calls for the establishment of appropriate processes to provide justice and restitution to members of the stolen generation through consultation, conciliation and negotiation rather than requiring indigenous Australians to engage in adversarial litigation in which they are forced to relive the pain and trauma of their past suffering"[5].

With the standoff in Parliament, members of the stolen generations brought test cases in the courts. But it was not until August 2007 that the first case succeeded. Bruce Allan Trevorrow, now 50, was awarded more than half a million dollars in damages by the Supreme Court of South Australia because, at the tender age of 13 months, he

[5] 1999 CPD (HofR) 9202; 26 August 1999

was falsely imprisoned and "dealt with by the state without lawful authority in a manner that affected his personal wellbeing and freedom". He was taken to hospital on Christmas Day 1957, made a good recovery within the week, but was then handed by state authorities to a white foster family with whom he remained for 10 years. In July 1958, Trevorrow's mother wrote to the state welfare officer asking “if you will let me know how baby Bruce is and how long before I can have him home”. The welfare officer replied that he was “making good progress but as yet the doctor does not consider him fit to go home”.

In all the previous failed test cases, the Aboriginal plaintiffs failed because they could not jump four legal hurdles:

1. They have to prove that the removal was without parental consent.

2. They need hard evidence that the removal was contrary to law, and not in the best interests of the child.

3. They need to show that the decision to remove the child was unreasonable according to the community standards and policy of the day.

4. They need to show that their belated court action (often 50 years after the removal) is fair and proper because material facts came to light only recently.

Trevorrow was able to jump all four hurdles. In the Northern Territory cases, much documentary evidence had been lost with the World War II bombings and Cyclone Tracy.

Only in 1997 did Trevorrow get access to his government file of 300 pages. There was the evidence of his mother's pleading for the return of her child nine years before he was returned.

There were two opinions from the state solicitor-general warning state officials that they could not arbitrarily remove children from their families. They had to comply with the strict provisions of the statute, and the state officials had not done so in this case.

Not all removals were morally outrageous, and not all were in the best interests of the child. Some were very suspect. It is time for the politicians to reconsider the HREOC recommendations in light of the fact that there is still a stolen generation and, through no fault of their own, only some of them could jump all legal hurdles in court.

4. The need for an elected Aboriginal Advisory Body

The Howard government thought it was unacceptable to have an elected Aboriginal advisory body with which government can work. They preferred to pick those leaders with whom they would discuss the problems of Aboriginal Australia. Is this still the most practical way to proceed? Is it the way most consistent with Australian values such as democracy and the simple conviction that "given a fair go" everyone, including Aborigines, can better themselves and the world around them? Tolerance, fair play and compassion demand more.

Contrary to present mythology, the affirmative action programs of the Fraser, Hawke and Keating governments have borne fruit. They have helped create an Aboriginal middle class which did not exist previously. There are now Aboriginal and Islander professors and company directors, doctors and lawyers, nurses and teachers, senior public servants and administrators. Often these people have moved away from remote communities in the same way that non-Aboriginal Australians do when they receive higher education and better job prospects in the cities. The downside of this upward mobility for some has been that others are left behind in the remote communities but without the public service infrastructure which was in place up until the 1960s. The challenge is to provide the resources and issue the directives so that more police, teachers, nurses, tradesmen, and their families move to remote communities to provide the services and infrastructure which are missing. Remote Aboriginal communities will continue to develop only at the rate that the community residents desire and are able to deliver change, in partnership with government.

Partnership is the key. We will put good money after bad if we continue to believe that government can more efficiently address these questions without having to deal with Aboriginal representatives who have democratic legitimacy and local, traditional

authority. Every time the Howard government picked the Aboriginal leaders with whom it chose to deal, it de-legitimised those leaders with their own people; and, it further disempowered those leaders who were out of favour with the government of the day. The de-legitimising happened all the more readily because those chosen were likely to be members of the emergent Aboriginal middle class. The cry was heard all over the country: "Who are they to speak for us? They are not from here. They are not one of us. We did not choose them. They can speak only for those who chose them – the government, not us." For over thirty years, Commonwealth governments of both political persuasions accepted the need for an indigenous partner at the national level. There was the National Aboriginal Consultative Committee, then the National Aboriginal Conference, and then ATSIC. All these structures were flawed, but at least they provided Aboriginal and Torres Strait Islander Australians with a national political voice which was responsive to local indigenous aspirations. The Howard Government insisted the NIC was "not a representative body. It is not involved in specific funding proposals or program/planning matters in individual communities or regions". If there were an indigenous representative group with whom government worked in partnership, there would be no prospect of a well meaning Cabinet minister like Tony Abbott asserting, "Paternalism based on competence rather than race is really unavoidable if these places are to be well run."[6] The last government politician to use the term benignly, publicly and just as mistakenly was Joh Bjelke Petersen's minister Charles Porter who was appearing on stage with me and some Queensland Aboriginal leaders in Rockhampton in 1982. Mr Porter thought that Christians should have no objection to paternalism because we all prayed the "Our Father". The Christian Aborigines present corrected him in quick time assuring him that voluntary submission to one's God was to be distinguished from involuntary submission to state power, no matter how well intentioned the exercise of state power.

If more is to be delivered to poor, remote Aboriginal communities in the name of tolerance, fair play and compassion, it must be done by partners and not by a paternalistic state advised by its own hand-picked advisers. It is time for government and all major political parties to commit themselves to a true partnership with

[6] ABC News, 21 June 2006

Aboriginal Australia so that respect for the freedom and dignity of the individual, the equality of all citizens, and the spirit of egalitarianism that embraces tolerance, fair play and compassion for those in need might extend to the poorest, most remote communities in our land. Launching his Social Justice Report on Monday, Tom Calma made a survey of 19 communities acting to counter child abuse. He provided five indicators for what works:

- **First, community generated:** The most successful programs are those that are developed by the community, and that respond to individual community needs.

- **Second, created with genuine community engagement:** This engagement involves more than just consultation. Communities need to have real power to make decisions and have input into the program development and implementation. This can take time and requires flexibility and patience but ultimately reaps long term rewards.

- **Third, recognises the need for community development:** Community development and capacity building often needs to take place before communities are able to take ownership of family violence initiatives.

- **Fourth, be built on partnership:** All of the successful case studies were built on partnerships, be it with government departments or other agencies.

- **Fifth, adopt a holistic approach:** The underlying, situational and precipitating factors of violence and abuse all need to be tackled, often simultaneously. So while a person participating in a healing program, might present with issues around alcohol or drug use, a whole range of practical, cultural, psychological and emotional needs might need to be dealt with as well.

5. The Case for Signing the Declaration on the Rights of indigenous peoples

In the dying days of the Howard Government the United Nations General Assembly voted overwhelmingly to adopt the UN Declaration on the Rights of Indigenous Peoples. John Howard personally intervened to convince the new Canadian government to join the US, New Zealand and Australia as the only governments to register outright opposition to the adoption of the declaration. The Labor Opposition indicated support for the declaration, conceding that many of its provisions were open-ended while noting that the declaration was not legally enforceable. The Rudd government is presently engaged in consultations before announcing its final decision whether to register an affirmative vote for the declaration.

The declaration is not a treaty or international covenant. It does not require nation states to be signatories. It does not become part of the domestic law of any country voting for its adoption. It does not carry with it any conditions requiring supportive governments to report periodically on compliance. It does not permit supportive governments to report violations by other governments. It is a largely symbolic document expressing the finest aspirations of and for indigenous peoples.

We are now marking the 60th anniversary of the finest aspirational declaration of rights ever made by the UN General Assembly – the UN Declaration of Human Rights, which was backed up two decades later with covenants on civil and political rights and on economic and social rights. Last month, the Irish poet Seamus Heaney published an evocative tribute to that declaration. He wrote in the *Irish Times*:

Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system. The articulation of its tenets has made them into world currency of a negotiable sort. Even if its Articles are ignored or flouted – in many cases by governments who have signed up to them – it provides a worldwide amplification system for the ‘still, small voice’.

Opponents of the indigenous declaration point out that it differs markedly from the 1948 universal declaration in both process and outcomes. The indigenous declaration was worked on primarily by indigenous groups and not by national governments. Its strength and its weakness is that it lists the aspirations of politically active indigenous groups and not necessarily the aspirations of governments of nation states. It applies to indigenous peoples only but does not define who indigenous peoples are. And it places heavy emphasis on self-determination, a politically evocative but legally undefined term.

The four nation states which opposed the adoption of the declaration are post-colonial societies with indigenous populations. They pride themselves on being developed countries with fine legal systems and a strong commitment to honouring the letter and spirit of any international instrument they sign regardless of its status in the international hierarchy. Their governments were worried that an unqualified right of self-determination for undefined indigenous peoples within their national borders could upset national cohesion and even threaten national sovereignty.

Articles 3 and 4 of the declaration provide:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Back in 1988, the Hawke Labor government was happy to sponsor a resolution as the first item of business in the new Parliament House acknowledging the right of Aborigines and Torres Strait Islanders to self-determination subject to the laws of the Commonwealth of Australia. The Coalition parties in opposition would not agree to such a resolution unless the right of self-determination for indigenous people was further qualified by the rider “in common with all other Australians”. Twenty years on, this is still the sticking point. Should the Australian government agree to an aspirational document with an open-ended recognition of the right of self-

determination which some think could lead to separatism or a capacity for one section of the community to act outside the mainstream legal system? Even if there not be such a broad based right of self-determination, should there be even an acknowledgment of the indigenous aspiration for self-determination? Or should the legitimacy of the aspiration, as well as the right, be circumscribed?

The Rudd government is presently reviewing the federal intervention on Aboriginal communities in the Northern Territory. Some of those measures breach the Convention on the Elimination of Racial Discrimination to which Australia is a signatory. Many more of those measures fly in the face of the new declaration which provides in Article 19:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The Howard government thought we should vote for a declaration only if it stated accurately what we were committed to. The Rudd government is minded to vote for a declaration saying what politically active indigenous leaders hope for. Whether or not we change our vote at the UN, it is imperative that our post-apology government and parliament do more to work in partnership with indigenous Australians. A more tightly worded declaration would have done more to forge a moral consensus and to highlight real abuses. Even this loosely worded declaration could provide some amplification system for the still small voice. When pressed by the Opposition to state the new government position last month, Senator John Faulkner told Parliament "that, while the government is still considering the implications of the declaration, including in the context of the emergency response, we do support the importance of consultation and discussion with indigenous peoples and have significantly increased our engagement." The symbolism of reversing Australia's vote against the declaration needs to be matched by consultation, co-operation and agreement on any extension or maintenance of special measures in the name of intervention.

Conclusion

The delayed apology has provided the opportunity for many non-indigenous citizens and groups to come on board working with indigenous Australians, and we need to replicate that form of co-operation and partnership.

Whether or not we change our vote at the UN on the Declaration of Rights of Indigenous Peoples, it is imperative that our post-apology government and parliament do more to work in partnership with indigenous Australians. The symbolism of reversing Australia's vote against the declaration needs to be matched by consultation, cooperation and agreement on any extension or maintenance of special measures in the name of intervention.

Now that our Parliament has apologised and now that there has been an acknowledgment of the good and the bad in past church interventions on Aboriginal communities, it is once again time for respectful and realistic dialogue about possibilities for the future. It is a sign of the times that the Reconciliation Action Plans of Corporations are more likely to attract public interest than church commitments to indigenous education and welfare. Either way, there will be a need for contemporary civil society in the Australian nation to accept some responsibility for engagement with remote Aboriginal communities wanting a fair slice of the pie for education, health and welfare services.

Speech by Jack Rush QC
Phone: (03) 9225 7463
Secretary: (03) 9225 8043
Fax: (03) 9670 0273
Email: jtrush@owendixon.com

LITIGATION AND THE APOLOGY TO THE STOLEN GENERATION

> *"That today we honour the indigenous peoples of this land, the oldest continuing culture in human history.*
>
> *We reflect on their past mistreatment.*
>
> *We reflect in particular on the mistreatment of those who were stolen generations – this blemished chapter in our nation's history.*
>
> *The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.*
>
> *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 Straight 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 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."*

These powerful words, a little over two months ago, from the Prime Minister Kevin Rudd, supporting a motion of apology in the Federal Parliament were the genesis of a great outpouring of support for reconciliation across the nation.

Yet former Prime Minister Howard addressing the Enterprise Institute in Washington only weeks later was critical of the apology as unnecessary using the old excuse that this generation should not have to apologise for the conduct of a past generation. Howard had previously argued against an apology on the grounds that it would create for the Commonwealth a legal liability to pay compensation. It would be a mistake to think he does not represent still a significant body of opinion.

Before looking at these issues I wish to go back to the case of *Cubillo & Gunner v The Commonwealth* to illustrate the practical legal hurdles in litigation but, also, to illustrate the policy of removal of part aboriginal children and above all the distress, hurt and humiliation caused as a consequence of the actions of the Commonwealth Government.

Let me start by reminding you that Justice O'Loughlin, trial judge in *Cubillo and Gunner*, did not find, as the Stolen Generations deniers would have you believe, there were no Stolen Generations. As he stated 'neither the evidence in this trial, nor the reasons for judgment, deny the existence of "the Stolen Generation".'[i] And well he might have made this comment – the evidence was stark.

Lorna Cubillo was eight years of age. In 1947, she was at Philip Creek. Philip Creek lies in the heart of the Northern Territory, not far from Tennant Creek and between Alice Springs and Darwin. She attended a rudimentary school. Philip Creek was what was called a ration depot where Aboriginal people would congregate. The Warrumungu people had been forced there after their ancestral lands were taken over by pastoral activity in the 1920s. They were forced there after the 'Coniston massacre' — the last massacre in the Northern Territory when Aborigines were hunted and killed. The fear of this massacre lasted for generations.

Early one morning in July 1947, 16 Aboriginal children were put on the back of an open truck at Philip Creek. Lorna Cubillo was one of those children. The children were told they were going on a picnic. With the crying and wailing of adult Aboriginal people around the truck and in the area, they soon realised that this was not the case.

An aunt of Lorna Cubillo was one of the people near the truck. A female missionary was having a tug of war with Lorna Cubillo's aunt. The missionary was trying to take her baby, who was still being breastfed. Eventually Lorna Cubillo's aunt, distressed and crying, pointed to Lorna on the truck: 'Napanangka, you care for this baby', and handed the baby to Lorna Cubillo on the truck. Lorna Cubillo was eight years old; an eight year old responsible for a baby.

As the truck drove away from Phillip Creek, mothers cut themselves with stones and hit themselves over the head with sticks. Others chased the truck, screaming and yelling. Lorna Cubillo's last memory of Phillip Creek is of those people running after the truck, disappearing in a cloud of dust. The children on the truck were all crying, not knowing where they were being taken. Lorna Cubillo, who had been told of Europeans killing

Aborigines, thought she too would be killed.

For three days and two nights, she cared for the baby on the back of the truck as it was driven to Darwin. She was given a blanket. The baby had diarrhoea. She kept folding the blanket into squares until it was so soiled she threw it from the truck. She fed the baby by dribbling water into the baby's mouth. The water was taken from a 44 gallon drum on the back of the truck.

In the Northern Territory, the Government used patrol officers for Aboriginal administration. They had the power of police over Aboriginal people. The patrol officer who drove the truck gave evidence in the *Cubillo and Gunner* case. He described the event, this removal, as a scene he never wished to experience again. But of course, he was only doing his job.

There was no issue of neglect or lack of food or welfare consideration for these children. Lorna Cubillo was in good health and developing as any other normal eight year-old child in that Aboriginal community. She was deeply loved by her family and kin.

From 1947 until 1956, Lorna Cubillo was detained in an institution in Darwin, an institution devoid of love and affection and proper care. She had been removed from a family that did give her love and affection – circumstances from which no white child would have been removed. Moreover, she had been removed into circumstances where lasting psychological harm could be expected.

In the institution in Darwin, physical punishment was the norm. To provide an example of that punishment: Lorna Cubillo gave evidence that, on one occasion in 1955, she was flogged by a male missionary with the buckle end of a belt that caused scarring to her face and the partial severing of a nipple.

Her crime was splashing in a creek on the Sabbath. For the religious zealots who ran the institution, to do such a thing on the Sabbath was deserving of this punishment.

As a consequence of her institutionalisation, Lorna Cubillo lost her language — she could not communicate with her family and Aboriginal mother when she left the institution. Between 1947 and 1955, she had no communication with her family. She was told Aboriginal culture, dances and song were the work of the devil. Lorna in Darwin, her family in Tennant Creek – it was like being on opposite sides of the world. Meanwhile, Lorna's family in Tennant Creek mourned her as if she were dead.

Our Commonwealth Government argued in the Federal Court with great fervour that this was the equivalent of a child being taken to boarding school.

What did O'Loughlin J find in relation to this incident of removal of Lorna Cubillo? Let me quote from the judgment:

> Asked to describe the impact on her when she left Philip Creek on the truck Mrs Cubillo replied:
>
> *'I'd been upset and confused and I find it hard to sleep at night. I'll never forget what happened to me on the day I – when I was removed.'*
>
> I have no difficulty in accepting this passage from Mrs Cubillo's evidence. She was a young child – no more than 8 years of age. Mrs Cubillo received great comfort from her extended family and the community at the Settlement.[ii]

The trial judge found that it would have been a sad and traumatic event, one that would leave a lasting impression on a young mind. He stated, 'Mrs Cubillo said that she has suffered in silence and continues to suffer. I believe her.'[iii]

Justice O'Loughlin accepted the hurt and distress caused by such removals. The deniers of the Stolen Generations are perverters of history – in the same bin as the fringe historians who deny the Holocaust. Such conduct can never be excused, no matter when it occurred or whatever the motive used in an attempt to justify it.

Peter Gunner was brought up at Utopia Station in a very traditional Aboriginal culture. Even in 1950, Utopia Station had experienced little contact with Europeans. The evidence from witnesses for the Commonwealth, as well as those for Peter Gunner, described him as being loved and cared for in his early years in the same way as any other child. On 6 April 1955, the following note was written by a patrol officer, Mr Kitching, upon a visit to Utopia Station:

> *On the appearance of any Commonwealth vehicle both mother and child flee, and no contact by officials has been made during past 5 years. … Not suitable for St Mary's ... The majority of children on Utopia all disappear as quickly as possible, and I have made no attempt to chase them ... It might be added that they are all frightened that they will be taken away to the Bungalow School.*[iv]

This report was consistent with evidence given of children being hidden by mothers and having their skin covered with charcoal in an effort to disguise them. On 14 September 1955, the same patrol officer wrote:

> *The two children, Florrie Ware and Peter, were seen with their parents, and it*

> *now appears that they will both be willing to attend school and go to St Mary's Hostel in the coming year. … One consideration which I promised, and which should be honoured, is that they should be allowed to return home for their school holidays.*[v]

The evidence of Mr Kitching was that such a promise was made because of the close concern of Peter Gunner's mother for his welfare. He stated in his evidence that it was a promise that should have been honoured.

In May 1956, Peter Gunner was removed from Utopia Station. Justice O'Loughlin accepted that this removal was forcible and in circumstances both frightening and upsetting. The promise of return for school holidays was never honoured.

One of the issues that O'Loughlin J had to decide was the issue of consent. His Honour relied on a formal legal document purporting to bear the thumbprint of Topsy Kundrilba, Peter Gunner's mother. The document was headed 'Form of Consent by a Parent'. It reads, in part:

> *I, Topsy Kundrilba, being a full blood Aboriginal (female) within the meaning of the Aboriginals Ordinance 1918–1953 of the Northern Territory … do hereby request the Director of Native Affairs to declare my son Peter Gunner, aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said Aboriginals Ordinance. My reasons for requesting this action by the Director of Native Affairs are:*
>
> ...
>
> *2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.*
>
> ...
>
> *4. By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made available to him by admission to St Mary's Church of England Hostel, Alice Springs.*[vi]

The judge found the thumbprint on this form to amount to 'informed consent';[vii] consent by a mother who could write no English and, on any view of the evidence, could speak little. This was consent by a mother who had never travelled beyond the lands of her clan. It provided a basis, in the judgment of O'Loughlin J, for excusing the Commonwealth from liability — it seems that, for the judge, it was the mother sending the son away, not the Commonwealth taking him away.

The document purported to have Peter Gunner placed in the care, custody and control of the Director of Native Affairs for a 'standard European education'.

Peter Gunner, at age seven, at the behest of servants and agents of the Commonwealth, was placed in an institution — St Mary's Hostel in Alice Springs. The archdeacon, who was nominally in charge of this hostel, described it in correspondence as presenting facilities 'nothing short of criminal' and no better than 'stinking slum conditions'. I quote what the trial judge found in relation to St Mary's Hostel:

> *The evidence of Mr Gunner and others of children searching for food in rubbish bins and dumps, the lack of social contact with children outside the Hostel, the failure to return him [Peter] to his family during school holidays, the shocking conditions of the Hostel as depicted in the reports from Mrs Ballagh [a welfare officer] and others, the quality of its staff and the conduct of Mr Constable [a missionary who physically and sexually abused Peter] add up to a damning indictment of St Mary's. The documents that were received into evidence were sufficient; they reveal the failure on the part of St Mary's to staff and administer the Hostel appropriately. St Mary's failed in its management and its care for the children; it also failed in that it did not provide proper and adequate facilities based on the standards of the day.*

I remind you that throughout this period of detention at St Mary's, Peter Gunner was in the care, custody and control of the Director of Native Affairs, an officer of the Commonwealth public service.

Peter Gunner was sexually assaulted by Mr Constable, the person charged with the responsibility of caring for young boys at this institution. The evidence disclosed Mr Constable as a serial sexual assaulter. His conduct was appalling. Peter Gunner had never spoken of the incident with Mr Constable until a short time before the trial. The trial judge heard from Mr Constable at the trial – he was called by the Commonwealth. The trial judge found that Mr Constable partook in perverted behaviour amounting to sexual misconduct.

For Peter Gunner, removal at seven years of age meant that he never partook of the necessary ceremonies, never learned the knowledge necessary to be properly accepted as a man within his clan, as his brothers and cousins were and are accepted. He lost his language. He lost contact with his mother.

In relation to injury, the thrust of the Commonwealth case was that both applicants suffered no injury – that they were in fact spinning a tale, were in effect malingerers after compensation. These assertions were rejected by the trial judge. The trial judge recognised the loss of land and cited a passage from Professor Stanner, a famous Australian anthropologist, to demonstrate that loss:

> *No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it be, does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre' and much else all in one. … The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. … A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call 'land' we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, form part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life, every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.*

This is what each applicant lost as a consequence of removal by the Commonwealth Government. Justice O'Loughlin went on to state in relation to physical injury:

> *The evidence has demonstrated that Mrs Cubillo will not recover from her injuries; those injuries may, from time to time, require treatment or counselling. I accept that Mrs Cubillo presented as a stoic woman, a woman who bears pain and injury internally with little complaint. However, that stoicism and lack of complaint do not reduce the significance of her injury nor do they reduce the extent of her damages. Those injuries and losses that she suffered and will continue to suffer flow back to her removal and detention. … I believe this observation applies with equal force to Mr Gunner.*

Lorna Cubillo and Peter Gunner were taken from families that loved and cared for them. Regrettably, so deserving of the nation's act of contrition Peter Gunner did not live to hear that apology.

There was one fundamental reason for the removal of these children. They were part aboriginal – *"quadroon"* or *"octoroon"* to use the language of the eugenicists who dominated Federal and State policy at this time. Their European blood, according to the policy, in effect meant they could serve a useful purpose if removed to a white European culture. The perceived wisdom; that such children could be assimilated whilst those who lived the traditional life would never adapt and would just die out.

The policy is best reflected in the legislation: the *Aboriginals Act 1918–1953* (NT) (formerly the *Aboriginals Ordinance 1918–1953* (NT)). This legislation gave the Commonwealth Government unprecedented power over Aboriginal people. There is no equivalent legislation in the Commonwealth statute books. To illustrate this point I refer

to some of those powers contained in the legislation:

- Aboriginal people could not go into towns without permission;
- Aboriginal people could not travel from one part of the Northern Territory to another without permission;
- Aboriginal people could not marry without permission; and
- The ultimate power, Aboriginal parents had no rights in relation to their children. The legislation provided that a senior public servant, the person designated in the legislation as *"the protector of Aboriginals"* was the legal guardian of every Aboriginal child. Children could be legally wrenched from families. Aboriginal people were treated as less than human.

I wish to give you the flavour of the Commonwealth Government's policy by conveying to you directly from some documents that were tendered in the trial. The Chief Protector of Aboriginals in 1912 stated:

> *No half-caste children should be allowed to remain in any native camp, but they all should be withdrawn ... In some cases, when the child is very young, it must of necessity be accompanied by its mother, but in other cases, even though it may seem cruel to separate the mother and child, it is better to do so when the mother is living, as is usually the case, in a native camp.*

By 1949, a patrol officer had complained of the distressing scenes associated with removal of children. The Secretary of the Northern Territory wrote to the Administrator of the Northern Territory seeking guidance following the complaints of a patrol officer. He stated:

> *I cannot imagine any practice which is more likely to involve the Government in criticism for violation of the present day conception of 'human rights'. Apart from that aspect of the matter, I go further and say that superficially, at least, it is difficult to imagine any practice which is more likely to outrage the feelings of the average observer. ... If children, however, are to be forcibly taken from their mothers despite what Mr Evans calls distressing scenes which he hopes never to experience again, it is of the greatest importance that the Minister's approval for such a policy be readily stated, and further that the administration of such a policy can be shown to be just and considerate.*

In 1951, the policy was noted as follows by the then Administrator of the Northern Territory, Frank Wise:

> *Aborigines are human beings with the same basic affections that we have, and the aboriginal mother has a real love for her children, especially those of tender age. … We cannot expect the normal aboriginal mother to appreciate the reasons why her part aboriginal child should be taken from her. … In effecting the removal of part aboriginal children from their mothers these factors must be taken into consideration…*

The Commonwealth argued removals could only occur with a mother's consent.

Removals went on. The trial judge made the following finding in relation to the policy of child removal:

> *Despite the submissions by the Commonwealth to the contrary, I cannot accept that the policy … meant that a part Aboriginal child could only be removed if his or her mother consented.*

Let me assure you this litigation is not conducted in a co-operative spirit. Every legal point is taken; the cross-examination of Lorna Cubillo and Peter Gunner was extraordinary. As I understand it the entire case of the defendant was oversighted by the Office of the Prime Minister and Cabinet – submissions approved and tactics developed by the Office. Similarly the case of *Trevorrow v The State of South Australia* was also, as I understand it, effectively legal warfare.

There were a number of factors that led to the dismissal of each applicants' claim in *Cubillo & Gunner*.

Two were critical. The statute of limitations and the independent discretion of the Director of Native Affairs.

Although each applicant was found to have met the test for the exercise of discretion to extend time, that discretion was not exercised in their favour. The reason given by the trial judge was that the effluxion of time had so prejudiced the defence of the Commonwealth that it could not obtain a fair trial. This finding was made despite the positive findings of fact concerning much of each applicant's claim.

The Judge found that the statutory regime provided the Director of Native Affairs with an independent legal discretion. In other words his powers were not derived from his employment but came directly from statute. Thus O'Loughlin J, determined that the Commonwealth did not act through the Director and, whilst the Director could be held

personally liable for his actions, that responsibility did not extend to the Commonwealth Government.

In *Trevorrow* Gray J examined a legislative framework similar to that of the Northern Territory. In contrast to the decision of O'Loughlin J, Gray J held the statutory officers implementing child removal were an emanation of the State and as a consequence the State was responsible for their actions. Gray J differed also in considering the statute of limitations which in terms was identical to that considered by O'Loughlin J in *Cubillo and Gunner*. The voluminous documentation and oral evidence were sufficient to justify a positive exercise of discretion in relation to extending time.

Estimates of the costs of the *Cubillo and Gunner* litigation vary. It is clear from parliamentary questions that the Commonwealth spent massively. Estimates of total costs range from $15 million to $20 million. I am confident that if this sort of money had been invested in reparations in 1998, the process of healing, together with the issue of compensation, would have been enormously advanced. But the then Federal Government, and particularly Prime Minister Howard continually presented a doctrinaire political objection to this idea.

The apology in my view makes no difference to the prospects of successful litigation.

The speeches (including the acts of moving the motions) and the apology were made in Parliament during open session. The apology was therefore made during *"proceedings in Parliament"* within the meaning of section 16 of the *Parliamentary Privileges Act* 1987 (Cth). An important effect of section 16 is to make unlawful the tendering or reception in a Court or Tribunal of any statements, submissions or comments made concerning words spoken or acts done in the course of the transacting of the business of the house. Another effect is to prevent a Court or Tribunal from drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of the proceedings of parliament.

A further hurdle in relation to litigation concerns the substance of the apology, the meaning of its words and the nature of the very act of apologising. It cannot be denied the apology contains frank admissions about what happened generally to the Stolen Generations. But how far does an admission that laws and policies of government, the effect of which was the removal of aboriginal children from their families and communities, and associated deleterious consequences, go in establishing liability in a

given case? In my opinion, regrettably, while the apology may acknowledge that laws and policies of government have caused loss and damage of various kinds the apology does not and cannot because of its very nature as a motion of Parliament with no legislative effect render unlawful the acts and omissions of past governments.

Where it is a State Government, as opposed to the Commonwealth Government, which is sued by a member of the Stolen Generations two further hurdles for the plaintiff arise. First, the prospective plaintiff needs to determine whether the apology, where sought to be led in evidence, can have any effect at all in light of State legislation such as the *Civil Liability Act* 2002 (NSW). Section 69 of this Act provides that an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person does not constitute an express or implied admission or fault or liability by the person in connection with that matter and is not relevant to determination of fault or liability. Secondly, the plaintiff is faced with the task of attributing or imputing the apology of the Commonwealth Parliament to the State which is obviously not the source of the apology.

In my opinion in legal proceedings a Court is unlikely to view the apology as having any effect on its determination of liability in a given case.

There is a great contradiction when the Federal Parliament recognises that laws and policies of removal have inflicted profound grief, suffering, loss, indignity and degradation upon a proud people but will not recognise that this carries with it a responsibility in a practical way to compensate for such wrongs. In religious terms, as Frank Brennan would understand, the confession is incomplete without penance.

Apology aside, cases can be won. Of 3 cases litigated one, *Trevorrow*, has been successful albeit it is under appeal. I am briefed in a Victorian case of removal and isolation of a part aboriginal baby from his mother – the rebuffing and ignoring of the mother's continued attempts to contact and care for him. It is a tragic case; but surely there is a better way to compensation than forcing persons to relive the trauma in court and to conduct bitterly contested litigation at enormous cost.

And of course John Howard, at the Enterprise Institute, continues to represent a significant section of the Australian community that contests the apology and would deny compensation. Let me conclude by briefly dealing with Howard's arguments. He continues to assert that this generation should not bear responsibility for the acts of a

previous generation. The logic is flawed. The current Board of James Hardie pays a heavy price for the conduct of its predecessors in the 1960s and 1970s for the harm caused in exposing Australian citizens to asbestos. A precondition for Belgrade (Serbia) joining the European Economic Community is reparation to those dispossessed by the communist government of Yugoslavia after the war; the point is the Federal Government is a continuing legal entity that must bear the full responsibility for its past actions. That responsibility in addition to acknowledging the hurt and distress of the conduct demands reparation for such conduct.

Howard stated time and time again during his years in office that those who advocated an apology and compensation had a black armband view of history. This of course is nonsense. Is our nation not the better, the stronger for the recognition of the abject failure of past policy through the apology of February 13, 2008? Whilst there is much to be done did not that simple yet powerful act advance more than anything else in recent history the cause of reconciliation? The answers are obvious – yet it has to be understood that *"sorry is the first step"*.

---

[i] Ibid 12.
[ii] Ibid 148–9.
[iii] Ibid 149.
[iv] Ibid 240–1.
[v] Ibid 242.
[vi] Ibid 243–4.
[vii] Ibid 245.