The National Legal Eagle

Volume 4
Issue 1 *Autumn 1998*

Article 3

1998

Abducted by aliens: The stolen children

Abducted by aliens

The Stolen Children

True Stories

'X'

'X' was removed from her mother at the age of two. From the day she was taken away, she never saw her mother alive again. It wasn't until she reached adulthood that she found out about her origins and who her mother was. By that time, her mother was dead.

'Y'

'Y' was two years old when she and her six siblings were removed from their parents and sent to different places so that they grew up not knowing of each other's existence or who their parents were. 'Y' was 32 years old before she found out that she had brothers and sisters. She is still looking for them and still trying to find out who her parents are and if they are still alive.

'Z'

'Z' was ten years old before he learned that he wasn't living with his real mother and father. He had at times wondered why he was so different to the people around him, but had not guessed, at his young age, that he was not of their kind and that his origins were somewhere else.

Even after searching for years in adulthood for his real mother and father, he still has not found them.

And Thousands And Thousands More

The stories of 'X', 'Y' and 'Z' are typical of the thousands and thousands of stories which have been told by Aboriginal and Torres Strait Islander people around the nation.

During the Human Rights and Equal Opportunity Commission (HREOC) Inquiry into the former practice of removing Aboriginal and Torres Strait Islander children from their families, which commenced hearings in December 1995, the extent of removals has emerged.

HREOC was requested to hold a national Inquiry into the issue. This Inquiry created a forum in which the extent and impact of past governmental policies of removal of Aboriginal and Torres Strait Islander children from their families could be examined.

Discussion Questions

1 Why was HREOC requested to conduct an Inquiry into the matter of 'Stolen Children'?

2. What were the terms of reference of the Inquiry?

History

NSW in perspective

The first significant attempts by Europeans to intervene in the lives of Aboriginal children date back to the early 19th Century when white families took indigenous children into their homes in an attempt to educate and civilise members of what was then viewed as a 'barbarous race'. The aim was to produce 'useful citizens' in Anglo-Saxon terms.

The earliest attempts at removals and institutionalised care in NSW date from 1814. However it wasn't until 1883 that the Aboriginal Protection Board was established, seemingly, in response to the increasing number of mixed race children. In 1940 this became the Aborigines Welfare Board, which remained responsible for the control of Aboriginal child welfare until 1969.

The Board implemented a policy of physically separating full blood Aborigines from the rest of society, while seeking the assimilation of mixed-race children into white society.

Although by 1900 the Board had begun trying to desocialise mixed-race children as Aborigines and resocialise them as whites, it had no legislative power with regard to Aboriginal children until 1909.

Legislative powers

The Board received its first legislative powers over Aboriginal children under the Aborigines Protection Act 1909 (NSW). It was empowered to enforce apprenticeship schemes and to remove children without parental consent if they were found to be 'neglected'.

The most commonly applied aspect of the definition of 'neglect' was that it included children having no fixed abode.

Class Assignment

1. Consider the concept of 'fixed abode' in terms of your knowledge and research of the tradition of Aboriginal people.

2. Consider the disparities between the white settler's definition and the Aboriginal's definition of this.

In 1915 amending legislation allowed for:

- physical separation between full-blooded and mixed-race by the Board; and,
- removal of pubertal Aboriginal girls from their communities.

The amendments gave the Board total power as the legal guardian of Aboriginal children. It enabled younger children to be seized and placed in homes or institutions, until they were old enough to begin apprenticeships.

The Board could remove Aboriginal children without consent if it considered removal to be in the child's 'moral or physical welfare interest'.

Arguably, being Aboriginal was often a good enough reason for seizure. Unlike white children, no court hearings were necessary and it was up to the parents to prove the child should stay with them.

The prevailing assimilationist view was to wean children of Aboriginal descent from Aboriginal ways to such an extent that they had no idea that they were Aboriginal.

This meant that they would grow up unaware of their family, heritage, culture and language.

This legislation remained in force until 1939, when increased public scrutiny and political pressure from Aboriginal groups led to the introduction of the Child Welfare Act 1939 (NSW).

From 1940 until 1969 the Aborigines Welfare Board implemented a system incorporating many of the provisions of the white child welfare legislation. Under the new Act, court hearings became necessary prior to removal.

In 1969 the Aborigines Welfare Board was abolished and much of the discriminatory legislation repealed. Since then, there has been no formal distinction between Aboriginal and non-Aboriginal children.

Discussion Questions

1. What problems do you think would have confronted any Aboriginal parents wanting to challenge the seizure of their child/children before 1940? After 1940 to 1969.?

2. Why was the Aborigines Welfare Board abolished? What forces led to the repeal of much of the discriminatory legislation?

Essay Questions

1. It was with the 'best interests of the child' at heart that Aboriginal children were removed from their families.

Discuss with reference to the prevailing philosophical and sociological ideologies of the time.

2. "White society failed to acknowledge the existence of Aboriginal culture and could not accept its validity. There was only one way to raise children-the white way".

Evaluate this statement providing examples to support your view.

Around The Nation

The history of the removal of Aboriginal and Torres Strait Children from their families is not unique to NSW but is a national history.

For example, until the late 1960's in Western Australia it was common practice for Aboriginal children to be removed from their families by police and welfare officers. Statutes such as the *Aborigines Act* 1895 (WA) and the *Native Welfare Act* 1954 (W.A.) gave State authorities control over all Aborigines. This control included the removal of Aboriginal children of mixed Aboriginal blood into the 'white' community.

The *Aboriginals Ordinance 1918* (NT) (Section 16(1)) allowed "the Chief Protector to cause any Aboriginal or half caste to be removed and kept within the boundaries of any reserve or Aboriginal institution".

In fact, the HREOC Inquiry Report asserts that every Aboriginal community in Australia has been scarred by the removal of a loved one.

Research Question

What Ordinances or Acts existed in other States and Territories of Australia which allowed for the removal of Aboriginal and Torres Strait Islander children from their families?

Resons for removal

The NSW Protection Board for example, kept registers of wards in its custody. One register survives, dating from 1916 to 1928. In it there is a section marked 'Reasons for Removal'. The most common reasons given for the removal of females were: 'To send to service'; 'Being 14 years old'; 'At risk of immorality'; 'Neglected'; 'To get her away from surroundings of Aboriginal station'; 'Removal from idle reserve life'; or 'Orphan'.

From the language used in the register however, it is clear that negative stereotypes and 'white' conceptions of Aboriginal parenting and lifestyles were the major factors influencing removals.

As the HREOC report noted, the meaning of such terms as 'neglected' in a register such as this, is highly subjective. In the context of white middle-class parenting expectations of the early 20th Century, Aboriginal parenting was considered to be 'negligent' by definition.

White society viewed child rearing at this time as centering on prolonged and intensive maternal care, the extensive family childcare networks of Aboriginal communities were scorned. Similarly, the removal of children as 'orphan', despite 'foster' care within kinship networks, indicates a lack of understanding of Aboriginal kinship practices.

Research Questions

1. What were the reasons given for removing male children from their families?

2. Were full blood Aboriginal children removed from their families?

3. What was the policy with regard to full blood Aboriginal children?

Discussion Questions

1. If the justification for removals was 'protection', why were full blood Aboriginal children treated differently to mixed-race children?

2. Where were mixed-race children generally moved to?

3. What efforts were made in these places to help Aboriginal children maintain and understand their culture, language and heritage?

The Aboriginal community considers that the removals were an act of genocide. They do not accept the argument of protection, but maintain that:

- it was believed that full blood Aboriginals would die out; and,
- removal of mixed-race children was based on assimilation policies which denied the children their Aboriginal heritage.

As a consequence, it is argued, it was envisaged that Aboriginals would no longer exist. (It is important to note that to Aboriginals there is generally no distinction between full or mixed blood).

Genocide

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide,(the Convention), adopted by the UN General Assembly in 1948, defines genocide as:

'any of the following acts committed with the intent to destroy in whole or in part, any national, ethnic, racial or religious group, such as:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures designed to prevent births within the group; and,

(e) forcibly transferring children from the group to another group.

Assignment

Consider the above definition of genocide and, based on your knowledge of removal, assimilation and integration policies pursued by governments around Australia with regard to Aboriginal and Torres Strait Island children, evaluate the argument that what occurred amounts to genocide.

However, the Aboriginal community is not unique in viewing removal laws, practices and policies of the past as a matter of genocide.

Comments in Coe (on behalf of the Wiiradjuri tribe) v *The Commonwealth* (1993) 118 ALR 193 represent an admission by a Justice of the High Court of Australia that genocide had occurred. His statements were made in the context of a native title land claim, which specifically sought a declaration in relation to genocide. He stated: "the plaintiff and the Wiradjuri nation and people are entitled for reparations for acts of genocide and other crimes against humanity inflicted upon them". (at 198).

In fact, in an earlier High Court case, *Tasmania v The Commonwealth* (Tasmanian Dams Case) (1983) 158 CLR 1 (at 180) Murphy J., commented on the "unprovoked aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of the culture in Aboriginal affairs".

Legal action

For Aboriginals to take legal action alleging that genocide has been committed, there are some major obstacles to overcome.

The UN Convention declares it a crime under international law and imposes an obligation on all parties to ensure that it is prevented and punished.

Although having ratified the Convention in 1949, Australia has failed to introduce legislation making the obligations specified in it enforceable in municipal courts.

In the absence of legislation making genocide a statute-based indictable criminal offence it would be difficult to institute a public or private prosecution in municipal courts for alleged acts of genocide.

Assignment

An Advisory Opinion by the International Court of Justice described the principles underlying the Convention as "recognised by civilised nations as binding on States, even without any conventional obligation"

Consider whether this means that common law may recognise that the punishment of genocide is enforceable in municipal courts, even in the absence of legislation carrying the Convention into effect.

(see Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 220; Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529 at 553-558).

Another obstacle to proceedings at criminal law would be the difficulty in identifying a defendant who can be prosecuted. For example, if the Crown is the defendant, it cannot be held criminally liable at law (see *Cain v Doyle* (1946) 72 CLR 409; *Canadian Broadcasting Corporation v Attorney-General (Ontario)*[1959] SCR 188).

Consequently, the Crown has effective immunity from criminal prosecution for genocide even though this breaches Article IV of the Convention, which states; "Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

Discussion Question

What other obstacles to Aboriginals pursuing a case of alleged genocide at criminal law might exist?

Other avenues of legal action are being tested, for example, in the civil law case of *Williams v The Minister, Aboriginal Land Rights Act 1993* and Anor (unreported, NSW Court of Appeal, 23 December 1994).

In this case action was brought by an Aboriginal woman against the NSW Government for negligence, wrongful detention and breach of fiduciary duty.

She had been removed from her family as a young child and institutionalised. She argues that while under the control and care of the government she suffered physical and sexual abuse and was denied her Aboriginality.

At question initially was whether the *Limitation Act 1969* (NSW), would stop her case from being heard.

It was held that by the Court that no extension of time under the Act was required to bring a claim for equitable compensation for breach of fiduciary duty.

Discussion Questions

1. *What does it mean to 'bring an action in equity'?*
2. *What does 'fiduciary duty' mean and how is it relevant to the Williams case?*
3. *What do statutes of limitations say and do? Why?*

Research Question

At what stage is the Williams case now?

In 1995 a small group of Indigenous people began actions in the High Court against the Commonwealth. This has become known as the 'Kruger action' *(Kruger & Ors v The Commonwealth,* High Court, M21 of 1995, *Bray & Ors v The Commonwealth*, D5 of 1995).

This is an historic challenge under the Australian Constitution. Six Northern Territory Aboriginal people, five removed as children from their families and one the mother of a stolen child, will argue before the High Court that the *Northern Territory Aboriginals Ordinance 1918-1953 Act* which 'authorised' this to occur was constitutionally invalid.

The plaintiffs are seeking recognition of implied Constitutional rights to:

- freedom or immunity from removal without due process of law in the exercise of the judicial power of the Commonwealth;
- equality before the law;
- freedom of movement and association;
- freedom from laws authorising genocide, or having the effect of the destruction in whole or in part, of a racial or ethnic group.

They are seeking damages under two claimed rights of action. One, that the removals were in breach of the above Constitutional rights. Two, that if the Ordinances were invalid, the removals and detention constituted wrongful imprisonment.

The Commonwealth's arguments are that:

- there is no right of action in damages arising out of a breach of the Constitution, and even if there were, such action would defeated by the Limitation Act 1981 (NT);
- the laws in question were made pursuant to s122 of the Constitution and that this section is not restricted by any of the implied Constitutional freedoms, and, even if they were, the Ordinances were not contrary to those freedoms in that they were enacted for 'the protection and preservation of the Aboriginal race';
- the validity of the Ordinances must be considered by reference to the standards and perceptions prevailing at the time of their enactment.

Damages sought by the plaintiffs are with respect to the losses they have suffered in personal, cultural, spiritual and familial terms and in terms of their possible entitlement to participate in land claims.

Research Question

At what stage is the Kruger action at present?

Discussion Questions

1. *What are the strengths and weaknesses of the plaintiffs' argument?*
2. *What are the strengths and weaknesses of the Commonwealth's argument?*
3. *Of what significance is this case with respect to future compensation cases?*
4. *What is the connection between land right claims and the removal of Indigenous children from their families?*

Past History?

Critics of the HREOC Inquiry, say that the laws, practices and policies of forced removal belong to the distant past, and little good can be done by digging up the past.

However, there are many people who argue that it is not just an issue of past history. They point to the fact that lives today remain dramatically shaped by the consequences of these practices, the effects of which ripple through entire communities.

The Inquiry has heard that grief and loss, and the unresolved intergenerational trauma of forced removals, are the underlying causes of other, widespread problems in Aboriginal communities: family breakup, violence, alcoholism and substance abuse, high infant mortality and low birth rates, dramatically reduced life expectancy rates, parental incarceration and lack of parenting skills.

Loss of cultural, spiritual and community roots, and personal, family and cultural identity, alienation and ongoing grief and anger are also consequences noted by the Inquiry in its Report.

These are seen to be contributing factors in a continuing cycle of State intervention in Aboriginal family life, where Aboriginal children remain vulnerable to forced separation under current child protection laws and where Australia's Indigenous people are over represented in the welfare and criminal justice systems.

Essay Question

'Better educating the wider Australian community as to past policies and practices towards Indigenous people and the effects on their communities is a major step in the process of reconciliation'. Discuss.

Compensation

The issue of compensation has been raised by Indigenous people, and a number of groups in the wider Australian community, as well as in the HREOC Report, as a means by which to assist Indigenous people to redress the disastrous effects of the forced removals.

Compensation, it is argued, would be one form of reparation, along with restitution and assist in rehabilitation, for the losses suffered.

To date, the Federal Government has been opposed to the idea.

Apology

Indigenous people maintain that an apology from the governments of Australia, for the past practice of forced removals, is appropriate. It is felt that this would give formal recognition to the wrongs which have been committed and assist in the healing process.

On June 18 1997 Premier Bob Carr stated "I reaffirm in Parliament as Premier on behalf of the Government and people of New South Wales our apology". The heads of most States and Territories have done likewise. However, the Federal Government has rejected the idea, at the date of writing, with Prime Minister Howard stating in Federal Parliament on May 27, 1997 "I do not believe that a national apology is appropriate".

Discussion Questions

On 7th January 1998 the Canadian Government formally apologised to its Indigenous people for the past practice of forcible removal of their children. It has also provided for substantial compensation.

1. *Is the Canadian history of removals comparable to Australia?*
3. *Should Australia follow Canada's example of a Federal Government apology and provide compensation?*