

an undertaking to the Court by the MDBC not to raise the level of the lake above 26.5 metres before 30 June 1995. In the interim, the MDBC has lodged a report on the environmental effects of refilling the lake with the Director-General in support of its application for a consent to destroy burials. Outside the litigation, the parties have been involved in discussions aimed at achieving a long-term resolution of this very important and complex matter.

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## ABORIGINAL CHILDREN

### 'They took the children away'

**TONY BUTI discusses a project to redress some of the harm caused by removal of Aboriginal children from their families.**

Until late 1960 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* (WA) gave State authorities control over all Aborigines. The removal of Aboriginal children from their parents was an attempt to assimilate children of 'mixed Aboriginal blood' into the 'white' community. In 1937, *The Telegraph* (Brisbane, 5.5.37) reported:

Mr Neville [Chief Protector of Aborigines in Western Australia] holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population. Sixty years ago, he said, there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying. The pure-blooded Aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of twenty and upwards. That showed the magnitude of the problem.

In order to secure this complete segregation of the children of pure blacks, and preventing them ever getting a taste of camp life, the children were left with their mothers until they were but two years old. After that they were taken from their mother and reared in accordance with white ideas.

In Western Australia Aboriginal children were readily removed from their families and placed in missions, which were usually controlled by various 'Christian' churches. Some children were also fostered out to 'white' families. Some were adopted out without the consent of their parents.

The Aboriginal Legal Service of WA (Inc.) is currently involved in collecting information from Aborigines who were removed from their families. The information gathered will form the basis of a submission to be made to the State Government and possibly the Federal Government urging remedies for people who suffered as a result of successive governments policies of removing Aboriginal children from their families. The data collected may also lead to legal proceedings being commenced.

### Stories

Well over 100 stories have been collected over a very short period of time. It is perfectly clear that past government policy in regard to Aboriginal people has had a long lasting effect. Most people interviewed still carry deep psychological and emotional scars from the trauma of being removed from their families, being brought up in an uncaring missionary or foster family environment, and being denied experience of their Aboriginal culture. The following three stories are illustrative of the consequences of the removal policies. The persons referred to gave the Aboriginal Legal Service permission to publish their stories but asked that their identity be kept confidential.

#### 'X'

'X' was removed from her mother at the age of two. For the next 16 years she lived in a number of foster homes. At only one of these homes was there even the slightest affection shown by the foster parents, but she stayed there for less than a year. From the day she was taken away at the age of two she never again saw her mother alive. She was not informed of her mother's death until six or seven months after it occurred. When she reached adulthood she obtained her Native Welfare file. It contained a number of letters written by her mother to the Department of Native Welfare requesting that her mother be able to visit her and also that her mother be allowed to take her back. The Department of Native Welfare had refused her mother's pleas. 'X' has been undergoing comprehensive psychiatric treatment for a number of years. She has attempted suicide numerous times. X relayed to the author that she feels that she has never been loved by anyone and doesn't know where to turn. To make things worse she has also lost custody of her three children.

#### 'Y'

'Y' was two years of age when she and her seven siblings were removed from their parents and sent to a mission. She stayed at the mission until she was 15 years of age. Whilst at the mission she was subjected to severe sexual abuse by a teenage son of a staff member. This sexual abuse occurred from the age of five until the age of eight. 'Y' has been unable to tell anyone about this sexual abuse. Even now she feels confused about what happened and feels that she hates herself. She has been unable to reform a close relationship with her parents and it is only recently that she has been able to feel comfortable with her Aboriginal culture.

#### 'Z'

'Z's mother was only 13 years of age when she had 'Z'. She was placed under great pressure to give him up to the 'authorities'. She succumbed to the pressure and at the age of two 'Z' was adopted by a 'white family'. Shortly after, the family returned to their overseas home land. Whilst growing up overseas 'Z' was subjected to racial abuse and taunts and was called names like 'nigger', and 'coon'. He had no idea he was different from the other children he was growing up with and it was not until he was ten years of age that his adoptive parents told him that he was Aboriginal. He reacted very negatively to this information as he was unsure what it meant and further he thought that he should be back in Australia. By the age of 13 he was drinking regularly and was getting into constant trouble at school. About a year after his return to Perth he travelled up north to visit his mother and family. He felt alienated from his mother's way of life and culture and became very depressed. Since his return to

Perth he has been involved in two armed robberies and is presently incarcerated. He has stated that he feels lost. He doesn't feel able to fit into mainstream white society or traditional Aboriginal society. He feels very upset that he is unable to easily associate with his own people.

### Legal issues

Through the actions of governments and authorities, Aboriginal people were denied their fundamental human rights in regard to land and association with family, tribe and culture. The forcible removal of children from their families arguably constitutes genocide under Article 2 of the United Nations Convention Against Genocide, which defines genocide as acts committed with the intent to destroy, in whole or in part, a national ethnic, racial or religious group. It also contravenes Paragraph 6 of the Draft Declaration on the Rights of Indigenous Peoples.

Governments and church groups could be liable for breaching their fiduciary duty to Aboriginal people. When governments and other organisations undertook guardian or wardship roles in respect of Aboriginal children a fiduciary relationship developed. Being taken away from their families and placed in missions was rarely in the best interest of the children.

Bringing an action in equity for breach of fiduciary duty may overcome the non-discretionary six-year limitation period for bringing an action that otherwise would apply under s.38(1) of the *Limitation Act 1935* (WA) (the Act). The Act should be interpreted to not apply to equitable actions generally, because it is worded so as to apply only to some specifically mentioned actions based on equity (s.24). In the New South Wales case of *Williams v The Minister, Aboriginal Land Rights Act 1983 and Anor* (unreported, NSW Court of Appeal, 23 December 1994) it was held that no extension of time under the *Limitation Act 1969* (NSW) was required to bring a claim for equitable compensation for breach of fiduciary duty. The case concerned an action brought by an Aboriginal woman against the NSW Government for negligence, wrongful detention and breach of fiduciary duty relating to the conduct of the Aboriginal Welfare Board in 1947 in removing the applicant from a home containing Aboriginal children on the grounds of her fair skin. Similarly the Canadian case of *KM v HM* (1993) 96 DLR (4th) 289 at 289 which was concerned with an action brought by a woman against her father for damages for incest, shortly after being given therapy, held that 'the *Limitations Act* does not apply to equitable action such as an action for compensation for breach of fiduciary duty'. In that case it was presumed that the victim did not discover the nexus between the injuries and abuse until the therapy commenced.

Governments may also be liable for other causes of action including misfeasance in public office (knowingly engaging unlawful conduct), breach of statutory duty and unlawful conduct. However, the cause of action under these heads may be statute barred due to the expiration of the six-year limitation period.

### Outcomes

Irrespective of the legal argument, governments have a responsibility to initiate actions that will go some way towards redressing the injustices inflicted upon Aboriginal people. All the people who have contacted the Aboriginal Legal Service of Western Australia have felt that part of them has been forever removed. Many children and families feel al-

ienated and are unable to cope adequately with their lives. Whilst the extent of the physical, psychological, emotional and spiritual hurt suffered by indigenous people is not fully known, we believe it is a significant factor in current problems including the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system; physical, mental and emotional health problems; domestic violence; welfare dependency; substance and alcohol abuse; the breakdown of traditional family structures; parenting difficulties; and the loss of cultural and personal identity.

Some initiatives that governments should take include:

- acknowledging that past policies and practices towards Aborigines were wrong;
- supporting or establishing a counselling service run and staffed by Aboriginal counsellors for people who have been affected by such policies;
- better educating the wider community as to past policies and practices towards Aborigines and the consequent effects on the Aboriginal community (this is important so that the imposition of such policies never happens again); and
- providing monetary compensation for affected individuals.

Governments must respond to the real consequences of removing Aboriginal children from their families if the reconciliation between indigenous people and the broader community is to be genuine and effective.

*Tony Buti is a solicitor at the Aboriginal Legal Service of WA (Inc.).*

## COPYRIGHT

### *The carpets case*

**TERRI JANKE reports on a recent case involving the application of intellectual property laws to Aboriginal artists.**

A recent decision in the Federal Court awarded record damages to Aboriginal artists whose works were reproduced on carpets without their knowledge or permission. Von Doussa J in *Milpurrru & Others v Indofurn Pty Ltd & Others* (unreported, No. DG 4 of 1993, Von Doussa J, Adelaide, 13 December 1993) awarded an amount of \$188,640 to three living artists and the personal representative of five deceased artists. The decision comes in the wake of the Federal Government's review of intellectual property laws as they apply to Aboriginal and Torres Strait Islander arts and cultures.<sup>1</sup> (See also the article by Catherine Hawkins on p.7.)

### The facts

The action was brought against a Perth-based company, Indofurn Pty Ltd, which was known as Beechrow Pty Ltd at the time the alleged infringements occurred. Beechrow imported the carpets from Vietnam, a country without copyright laws, and sold them in Australia for up to \$4000 each.

The artists whose works were reproduced without permission were all very prominent Aboriginal artists including George Milpurrru, the first Aboriginal artist to have a solo