Compensating the 'Stolen Generation'

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The Federal Government's refusal to compensate the stolen generation is an abdication of responsibility.

One of the bleakest chapters in Australia's history concerns the 'stolen generation' — Indigenous children who were forcibly separated from their families due to the laws and policies of Australian Governments from early colonial times right up until the 1970s. Their stories, and the stories of all the families and communities that suffered as a result, are emotionally and sympathetically illustrated in *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (the Report), which was tabled in Federal Parliament in late May. This Report by the Human Rights and Equal Opportunity Commission links many of the present problems of Indigenous Australians — such as high rates of alcoholism, unemployment, imprisonment, health difficulties, and family violence — with the stolen generation. It attracted much publicity, political comment and controversy, particularly with respect to the issues of genocide and an official apology by the Federal Government.

This article will focus on the important issue of compensation. At the time of writing, the Commonwealth has yet to reply in detail to the recommendations contained in the Report. It did, however, rule out compensation even prior to the Report's tabling in Parliament.[1] The arguments in favour of compensation throughout this article will show that the Government's response is inadequate and inappropriate, and represents an abdication of responsibility by the Federal Government.

Arguments in favour of an administrative compensation scheme

Monetary compensation is important for many of the stolen generation

One of the major findings of the Report is that given the damaging effects of the forced removal policies on past, present and future generations of Indigenous peoples (Part 3), all of those negatively affected are entitled to 'reparation'. This word is interpreted broadly to include remedies such as acknowledgment and apology; guarantees against repetition; restitution for loss of land and culture; rehabilitation and monetary compensation.[2] Monetary compensation must thus be understood in the context of constituting only one component of reparation; yet it is one that cannot be dismissed in favour of others. Some have argued that money is not the answer for the stolen generation, who primarily need an apology, rehabilitation and counselling services. Certain newspaper editorials have also contended that monetary compensation may be counterproductive as it detracts from these other remedies.[3]

Yet no-one has suggested that money alone can solve all problems. Monetary compensation should be seen as part of an overall package of measures; but nevertheless an essential part of this package. Indigenous people are clearly the most disadvantaged group in Australia, and many

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of the stolen generation are even more disadvantaged due to the circumstances of their childhood. A sum of money may thus make a significant difference to their lives, and in this respect an apology alone does not suffice.[4]

Furthermore, in a materialistic society such as Australia a monetary award is probably the best form of acknowledgment that any government can provide. It represents a societal recognition in a very public manner that a wrong has been committed, and I believe that this can have a significant positive psychological effect on recipients. Anecdotal evidence suggests that crime victims benefit psychologically from a victim compensation award, and by analogy, this should also be true in respect of the stolen generation.

Courts not appropriate mechanism to determine compensation

Many people are under the misconception that the choice is to compensate or not to compensate. This is simply not true. The real choice is whether compensation will take place via our court system, or by an administrative scheme as advocated by the Report. Presently in Australia there are somewhere in the vicinity of 1500 writs that have been or are about to be issued on behalf of plaintiffs who constitute some of the stolen generation,[5] and this may be just the tip of the iceberg. The recent failure of the case of *Kruger & Bray v the Commonwealth* (1997) 146 ALR 126 in the High Court is only a minor set-back for these plaintiffs. It must be remembered that this was a controversial High Court constitutional challenge and, given the current political climate, including attacks on judicial activism, it was not surprising that it failed. However, most lawsuits on behalf of the stolen generation will be seeking damages and other remedies in respect of a multitude of common law actions (depending on each individual case) which are largely unrelated to constitutional issues. Examples of such actions are negligence, assault, false imprisonment, breach of fiduciary duty, breach of statutory duties and misfeasance in public office. In many instances, there may well be significant statute of limitations problems for claimants. However, while it is beyond the scope of this article to discuss the likelihood of success of such lawsuits, it is conceivable that at least one or more of these common law actions will succeed in a reasonable number of cases.

The use of the court system as an alternative to an administrative compensation scheme is deficient from a number of perspectives. First, some court actions will succeed and others will not due to technical defences (including statutes of limitations) and the attitude of the particular judge hearing the case, rather than the actual merits of the claimant's case. From this viewpoint, the court system can be seen as arbitrary and unfair, leading to inconsistent results. Second, the daunting nature of legal proceedings will eventuate in many of the stolen generation being reluctant to take action. In all likelihood, these will be the most deserving. Third, the court system has proven time and time again to be insensitive to the needs of Indigenous people, and is thus culturally inappropriate to hear the claims of the stolen generation. Finally, the cost of court proceedings (remembering the current state of legal aid), the inconvenience and the time spent on the case will also result in many deserving claimants not being able or willing to proceed.

An administrative tribunal — the suitable mechanism

On the other hand, an appropriate administrative style tribunal can overcome many of the above difficulties. Successful victim compensation tribunals (such as in NSW) could be used as a model for a 'stolen generation tribunal'. Such victim compensation tribunals were established with the following ideals in mind (at least in theory): informality, a non-adversarial environment, simplicity, support services for victims as part of the tribunal structure, tribunal members selected for their understanding and sensitivity to victims, no formal rules of evidence and optional hearings at the request of the victim. If such principles were incorporated into a 'stolen generation tribunal', this should result in the tribunal being more culturally sensitive to Indigenous claimants than the courts. Indigenous participation in the formation and structure of the tribunal would also help in this regard.

If victims of crime are entitled to compensation, why not the stolen generation?

Compensation schemes for victims of crime exist in every jurisdiction in Australia. Although they vary in many aspects, the basic principle is that every victim of a violent crime in Australia is entitled to a government guaranteed monetary award. What is the justification for the stolen generation not also being entitled to compensation? Is it because the trauma of being a victim of violent crime is greater than that of being taken away from one's family and culture for most of one's life and placed in an institution? These are all, of course, highly traumatic events, and it is difficult to say that one set of events is automatically more traumatic than the other — each will depend on individual circumstances.

It is submitted that one of the most important reasons why the community is prepared to compensate one set of people, while it is reluctant to compensate another, can be explained in terms of the difference in the legal profession's perceptions of criminal law as compared to family law. This is most clearly shown by the gendered way in which legal aid funds are divided. Following the High Court's ruling in *Dietrich* (1992) 177 CLR 292, which stated that indigent defendants charged with a 'serious' criminal offence should have legal representation unless exceptional circumstances apply, legal aid funds have had to be diverted from family law matters (which mainly benefit women) to criminal law matters (mainly benefiting males). This is based on the questionable assumption, strongly criticised by some writers and judges,[6] that potential loss of liberty is more important than the potential loss of one's children. This is fairly typical of a more general assumption that criminal law issues are more important than family law issues.[7] On this basis, it is not surprising that victims of criminal acts are provided with compensation, whereas victims of the destruction of one's family, such as the stolen generation, are not.

Furthermore, when we analyse who presently receives compensation in Australia, we can see that it is mainly males who benefit. In particular, victim compensation schemes tend to have more male than women applicants,[8] and it is also claimed that the schemes disadvantage women applicants.[9] Workers compensation schemes are also likely to favour men.[10] A scheme to compensate the stolen generation, where the emphasis is on families and children, does not seem to attract the same societal consensus as other compensation schemes which, perhaps, encompass more of the male paradigm.

Victimology

The discipline of victimology has achieved much recognition in recent years. While there are still many debates amongst victimologists as to who exactly should be defined as 'victims', an international consensus of sorts arose when the

United Nations General Assembly agreed in 1985 to the *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* (the UN Declaration). This was a significant milestone in the history of victimology. The title of the UN Declaration indicates that victimology should consist of the study of both crime victims and victims of abuse of power. Because most removals of Indigenous children were carried out with the sanction of the law, the act of removal per se could not be construed to be a crime against prevailing Australian law. Thus, the stolen generation do not constitute crime victims, with the important exception of those children who were abused while in a children's home or in foster placement.

The stolen generation are more likely to be considered as victims of abuse of power, as defined in Clause 18 of the UN Declaration. This states that abuse of power victims are 'persons who ... have suffered harm ... through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights'. The question that needs to be answered in the case of the stolen generation is whether any norm of international human rights law was violated at the time the removal of children took place. The Report argued that at the time of the removal of Indigenous children after 1948 the commonly accepted international human rights norms against genocide and systematic racial discrimination were breached. Other international human rights norms could also have been mentioned. For example, the prohibition against slavery, which would have applied to the stolen generation in some situations, and which was outlawed early in the 19th century. Even more important is the modern human rights requirement that the state protect 'the family', embodied in Article 16(3) of the *Universal Declaration of Human Rights* and Article 23(1) of the *International Covenant on Civil and Political Rights.* Once it is established that the stolen generation are abuse of power victims, we should note that Clause 19 of the UN Declaration urges States to 'consider' the provision of 'restitution and/or compensation' for abuse of power victims.

There are other important reasons why victimology can be used to assert that abuse of power victims be compensated to the same extent as crime victims. First, they suffer similar types of losses, such as post-traumatic stress disorder, as those suffered by crime victims. In many cases they may suffer greater psychological loss due to the state actually sanctioning their victimisation. Second, it would not be within the spirit of the UN Declaration to give preference to one type of victim over another. As it was a deliberate decision to include both types of victims in the one Declaration,[11] the UN Declaration must be read as a whole. Third, many State and Territory Governments have been very supportive of crime victims, and have used the existence of the UN Declaration to justify legislation such as the *Victims Rights Act 1996* (NSW), the *Criminal Offences Victims Act 1995* (Qld) and the *Victims of Crime Act 1996* (ACT). Australia (particularly the former South Australian Government) was one of the UN Declaration's foremost advocates when it was first discussed in the United Nations. It would be hypocritical for Australian Governments, having supported some parts of the UN Declaration, not to support those parts of the UN Declaration that refer to abuse of power victims. Finally, the main justifications normally provided for the provision of government-funded compensation to crime victims, such as the strict liability theory, social welfare theory, and the equal protection theory,[12] are equally applicable to abuse of power victims.

Moral and ethical arguments

Establishing an administrative compensation scheme would go a long way towards reinstituting the reconciliation process and be a definitive signal to the community that racism and bigotry will not prevail over what is fundamentally just. Furthermore, if the tribunal was constituted in the manner suggested above, it would represent a compassionate response to the harm suffered by the stolen generation, and its overwhelming effect on past, present and future Indigenous society and culture.

A related argument is that because the removal of Indigenous children violated prevailing international human rights norms (see above), and international law provides for monetary remedies to victims of such violations,[13] the Federal Government is thus bound under international law to provide compensation for the stolen generation. This is again more of a moral argument, as no legal consequences normally follow a violation of international law, except on the rare occasions when the United Nations decides to take positive action against a recalcitrant nation. Such a scenario is unlikely to occur with respect to a failure to compensate the stolen generation. Furthermore, under Australian law there are no binding remedies[14] against a government for individuals who are victims of a violation of international law by that government.

A final argument is that a failure by the Federal Government to provide compensation will result in the deterioration of Australia's international standing and reputation. This is particularly so as Indigenous people are increasingly turning towards international forums to protest what they see as the loss of their rights and continued breaches of international law principles by Australia.

Arguments against the establishment of an administrative compensation scheme

Federal Government not responsible

It is true that, with the exception of removals that occurred in the Northern Territory prior to self-government and in the other Australian Territories, it is State Governments that were responsible for the removal of Indigenous children. This makes them primarily liable at law. However, while not suggesting that State Governments might not make a contribution to the administrative compensation scheme, I would argue that it should be a Federal Government responsibility. Given the national dimensions of the issues, any other approach is fragmentary, unacceptable and arbitrary, and a denial of our ability to act as one nation on an issue of such fundamental importance. If reconciliation is to become a reality, responses to important Indigenous issues must come primarily at the Commonwealth level.

Administrative tribunal too costly

In economic rationalist times, naturally considerations of cost will be important. However, the cost of any administrative tribunal must be offset against the cost of compensation via the court system and the cost of the damage to the reconciliation process and to Australia's international standing. Keeping this in mind, there are ways to keep down the costs of any proposed tribunal . One might place an overall limit on individual claims, which is precisely the approach of all victim compensation schemes in Australia. The total

payments could also be capped, preferably subject to meaningful negotiations with representatives of the stolen generation.

The Report recommended that the category of claimants should be confined to the stolen generation themselves — the removed children, and not others who may also have suffered loss (see below). Once a person establishes their eligibility, then a fixed amount would automatically be awarded (recommendation 18, p.312). This would have the advantages of limiting the costs of the tribunal; creating certainty for both claimants and the Government; efficiency and speed, due to the lack of legal arguments about quantum; and most importantly, consistency. Furthermore, it was also recommended that civil claims could still be pursued by those who think that the fixed amount is particularly unjust in light of their particular circumstances (recommendation 20, p.313). This approach may not be entirely satisfactory, as to allow either one fixed sum or the use of civil courts may encourage too many claimants to opt for the civil courts, which would negate the point of a separate administrative tribunal . Perhaps a better approach might be to empower the tribunal to award three or four levels of compensation, depending on clear and specified criteria of levels of harm caused by the removal. Such an approach is more flexible, but still retains enough certainty to meet the concerns of arbitrariness and inconsistency.

Too many problems of proof, and problems relating to entitlement and assessment

Victim compensation schemes in Australia also have definitional problems, proof problems, and in schemes where no fixed amounts of compensation are specified, problems in quantifying awards. Yet nobody argues that as a result of these problems crime victims should not be compensated. The Report provides solutions to each of the above concerns. For instance, where records of removal have been destroyed, but a person is able to make out a credible case that they are a member of the stolen generation and suffered loss as a result, then it recommends that the onus of proof should switch to the government to show that this was not in fact the case, or that the removal was in the best interests of the child (Report, p.312). While the Report in Part 3 details the negative effects of removal and/or reunion on Indigenous communities, the extended family and the children of the stolen generation, and on foster parents, it does not recommend that these categories of people be entitled to monetary compensation.[15] Instead, it argues that money awards should be confined only to the removed children who can show they suffered loss as a result of the removal (recommendation 18, p.312).

Finally, if fixed amounts of compensation were not to be used, difficulties in quantifying loss of the stolen generation should not, to any significant extent, be greater than it is for crime victims or in common law tortious claims. The Report recommended that compensation be paid to the stolen generation in respect of their pain and suffering, economic loss and loss of opportunities (such as the opportunity to be party to a native title claim) (recommendation 14, p.304). These are similar to typical heads of damage available to plaintiffs in common law tort actions. Furthermore, difficulties of quantification have never been a bar to an award of damages in either tort or contract law.

Non-Indigenous stolen children equally entitled to compensation?

It is true that many non-Indigenous children were also 'stolen' from their families. The most common example is the many single mothers in the socially conservative 1950s and 1960s who were coerced into giving up their babies.

While these 'stolen' children may also have valid claims to compensation, I would argue that the fact that the stolen generation consisted of Indigenous children places their claims on a different *qualitative* scale. This is because the additional factors of racism and Australia's colonialist history give their stories and claims a completely extra dimension. This is also reflected by the list of the heads of damage for compensation the Report recommends, which includes matters such as loss of cultural rights, racial discrimination and loss of native title rights (recommendation 14, p.304). While some of these types of damage may have been applicable to non-Indigenous separations, clearly not all were. Another obvious difference is that for the stolen generation it did not matter if their family was intact; children were subject to removal anyway. Compare this to the above example — the pre-condition for removal of non-Indigenous children was the absence of the father.

These important differences justify a different approach to compensation for the stolen generation than for non-Indigenous children. In the case of the latter, recourse to the regular legal system should be sufficient, whereas in the case of the stolen generation a specialist compensation regime is required.

Too many tribunals already

Some may contend that the creation of yet another specialist tribunal will further fracture the justice system, leading to a possible loss of accountability and greater inconsistency of decisions. While this argument is not without some merit, the counter to it is that there are some areas of the justice system that require specialist knowledge and sensitivity, and perhaps a less formal approach. It is clear that the kind of sensitivity and cultural appropriateness required of a 'stolen generation tribunal' does mean that there is a strong case for a separate forum of justice in this instance.

Compensating past wrongs would open the 'flood gates' to many areas of Federal Government liability

This argument was dismissed by the Report on the basis that the past wrongs in question involved fundamental breaches of human rights which distinguished them from other wrongful policies (p.307). Another answer to this argument is that the Indigenous character of the stolen generation makes the wrongs committed against them qualitatively different (see above) from other wrongs, thus requiring a special response.

Compensation would create further social division

The Federal Government has argued that the payment of compensation to the stolen generation may in fact worsen racial tensions in Australian society. For example, some in the community may claim that such payments represent racial discrimination in reverse. This is not really an argument against compensation; rather it actually shows the need for greater awareness and understanding of Indigenous suffering and disadvantage caused by centuries of prejudice and neglect. Racists in the community will of course never be convinced that any benefits for Indigenous people are worthwhile. The Report also quite rightly states (at p.307) that

reparations are essential to the reconciliation process, that gross breaches of human rights should not be trivialised, and the obligation under international law to make reparations in such circumstances should not be ignored.

Conclusion

Ultimately, whether the stolen generation are compensated in a manner which is compassionate and appropriate will be one of the biggest tests of the moral fibre of Australian society as we approach the next century and 100 years of nationhood. Only an administrative compensation scheme, as suggested in this article and in the Report, will suffice to achieve this end.

References

1. See 'Long delay for victims of forced removal', *Australian,* 27 May 1997.
2. See Recommendation 3 at p.282 of the Report. See Chapter 14 for a discussion of these issues, except the question of rehabilitation which is discussed in detail in Part 5 of the Report.
3. See 'Reconciliation not compensation', *Australian,* 14 October 1996 and 'Recognition of a past disgrace', *Australian,* 21 May 1997.
4. It is interesting to note that many African Americans are now arguing that an apology for slavery is insufficient; monetary compensation is really required. See White, Jack, 'Sorry Isn't Good Enough', *Time (Australian edition),* 30 June 1997, at p.27.
5. See 'Hundreds prepare to sue for "stolen" Aboriginal lives', *Sydney-Morning Herald,* 4 June 1997.
6. Mossman, M.J., 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change', (1993) 15 *Sydney Law Review* 42. See also the Family Court's comments in *McOwan and McOwan* (1994) FLC 92–451 at 80,691.
7. Other ways this is reflected are the inferior status of family law in the legal profession, and the fact that whereas criminal law is a compulsory subject at all law schools (as part of the Priestly 11), family law is rarely compulsory. See Garkawe, Sam, 'Admission Rules', (1996) 21(3) *Alternative Law Journal* 109.
8. For example, in a study carried out in NSW it was found that 64.5% of applicants who were defined under the relevant legislation as 'primary' victims (who represented the overwhelming majority of applicants) were male. See Salmelainen, P., *Criminal Victim Compensation: A Profile of Claims, Claimants and Awards,* NSW Bureau of Crime, Statistics and Research, 1993, at p.8.
9. See Whitney, K., 'The Criminal Injuries Compensation Acts: Do they Discriminate against Female Victims of Violence?', (1997) 1 *Southern Cross University Law Review* 92.
10. This is an anecdotal assumption, but would be logical as more males are employed than women in the community, generally at higher pay (which increases the amount of compensation they would be entitled to), and are more likely to be engaged in occupations that involve elements of physical risk.
11. There was some debate over whether there should be more than one Declaration. See UN Document A/CONF.121/C.2/L.14, 4 September 1985, paragraphs 1–10.
12. For a summary of these justifications (as well as others) see Elias, R., *Victims of the system: Crime victims and compensation in American politics and criminal justice,* 1983, New Brunswick, NJ: Transaction Books, at pp.24–26.
13. The Report relied upon a study by Professor van Boven, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law,* Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Document E/CN.4/Sub.2/1996/17; found at pp.649–650 of the Report.
14. While there are some human rights mechanisms, such as lodging a communication with the United Nations Human Rights Committee pursuant to the *First Optional Protocol* of the *International Covenant on Civil and Political Rights,* any negative ruling of the Human Rights Committee is in no way legally binding on the Australian Government.
15. For purely pragmatic reasons, I would agree with this limitation on monetary compensation. However, it should be noted that these categories of claimants would still be entitled to other forms of reparation.

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if not heeded will potentially (in the future) automatically result in the offer of a pre-payment in lieu of disconnection. At present the companies are required to gain the approval of the Regulator-General to make the 'offer'. The attitude of the regulator will matter very much. There is no doubt about how attractive these kinds of meters are to electricity companies and how much pressure will be brought to bear on the regulator to make certain that non-compliance on the part of a customer is grounds for an 'automatic' offer of a pre-payment meter. The SECV management also wanted these meters but back in the old days the check and balance was provided by politically vulnerable Ministers having to respond to public pressure. The regulator, as a government appointee, is not subject to public approval in the same way.

Pre-payment meters (being literally pre-payment — not 'pay as you go' as the electricity companies like to promote them) effectively privatise the act of disconnection, curtailing a socially informed collective response to poverty.

Poor Victorian households face a dual threat of continuing high prices and the erosion of concessions. The Victorian Government provides somewhere between 30 and 40 million dollars a year in energy aid grants for households. There are indications that this funding is under threat even though demand for aid has grown. Ernst and Webber make the observation that in Britain the panoply of procedural rights did not provide the solution to the fundamental problem of fuel or water poverty.[7]

Conclusion

The Victorian electricity reforms provide a privatisation case study capable of demonstrating how democratic rights have taken a back seat to a more limited form of consumer rights. Victorian households have lost any real control over the price they pay for their electricity and over the quality of supply. Further, they may have more clearly delineated procedural rights for things such as disconnection, but non-existent or inadequate monitoring and enforcement downgrade the value of these gains. In moving from service delivery based on a notion of rights, informed by ideas of democracy, to a consumption relationship, Victorians are losing the ability to achieve a socially informed collective response to problems such as poverty.

References

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5. Whitfield, D., *The Welfare State,* Pluto Press, London, 1992, p.91.
6. Australian Competition and Consumer Commission, Draft Determination Application for Acceptance National Market Access Code, 22 August 1997, p.xxvi.
7. Ernst, J. and Webber, M., above, p.138.