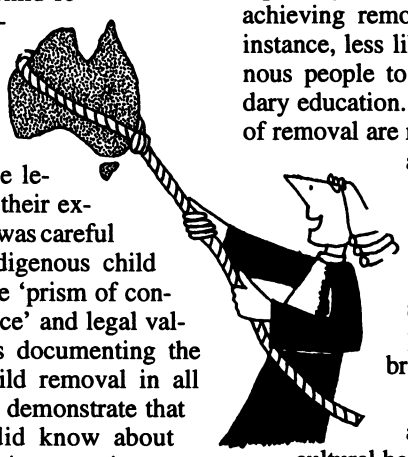
DownUnderAllOver

A regular column of developments around the country

Federal Developments

'BRINGING THEM HOME' REPORT

'Bringing them Home', the Human Rights and Equal Opportunity Commission Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families presents the vivid and devastating testimony of some of the stolen children. The Inquiry received submissions from 535 Indigenous people. The report details the personal and cultural effects of child removal as well as recommending principles for making reparation.



In addressing the legal implications of their experience, the report was careful not to evaluate Indigenous child removal through the 'prism of contemporary experience' and legal values. Early chapters documenting the long history of child removal in all jurisdictions amply demonstrate that past generations did know about child removal and in some instances were vehemently opposed to it: '[t]here have always been dissenting voices' including families themselves, Indigenous organisations dating from the 1920s, religious and humanitarian groups and MPs. This chronicle of dissent nullifies the Coalition's contention that child removal was in line with the values of the time and for this reason somehow excusable.

In the early decades of this century, the Chief Aboriginal Protectors in Western Australia, the Northern Territory and Queensland propounded a theory of biological and cultural assimilation which led to the wholesale institutionalising of 'half caste' children in order to 'breed out the colour'. The growing 'half caste population would be stemmed and the children could be trained for white employers as domestics and stockworkers. The institutions themselves, mission and government run, were, in the main, places of abject misery. Abuse of all types appears to have been the norm. Food, bedding, education were of an appalling standard. As John McEwen, the Minister responsible for the Northern Territory, said of the Darwin homes in 1937: 'I know many stock breeders who would not dream of crowding their stock in the way that these half caste children are huddled' (p.140).

Like all year zero fantasies, this policy of assimilation by child removal was genocidal. It quite possibly only failed to succeed because governments were too miserly to allocate sufficient funds to see the vision through.

For those who persist in bleating that the policy was ultimately of benefit, the report lays to rest the myth of the high achieving removed child who is, for instance, less likely than other Indigenous people to undertake post-secondary education. Far more likely results of removal are mental health problems as a result of the abuse experienced, higher rates of incarceration, inability to form close relationships and to parent properly. It's a heartbreaking legacy.

The stolen children also lost their language, cultural belonging and knowledge when they were removed. Even if reunited with their communities, some are unable to speak for their country because of the stolen years. Their ability to pursue or join native title claims is virtually destroyed. If we believe the power of law is to ensure that there should be no wrong without a remedy, the stolen children's claim for compensation is manifold. Some of the heads of damage the report canvasses include racial discrimination, arbitrary deprivation of liberty (administrative removal powers in most jurisdictions were not subject to judicial scrutiny before the child's removal into detention), and breach of guardianship duties, among others. It appears clear that the removal of Indigenous children was in breach of the Genocide Convention. Debates at the time of drafting the Convention contemplate that a policy can still be genocidal even if it springs from mixed motives (i.e. the sincere belief that child removal is good because it means a whiter lifestyle).

In some ways, Indigenous child removal has never stopped. The report highlights a contemporary variant, the disproportionate number of Indigenous children in care, mainly fostered to non-Indigenous families. As the Government now appears poised to enact significant legislation in reliance on a non-beneficial interpretation of the races power (s.51xxvi) to the detriment of Indigenous people, it is important to read this report into what Mr Howard would have us believe is all in the past. ● **HG**

[See also article on this issue on p.192. Ed]

THE HIGH COURT DECISION IN KRUGER & BRAY

On 31 July 1997 — almost 18 months after hearing argument in the cases — the High Court handed down its judgments in *Kruger & Ors v The Commonwealth* and *Bray & Ors v The Commonwealth.*

There were 15 plaintiffs in the two cases. Thirteen claimed to be members of the 'stolen children', that is, Aboriginal children who were forcibly separated from their families at an early age and kept in the control of the state. The remaining two plaintiffs were mothers of children who (it was claimed) were forcibly removed.

The removals took place between 1925 and 1949, when the Northern Territory was administered by the Commonwealth. They were carried out pursuant to the *Aboriginals Ordinance 1918* (NT) (the Ordinance), which itself purported to be a law made pursuant to s.122 of the Constitution (the territories power). By sub-section 7(1) of the Ordinance the Chief Protector was — subject to certain exceptions — the legal guardian of every 'Aboriginal or half-caste child' in the Northern Territory until he or she attained the age of 18 years. Sub-Section 6(1) of the Ordinance provided (the whole Ordinance has long since been repealed):

> The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any Aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the Aborigi-

nal or half-caste for him to do so, and for that purpose may enter any premises where the Aboriginal or half-caste is or is supposed to be, and may take him into his custody.

And sub-section 16(1) of the Ordinance provided:

> The Chief Protector may cause any Aboriginal or half-caste to be kept within the boundaries of any reserve or Aboriginal institution or to be removed to and kept within the boundaries of any reserve or Aboriginal institution, or to be removed from one reserve or Aboriginal institution to another reserve or Aboriginal institution, and to be kept therein.

The plaintiffs in the *Kruger & Bray* cases alleged that these provisions (amongst others) were constitutionally invalid. The provisions were said to violate various Constitutional requirements, guarantees and rights, namely (allowing for some simplification in the following summary):

1. the requirement inherent in Chapter III of the Constitution that, under Commonwealth law, a person may not be punitively detained except pursuant to an exercise of judicial power by a Chapter III Court;
2. an implied constitutional right or guarantee of legal equality;
3. an implied constitutional right to and/or guarantee of freedom of movement and association;
4. an implied constitutional guarantee of freedom from genocide;
5. the requirement that the Ordinance needed to be a law for the government of the Northern Territory;
6. the prohibition against laws for the prohibition of the free exercise of religion (s.116 of the Constitution)

It was further claimed that the breach of these infringements gave rise to an entitlement to damages on the part of the plaintiffs.

The challenge was an ambitious one, and it failed in every respect. The reasons of the six justices who heard the case may be briefly (and crudely) summarised as follows:

1. Judicial power (challenge failed 6–0)

Brennan CJ, Dawson and McHugh JJ: s.122 of the Constitution was not subject to the requirements of Chapter III of the Constitution so no Chapter III question arose;

Toohey and Gummow JJ: the Ordinance was directed to the welfare of Aboriginal people; it did not purport to bestow the judicial power to punitively detain, so no question of Chapter III arose;

Gaudron J: Chapter III in itself contains no prohibition against detention in custody .

2. Principle of legal equality: (challenge failed 5–1)

Brennan CJ, Dawson, Gaudron, McHugh and Gummow JJ: no such principle exists (for Gaudron J there was a limited right of non-discrimination to be found in Chapter III of the Constitution, but it was not applicable in this case).

Toohey J (dissenting): there is such a principle, but it is not yet possible to decide whether the Ordinance infringed it; an inquiry into the standards of the time in which the Ordinance was written is required first.

3. Freedom of movement (challenge failed 4–2)

Brennan CJ and Gummow J: the terms of the Ordinance did not infringe any constitutional guarantee of freedom of movement (which freedom is a corollary of the constitutional guarantee of freedom of political communications); whether such guarantee was infringed as a matter of fact in the cases of the plaintiffs is a matter for another day;

Dawson and McHugh JJ: no such freedom exists in the Territories;

Toohey J: it is not yet possible to decide whether the Ordinance infringed the plaintiffs' constitutionally guaranteed freedom of movement; an inquiry into the standards of the time in which the Ordinance was written is required first;

Gaudron J (dissenting): the Ordinance did infringe the plaintiffs' constitutionally guaranteed freedom of movement.

4. Genocide (challenge failed 6–0)

The Court, unanimously: the Ordinance, although it may have been misguided by the standards of today, did not have the intention of causing harm to Aborigines and therefore was not genocidal. (Their Honours did not pass upon the question of whether a prohibition against genocide is to be found in the Constitution.)

5. Not a law for the government of the Northern Territory (challenge failed 6–0)

The Court, unanimously: the Ordinance did have the necessary nexus with the Northern Territory to be within s.122 of the Constitution

6. A law for the prohibition of the free exercise of religion (challenge failed 5–1)

Brennan CJ, Toohey, Gummow JJ: the Ordinance did not have the purpose of prohibiting the free exercise of religion

Dawson and McHugh JJ: s.122 of the Constitution was not subject to s.116, so no question of prohibition of the freedom of religion arose.

Gaudron J: it is not yet possible to decide whether the Ordinance infringed s.116: the Ordinance did interfere with the plaintiff's free exercise of religion, but an inquiry into the standards of the time would be necessary before being able to determine whether the Ordinance was proportionate to a pressing social need, namely the protection of Aboriginal people. ● **ACT Committee**

ACT

CRIMINAL INJURIES COMPENSATION SCHEME

In June 1997 the ACT Government released a discussion paper for public comment which makes recommendations for 'reform' of the criminal injuries compensation scheme (the CIC scheme). The discussion paper makes it clear that the need for changes to the CIC scheme is stimulated by the increasing cost of the scheme and the perception that compensation is being paid for injuries of a kind not originally intended to be compensated under the scheme. The discussion paper makes 22 recommendations. Although the recommendations do not cut back the scheme to the extent that equivalent schemes in other States have been, the effect of the recommendations may be to reduce access to the scheme and to reduce awards at the expense of victims of crime.

In August 1993 the Community Law Reform Committee of the ACT produced Report No. 6 on Victims of Crime which included recommendations for reform of the CIC scheme (the CLRC Report). The discussion paper does not place weight on the CLRC discussion and some of its recommendations conflict with those of the CLRC.

The discussion paper recommends that two hours of free early counselling and further counselling up to a maximum of 20 hours should be available for victims of crime. An entitlement to counselling for victims of crime is important, but the process which is recom-

mended just to obtain the two hours of early free counselling is formal and legalistic and may deter victims of crime. It is recommended that the victim apply for early free counselling by affidavit to the Registrar who may authorise counselling by an approved counsellor. Further counselling can be ordered by the decision maker in the course of determining an application. Financial assistance for pain and suffering would be available where an applicant establishes that, despite counselling, a psychological injury causing significant disability has persisted or is expected to persist.

The discussion paper recommends that the Territory is a party to proceedings. Conversely the CLRC report recommended that the Government of the Territory should receive a copy of every application for compensation and should have the right to be heard if the Government believes on reasonable grounds that an application is falsely or fraudulently made, or is exaggerated, or if the application raises a question of law of general importance. The involvement of the Territory in proceedings will necessarily increase the adversarial nature of the proceedings and potentially increase the distress suffered by victims of crime.

A further recommendation of the discussion paper is that the amount of financial assistance for pain and suffering be assessed by the proportionate scaling method. This method sets a maximum award amount that can be awarded for non-financial loss and the total non-financial loss suffered by a claimant is assigned a numerical number on the scale.

There are numerous other recommendations, for example:

- an extension of the time limit for an application for compensation to two years, extendable only in exceptional circumstances;
- that the parties and the Government may enter into consent agreements;
- that no assistance be available for injuries resulting from criminal conduct that amounts to no more than a regulatory offence; and
- that assistance should not be available where the applicant has, without reasonable excuse, failed to report the offence causing the injury to the police within a reasonable time or failed to co-operate in the investigation and prosecution of the offence unless special circumstances brought about that result. ● **KW**

NSW

A NEW DAWN IN NSW ADMINISTRATIVE LAW

The NSW Parliament has just passed the *Administrative Decisions Tribunal Act 1997* and the *Administrative Decisions Legislation Amendment Act 1997*. The legislation creates an Administrative Decisions Tribunal which will have both an original and an appellate jurisdiction.

The Tribunal has its genesis in a 1973 report of the NSW Law Reform Commission which recommended the creation of an Ombudsman and a public administration tribunal.

NSW has had an ombudsman since 1975 but creating a tribunal must have taken a bit more thought and it is a tribute to the skills of NSW bureaucrats that they were able to delay its creation for so long.

The new tribunal will take over the existing work of the Community Services Appeals Tribunal, Legal Services Tribunal, Equal Opportunity Tribunal, School Appeal Tribunal, Boxing Appeals Tribunal and Veterinary Surgeons Disciplinary Tribunal.

In offering the Bills for the new Administrative Decisions Tribunal (ADT) to Parliament the Government said this was the beginning of a plan for the extension of the jurisdiction of the ACT to be carried out over the next three sessions of Parliament.

The Government had also identified a further 21 tribunals for possible integration into the ADT.

There is an irony in the Attorney-General's observation in his second reading speech that: 'The Government's commitment to administrative law reform stems from our belief in the need for open and accountable government'.

The irony is that at the same time as this legislation has been put forward, the NSW Government has obtained Special Leave to appeal to the High Court from a decision of the Court of Appeal *(Egan v Willis)* that upheld the power of Parliament to demand papers from the executive.

Yeah, sure they believe in open and accountable government. We shall watch the ADT with interest. ● **PW**

[For more details on the ADT see article on p.182.Ed]

NT

MANDATORY SENTENCING BITES

As previously reported, mandatory gaol sentences apply to all 'property offences' committed in the Northern Territory after 7 March 1997 by anyone aged 17 or over, with 15 and 16 year olds going compulsorily into detention for their second or subsequent property offence.

The new *Sentencing Act* really started to bite following the determination of several questions of construction which had been stated to the NT Supreme Court (*Bradley; McMillan*, unreported, 20 June 1997). Consequently, magistrates across the Territory are now being obliged to impose terms of immediate imprisonment for such heinous offences as breaking a light globe or stealing a can of beer.

The can-of-beer case itself (*Wynbyne*) has since become the subject of an appeal against the Act's validity, to be heard by the Full Court later this month. In our April 1997 issue, Martin Flynn provided *Alt.LJ* readers with a sneak preview of the arguments which will be ventilated in that appeal. One ground is that the Act invalidly infringes the doctrine of separation of powers. The recent High Court decision in *Kruger & Bray*, while bitterly disappointing to the stolen children, appears to have left ajar the crucial question of whether (and to what degree) this doctrine is applicable in the Territory. The matter seems destined for the High Court.

Apart from the fundamental issue of the Act's validity, the question of what it actually means may also ultimately be determined in Canberra. Various serious crimes including armed robbery are 'property offences' as defined in the Act (although interestingly, the white-collar offence of obtaining property by deception is not). Sentencers in the NT are now placed in the unprecedented position of having to set — in some cases lengthy — prison sentences without any of the discretionary options traditionally available to them: in *Bradley*, it was held that a court has no power to suspend any part of a prison sentence imposed in respect of a property offence, or to set a non-parole period. Whether this stems from sloppy drafting or legislative vindictiveness is moot, but in any event the result, if allowed to stand, will inevitably be a radical restructuring

of NT sentencing principles and practice. Application for special leave to appeal *Bradley* has been filed in the High Court.

In the meantime, many otherwise straightforward cases affected by this litigation are being set for hearing, appealed, or adjourned off, causing substantial additional costs and delays to the administration of justice. ● **RG**

Queensland

Queensland appears to be returning to 'old familiar ways' with the Borbidge Government taking actions reminiscent of previous National Party governments. The kicking of the Canberra can has intensified, significant extensions are proposed to police investigative powers, changes have been proposed to abortion law and Ministers have been criticised for their overseas travel. And then there's the Inquiry into the Criminal Justice Commission (CJC).

CJC INQUIRY COMMISSIONERS BIASED

The Queensland Supreme Court has closed down the Inquiry into the operations of the CJC. After more than $11 million had been spent on the Connolly-Ryan Inquiry, Justice Thomas found that the two Commissioners leading the Inquiry were biased such that they would be unable to bring down balanced findings. It was found that there was strong ostensible bias on the part of Inquiry head, Peter Connolly in various public statements. These statements related to Connolly's favouring of one side of politics (he is a former Liberal MP) and also to Kenneth Carruthers, the former head of an inquiry into the Memorandum of Understanding between the Queensland Police Union and the Queensland Police Minister which was signed before the Mundingburra by-election. Justice Thomas' judgment includes the extremely telling observation, 'It was important that anyone appointed to the inquiry be seen to be a commissioner, not an executioner'.

Strong calls have been made for the Attorney-General, Denver Beanland to resign. It is of course unlikely that such calls will be heeded. It is disconcerting that the Premier's response to the judgment was that the Government will not be stopped from producing a more accountable and more effective CJC. The questions must be 'accountable to whom?' and 'effective in what sense?'.

MINISTERIAL TRAVEL

The Tourism Minister, Bruce Davidson came under sustained criticism during June and July for a visit made to South Africa to investigate importing white and black rhinoceroses for a North Queensland Game Park. The Minister needs new advisers given that trade of this kind in black rhinos is prohibited. Wouldn't you think that Davidson might have contacted the South African High Commission for advice before leaving Australia.

PROPOSED CHANGES TO ABORTION LAWS

State Cabinet was divided by a move from Health Minister, Mike Horan, to further restrict the access of women to abortion services in Queensland. Horan sought to close Queensland's private clinics such that operations would only be conducted in hospitals in circumstances where such action was necessary to save the woman's life. Deputy Premier and Liberal Leader, Joan Sheldon opposed Horan's proposal on the basis that it could see the return of backyard operators and also criticised Horan for floating his proposal without first consulting Cabinet.

POLICE POWERS PROPOSALS

Significant changes have been proposed to police powers in Queensland. A 110-page discussion paper released by the Ministry for Police and Corrective Services proposes many changes, particularly in the granting of a post-arrest detention power. The proposal would enable police to detain a suspect initially for up to six hours with the approval of a commissioned officer of the rank of Inspector or higher. This investigation time can be extended to up to a total of 18 hours with approval of an officer of the rank of Superintendent or above. That's right, scope for up to18 hours of interrogation without review of this process by a court.

The discussion paper proposes the adoption of a range of 'open-ended' powers, requiring the police to have 'reasonable grounds' for their actions. Such powers need to be accompanied by strong external mechanisms to ensure effective accountability. No such mechanisms are proposed. ● **JG**

South Australia

ADELAIDE'S PONG: SOMETHING SMELLS ABOUT PRIVATISATION

For some months Adelaidians have suffered a pungent smell wafting over the suburbs. A breakdown in sewerage treatment at Bolivar caused the airborne pollution. *Advertiser* journalists, radio broadcasters and most of the population demanded to know the cause, who was responsible, and when we would get fresh air. Attributing blame and finding a solution is the subject of an unfinished investigation, but the pong raises issues about the Liberal Government's privatisation program.

In South Australia, privatisation involves the Government maintaining ownership of capital and infrastructure, while outsourcing the management of prisons, transport services, and water. Motivated by economically determined philosophy, and without any legislative change, parliamentary debate or public scrutiny, the Government contracted out Adelaide's water management to 'United Water', an Anglo-French consortium. The Government promised savings, and argued that the contract would bring expertise to the State and create employment opportunities in water management as United Water sought contracts in the Asia Pacific Region.

Private management also distances the Government from potentially politically damaging pongs. An election is in the air and poor management of sewerage could threaten the Liberal Party's hold on power. Instead of answering the pressing questions, the Minister for Infrastructure, Graham Ingerson, implied United Water was to blame and explained that he could impose penalties of up to $1.5 billion under the conditions of the contract, and engaged an independent expert to get the answers. Nevertheless, the strategy entails inherent dangers. Suggesting mismanagement raises questions about the Government's shrouded decision to contract out, and whether United Water was the best choice.

The community cannot tolerate unscrutinised and poor decision making in this area: water and the environment are too valuable. United Water is supposed to bring expertise in water management to South Australia. Yet the pong lasted for months before the Government engaged an independent expert in sewerage

treatment to determine the problem and propose solutions. Without local knowledge his solutions included flushing partially treated effluent from lagoons into the Gulf of St Vincent, a fish breeding nursery, already under stress from an earlier accidental discharge.

In addition, water is too important to be subject to economically driven management. Formerly the E&WS, a government department, managed Adelaide's water within economic resources available. The Government envisioned savings by appointing United Water, but instead gained the additional factor of a business operating for profit. The quest to make savings and profit has resulted in the reduction of staff operating the plant, and the use of fewer chemicals to treat sewage at Bolivar. There also appears to be an unwillingness to pay for essential operating costs. The failed operation of Gate A, which allowed partially treated effluent to flow into lagoons, emerged as a central reason for the problem, and United Water disputed responsibility for paying for its repair.

Privatisation of management is driven by economic determinism, and a desire by government to maintain power. Analysis of issues surrounding the pong suggests serious problems with the development. In South Australia water is a precarious resource. The Government needs to reconsider its policy, and engage in open debate that ensures quality of water for Adelaidians. ● **MC**

[It's amazing how far the Conservative stink spreads. Ed]

Victoria

CROWNLAND

Down here in Crownland, the former Council for Civil Liberties (now known as *Liberty Victoria*) has been holding meetings across Victoria in support of the independence of the Auditor-General. Starting with a 2000 strong meeting in May, organisers have been thrilled with the number of Victorians who have turned out to show their support for Ches Baragwanath since a government-appointed panel recommended the sizing down of the Auditor-General's powers. Support has been particularly strong in traditionally Liberal seats in the inner eastern suburbs.

Joseph O'Reilly, Executive Director of *Liberty Victoria*, suggests that the Auditor-General's independence represents a line in the sand for many people who would not normally become involved in protests or public meetings. A final decision on the panel's recommendations will go before the Parliament in spring. While Premier Kennett maintains that at the moment he has no position on the issue, it seems that 'Audit Victoria' is fairly well established in the minds of a government unlikely to be swayed by the 30,000 signatures of 'un-Victorian's' on a petition submitted by *Liberty Victoria*.

Meanwhile, more and more restaurants and entertainment venues on 'the other side of the river' are reporting a loss in trade — some estimating a 50% drop on weekends. Any visitor to Melbourne will notice that all roads do in fact lead to Crown, and it has certainly become increasingly difficult for Victorians to resist the tractor beams of the affectionately dubbed Death Star — so much so that word of mouth from officials at the County Court reports that one in three criminal matters before it in the last few months have been gambling related. Who says the Casino can't provide Victorians with gainful occupation?

PRESSURE POINT

On a different, but equally Victorian, note, a woman has lodged a Writ in the County Court against Victoria Police over their use of upper body pressure point tactics. In an investigation of the matter, which involved a protest outside the Department of Conservation and Natural Resources, the Deputy Ombudsman said that the tactics had the potential to cause serious injury or sudden death. He expressed similar concern over the use of the tactics in the Richmond Secondary College protests, describing the tactics as 'excessive force' used 'out of all proportion'. The matter will be a test case for other Victorians injured by the severe tactics adopted by police in recent years and police have now admitted that the use of pressure point strategies has been a mistake, particularly when used against protesters. ● **EC**

DownUnderAllOver was compiled by Margaret Cameron, Elena Campbell, Jeff Giddings, Russell Goldflam, Helen Grützner, Peter Wilmshurst and Kirsty Windeyer.

Heilpern article continued from p.191.

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