REDRESS IN RESPONSE TO INSTITUTIONAL SEXUAL ABUSE OF INDIGENOUS CHILDREN

by Terri Libesman and Hannah McGlade

INTRODUCTION

In January 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Commission') published a consultation paper entitled *Redress and Civil Litigation*.[1] In this article, we address four issues relevant to the specific concerns of Indigenous survivors of institutional abuse which we believe are not adequately covered in the consultation paper. They are:

- The context of forced removals under racially discriminatory policies
- Redress for collective and communal harm
- Burden of proof in civil litigation
- Children in the current welfare system.

Any redress scheme must take into account of the fact that Indigenous child survivors of sexual abuse have suffered particular hardship, because their institutional abuse has often taken place in the context of removals driven historically by racially discriminatory policies. As has been well-documented, Indigenous children have been forcibly separated from their families and communities under various government policies since the very first days of the European occupation of Australia.[2] The current legacy of these policies is seen in the ongoing disproportionate experience of institutionalisation of Indigenous children in out-of-home care including within kin and foster care.[3] The systemic factors which result in disproportionate experience of institutional abuse, including sexual abuse in institutions, must be taken into account in redress schemes.

REDRESS FOR COLLECTIVE AND COMMUNAL HARM

The Commission recognises that responsibility for sexual abuse falls both on the individual perpetrators and on the institutional/social context which created an environment that made children vulnerable. It is these same circumstances which facilitate other forms of abuse such as physical and cultural abuse. The need for redress across the spectrum of harm needs to be acknowledged and addressed not as a private individual harm, but systemically.

In considering the issue of collective redress for Aboriginal and Torres Strait Islander survivors, the Commission notes the work of Castellan (from the Canadian context) that a holistic approach includes 'addressing social and environmental conditions including education, housing, and a compromised natural environment.'[4] Research[5] and submissions to the Commission[6] have emphasised the best way to deliver holistic healing services is to work with Indigenous communities and support the development of services which are community controlled. It is apparent that the Commission endorses the evidence from Aboriginal survivors and organisations with respect to the need for collective redress; including culturally appropriate healing services, land connection, social services and housing. However, this is then relegated in terms of implementing redress to direct personal responses through support organisations. The direct personal response suggested by the Commission individualises the experience and in doing so, effectively undermines the ongoing recognition of the systemic and institutional nature of the harms and the capacity to provide appropriate redress. This approach will lead to further disempowerment of Indigenous survivors.

THE CANADIAN EXPERIENCE

The Commission is of the view that the individual institutions which perpetrated abuse on Aboriginal children are responsible for providing personal redress for that abuse. It states, 'An appropriate personal response can only be provided by the institution and cannot be provided through a redress scheme independent of the institution'.[7] While an apology can only be provided by the Institution which perpetrated the harm, other non-financial forms of redress should not fall under the rubric of a direct personal response.

In considering possible frameworks for restitution for Indigenous peoples, the Commission might have regard to significant international Indigenous collective approaches, such as that adopted by Canada through the Indian Residential Schools Agreement ('IRSA'). This historic agreement with the Canadian Government included the establishment of a Truth and

Reconciliation Commission and both personal and collective aspects of redress. The IRSA includes a common experience payment for all students; an independent assessment process for students who were abused which is claimant-centred and non-adversarial; measures to support healing and commemorative activities.[8]

In response to the Commission the Australian Government has stated that legal, financial and moral responsibility should lie with the institution responsible for abuse. This denial of responsibility for redress by government is inconsistent with international human rights obligations, such as those outlined in the *Bringing Them Home* report, and is an affront to the nation's ongoing reconciliation process. As in Canada, we consider that responsibility must also be assumed at a governmental level.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The Commission's approach does not reflect a level of engagement and cooperation with Indigenous peoples that accord with human rights standards. An Indigenous rights based approach would see high level formal engagement with Indigenous peoples, in recognition of the fundamental rights of Indigenous self-determination, participation and decision-making as enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), which Australia signed in 2009. While the Commission has undertaken two roundtables to date, they have not held one with Indigenous peoples. There is no evidence of any formal relationship with Indigenous peoples. This lack of formal engagement is not consistent with the right to self-determination in Article 3 of the UNDRIP nor does not accord with Article 18 which states:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision making institutions.

The Royal Commission must engage with international human rights as recognised by their Letters Patent which states that 'Australia has undertaken international obligations to take all appropriate legislative, administrative, social and educational measures to protect children from sexual abuse and other forms of abuse'.[9] In addition to the UNDRIP, the *Convention on the Rights of the Child* includes key rights pertaining to Indigenous children. The UN Committee on the Rights of the Child acknowledges that many states give insufficient attention to the rights of Indigenous children and that special measures are required through legislation and policy for the protection of Indigenous children.[10]

BURDEN OF PROOF IN CIVIL LITIGATION

Members of the Stolen Generations who have pursued civil claims for damages against State and Commonwealth governments, including for sexual abuse, have faced significant obstacles in meeting the evidentiary threshold.[11] Even when documentary evidence does exist, questions arise as to the reliability of archival sources when these have been produced by the governments and institutions actually responsible for the implementation of policies of removal and institutionalisation.[12] Furthermore, when historians have been called as expert witnesses, courts have been reticent to accept their evidence.[13]

For these reasons, with respect to civil litigation, we believe that legislation should provide that the policy of assimilation, and with this the racially-based removal of Aboriginal and Torres Strait Islander children under specific Commonwealth, State and Territory protection legislation and policy, should be taken as part of the factual matrix of which a court can take judicial notice. Within this factual matrix, historians and other experts could then provide expert evidence with respect to the particular circumstances in which the claimant's abuse took place.

Survivors should not be punished for the failure of institutions to keep or their destruction of records. It should be up to the institution once a prima facie case has been made to disprove it. The power disparity between institutions, differential in control over how documentation was made and retained, the collective nature of events should enable historians to prepare and admit as fact, expert evidence which supports the abuse, which if accepted by a body of historians which are not considered irrational, should be taken into and accorded the weight of accepted fact relevant to the particular matter.

CHILDREN IN CURRENT CHILD WELFARE SYSTEMS

The Royal Commission's terms of reference require that it consider:

> What institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

The Commission's redress discussion paper focuses on redress for historical survivors and does not include what institutions and governments should do to address contemporary and future abuse. The guarantee against repetition, which is encompassed in the UN Van Boven Principles, is widely referred to in submissions to the Commission and is central to the Commission's Terms of Reference.

The 2012 report to the Australian Government by the UN Committee on the Rights of the Child has recorded its 'deep concern' at the significant increase in the high number of Aboriginal children being removed from their families and communities and placed in out of home care. It stated that, '… the large numbers of Aboriginal and Torres Strait Islander children being separated from their homes and communities and placed into care that, inter alia, does not adequately facilitate the preservation of their cultural and linguistic identity.' It recommended that the Australian Government review its progress in the implementation of the recommendations of the *Bringing Them Home* report to ensure full respect for the rights of Aboriginal and Torres Strait Islander children to their identity; name; culture; language and family relationships.[14] The Royal Commission's consultation paper refers to the specialist services provided to Indigenous survivors, particularly members of the Stolen Generations, such as the Healing Foundation and Link-Up.[15] It also notes that there remain significant gaps in services provided.[16] An additional and extremely significant gap, which is not addressed in the discussion paper, but which goes directly to the Terms of Reference—with respect to alleviating past and future sexual abuse and related matters—is the adequacy of services for children in the current child welfare system. Unfortunately there is still an overwhelming and outstanding need for culturally appropriate, community supported services. Basic services and legislative required supports, such as sexual assault counselling, community based support services and cultural care, are often not provided to contemporary survivors, adults and children.

The harms identified, being historical cultural abuse and intergenerational individual and collective trauma are therefore, for Indigenous communities, and many children and families, being reproduced. It should be noted that this is also occurring in out-of-home placements and institutions. It is crucial that human rights responses for legislative, policy and funding measures which support contemporary Indigenous victims of child sexual and related abuses, are recognised and included as a fundamental aspect of redress. This responsibility clearly falls on the federal, state and territory governments. And while child welfare falls within state or territory jurisdiction, the Federal Government has taken responsibility for funding a range of advocacy and service delivery related to Indigenous child welfare. The Commission moots the possibility of a trust fund for gaps such as cultural awareness training for service providers and funding Indigenous or other practitioners to gain the right skills to work with Indigenous survivors.[17]

Early intervention and support for families should be available as best practice with respect to child welfare, but also as a form of redress. Indigenous children continue to be placed in out-of-home care disproportionately for neglect, which is closely associated with poverty. In effect, rather than supporting families to keep children safely at home, they are being re-punished for structural and systemic inequalities, many of which are born out of past racist policies and practices. When children do require out-of-home care, the first priority is their physical and emotional safety. The Aboriginal and Torres Strait Islander Child Placement Principles ('ATSICPP') are structured to enable Indigenous children to be placed, whenever possible, in descending order of priority with kin or if this is not possible, within their community or with another Indigenous family. In its remit to prevent future abuse, and with respect to redress for past harms, the Royal Commission is called upon to affirm the ATSICPP, and recommend renewed support for both early intervention and for kin and foster carers.

CONCLUSION

The Commission is called upon to support a holistic approach to culturally appropriate service provision, and to give support to the full implementation of the recommendations of the *Bringing Them Home* report. This includes the report's recommendations that support the ATSICPP and the transfer of responsibility for child services to Indigenous organisations and bodies consistent with the principle of self-determination and the child's right to their Indigenous identity. To prevent the repeated removals of Aboriginal and Torres Strait Islander children from families and communities, the state is obliged to engage with and respect critical principles of human rights that pertain to Indigenous peoples families and children, these include self-determination, participation and consent.[18]

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Hannah McGlade is a human rights lawyer and child rights advocate who attended the 2012 meeting of the UN Committee on the Rights of the Child in Geneva. She is the author of Our Greatest Challenge, Aboriginal Children and Human Rights *which received the 2011 Stanner award.*

1 Commonwealth, Royal Commission into Institutional Response to Child Sexual Abuse ('RCIIRCSA'), *Redress and Civil Litigation*, Consultation Paper (2015).

2 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

3 In 2012-13 Aboriginal and Torres Strait Islander children were 10.6 times more likely to be in out-of-home care than non-Indigenous children nationally; Australian Institute of Health and Welfare, 'Child Protection 2012-13' (Child Welfare Series No.58, 2014) 51.

4 Marlene Brant Castellano, 'Healing Residential School Trauma The Case for Evidence-Based Policy and Community-Led Programs' 7 *Native Social Work Journal* 11, cited in RCIIRCSA above n 1, 100.

5 Linda Briskman, *Social work with Indigenous communities: A Human Rights Approach* (Federation Press, 2nd ed, 2014; Hannah McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights* (Aboriginal Studies Press, 2012); Terri Libesman, *Decolonising Indigenous Child Welfare – Comparative Perspectives* (Routledge, 2014).

6 See, eg, Victorian Aboriginal Legal Service, Submission No. 51 to the RCIIRCSA Issues Paper 6: Redress Schemes, June 2014; Secretariat of National Aboriginal and Islander Child Care (SNAICC) et al, Joint Submission No. 52 to the RCIIRCSA Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-home Care, 2014.

7 RCIIRCSA, above n 1, 103.

8 Government of Canada, *Indian Residential Schools*, Aboriginal Affairs and Northern Development Canada <https://www.aadnc-aandc.gc.ca/eng/1100100015576/1100100015577>.

9 RCIIRCSA, Terms of Reference <http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>.

10 Committee on the Rights of the Child, *General Comment No, 11*: *Indigenous Children and Their Rights Under the Convention*, 50th session, UN Doc CRC/C/GC/11 (12 February 2009) [5]-[20].

11 Robert van Krieken, 'Is Assimilation Justiciable? *Lorna Cubillo and Peter Gunner v The Commonwealth*' (2001) 23(2) *Sydney Law Review* 239; Trish Luker, 'Intention and Iterability in *Cubillo v Commonwealth*' (2005) 54(1) *Journal of Australian Studies* 35.

12 Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption*: *History, Law and Indigenous People* (New South Books, 2008).

13 Ibid.

14 Human Rights and Equal Opportunity Commission, above n 2, 38.

15 RCIIRCSA, above n 1, 119.

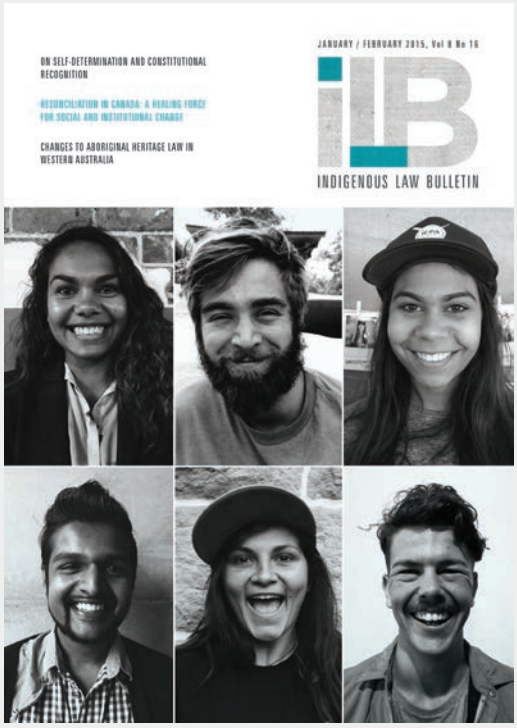
16 Ibid 15.

17 Ibid 130-131.

18 John Burton et al, 'Whose Voice Counts? Aboriginal and Torres Strait Islander Participation in Child Protection Decision-Making' (Research Report, Secretariat of National Aboriginal and Islanders Child Care, August 2013).

Yampurriparri and Tapalinga, 2014
Karina Coombes
Acrylic on linen
1200mm x 800mm

These paintings depict the Tiwi story of the shooting star, or Yamparriparri. Yamparriparri are viewed by Tiwi people as a very bad omen, a type of demon similar to a vampire. The custom on the Tiwi Islands when a shooting star is observed is to spit several times on the ground to mitigate potential bad luck. Tapalinga is the general Tiwi term for a star, or group of stars in the night sky.



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ARTIST NOTE
KARINA COOMBES

Karina's language is Tiwi and she was born in 1982. Her work has been exhibited throughout Australia in various group exhibitions of Tiwi Art. Karina's father came from the South Island of New Zealand, and her mother's country is Munupi on Melville Island, where Karina was born and has lived to this day. Her grandfather (who became a famous artist later in life) guided her artistic career when she started painting in mid-2010 giving advice on what she could correctly portray through her Tiwi family ties. She has since progressed from painting Takaringa, and her Dreaming, Jarrikalani (the turtle) to painting the various incarnations of the night sky as it appears over the Tiwi Islands.

Tiwi people identify by dance (whereas Aboriginal people identify by language group) and these ceremonies were essential to pass on crucial survival information to the next generation. For example the turtle dance tells people in its actions and in the accompanying song, how to find the turtle, how to catch it, prepare it and cook it and share it. You are responsible for ensuring people conduct the ceremonies with this dance if it is your dance.

Images and text courtesy of Munupi Arts (Melville Island) and Tali Gallery (Sydney).