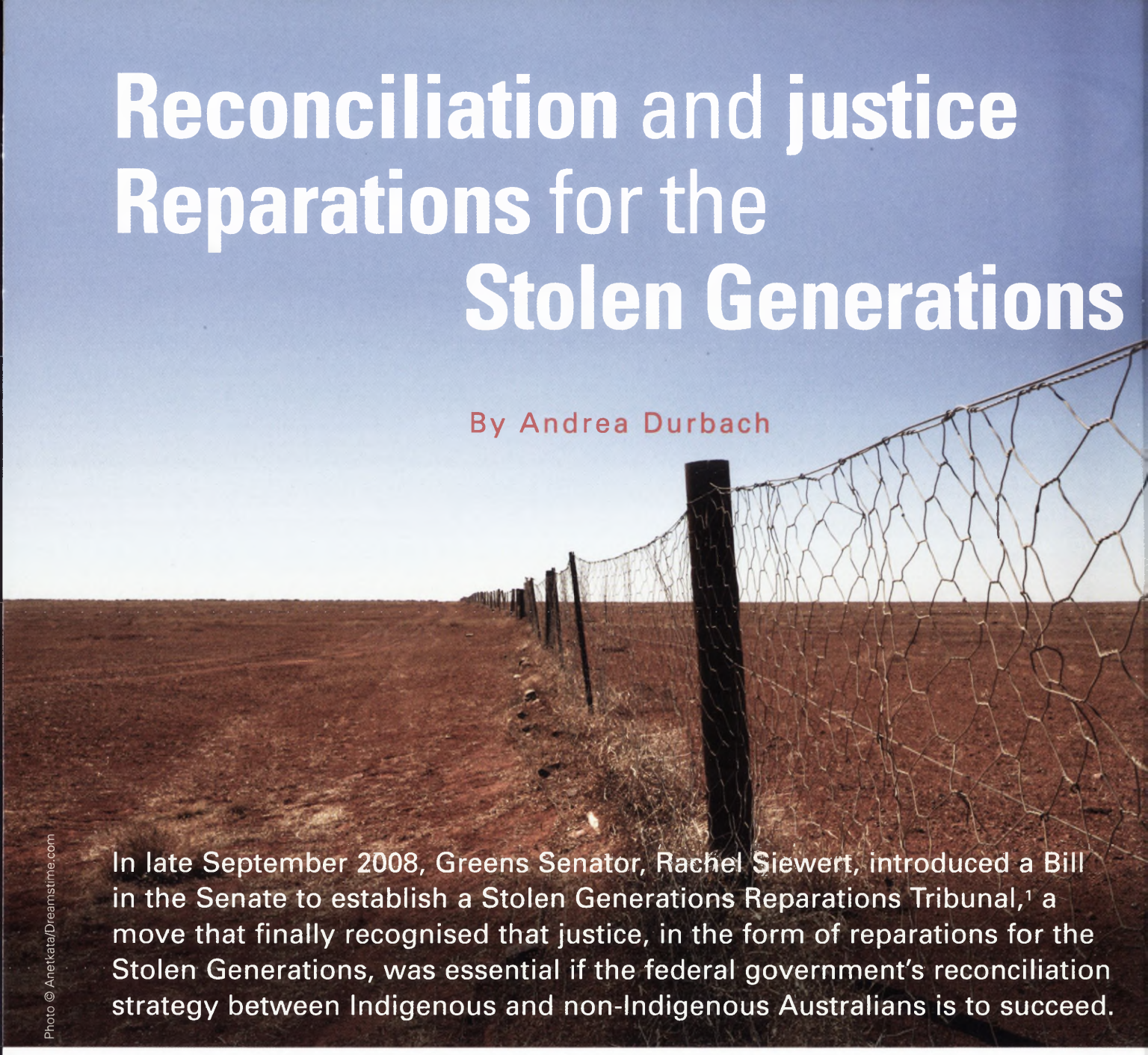
Reconciliation and justice Reparations for the Stolen Generations

By Andrea Durbach



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In late September 2008, Greens Senator, Rachel Siewert, introduced a Bill in the Senate to establish a Stolen Generations Reparations Tribunal,[1] a move that finally recognised that justice, in the form of reparations for the Stolen Generations, was essential if the federal government's reconciliation strategy between Indigenous and non-Indigenous Australians is to succeed.

The establishment of a reparations tribunal, which combines various models proposed by the Public Interest Advocacy Centre (PIAC), the Australian Human Rights Centre (AHRC) and Democrats Senator, Andrew Bartlett, was a belated but welcome response to a ten-year call by human rights and Indigenous leaders and advocates that reparations – including but not limited to monetary compensation – be made to members of the Stolen Generations.

BRINGING THEM HOME

In 1997, the *Bringing Them Home* report (the BTH report) – the culmination of the Human Rights and Equal Opportunity Commission's inquiry into the removal of Indigenous children from their families – recommended that reparations be made to members of the Stolen Generations, in keeping with Australia's international human rights obligations. This obligation is derived from the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, drafted in 1996 by the former UN Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, Professor Theo Van Boven.[2] The guidelines require nation states to address human rights violations by adopting special measures to provide expeditious and fully effective reparations where the violation includes systematic discrimination and the forcible removal of populations. The Van Boven conception of reparations, acknowledged to be more 'comprehensive' and 'encompassing' than compensation (which is traditionally seen as limited to monetary payments), includes the making of an apology, the restitution of language, land, cultural practices lost as a consequence of removal, rehabilitation where victims have suffered trauma, guarantees against the repetition of human

rights violations such as forced removals, and the payment of monetary compensation.[3]

In recognition of the widespread and enduring effects of forced removals on Indigenous families and whole communities, the BTH report recommended that reparations should be extended to include not only the individuals removed but also the family members, communities and descendants of those forcibly removed, 'who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land'.[4]

Despite Australia's international human rights obligations and the report's recommendations, the story of the Stolen Generations since the tabling of the BTH report in Parliament in 1997 has focused largely on the refusal by the Howard government to offer an apology and provide reparations. This refusal was steadfastly maintained, despite detailed testimony from members of the Stolen Generations, comprehensive reports and submissions, reports and books documenting the psychological trauma, violence and physical and sexual abuse suffered by thousands of Indigenous children forcibly removed from their parents under government policies implemented between the early 1920s and 1970s.

THE 'UNFINISHED BUSINESS' OF REPARATIONS

The Australian government's failure to recognise the relationship between justice and reconciliation explains why reconciliation has primarily remained at the level of symbolic gesture. This criticism is not confined to Australia. Indeed, in many countries recovering from histories of gross human rights violations, the concept of reconciliation has been criticised as promoting an unsatisfactory 'alternative to criminal prosecution or other forms of accountability and negating or covering over the seriousness of harm incurred by victims of abuse'.[5] The absence of any national strategy or scheme to allocate redress in the form of reparations to the Stolen Generations has long been termed the 'unfinished business' of reconciliation. The legitimacy of reconciliation depends on effecting accountability, remedying social, economic and political imbalance and redressing the individual and collective scars of the survivors of extreme trauma. In its submission to the 2003 Senate Inquiry into the Progress towards National Reconciliation, the Western Australian *Bringing Them Home* committee told the inquiry that scepticism about the national reconciliation process among many members of the Stolen Generations stemmed from a belief that 'justice has to occur before reconciliation can begin'.[6]

At a state level, almost ten years after the BTH report was released, the Tasmanian government introduced legislation to financially compensate Indigenous people who were forcibly removed from their families. The *Stolen Generations of Aboriginal Children Act* 2006 (Tas), passed by both houses of the Tasmanian Parliament in November 2006, created a $5 million fund to provide payments to eligible applicants, including children of deceased members of the Stolen Generations. *Ex gratia* payments of $5,000 were available to individuals, with a maximum payment of $20,000 for a family group. An Office of the Stolen Generations Assessor was established to determine claims by mid-January 2008. Of the 151 applications received, 106 claimants qualified for compensation under the scheme.[7]

While other states have implemented similar schemes, the Tasmanian scheme remains the only initiative specifically directed at the members of the Stolen Generations and their descendants. Applicants to the Queensland and Western Australian government schemes are required to prove that they suffered abuse while in state care to be eligible for payment; the act of removal from family *per se* is not a basis for redress.

The Queensland Redress Scheme arose from key recommendations of the Forde Inquiry (1998–99), which investigated the abuse of children in Queensland institutions. Applications for payments (which range from $7,000 to $40,000), to be lodged between October 2007 and 30 September 2008, are limited to those who experienced institutional abuse or neglect. Eligible applicants to Redress WA, who may include members of the Stolen Generations, are awarded an *ex gratia* payment of $10,000 and given an official apology by the state government. If they can provide medical or psychological evidence of loss or injury sustained as a result of the abuse, they may be entitled to a payment up to a maximum of >>

$80,000. Claims to Redress WA must be lodged between 12 May 2008 and 30 April 2009.

The Western Australian scheme – with its offer of an apology and the establishment of a 'prominent and permanent memorial' to acknowledge the impact on those who experienced harm[8] in addition to the payment of compensation – is the model that most closely reflects the reparations framework devised in 1997 by PIAC. PIAC developed its model in response to the BTH report recommendations and after extensive consideration of reparations initiatives in Canada, South Africa, America and New Zealand, the distribution of an issues paper, the conduct of focus groups and consultation with Stolen Generations members and organisations in all states, and the receipt of written submissions from Indigenous communities and human rights and church organisations.

Following an inquiry in 1999 to consider the establishment of an alternative mechanism to 'adversarial litigation' to facilitate the resolution of claims for compensation brought by members of the Stolen Generations, the Senate Legal and Constitutional Affairs Committee recommended a national Stolen Generations reparations tribunal as the model best able to 'address the need for an effective process of reparation, including provision of individual monetary compensation', and noted that PIAC's model should be used 'as a general template for the recommended tribunal'.[9]

PIAC's proposal to establish a reparations tribunal was a response to three key concerns: firstly, that the nature of potential claims and the redress sought would not necessarily be accommodated appropriately 'within the confines and limitations of the traditional legal process';[10] secondly, that the most appropriate framework for redress should extend beyond a limited focus on monetary compensation, to allow for a more comprehensive approach to reparations in keeping with the Van Boven principles;[11] and thirdly, that there were strong social and economic imperatives to address the extensive and continuing damage articulated by members of the Stolen Generations at the National Inquiry within an innovative and compassionate framework. PIAC argued that a reparations tribunal also offered key advantages over litigation, such as:

- compliance by claimants with threshold tests or criteria for eligibility for reparations (such as proof of removal), rather than engaging in the complex, protracted and, at times, artificial exercise of establishing fiduciary and statutory duty, harm and liability;
- reduced emphasis on corroborative evidence (in cases where threshold criteria have clearly been met), as recognition that, with the passage of time, many witnesses are no longer alive and documentary evidence is often non-existent or has been destroyed;
- avoiding the prospect of revisiting the trauma surrounding acts of removal and subsequent harm in an adversarial setting;
- an absence of overly formal procedures and the inclusion of tribunal members and staff with links to Indigenous communities, appropriate training and a demonstrated understanding of and expertise in Stolen Generations issues and history;
- the expeditious determination of relief, with minimal costs to both claimants and respondents, particularly where many potential claimants will now be elderly; and
- a shift away from a focus on damages as individual monetary compensation to reparation, shaped by reference to historical and sociological factors, community need and available resources.

The Howard government rejected the Senate Committee's report and, in the absence of any alternative, litigation has, until recently, been the only option available to members of the Stole Generations to resolve claims for redress.

LITIGATION BRINGS LONG-AWAITED REDRESS

In August 2007, the South Australian Supreme Court became the first Australian court to recognise that the removal of an Aboriginal child from his mother was unlawful and amounted to wrongful imprisonment. The late Bruce Allan Trevorrow[12] was awarded $525,000 as compensation for the emotional, physical and cultural consequences of his unlawful removal at the age of 13 months. His award included a provision for exemplary damages, the Court finding that 'the conduct of the State was conscious, voluntary and deliberate … [and that] [d]espite legal advice to the contrary the State removed the plaintiff from his family'.[13]

At a subsequent hearing in February 2008, the court awarded Mr Trevorrow a further $250,000, 'a lump sum of $250,000 in lieu of interest'.[14] Five years earlier, Sydney woman, Valerie Linow, was awarded $35,000 by the NSW Victims Compensation Tribunal for the psychological harm arising from the sexual assault and violence she suffered after she had been sent to work as a domestic servant on a rural property at the age of 14.[15] At the age of two, the Aboriginal Welfare Board had removed Ms Linow from her family, placing her in the Bomaderry Children's Home and, subsequently, at Cootamundra Girls' Home.

The *Linow* case came after the Federal Court's decision in 2000 in *Cubillo v Commonwealth*.[16] The Court dismissed claims by the plaintiffs, Lorna Cubillo and Peter Gunner, for wrongful imprisonment, breach of statutory duty, negligence and breach of fiduciary duty arising from their removal from their families and their detention in mission-run institutions – claims similar to those brought by Bruce Trevorrow. Although finding against the plaintiffs, O'Loughlin J did, however, assess notional general damages for each applicant in the event that he was overruled on the law. He calculated Lorna Cubillo's damages at $126,800 and Peter Gunner's damages at $144,100. (In 2001, Lorna Cubillo and Peter Gunner lost their appeal to the Full Federal Court.[17])

Most of the handful of legal proceedings initiated by members of the Stolen Generations since the release of the report have been unsuccessful, given the factors highlighted by O'Loughlin J in *Cubillo*: the unavailability of critical evidence and the failure to discharge the onus of proof, the prejudice to the defendant given the frailty,

illness or death of key witnesses (potential evidence 'clouded by age or time')[18] and/or the loss or destruction of records and material documents.[19] Additionally, the 'protection' and 'welfare' laws[20] and policies between the early 1920s and 1960s, which regulated the removal of Aboriginal and part-Aboriginal children, were primarily assessed in the litigation by reference to the values and behaviour prevailing at the time:[21] the standards of entrenched 'misguided paternalism'.[22]

The case of *Trevorrow*, however, marks a critical turning point for potential Stolen Generations litigants, who stand to recover damages well in excess of any monetary compensation available under the various state schemes if they can demonstrate a case for extending applicable statutory limitation provisions and prove 'unlawful removal'.

Monetary compensation can undoubtedly make a significant practical difference to the lives of individuals and communities; however, the hurdles to substantiate a legal claim remain considerable, as do the financial and psychological resources required to sustain protracted litigation.

During PIAC's consultations on the development of the reparations tribunal proposal, many members of the Stolen Generations expressed the view that it was both difficult and inappropriate to assess the level of damages to adequately compensate their suffering. In addition, individual monetary compensation was considered divisive, especially when amounts awarded differ substantially depending on the forum in which the claim is determined. A range of reparation measures, including a set *ex gratia* amount on proof of removal and additional amounts where abuse is evident, was suggested as a more acceptable and appropriate, collective approach to redress in recognition of the widespread, ongoing harm suffered by whole families and communities.

AN OPPORTUNITY FOR REPARATION

In the last 12 months, the opportunity to resurrect a reparations framework to address the 'unfinished business' of reconciliation was ignited by two significant events: the Rudd government's comprehensive apology to members of the Stolen Generations early in its first term of office, and the consideration by the Senate of the Stolen Generations Compensation Bill 2008 (the Compensation Bill), proposed by Senator Andrew Bartlett, and the tabling, a few months later, of the Stolen Generations Reparations Tribunal Bill 2008 (the Bill) by Senator Rachel Siewert.

At the time of the apology to Australia's Indigenous peoples, prime minister Rudd assessed the 'the mood of the nation' as favouring reconciliation. He noted that symbolism was important but that 'unless the great symbolism of reconciliation is accompanied by an even greater substance, it is little more than a clanging gong'.[23] To a large degree, the substance to reconciliation may finally have been provided in the form of the Bill proposed by the Greens. It modifies and expands the Compensation Bill in line with the initial PIAC proposal and the joint submission and draft legislation provided by PIAC and the AHRC to the Senate Inquiry into the Stolen Generations Compensation Bill 2008 (the Inquiry). The Inquiry Committee rejected the Compensation Bill in favour of a National Indigenous Healing Fund, but made some significant observations in support of a reparations approach, including that:

- monetary compensation is a component of reparations;[24]
- a 'holistic, nationally consistent approach [is] the most appropriate means of … promoting an effective model of healing';[25]
- redress for the Stolen Generations requires urgent resolution and governments should act to resolve this issue as a matter of priority';[26] and
- the reparations tribunal model proposed by PIAC and the AHRC offered a 'valuable [framework] for consideration in the development of any reparations scheme'.[27]

Taking its cue from the Committee's observations and building on the reparations model proposed by PIAC and the AHRC, the Bill calls for the establishment of a tribunal to provide reparations, including but not confined to monetary compensation, in acknowledgment 'that forcible removal policies were racist and caused emotional, physical and cultural harm to the Stolen Generations'.[28] The Bill seeks to validate the specific experience and identity of the Stolen Generations by providing:

- a forum for Indigenous persons affected by forcible removal policies to 'tell their story, have their experience >>

acknowledged and be offered an apology by the Tribunal or others';[29]

- reparations that seek to redress the widespread and enduring social, cultural and economic damage endemic to the Stolen Generations experience. These include 'measures such as funding for healing centres, community education projects, community genealogy projects, and funding for access to counselling services, health services, language and culture training';[30] and
- reparations for family members, communities and descendants of those removed in acknowledgement of the intergenerational harm associated with forcible removal policies.[31]

Under the Bill, applicants may be entitled to monetary compensation under the head of *ex gratia* payments up to a maximum of $20,000 (on proof that the act of removal was authorised by legislation or by government)[32] and under the category of reparations, where monetary compensation may be considered appropriate for redressing collective or community rather than individual harm.[33] Essential to the form of reparations is that applicants will be given the opportunity to participate in their design and delivery.[34]

Although the Bill has been tabled, the Senate has yet to determine a time for its consideration and debate. A further failure by the Australian government to adopt a reparations framework, will only suspend and prolong the critical healing of Indigenous Australians and undermine any real prospect of effective reconciliation. As Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, said at the annual AHRC public lecture in September 2008:

> 'Over the next 12 months we will either rise to the human rights challenges facing Indigenous peoples and ensure that there is a clear synergy between reconciliation and human rights protection, or we will condemn reconciliation to being a marginal concept of little relevance to Indigenous peoples. … (U)ltimately, an apology without monetary compensation is the starkest example of what a commitment to reconciliation looks like when it is not accompanied by a corresponding commitment to human rights, to redress, and to justice.'[35] ■

Notes: **1** The Stolen Generations Reparations Tribunal 2008. **2** Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Theo Van Boven at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/85787a1b2be8a169802566aa00377f26?Opendocument. See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), recommendation 3 (at 282). **3** *Bringing Them* Home report, recommendation 14 (at 304). **4** *Ibid*, recommendation 4, 652. **5** Stephen Parmentier, *Reconciliation and Human Rights: Bridging the Gap in Times of Transition*, Annual Australian Human Rights Centre Lecture, 25 September 2008 (unpublished). **6** Senate Legal and Constitutional References Committee, Parliament of Australia, *Reconciliation: Off Track* (2003), 52, n139. **7** Barbara McMahon, 'Tasmania to compensate Aboriginal "Stolen Generation"', *Guardian*, 22 January 2008, http://www.guardian.co.uk/world/2008/jan/22/australia.barbaramcmahon. **8** Redress WA, Government of Western Australia, http://www.redress.wa.gov.au/about.asp#apol. **9** Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: A Legacy of Generations* (2000). See http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/stolen/report/c08.pdf at 259. **10** Alexis Goodstone and Amanda Cornwall, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation: Addressing Term of Reference (2)*, PIAC (2000) at http://www.piac.asn.au/publications/pubs/SenateInquiryintotheSG.pdf **11** *Ibid*. PIAC argued for a body that 'should not only make awards of monetary compensation, but also allocate funding for other reparation measures, and have the power to recommend that third parties (for example, churches, welfare agencies) take action to implement reparations, where appropriate': at 18. **12** *Trevorrow v South Australia (No. 5)* [2007] SASC 285. **13** *Ibid* [1215]–[1217]. **14** Pia Akerman and Jeremy Roberts, 'Test for Stolen Generations Payout', *The Australian*, 29 February 2008 at http://www.theaustralian.news.com.au/story/0,25197,23294261-601,00.html. **15** This case was unreported and the reasons remain confidential. The alleged assaults that were the subject of the application occurred in 1958. At the time, the maximum compensation payable by the tribunal was $50,000. **16** *Cubillo v Commonwealth (No. 2)* (2000) 103 FCR 1. **17** *Cubillo v Commonwealth* [2001] FCA 1213. **18** Jennifer Clarke, 'Case Note: Commonwealth Not Liable: *Cubillo and Gunner v Commonwealth*' (2000) 5(2) *Indigenous Law Bulletin* 11, at 14. **19** *Ibid*. **20** *Ibid*, 11. **21** *Kruger v Commonwealth* (1997) 190 CLR 1, at 76 (Toohey J). See *Cubillo v Commonwealth* at 39-40. See, also, *Williams v The Minister, Aboriginal Land Rights Act* 1983 (No. 2) [1999] NSWSC 843, per Abadee J at [757]: 'It is appropriate to repeat, that the events that I am being asked to judge and evaluate commenced in 1942 and finished in 1960. Thus in 1999 I am asked to judge that which took place 39 to 57 years ago (over a half a century)! I repeat again that these are events that occurred in a different Australia, a society with different knowledge, and with different moral values and standards. To apply attitudes of the present community to a period commencing so long ago would be to apply the standards of today not those of the 1940s and 1950s.' **22** *Cubillo v Commonwealth*, 408. **23** Prime Minister of Australia, 'Apology to Australia's Indigenous Peoples', House of Representatives, Parliament House, Canberra, 13 February 2008 at http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm. **24** See Committee view, Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report of the Inquiry into the Stolen Generation Compensation Bill 2008* (2008) para 3.121,47 at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_generation_compenation/report/report.pdf. **25** *Ibid*, para 3.122, 47. **26** *Ibid*, para 3.127, 48. **27** *Ibid*, para 3.126, 47-8. **28** Section 5(a), The Principles, Stolen Generations Reparations Tribunal Bill 2008. See http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbills%2Fs654_first%2F0001%22;rec=0. **29** *Ibid*,s10(d), Functions of Tribunal. **30** *Ibid*, s28(1)(a)-(j), Forms of reparation. **31** *Ibid*, s30(4) and (5), Eligibility criteria for an *ex gratia* payment or reparation. **32** *Ibid*, s29(3), *Ex gratia* payments. **33** *Ibid*, s28(1)(i), Forms of reparation. **34** *Ibid*, s5(c), The Principles. **35** Tom Calma, Concluding Remarks, *Reconciliation and Human Rights: Bridging the Gap in Times of Transition*, Annual Australian Human Rights Centre Lecture, 25 September 2008 (unpublished), 3 and 5.

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