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THE AUSTRALIAN 'STOLEN GENERATIONS' AND REPARATIONS

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Explanatory Note: This paper is not for publication or intended to be an exhaustive and scholarly treatise of the subject in question. This paper should be treated as a brief expose of the ideas being pursued by the author for his JSD at Yale Law School. It is hoped this expose will stimulate discussion at the seminar in question.

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INTRODUCTION

From the turn of the 20th century until at least the mid to late 1960s, large numbers of Aboriginal children in all States and Territories of Australia were separated from their families to be raised in institutions and by foster parents. The justifications and policy motives behind the practice varied but assimilation was at the crux of the removal process. The systematic separation or removal of Aboriginal children from their families received nation wide attention with the tabling in Commonwealth Parliament on 26 May 1997 of the Human Rights and Equal Opportunity Commission ('HREOC') report of the National Inquiry into the Separation of Aboriginal and Torres Straight Islander Children from their families (the 'National Inquiry'), titled *Bringing Them Home*[1]. This report which has been the catalyst for the demands for reparations for the so-called 'Stolen Generations', provides neither a philosophical nor a public policy analysis of this remedy. Even the report's analysis of the international law on reparations is limited and superficial.[2]

This study seeks to redress this deficiency. The project will analysed both the international law and philosophical justifications for awarding reparations.

THE HISTORY

The term 'Stolen Generations' was coined to describe the historical policy and practice of separating Aboriginal children from their families,[3] which in most states commenced in earnest at the turn of 20th century. The first legislative framework for the separation of Aboriginal children from their families was the *Aboriginal Protection and Restriction of*

[1]HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (AGPS, Canberra, 1997).

[2]One of the two principal Commissioners of the National Inquiry, Sir Ronald Wilson, has stated that the National Inquiry Report is a political rather than a legal document. This may be so, which makes it even more surprising while the report failed to look at the public policy dimension to the awarding of reparations for the 'Stolen Generations'.

[3] Australian historian Peter Read coined this term in relation to his historical study of New South Wales. P READ, THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NSW 1883 TO 1969 (NSW Ministry of Aboriginal Affairs, Sydney, 1981).

the Sale of Opium Act 1897 (Qld), which was followed seven years later by the *Aborigines Act 1905* (WA). The Queensland and Western Australian statutes formed a blueprint for legislation in the other states (except Tasmania[4]) and the Northern Territory. The churches housed many of the separated children in church-run missions. By the mid-1960s, this process of removal to missions had slowed down and the last mission school closed in the mid-1970s.

Separation policy sought to force assimilation, by completely 'absorbing' Aborigines, particularly 'lighter skinned' ones into the dominant white Australian society. The 1937 Canberra conference of Commonwealth and State Aboriginal Affairs ministers passed a resolution supporting the complete 'absorption' of the Aboriginal peoples of Australia into the 'white' population:

> DESTINY OF THE RACE. – That this Conference believes that the destiny of the natives of aboriginal origin, but not of the full-blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.[5]

Much of the education and the very way of life in the missions and other institutions, were aimed at inculcating non-Aboriginal beliefs in Aboriginal children. The missions emphasized Christian teaching with only an elementary teaching of literacy and numeracy skills,[6] and a focus on 'vocational' training for some useful trade or occupation, yet this training was often sub-standard or non-existent.[7]

There are numerous allegations of harsh conditions, denial of parental contact and cultural heritage, brutal punishment, and physical and sexual abuse in the missions. Typical is this statement from an Aboriginal removed to a mission as a child:

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[4]In Tasmania, Aboriginal children were removed under general child welfare legislation.
[5]COMMONWEALTH OF AUSTRALIA, ABORIGINAL WELFARE-INITIAL CONFERENCE OF COMMONWEALTH AND STATE ABORIGINAL AUTHORITIES (AGPS, Canberra, 1937) 3.
[6]F BATEMAN, REPORT OF SURVEY OF NATIVE AFFAIRS (WAGP, Perth, 1948) 10.
[7] ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, AFTER THE REMOVAL (ALSWA, Perth, 1996) 37.

> We were inculcated into a Christian religion and my Aboriginal culture or history was non-existent … It was really an understatement to say that we were not taught anything about our Aboriginal culture or history. The fact is that our Aboriginality was never mentioned, it was never a consideration. [8]

Debate continues about the enduring effects of the separation process and subsequent institutionalization. Claims abound of loss of culture, family, connection and trust, as well as of enduring pain from physical, sexual or psychological abuse. Many within and outside the Aboriginal community assert this has produced dysfunctional generations of Aboriginal families – the so-called 'Stolen Generations'. These claims of historical injustice and enduring suffering have led to the demands for reparations.

DEMANDS FOR REPARATIONS

Aboriginal individuals and organisations have been active since at least the late to mid 1980's in advocating for a national inquiry into policies and practices that lead to the forced separation of Aboriginal children from their families during the first six decades of the 20th century.[9] The Secretariat of the National Aboriginal and Islander Child Care ('SNAICC') resolved at its national conference in 1990 to demand a national inquiry into the separation issue. On 4 August 1991, National Aboriginal and Islander Children's Day, SNAICC in conjunction with high profile Aboriginal entertainers, Archie Roach and Ruby Hunter, publicly launched a demand for an inquiry.

Other Aboriginal organisations, such as, the Aboriginal Legal Service of Western Australia ('ALSWA') and Link-Up (NSW) were also vocal in their demands for a national inquiry. In association with the push for a national inquiry into separation procedures and policies, the ALSWA commenced a project to interview Aboriginal people who had been removed from their families. The ALSWA interviewed over 600 people before it launched its first report in June 1995, *Telling Our Story*. By the time the

[8] ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, TELLING OUR STORY (ALSWA, Perth, 1995) 40.

[9] Ron Butler speaking at the workshop on removal of Indigenous children at the Australian Reconciliation Convention in Melbourne, 26 May 1997, stated that the Secretariat of National Aboriginal and Islander Child Care, along with other organisations and individuals had been lobbying governments to hold an inquiry since the late 1980's.

ALSWA completed its second report in May 1996, *After the Removal,* it had collected over 700 stories. Both reports were submitted to the National Inquiry.

Others took the litigation pathway (unsuccessfully); most notably a female plaintiff from Sydney named Joy Williams[10] and a number of Aboriginal people from the Northern Territory.[11] As to the latter, the drive for litigation was given support and enforced by a 1994 conference in Darwin, called *The Going Home Conference*, which brought together Aboriginal people, mainly from the Northern Territory, who had been separated from their families. Ron Merkel, then QC, addressed the conference on possible legal redress.

On 11 May 1995, the Commonwealth of Australia Attorney-General Michael Lavarch commissioned HREOC to undertake an inquiry into the past practice of forcibly separating Aboriginal children from their families. The National Inquiry was officially launched in Adelaide on 10 August 1995.

THE NATIONAL INQUIRY AND REPORT

On 26 May 1977, after eighteen months of public and private hearings and submissions from Commonwealth, State and Territorial governments, churches, Aboriginal organizations and Aborigines who were separated from family and other interested parties, the National Inquiry report, *Bringing then Home,* was tabled in the Commonwealth Parliament of Australia. It documents widespread and systematic racial discrimination and gross ill treatment of Aboriginal Australians, as lawmakers and administrators sought to resolve 'the Aboriginal problem'.

The National Inquiry report states that from at least the mid or late nineteenth century, there was a policy of forcible separation adversely affecting Aborigines across Australia in all States and Territories. It argues that, in many cases, forcible separation resulted in deprivation of liberty, violation of parental rights, abuses of legislative and administrative

[10] *Williams v Minister Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497.
[11] *Kruger v Commonwealth; Bray v Commonwealth* 146 ALR 126.

powers, breaches of guardianship obligations and breaches of human rights. The report goes further to argue that the history of separation equaled genocide. Specifically, the laws and policies promoting the separation of Aboriginal children aimed to destroy, or had the effect of destroying, the Aborigines as a racial group and their 'Indigenous culture'. The report recommends that the Commonwealth, State and Territorial governments and relevant churches, provides a reparation package to those separated and their families and communities.

In total, the National Inquiry report made 54 recommendations. The recommendations covered all the components of reparations: acknowledgement of truth and an apology; guarantees of non-repetition of violations; rehabilitation; compensation; and restitution. In relation to one of the more controversial recommendations, compensation, the National Inquiry stated that part of the reason a 'National Compensation Fund' should be established is because of the procedural, evidential and cost difficulties involved in litigation.

GOVERNMENTAL RESPONSES

State, Territorial and Commonwealth governments have made some attempts to provide reparations, such as providing funding for family reunions, oral histories and counselling. But what remains the most outstanding issues are an apology by the Commonwealth Parliament and the establishment of a compensation tribunal. Even though historically, except in the case of the Northern Territory, it was the State governments that established and maintained the separation schemes, in contemporary Australian society it is the Commonwealth government that has dominated the debate on this issue and from whom the Aboriginal and non-Aboriginal community have demanded leadership.

INTERNATIONAL LAW AND REPARATIONS

The obligation to provide reparations for human right abuses, especially gross violations of human rights, has been recognised under international treaty and customary law,

decisions of international bodies such as the United Nations Human Rights Committee and Inter-American Court of Human Rights, national law and practices and municipal courts and tribunals. In 1989 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned Professor Theo van Boven to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. He came up with a set of basic principles and guidelines.[12] Reparation involves not only compensation but restitution, rehabilitation and satisfaction and guarantees of non-repetition of the human right's violation. [13]

A number of significant international human rights treaties create a general duty to make appropriate reparations for violations of human rights. These include the International Covenant on Civil and Political Rights (ICCPR)[14], International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[15], Convention on the Rights of the Child (CROC)[16], and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[17]

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[12] *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 Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996.

[13] It should be noted that the van Boven principles have been revised by the 'Bassiouni principles'. Refer to 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report of the Special Rapporteur, M Cherif Bassiouni, submitted in accordance with the Commission resolution 1999/33,' E/CN.4/2000/62, 19 January 2000.

[14] ICCPR *Article 2(3)(a)*: 'Each State Party… undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy…', G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) U.N.T.S. 171, entered into force Mar. 23, 1976.

[15] ICERD *Article 6* : 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies… as well as the right to seek just and adequate reparation or satisfaction…' 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

[16] CROC *Article 39:* ' States Parties shall take all appropriate measures to promote physical and physiological recovery and social integration of a child victim of… [any form of] cruel, inhuman or degrading treatment or punishment…', G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

[17] CAT *Article 14* – 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.', G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/15 (1984); adopted by the General Assembly on 10 December 1984.

However, in seeking the support of international law to support the demand that the Australian Government provide reparation to the 'Stolen Generations', one has to deal with the inter-temporal issue. This is because for all or nearly all of the period that removal of Aboriginal children was practised in any significant way (prior to the 1970s) Australia was not a signatory to the major relevant international human rights instruments such as the ICCPR or the ICERD. Although it is arguable that during the relevant period, international customary law prohibited the removal of children from family based on racial identity, denial or family contact and cultural heritage and physical and sexual abuse. Even if such matters did not have customary law status they were still recognised as human rights by the international community.

Before concluding this section on international law I should comment on the controversial claim that the separation policy amounted to genocide. As previously stated it has been argued that the Aboriginal child separation policy was genocide in that the intention of the policy was to destroy the Aboriginal race by assimilating the next generation of Aborigines into mainstream European society and culture.[18] The crux of the argument is that the separation policy intended to assimilate Aboriginal children into white society, whereby they would lose their 'Aboriginality'. Further the 1948 Convention on the Prevention and Punishment of the Crime of Genocide includes as part of the definition of genocide the forcible transfer of 'children of the group to another group' with the 'intention 'to destroy, in whole or in part, any national, ethnical or religious group.'[19] If the separation policy did amount to genocide, some of the inter-temporal arguments may be overcome as Australian became a signatory of the Genocide Convention in 1949. However, it must be acknowledged that it would be difficult, both legally and politically to establish that the separation policy amounted to genocide. The argument against the genocide claim was that there was never any intention to physically destroy the Aboriginal race via the separation policy and that in fact the opposite was

[18] M Storey, *Kruger v The Commonwealth: Does Genocide Require Malice?* 21 U. NEW SOUTH WALES L. J. 234 (1998); HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (AGPS, Canberra, 1997).
[19] Convention on the Prevention and Punishment of the Crime of Genocide, Art II.

true. That is the separation policy was done in the best interest of the Aboriginal children by helping them prepared for life in 'mainstream' Australian society.

Some may wish to argue that although the separation policy did not amount to physical genocide it was consistent with cultural genocide. However, cultural genocide is not included in the definition of genocide under the Genocide Convention. May be cultural genocide comes under the international customary law against genocide. But there still remain difficulties with the domestic incorporation of customary law in Australia as there does with the Genocide Convention itself.[20]

LEGAL PHILOSOPHY, JUSTICE AND MORALITY

Legal and philosophical bases or rationales exist for the awarding of reparations for an historical injustice. As Justice Guha Roy of India in 1961 wrote: 'That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable.'[21]

Roberts and Nozick argued that reparations ought to be awarded to victims of historic injustice because morality and rectificatory justice demands it.[22] Waldron writes that reparations are morally important to the identity of individuals and communities subjected to historic injustice.[23]

Reparations might also promote reconciliation between Aboriginal and non-Aboriginal Australians. Janna Thompson in her book, *Taking Responsibility for the Past: Reparation and Historical Justice,* argues that respect and reconciliation place a moral responsibility

[20] *Kruger v Commonwealth* (1997) 190 CLR 1, 72, 159; S Peters, *The Genocide Case: Nulyarimma v Thompson*, AUSTRALIAN INTERNATIONAL L. J. 233 (1999).
[21] Justice G Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law*, 55 AMERICAN J. I. L. 863, 863 (1961).
[22] R Roberts, 'Justice and Rectification: A Taxonomy of Justice' in R Roberts (ed), INJUSTICE AND RECTIFICATION (Peter Lang, New York, 2002), 7; R NOZICK, ANARCHY, STATE, AND UTOPIA (Blackwell Press, Oxford, 1974) 152-3.
[23] J Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 6 (1992).

on current generations to repair historical injustices, although 'it may not always be necessary to make reparations for past wrongs in order to establish or re-establish relations of respect.'[24]

This project will explore and analyse how legal philosophy or theory – specifically natural law and liberalism - may be used to justify reparations for the 'Stolen Generations'.

(a) Natural Law

Here the writings of John Finnis will form the cornerstone of my analysis. Finnis, a major player in the modern development of natural law theory, arguably provides the best modern Thomist account of natural law.[25]

Finnis' theory proposes that natural law is the set of principles of practical reasonableness in ordering human life and human community. In essence, Finnis' theory is in terms of human goods and basic forms of human flourishing. Finnis argues that the aim of natural law theory is to provide guidance to the living of a good life which will lead to a good and harmoniously ordered community.[26] This argument picks up the natural law theory of Aquinas,[27] which looks at the role of individuals and their actions, and the impact these have on the rest of the community. Finnis sees individual and community interests as inextricably bound together. Where individuals flourish the common good is also served, and the function of law is to facilitate both human flourishing and the common good.

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[24] J THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL JUSTICE (Polity Press, Cambridge, 2004) 35.

[25] Finnis is a fertile and ongoing writer. Refer for example, J FINNIS, NATURAL LAW AND NATURAL RIGHTS (Clarendon Press, Oxford, 1980); J Finnis, *The Natural Law Tradition,* 36 *J of Legal Education* 492 (1986); J Finnis, 'Natural Law and Legal Reasoning' in B George (ed), NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Clarendon Press, Oxford, 1992); J Finnis, 'Natural law: the Classical Tradition' in Coleman and Shapiro (eds), THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (OUP, Oxford, 2002), 1-60.

[26] J FINNIS, NATURAL LAW AND NATURAL RIGHTS (Clarendon Press, Oxford, 1980) 23.

[27] And to a lesser extent Aristotle. Finnis is a disciple of Aquinas, and I would only call him an Aristotelian insofar as Aquinas was also an Aristotelian.

Within the paradigm of Finnis' theory, it may be argued that being separated from family and cultural heritage violates a natural right of an individual. Arguably, the interests of the individual members of the 'Stolen Generations', the Aboriginal community in general and Australian society as a whole, are best served by the awarding of reparations for the violation of natural rights. However this may not be the case if the awarding of reparations results in detriment or disadvantage to other members of the Australian society. Opponents of affirmative action based reparations may make such an argument.

(b) Liberalism

Here it is proposed to approach liberalism in Rawlsian terms.[28] Rawls emphasised a contractarian device to illuminate the content of justice. However, he understood the duty to be just as a categorical natural duty, not as a contractually incurred obligation.[29] I will explore whether this Rawlsian view of duties and obligations provides a rationale for the awarding of reparations for the 'Stolen Generations'.

Rawls argued that 'self respect' is crucial to his theory of justice.[30] This requires the liberty to examine one's plan for life and to be free to change it to ensure one feels their life has worth attached to it. The decision on how to lead one's life is a personal decision. However it is a decision that is made from the options available. The range of options is determined by one's cultural heritage. Thus culture is an important component of Rawls' views on liberty even though he never included cultural membership as one of his primary goods with which justice is concerned. Cultural membership should be viewed as capable of being a primary good in Rawls' theory, because of its potential importance to

[28] J RAWLS, A THEORY OF JUSTICE (OUP, Oxford, Revised Edition, 1999)
[29] J RAWLS, A THEORY OF JUSTICE (OUP, Oxford, Revised Edition, 1999) 144ff.
[30] J RAWLS, A THEORY OF JUSTICE (OUP, Oxford, Revised Edition, 1999) 155-159. It is noted that Finnis and J Raz also deal with this issue of self-respect. Finnis argues that a basic form of human flourishing is represented by what he calls 'practical reasonableness'. That is just the ability to deliberate upon reasons, make choice on the bases of reasons, and develop oneself as a rational, choosing person: J FINNIS, NATURAL LAW AND NATURAL RIGHTS (Clarendon Press, Oxford, 1980) 100-127. J Raz argues that a person can only develop himself/herself as a rational, choosing person if she has good options to choose from: J RAZ, THE MORALITY OF FREEDOM (Clarendon Press, Oxford, 1989).

Rawls' emphasises on liberty.[31] The demise of culture may restrict the freedom of members of that culture to make choices, which reduces the liberty of individuals. Such an argument may lend support for reparations measures that seek to 're-connect' members of the 'Stolen Generations' with their Aboriginal culture and families.

PUBLIC POLICY

Even if one can justified the awarding of reparations to the 'Stolen Generations', one must then deal with the public policy dimensions. Here the difficulties with present-day reparations for historic injustice will be identified and examined.

Others have identified some of these difficulties, albeit not in the context of the particular claims of the 'Stolen Generations'. [32] One particularly difficult issue is how to calculate the reparations given the uncertainties about what would have happened had the injustice not occurred. Would the 'victims' have turned out the way they did anyway? Members of the 'Stolen Generations' might have received a poor education even if they were not removed from family and sent to a mission schools. The education level attained by many Aboriginal children today who attend public schools is not so different from that attained by those who attended mission schools in the past.[33] Current problems encountered by Aboriginal children, of course, may have been caused to some degree by inter-generational effects transmitted from the 'Stolen Generations'.

Another issue is whether current governments, organizations and individuals have an obligation to provide reparations for past conduct. The current Australian Prime Minister for example, maintains that 'Australians of this generation should not be required to

[31] A culture might conceivably make exclusivist claims that arguably would be inconsistent with freedom. This argument and whether Aboriginal cultures make such claims will be examined in my proposed dissertation.
[32] See generally, J Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992); and J Waldron, *Redressing Historic Injustice*, 52 UNIV. OF TORONTO L. J. 135 (2002).
[33] ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, AFTER THE REMOVAL (ALSWA, Perth, 1996) 148.

accept guilt and blame for past actions and policies' concerning the 'Stolen Generations'.[34]

There is also the vexed issue of providing reparations for the relatives or descendants of the 'victims' of the historical injustice. It is difficult to justify providing reparations for those who were removed as children; it is more difficult still to justify reparations for their children who have had to grow up under the 'shadow' of the 'Stolen Generations'? Would it ever be justifiable to provide reparations for subsequent Aboriginal generations?

Also the connection of awarding reparations with reconciliation between Aboriginal and non-Aboriginal Australia will be explored. This reconciliation became a legislative goal in the early 1990s with the enactment of the *Council for Aboriginal Reconciliation Act 1991* (Cth) and the establishment of the Council for Aboriginal Reconciliation.

CONCLUSION

The issue of reparations for the Australian 'Stolen Generations' has along with native title dominated debate on Aboriginal affairs in Australia for the last decade. This at a time when there has been a proliferation of demands for reparations for historical injustices in many countries.[35] Thus it is hope this project will not only be a vehicle to tell the Australian story but provide some relevance to other reparation scenarios

[34] *PM No Apology*, SYDNEY MORNING HERALD, 25 August 1999, 4.
[35] Although arguably the 'pace and intensity' of reparations demands have declined in the new millennium. Refer to J TORPEY, MAKING WHOLE WHAT HAS BEEN SMASHED (Harvard University Press, Cambridge, Massachusetts, 2006).