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The Indigenous People in Australia

- Examination of Child Removal Policies from a Human
Rights Perspective

Graduate Thesis
20 points

Supervisor
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Field of study
International Human Rights Law

Spring 2001

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SUMMARY

Aboriginal and Torres Strait Islanders, the Indigenous peoples of Australia, inhabited this continent thousands of years before the arrival of the Europeans. Prior to the arrival of the white man the Aboriginal and Torres Strait Islanders, hereafter referred to as the Aboriginals, practiced their own culture and applied their own laws without interference from external powers. Some scientists claim that the ancestry of the Aboriginals extends back over 60 000 years, under which time the ownership of the lands was undisputed. The situation radically changed when James Cook discovered the Australian continent and subsequently, in 1770, claimed possession of the whole east coast. The English' occupation of the Aboriginal lands was justified under the *terra nullius doctrine*, and it did not take long until the invaders controlled the whole continent. As a consequence, the Indigenous people had to leave their native lands. This had naturally enormous effects of the Aboriginal culture, particularly since the Aboriginal people have and always have had a special connection to their lands and everything natural. Separation of families, starvation, massacre, rape and disease prevented people from surviving and reproducing. Even those who did survive were deprived of their right to live within their culture and control their lives, since the non-indigenous interfered with their systems of law and their look upon welfare, education and land title.

Of all the tragedies suffered by the Indigenous peoples of Australia, the greatest and most unforgivable wrong has probably been the removal of Indigenous children from their families and communities to be brought up in the non-indigenous community. Ever since the first days of colonization Indigenous children have been forcibly separated from their families and communities. In early colonial times many Aboriginal children were taken from their families to be used as cheap labour for the white settlers. However, these random child removals were later converted into systematic removals. As Indigenous peoples were seen as threats to the white settlements and were considered a shame of the nation the different states, and later the federation, introduced a number of policies with the aim to efficiently decrease the number of the Indigenous population. The process of removing children has primarily been affecting the Indigenous peoples from 1900's to 1960's but the effects of these child removal practices are clearly visible in contemporary society. The children were cut off from their culture and forced into a new way of thinking, which resulted in a loss of identity. They did not feel either white or black and were not entirely accepted in either the Aboriginal community or among the white people. They were simply a lost generation of children. These policies, today known as child removal policies, had an extremely harmful effect on overall Aboriginal and non-Aboriginal relations throughout the whole period of colonization. The systematic child removals have caused countless social problems, which affect Aboriginal society today and undoubtedly touch almost every Aboriginal person. It is impossible to estimate the number of children being

removed with any precision, especially since many relevant documents are missing. However, it has been suggested that one out of seven Aboriginal children was removed from their families in the 20th century, as opposed to the approximate one in 300 white children removed. It has been claimed that at least one third of all children removed have still not been returned to their families and communities. It is likely that several thousands will never return at all. With these facts in mind it is not remarkable that the families affected by the child removal policies are referred to as a stolen generation.

It was not until a couple of decades ago this systematic dispossession, slaughter, destruction and impoverishment of the Aboriginal people became an issue in Australia and internationally. The exposure of how the Australian authorities have treated the Aboriginal people has caused individuals and organizations to react and seek redress for the families, which were affected by the governmental removal policies. Today, the past and current situation of the Indigenous people in Australia is not only an issue being addressed by the Australian governments and organizations. Voices have been raised internationally, criticizing and condemning the Australian approach to Indigenous matters. The treatment of Aboriginals from the beginning of the colonization up until present day gives rise to questions regarding violations of both generic human rights instruments, which guarantee the minimum human rights protection of all peoples, as well as specific instruments, which exclusively give protection to specific groups, such as Indigenous Peoples. Australia has not only ratified a number of relevant instruments, but has also been very eager in developing such tools. A national Human Rights Commission, recently established by the Australian government, was given a mandate to oversee the domestic implementation of the treaties signed by Australia and monitors the observance of human rights. The Commission has so far dealt with more than 35 000 complaints of discrimination and human rights violations. This gives an idea of the prevailing situation in Australia.

Today, the situation for the Aboriginals has improved, but there is still a lot to be done. The common aim is said to be reconciliation between the Indigenous and the non-indigenous population, but there are many obstacles, a major being Australia's stand-point in issues relating to the stolen generation.

ABBREVIATIONS

CERD	Committee on the Elimination of Racial Discrimination
CTH	Commonwealth
HREOC	Human Rights Equal Opportunity Commission
ICCPR Rights	International Covenant on Civil and Political
ICESCR	International Covenant on Economic, Social and Cultural Rights
NSW	New South Wales
NT	Northern Territory
QLD	Queensland
SA	Southern Australia
UN	United Nations
VIC	Victoria
WA	Western Australia

1 INTRODUCTION

1.1 Scope and Objectives

In this thesis I intend to present the child removal policies applied in Australia during the 20th century. The existing legal framework in the area of human rights concerning Indigenous people, and particularly with respect to the stolen generation, will be examined so as to determine whether Australia can be held responsible for any human rights violations in relation to these policies. Furthermore, the issue of reparation as a remedy for human rights violations will be explored and in this respect, Australia's attitude towards reparation to the stolen generation will be analyzed. Additionally, the suitability of the existing possibility to seek monetary compensation as a part of a reparation scheme will be analyzed in order to assess whether another compensation scheme should be established.

The native title issue and the questions relating to the mandatory sentencing laws are issues of great concern and importance, but they are outside the scope of this thesis.

1.2 Sources and Methodology

This undergraduate thesis in international law is the result of a field study carried out at the University of New South Wales in Sydney, Australia. In relation to the method it consists mainly of the analysis of international legislation, reports submitted by national and international bodies as well as articles and cases related to the topic.

The material in the first part of the thesis relies upon reports issued by national commissions in combination with articles written on the subject. The section on applicable international legal instruments is mainly based on the study of international legislation and literature, whereas the part on the applicability of these instruments in the case of Australia as well the issue on reparation in international law rely upon reports issued by UN bodies, a range of articles and to some extent reports submitted by international organizations and governmental committees. In addition, relevant material gathered from the Internet has been employed throughout the thesis.

1.3 Layout

With the intention to give the reader an idea of the topic of this thesis, there is initially a brief summary. This summary is followed by a second chapter, in which the different child removal policies are presented individually. Thereafter, in Chapter three, the focus is placed on international human rights instruments so as to lay ground for the examination of Australia's liability under international law in Chapter four. Chapter five deals with the

issue of reparation and next, in Chapter six, case law relevant to the issue of monetary compensation is examined. The conclusions drawn from the research is finally presented in the seventh Chapter.

2. THE AUSTRALIAN JUSTIFICATION FOR CHILD REMOVALS

2.1 Reasons for the Removals

The reasons for the removals have changed over time as old policies have been revoked and new ones introduced, but it can nevertheless be said that the overall purpose of the child removals was to seize total control over the Indigenous communities. Logan Jack, a well-known explorer and historian of northern Australia, wrote in 1922:

(...) "This northern land is thinly peopled by a feeble folk inevitably doomed to vanish from the face of the earth within the current century.... To any stud-master or student of eugenics, the idea of leaving the future of the North to a breed tainted at its foundation-head is in the last degree repugnant and politically it is full of danger."¹

In the early colonial days the children were separated from their families because they were seen as most vulnerable to cultural indoctrination and could be used as hostages to maintain Aboriginal adult co-operation.² There was also a growing awareness that the Aboriginal population of half-castes, which was the word used to describe a person who was part Indigenous and part European, was increasing rapidly and thereby raising the risk of creating a racial conflict between the Indigenous and non-indigenous population. By introducing the child removal policies it would be possible to "breed out the colour" of the Indigenous population. It was mainly the children of mixed descent who were subject to removals. The idea was that these children could be "dangerous" if left in Aboriginal communities since the white blood would make them natural leaders and thus create a threat to the white population. Conversely, this same white blood would also facilitate a total assimilation into the white population so that the Indigenous breed sooner or later would die out.³ The full descent population was not considered a threat, since it was assumed it was inevitably doomed to disappear.

One of the fundamental reasons of the removals was to control the reproduction of Indigenous peoples. To this end, the Aboriginal girls were the centre of attention. There is evidence that, from 1900 to 1940,

¹ Roberts J, *Australia before the Europeans*, <http://www.gn.apc.org/inquirer/aborig.html>, March 28, 2001

² Goodall H, "Saving the Children – Gender and the Colonization of Aboriginal Children in NSW, 1788 to 1990", *Aboriginal Law Bulletin* Vol. 2 No. 44 June 1990, p.6

³ Cummings B, "Writs and Rights in the Stolen Generations (NT) Case", *Aboriginal Law Bulletin* Vol. 3 No. 86 November 1996, p.8

Aboriginal girls suffered the heaviest impact from child removal policies.⁴ It was presumed that half-caste boys would only inter-marry with Aboriginal girls, whereas it was also assumed white men would find half caste women more attractive than full blood women and as a result increasing the extent of the “coloured problem”.

The main public justification for the policies was that the children removed needed “protection”.⁵ By forcing the Aboriginals to live according to European values and work habits they would eventually find themselves totally distanced from their culture, which was considered non-developed and harmful. The protection from Aboriginal culture was claimed to be in the best interest of the child and would save them from immorality. If then protection was the basis for the removals, it can be questioned why full descent Aboriginal children were not in need of such protection.

There were several different policies adopted during the 20th century and they all gave their own justifications for the child removals. The policies can be differentiated according to the time period in which they were introduced and used, and they will be subject to a closer examination in the following.

2.2 Early Legislative Measures

In 1901 the states and Territory which comprised the colony of Australia decided to establish a federation known as the Commonwealth of Australia. Since the constitution prohibited the Federal government from making laws affecting Aboriginal people every aspect of their lives was still regulated and administered by the member states of the federation⁶, i.e. the old colonizers. The states of the federation created Aborigines Protection Boards for the management of Indigenous issues or allowed a Chief Protector to handle these matters. These boards became statutory bodies under the legislation concerning Aborigines, which was enacted in each state from the end of the 19th century and onwards.

The first official power over aboriginal children in New South Wales (NSW) was granted to the Aboriginal Protection Board in 1909 with the passing of the *Aborigines Protection Act*, giving the Aboriginal Protection Board specific statutory powers, which they did not possess prior to this time and the passing of the act⁷. Previously the Protection Board had simply relied on unofficial power and the exercise of coercion and inducement to remove children. The official functions of the Board were to apportion,

⁴ Goodall H, “Saving the Children – Gender and the Colonization of Aboriginal Children in NSW, 1788 to 1990”, *Aboriginal Law Bulletin* Vol. 2 No. 44 June 1990, p.6

⁵ Cummings B, “Writs and Rights in the Stolen Generations (NT) Case”, *Aboriginal Law Bulletin* Vol. 3 No. 86 November 1996, p.9

⁶ The member states are New South Wales (NSW), Queensland (QLD), Northern Territory (NT), Western Australia (WA), Southern Australia (SA) and Victoria (VIC).

⁷ McRae H, Nettheim G, Beacroft L, *Indigenous Legal Issues*, LBC Information Services 1997, North Ryde, p.410

distribute, and apply any monies voted by Parliament on behalf of Aborigines; to provide for the custody, maintenance, and education of the children of Aborigines; to manage and regulate the reserves; to exercise a general supervision and care over all matters affecting the interests and welfare of Aborigines and to protect them against injustice, imposition and fraud.⁸ Under the Act, children could be removed without the consent of their parents, but a criterion of neglect had to be established by a magistrate.⁹ The neglect criterion referred to in the Act was defined in the *Neglected Children and Juvenile Offenders Act, No 16, 1905*, which stipulated that a neglected child was a child who associates with persons who have no visible lawful means of support, who is ill-treated by his parent or is living under such conditions as indicate that the child is lapsing into a career of vice and crime.¹⁰

The Protection Board considered its powers under the *Aborigines Protection Act* inadequate. The members of the Board felt that it was very difficult to prove the neglect criterion and criticized the court procedures, which they thought were unnecessarily cumbersome and ineffective. In 1915 the Act was amended to give the Protection Board extensive powers. The *Aborigines Protection Amending Act 1915* provided the Board with power to remove any Aboriginal child without parental consent and even without a court order provided that the Protection Board considered it to be in the interest of the child's moral or physical welfare.¹¹ Onwards, the reasons justifying the removals could be statements like "for being Aboriginal", "at risk of morality", "neglected", "to get the child away from the surroundings of Aboriginal station" or "removal from idle reserve life".¹² Before the amendments were made no children over the age of 14 were to be removed, but this maximum age was abolished in 1915. In practice the amendments of the legislation meant that the parents had the burden of proof to show that the child had the right to be with them.¹³ Theoretically the parents had a possibility to appeal to a court, but considering the unequal distribution of powers between indigenous and non-indigenous people and the lack of legal services for Aboriginal people it is unlikely that this appeal had much effect. The fact that there is no record of any such appeals shows that the parents

⁸ The *Aborigines Protection Act*, No 25, 1909, Section 7

⁹ The *Aborigines Protection Act*, No 25, 1909, Section 1, Subsection 1

¹⁰ The *Neglected Children and Juvenile Offenders Act*, No 16, 1905, Section 7, Subsection 5A

¹¹ *Aborigines Protection Amending Act*, No 2, 1915, Section 4, Subsection 13A

¹² Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen09.html#Headin g29>, April 1997

¹³ Law Reform Commission Publications, *Aboriginal and Torres Strait Islander Children and the Child Welfare System in NSW*, <http://www.agd.nsw.gov.au/lrc.nsf/pages/RR7CHP2>, March 31, 2001

did not even consider appealing; they were probably not even aware that this right existed.¹⁴

While the legislation quoted above originates from NSW, there was equivalent legislation in all Australian jurisdictions, which gave virtually unlimited powers in relation to the removal, maintenance of order and discipline, care, custody and education of Aboriginal children. In Victoria (VIC) the *Aborigines Protection Act 1869* established the Protection Board and set the pattern for subsequent laws applying to Aboriginals. The act contained very few substantive provisions but instead authorized the adoption of regulations on a wide range of issues concerning Aboriginal children. In the Northern Territory (NT) the *Aboriginals Ordinance* was adopted in 1918, in Western Australia (WA) the *Aborigines Protection Act* in 1886, in Queensland (QLD) the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* and in South Australia (SA) the *Aborigines Act* in 1911.

2.3 Protection, Merging and Absorption

One of the child removal policies, called the protectionist policy, aimed at the separation and isolation of Indigenous Peoples. The system was based on the view that Indigenous people would voluntarily establish self-sufficient agricultural communities on reserved areas designed as an English village and would not interfere with the land claims of the colonists.¹⁵ The Aboriginals were kept in reserves and were under a considerable measure of control by the authorities managing the reserves. For instance, their entry to and exit from reserves, their right to marry and their employment was strictly regulated. The Aboriginals were subject to almost total control in the name of protection. The governments were simply of the opinion that they were protecting Aborigines from their own "weaknesses". This early protectionist policy was based on a belief that the Aboriginal population would die out and was basically intended to "smooth the pillow of a dying race" of full-blooded Aboriginal people.¹⁶

The situation with half-caste children was different. Instead of isolating them from the non-indigenous population, as was done with the "full-blood" Aboriginals, the government officials speculated that by forcibly removing them from their families and sending them away from their communities to work for non-indigenous people, this mixed descent population would

¹⁴ Chrisholm R, "Destined Children – Aboriginal Child Welfare in Australia: Directions of change in Law and Policy", *Aboriginal Law Bulletin* No. 14 June 1985, p.6

¹⁵ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.html#Headin g21>, March 30, 200

¹⁶ Law Reform Commission Publications, *Aboriginal and Torres Strait Islander Children and the Child Welfare System in NSW*, <http://www.agd.nsw.gov.au/lrc.nsf/pages/RR7CHP2>, April 2, 2001

sooner or later “merge” with the non-indigenous population.¹⁷ However, regardless of the separate emphasis of either separation or removal the desired effect was the same, namely to “breed out” the Aboriginal population. For the purpose of absorbing those other than “full-bloods” into the non-indigenous society children were sent at an early age to “training homes” and other “educational” institutions. At these homes Aboriginal girls were trained as domestic servants, and Aboriginal boys were trained to be rural workers. The majority of children who were sent to work as domestics in non-indigenous families received little or no payment. There is also substantial evidence that these children, as well as the children who were placed in training homes and other institutions suffered both physical and sexual abuse.¹⁸

However the concept that people forced off the reserves would merge with the non-Indigenous population no account was taken of the discrimination this involved towards the Indigenous population. Due to the difficulty of finding employment and the denial of social security benefits, which the Aboriginal people were originally granted, they lived in unpleasant towns near the reserves or on the edges of non-Indigenous settlement.

Another method of separating people of mixed descent from their families and communities into non-Indigenous society was to change the definition of “Aboriginality” in the legislation so as to fit the current policy in relation to Aboriginal matters. The definition was simply narrowed, which in effect made it more difficult to meet the criteria of Aboriginality. As a consequence, more people could be disqualified from living on reserves with their families.¹⁹

2.4 Assimilation

Aboriginal affairs had not been discussed at a national level until 1937, when the first Commonwealth-State Conference on assimilation was held.²⁰ It was declared that the destiny of the natives of aboriginal origin lies in their ultimate absorption by the non-indigenous population. This however did not apply to the Aboriginals of “full-blood”. The “full-blood” population was still to be separated, since it was thought that it was doomed to extinction. The mixed descent children were to be educated in non-indigenous culture so that they ultimately could take their place in the white community on an equal footing with the non-indigenous population. Besides

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.html#Heading22>, April 2, 2001

²⁰ Burns K, *Short History*, <http://scholar.nepean.uws.edu.au/~10080900/stolen/history.htm>, April 2, 2001

the cultural assimilation policy, there was a biological assimilation policy. This latter policy was ensured by the terms of the various Aborigines Acts, which required the prior permission of the Board to be sought for any marriages between Aboriginal women and non-aboriginal men. From this time onwards, states began adopting policies designed to assimilate Indigenous people of mixed descent. While merging was fundamentally a passive process of forcing Indigenous people into the non-indigenous community and denying them assistance, assimilation involved a very intense process requiring continuous surveillance of people's lives. Every governmental decision, which was made, was based on non-indigenous standards and values.²¹ Implicitly, the assimilation policy held the idea that there was nothing of value in Indigenous culture. Effectively, assimilation involved Aboriginal people renouncing their own distinct cultures, languages, customs and identity and adopting the dominant Australian culture, language and customs. The policy was pursued by encouraging the fostering or adoption of Aboriginal children into non-indigenous homes and families. The families, in which the children were to be brought up, were even given the right to adoption without the knowledge of the biological mother and many of the removed children never saw their biological mother again.

2.5 Removals Justified under Child Welfare Legislation

In the beginning of the 1940's the removal of Indigenous children was no longer governed by specific laws relating exclusively to Aborigines. The removals were now administered under the general child welfare law, which meant that all children were to be judged on equal grounds regardless of race and a court hearing was necessary. However, the assimilationist policy was still applied by the governments. In accordance with the general child welfare law, the children subject to investigation had to be found "neglected", "destitute", "uncontrollable" or exposed to moral danger for a removal to be justified.²² The definition of neglect in the *Child Welfare Act 1939* (NSW) is almost identical to the definition in the *Neglected Children and Juvenile Offenders Act 1905*, which clearly indicates that it was not more complicated to give reasons for child removals under the general Child Welfare legislation than under the Aborigines Protection Act. At a closer look it even seems that the Child Welfare Act made the removals even easier to justify in that the elements of "destitute" and "exposed to moral danger" were added to the Act. These highly vague definitions gave a considerable amount of discretion to the judges. Despite the fact that the elements were to be used equally against Indigenous and non-indigenous children, the courts considered the criteria being satisfied much more

²¹ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney 1997,

<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.html#Headin g23>, April 2, 2001

²² The *Child Welfare Act*, No 17, 1939, Section 72

frequently with regard to Indigenous children than non-indigenous.²³ Moreover, since poverty was regarded equivalent to neglect, the removal of Aboriginal children was easily justified given that the Aboriginal people were considerably poorer than the rest of the population. Additionally, the prejudice and contempt of the Aboriginal culture and more specifically, child rearing practices, still dominated the views of the persons dealing with Indigenous issues, which was another reason for the continuous removals. Regardless the requirements set up to make a removal justifiable the number of Aboriginal removals did not decrease. It was simply a change of procedures, resulting in even greater numbers of removals of Indigenous children during the 1950's and 1960's.²⁴ The assimilation process continued aiming to distance Aboriginals from their background by alleging the children were neglected and subsequently place them in remote schools or give them away for adoption to non-indigenous families.

2.6 The Current Situation of Child Welfare Related Matters

In 1967 a national referendum was held, amending the Constitution to give the Commonwealth government the power to pass laws relating to Aboriginal people.²⁵ This power, which had previously been exclusively in the hands of the states, was intended to be used to develop new directions with regard to Indigenous people in Australia. The legislation passed in the various states in the beginning of the 20th century was repealed in the late 1960's or early 1970's, dissolving the Protection Board or Chief Protector. During this time several Aboriginal political organizations emerged, aiming at changing the political and social environments surrounding the Indigenous population. In the future, efforts would be made at both a state and a federal level to allow representatives for the Indigenous population to influence processes and decisions affecting Aboriginal families and children. Indigenous groups received governmental funding making it possible to challenge the very high rates of Indigenous child removals. Aboriginal legal services began representing Indigenous children and families in removal applications, which led to an immediate decline in the number of Indigenous children being removed.²⁶ However, the assimilationist approach seemed to have continued its existence even after the abolishment of the Boards and Protectors, leading to further removals of

²³ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney 1997

<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.html#Heading24>, April 2, 2001

²⁴ Haebich A, Delroy A, *The Stolen Generations, Separation of Aboriginal Children from their Families in Western Australia*, Advance Press 1999, pp.56-57

²⁵ State Records New South Wales, *A Guide to New South Wales State Archives relating to Aboriginal People*, May 1998, http://www.records.nsw.gov.au/publications/aboriginalguide/aboriginalguide-12.htm#P3040_176815, April 2, 2001

²⁶ Haebich A, Delroy A, *The Stolen Generations, Separation of Aboriginal Children from their Families in Western Australia*, Advance Press, Perth 1999, pp.54-55

mainly Indigenous children. Non-aboriginal social workers and departmental officers still had the power to define what constituted “neglect” and “moral danger” for Aboriginal children. Consequently, these terms as interpreted by these officers, had a far more detrimental effect when applied to Aboriginal families than when applied to non-indigenous families.

The Aboriginal Child Placement Principle, which emerged from negotiations in the late 1970’s, constituted a policy and action plan intended to keep Aboriginals within their natural families. In implementing this policy, Aboriginal care agencies in most jurisdictions of Australia assist in decisions as to the placement of Indigenous children. In all jurisdictions the policy nowadays is to work with the family in such a way that the child will not have to be removed or, if removed, can be rapidly returned. Bringing a care application is a last resort. In cases where a removal cannot be prevented, the Aboriginal child is to be placed within their own community with the primary objective to attain family reunion within a short period of time. Moreover, all jurisdictions require a court order to be obtained if a child is to be removed from the family under the child welfare legislation. The proceedings take place in the Children’s Court, which requires that the order must be made in the “best interests of the child”.

The current policies and practices in the area of child welfare have now reached a point where they are intended to provide a non-discriminatory framework for the administration of services to Aboriginal and non-Aboriginal children. However, the broad social, economic and cultural differences between the Indigenous and non-indigenous population make Indigenous children more vulnerable to removal. Consequently, in many cases it is the effects of the laws, which are discriminatory rather than the intention of them.

2.6.1 Federal Inquiry into the Removal of Children

The fact that the Aborigines Protection Boards and Chief Protectors were abolished in 1969 and that Aboriginal children have been dealt with under generally applicable child welfare legislation since that year, does not mean that Aboriginal people have ceased to suffer the impact of the policies adopted, or that no remedial action is necessary. The efforts made to improve the situation for the Aboriginal people did generate some positive outcomes, but it was nevertheless unquestionable that more needed to be done. In order to assess the happenings of the past as well as the current situation relating to the Indigenous population, the Federal government appointed the Human Rights Equal Opportunity Commission (HREOC) to lead an inquiry into the separation of Aboriginal children from their families.²⁷ In particular, the HREOC was to trace the past laws, practices and policies, which resulted in the separation of Aboriginal and Torres Strait Islanders from their families, examine the adequacy of and need for changes

²⁷ *Ibid.*

in the current legislation and look at the possibilities of compensation for the families affected by the removal policies. The findings and recommendations of the Commission were presented in a report called *Bringing them Home*, in 1997, and showed that Aboriginal and Torres Strait Islander children are still at much greater risk of removal than non-Indigenous children and, more generally, that Indigenous children remain very significantly over-represented in contact with welfare authorities. A statistic report issued by the Australian Bureau of Statistics showed that 17.3 out of every 1000 Aboriginal children were put under care and protection orders, compared with only 2.6 per 1000 for other children.²⁸ Considering the happenings resulting in Aboriginal child removals it is not surprising that there is often a deep distrust in aboriginal communities of state welfare organizations and great concern about the numbers of indigenous children still being removed from their families on the basis of neglect. There are conflicting opinions whether the serious over-representation of Indigenous children in the welfare system can be attributed to racism or insensitivity to different cultural norms and child rearing practices, or if the likely causes are chronic alcohol and substance abuse, domestic violence and the consequences, which flow from poor health and nutrition. It was concluded in The *Bringing them Home* Report that Indigenous families face both race and class prejudice among welfare officers. It was maintained that welfare departments consider that Aboriginal children with distressed family conditions can potentially be saved if they are separated from the “dysfunctional” or “culturally deprived” environments.²⁹ This is a clear indicator of continuous departmental practice of both skepticism and ignorance of the Indigenous population.

In the report released by the HREOC it was further confirmed that Australia was in breach of international conventions and favoured the idea of compensation to the affected families, issues which will be closer examined in the following Chapters.

3. APPLICABLE HUMAN RIGHTS INSTRUMENTS

3.1 In General

The concept of human rights is very dynamic and has been subject to both change and expansion throughout the history of the modern world. The essence of the concept is that every individual has certain inalienable and

²⁸ Jopson D, “Child Removals still go on at much higher rate”, *Sydney Morning Herald*, April 3, 1997

²⁹ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney 1997, pp.451-453

legally enforceable rights protecting him or her against state interference and the abuse of power by governments.

Since World War II, the international community has become progressively more concerned with developing standards of conduct in the area of human rights. This concern has been manifested in the UN Charter as well as in an ever increasing number of conventions, declarations and covenants. Human rights considerations have unquestionably become a legitimate field of concern of the international community legally, morally and politically. The progress made within the field of human rights was mostly attained in general human rights law, dealing with the rights of all peoples of the world. Generic instruments include the *UN Charter*, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The concerns of particular groups, such as Indigenous peoples, were left ignored until relatively recently in the evolution of human rights instruments. Another approach has now been taken, which includes the importance of the protection of individuals as well as groups. In 1947, the Commission on Human Rights established a sub-commission on the Prevention of Discrimination and Protection of Minorities, whose instruction was to create international standards on minority rights as well as evaluate the developments concerning the protection of human rights and minorities.³⁰ In 1982 an organ of the Sub-commission was established, called the UN Working Group on Indigenous Populations, in order to further guarantee a satisfactory development regarding the rights of Indigenous peoples.³¹ Since its adoption, the Working Group has played an important role in the distribution of information and exchange of views among Indigenous peoples, governments and non-governmental organizations. Additionally, it was involved in the decision to draft a declaration on the rights of Indigenous peoples for adoption by the UN.

Thanks to the persistence and skillful advocacy by Indigenous peoples' representatives at the international level, various governments and the UN have come to acknowledge the significance of Indigenous peoples' rights claims. The exclusion of Indigenous peoples as subjects of international law successively changed and from having been on the periphery of the development of human rights instruments, Indigenous matters were put on the international agenda, resulting in the adoption of conventions and declarations specifically relating to Indigenous people. The modern approach is the evolution from the notion of *protection* of human rights to a more general concept of *rights* relating to specific, well-defined groups.³²

³⁰ In 1999 the Economic and Social Council (ECOSOC) changed the title of the Sub-Commission to Sub-Commission on the Promotion and Protection of Human Rights, see Sub-Commission on the Promotion and Protection of Human Rights, United Nations 2000, <http://www.unhchr.ch/html/menu2/2/sc.htm>, April 18, 2001

³¹ Anaya S J, *Indigenous Peoples in International Law*, Oxford University Press, Oxford 1996, pp.51-52

³² For a definition of Indigenous People, see Chapter 3.3.1

One relevant instrument for the Indigenous people in Australia is the *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)*, which includes provisions recognizing the rights of Indigenous populations and for the safeguarding of their institutions and traditions, as well as their languages, land rights and special measures in favour of the protected populations.³³ The right of members of national minorities to continue their educational activities, including the preservation of their languages, is specifically maintained in the *Convention against Discrimination in Education*, adopted in 1960.³⁴ The right for minorities to practice their own language is naturally very significant for the preservation of group identity. Moreover, the *UN draft Declaration on the Rights of Indigenous Peoples*, the *Convention on the Rights of the Child*, the *International Convention on the Elimination of all Forms of Racial Discrimination* and the *Convention on the Prevention and Punishment of the Crime of Genocide* are further instruments, which are relevant in the discourse of Australian child welfare matters.

In addition to the treaties governing human rights law consideration must be taken to the existing customary law in the area. Custom is constituted by one objective element, that of general practice, and one subjective element, *opinio juris*. Evidence of customary law is to be found in the actual practice of states, gathered from, for instance, published reports and government statements. The subjective element requires that the states actually consider themselves bound by the rule in question. Customary law is binding on all states and does not require ratification nor implementation. The only way to avoid being bound by it is to persistently object to an emerging rule. Additionally, some basic principles of international law cannot be avoided by means of signing a treaty. These rules, called *jus cogens*, are rules from which no derogation is allowed and can only be modified by a subsequent standard of general international law possessing the same character.³⁵ Norms such as the prohibition of genocide, slavery, torture, racial discrimination and crimes against humanity are considered *jus cogens*.³⁶

Most issues of concern to the Indigenous people in Australia can somehow be related to human rights, since at the heart of social justice issues are the experiences and suffering of Aboriginals. It is rightfully maintained that social justice will not be achieved until all the citizens of Australia enjoy their human rights.³⁷ The Aboriginal population has been empowered by a growing awareness of and resort to human rights discourse as a means of challenging systematic disadvantage and discrimination. Although the

³³ Lerner N, *Group Rights and Discrimination in International Law*, Kluwer Academic Publishers, The Netherlands 1991, pp.16-18

³⁴ Ratified by Australia on March 1, 1967

³⁵ The Convention on the Law of Treaties, 1969, Art.53

³⁶ Lerner N, *Group Rights and Discrimination in International Law*, Kluwer Academic Publisher, The Netherlands, 1991, p.24

³⁷ Dodson M, "The Human Rights Situation of Indigenous Peoples in Australia", *IWGIA Indigenous Affairs*, No. 1 Jan/Feb/March 1999, pp.33-34

generic human rights instruments concern all peoples of the world, they nevertheless contain provisions, which are of importance to indigenous peoples.

There is harsh criticism from the International Community that Australia does not comply with international instruments relating to the management of its Indigenous population, and in many respects, as will be shown below, these allegations can be verified.

3.2 Generic Human Rights Instruments

3.2.1 The UN Charter

The Charter of the United Nations was signed in San Francisco on 26 June 1945 and is the first international treaty whose aims are expressly based on universal respect for human rights.³⁸ Article 1 of the Charter provides for the promotion and encouragement of respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion, shall be the main purpose of the UN. The principle of non-discrimination is hereby made one of the foundations of the UN for the achievement of their goals. In Articles 55 and 56, UN Member States promise to take joint and separate action for the achievement of universal respect for, and observance of, human rights, while respecting the prohibition of discrimination. Discrimination can be defined as any distinction, exclusion, restriction or preference based on race, color, religion, descent, ethnic origin or sex, which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of life.³⁹ Consequently, when assessing an alleged act of discrimination, attention is given to the result of the act and not to the act itself. The UN Charter further establishes equal rights and self-determination of all peoples as principles to be promoted by the UN. These rights have gradually been affirmed and strengthened by subsequent developments of human rights, which will be pointed out below.

3.2.2 The Universal Declaration of Human Rights

Since 1945, numerous steps have been taken in the development of a comprehensive international human rights system. The first step in this direction was the adoption of the Universal Declaration of Human Rights in 1948. There is a widely supported view that the Declaration has acquired the status of *jus cogens* in international law, on the basis of the consistent practice of states as well as of international institutions in invoking its provisions. Consequently, the Declaration, or at least parts of it, now forms

³⁸The United Nations Department of Public Information, *The United Nations and Human Rights 1945-1995*, New York 1995, p.5

³⁹Lerner N, *Group Rights and Discrimination in International Law*, Kluwer Academic Publishers, The Netherlands 1991, pp.25-26

part of customary international law and is therefore binding on all states, whether or not they are members of the UN. One of the fundamental principles, on which the Declaration is based, is set out in Art.1 and refers to every person's right to dignity.⁴⁰ Article 2 and 7 lay down the essential principle of equality and non-discrimination, whereas Article 3 proclaims three interrelated fundamental rights, namely the right to life, the right to liberty and the right to security. An additional important provision is for example Art.12, stating that nobody should be subjected to arbitrary interference with his privacy or family.

3.2.3 The International Covenants

The two International Covenants on Human Rights, one on economic, social and cultural rights, the other on civil and political rights, were adopted in 1966 and entered into force in 1976. The Covenants constitute the most extensive body of international treaty law on the subject, both in terms of the areas covered and in terms of their geographical scope. Australia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976 and the International Covenant on Civil and Political Rights (ICCPR) in 1980.⁴¹ The two Covenants contain some identical or similar provisions. The preambles stress their common view regarding the inherent dignity of the human person and of the inalienable rights to freedom and equality. Art.1, confirming the universality of the right to self-determination and Art.3, obliging the states parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights as set out in the respective Covenants, are both identical provisions. The Human Rights Committee, which is the body established to supervise the implementation of the ICCPR, has expressed that the implementation of Art 3 of the ICCPR requires not only measures of protection, but also affirmative action designed to ensure the positive enjoyment of this right.⁴² The enactment of laws is not a sufficient action to satisfy this criterion.⁴³ The two Covenants also contain similar provisions prohibiting discrimination in the application of them.⁴⁴

The ICCPR provides for protection of the right to life (Art.6). This provision is to be given a broad interpretation. In the protection of this right it is desirable that states adopt positive measures, such as measures to reduce infant mortality and increase life expectancy, especially in adopting

⁴⁰ Morse B W, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa 1985, p.763

⁴¹ The United Nations Department of Public Information, *The United Nations and Human Rights 1945-1995*, New York 1995, p.504

⁴² Office of the High Commissioner for Human Rights, CCPR General Comment 4, 31/07/81, Equality between the sexes, Thirteenth session 1981

⁴³ Pritchard S, *Indigenous Peoples, the United Nations and Human Rights*, Federation Press, Sydney 1998, p.190

⁴⁴ Art. 2 Paragraph 2 in ICESCR and Art. 2 Paragraph 1 in ICCPR

measures to eliminate malnutrition and epidemics.⁴⁵ The Covenant also contains a prohibition of interference with privacy, family and home (Art. 17) and a guarantee of equality before the law (Art. 26). The Human Rights Committee has expressed that the application of the principle of non-discrimination contained in Art. 26 is not limited to the rights provided for in the Covenant. The word “discrimination” is to be interpreted as implying any distinction, exclusion, restriction or preference which is based on any ground and which has the purpose or effect of nullifying or impairing the enjoyment or exercise by all persons of *all* rights and freedoms.⁴⁶

Art. 27 of the ICCPR provides that members of ethnic, religious or linguistic minorities have the right to enjoy their own culture. This was the first provision in human rights history, which dealt exclusively with the rights of minorities. The Human Rights Committee has tried several cases regarding Art. 27 under the individual communication procedure. Previously, the only way to supervise the implementation of the Covenant was through a reporting procedure and inter-state communication procedure. By becoming a party to the First Optional Protocol, a state can recognize the competence of the Human Rights Committee to receive individual communications. As of December 1999, 95 of the 144 parties to the ICCPR were also parties to the Protocol.⁴⁷ The Protocol, which entered into force in 1976, was however not ratified by Australia until 1991.⁴⁸ The Committee has rejected a minimalist interpretation of Art. 27 as imposing an obligation on States Parties merely to refrain from activities interfering in the enjoyment of the rights under the article. It has emphasized the obligation of states to take positive measures to ensure the survival and development of the cultures, languages and religions of the minorities concerned.⁴⁹

The only international measure for monitoring supervision of the ICESCR is a state reporting procedure, which obliges states to submit periodic reports on measures adopted and progress made in achieving observance of the rights recognized in the Covenant. The reports are then considered by the supervisory body of the Covenant, the Economic and Social Council. An introduction of an individual communications procedure similar to the one established under the ICCPR has been suggested, but so far it has not been implemented.⁵⁰

⁴⁵ Office of the High Commissioner for Human Rights, CCPR General Comment 6, 30/07/82, The Right to Life (Art. 6), Sixteenth Session 1982

⁴⁶ Broeks v. The Netherlands, Comm. No. 172/1984, 42 UN GAOR Supp. No. 40at p.139, UN Doc. A/42/40 (1987)

⁴⁷ Alston P, Crawford J, *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press 2000, p.16

⁴⁸ The United Nations Department of Public Information, *The United Nations and Human Rights 1945-1995*, New York 1995, pp.503-504

⁴⁹ Office of the High Commissioner for Human Rights, CCPR General Comment 23, 08/04/94, The Right of Minorities (Art. 27), Fifteenth Session 1994

⁵⁰ The United Nations Department of Public Information, *The United Nations and Human Rights 1945-1995*, New York 1995, p.47

3.3 Specific Human Rights Instruments

3.3.1 The ILO Convention No169 and The UN Draft Declaration on the Rights of Indigenous Peoples

The ILO was the first among international organizations to develop standards for the protection of Indigenous peoples. Until 1989 the Convention No 107 was the only international instrument specifically concerned with Indigenous people. Its integrationist approach to indigenous rights issues was widely criticized by Indigenous groups leading to its revision and adoption of the ILO Convention No 169. This Convention has been claimed to be just as assimilationist and destructive as its predecessor, which has resulted in a reluctance by some countries to ratify it. Lack of consultation with Indigenous groups in the elaboration of the Convention is the main reason for the criticism launched. The Aboriginal and Torres Strait Islander Special Justice Commissioner agrees that the Convention is flawed from the perspective of Indigenous Peoples, but believes however that there is value in an Australian ratification, especially considering the wider benefits ratification might have for the development of international law in the area.⁵¹ In spite of its shortcomings, the ILO Convention 169 remains the only international treaty specifically concerned with Indigenous peoples' rights and represents the most concrete expression of the growing responsiveness to their demands.

In 1993 the Working Group on Indigenous Populations agreed upon a final text of a Draft Declaration on Indigenous Rights hoping that the draft would eventually be adopted by the General Assembly. Due to the active participation by Indigenous representatives in the drafting of the Declaration the final draft substantially reflected proposals submitted by them. The Declaration protects against a wide variety of threats to Indigenous peoples' culture and integrity, including more specific problems affecting Indigenous peoples. These specific articles relate to situations based on real experiences of Indigenous peoples. For instance, Art. 6 in the current draft of the Declaration contains a guarantee against removal of children from their families and communities.⁵²

The discussion about a suitable definition of Indigenous peoples has caused political controversy. Attempts to establish a definition were made in the ILO Convention No. 169, but was highly criticized by Indigenous representatives.⁵³ The UN Draft Declaration on the Rights of Indigenous

⁵¹ Aboriginal and Torres Strait Islander Special Justice Commissioner, "Consideration of Ratification of ILO 169" in *Second Report 1994*, AGPS Canberra 1995, pp.228-229

⁵² Coulter R T, "Commentary on the UN Draft Declaration on the Rights of Indigenous Peoples", *Cultural Survival Quarterly* 1994, pp.37-41

⁵³ Sub-commission on Prevention of Discrimination and Protection of Minorities, Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, UN Document E/CN.4/Sub.2/AC.4/1996/2/Add.1

Peoples does not provide a definition, but in preparing the Declaration a definition formulated in the 1983 Study of the Problem of Discrimination Against Indigenous Populations was used. It maintains that:

(...) Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵⁴

Indigenous representatives have consistently opposed the idea of including a definition of Indigenous peoples in the Draft Declaration, primarily because of the fear that almost any definition might eventually be employed to deny certain groups the rights set forth. By omitting a formal definition, the term is left open-ended and made widely applicable.⁵⁵

Whether the Declaration will be adopted in its present shape is far from certain, since a majority of governments have indicated that they are unwilling to agree to all provisions as currently formulated. It is important to point out that even upon adoption by the UN, the Draft Declaration will be a non-binding instrument. It can nevertheless be of great significance as a contributive element to the emergence of customary international law in the area of Indigenous peoples' rights. Most significantly, and regardless of the formal status of the Declaration, it holds exceptional legitimacy in the eyes of the Indigenous peoples in the world.

3.3.2 The Convention on the Rights of the Child

The Convention of the Rights of the Child, adopted by the UN in 1989 and entered into force in 1990, had by December 1999 been ratified by 191 states.⁵⁶ It has become a virtually universally accepted human rights treaty within only eleven years of its adoption⁵⁷ and is by far the most detailed and comprehensive of all of the existing international human rights instruments. The Convention is based upon the best interest of the child principle. This principle was not an innovation, but had been used in the non-binding 1959 Declaration of the Rights of the Child.⁵⁸ Although the phrase is not used specifically in the ICCPR, the Human Rights Committee has made

⁵⁴ Martínez-Cobo J, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations, UN Document E/CN.4/Sub.2/1986/7 Add.4

⁵⁵ Sub-commission on Prevention of Discrimination and Protection of Minorities, Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples, UN Document E/CN.4/Sub.2/AC.4/1996/2/Add.1

⁵⁶ Alston P, Crawford J, *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge 2000, p.113

⁵⁷ Only the United States and Somalia have yet failed to ratify it.

⁵⁸ Alston P, *The Best Interests of the Child – Reconciling Culture and Human Rights*, Clarendon 1994, p.85

comments referring to the paramount interest of children.⁵⁹ The strongest evidence of the extent to which the principle has gained general acceptance is probably the frequency with which it is used in legal analyses at the international level, for example in the jurisprudence under the European Convention of Human Rights. Moreover, the principle is often visible in many national legal systems.

The Convention recognizes every child's right to life and dignity.⁶⁰ Art. 30, which is similar to Art 27 in the ICCPR, identifies the right of minorities and Indigenous children to practice their own culture. In ratifying the Convention, the Commonwealth of Australia also made a number of commitments to Australia's children and to the international community in relation to the care and protection of children. These include a commitment to recognize and assist in the realization of the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development⁶¹ and to protect children from violence, neglect and mistreatment.⁶² In addition, Art. 9 states that a child is not to be separated from his or her parents against their will, unless such separation is in the best interest of the child. The decision to separate a child from his or her family must then be established by a judicial organ. In accordance with Art. 39 states undertake to take all appropriate measures to promote physical recovery and social reintegration of a child, who is victim of neglect, exploitation or abuse.

The Convention establishes a Committee of the Rights of the Child, to which state parties are obliged to send reports on the measures undertaken with regard to the implementation of the Convention. There is so far no possibility to submit individual complaints.

4. AUSTRALIA'S LIABILITY UNDER INTERNATIONAL LAW

4.1 Violations with regard to Generic Human Rights Instruments

Aboriginal people do not only have a unique racial experience but also fall into the lowest socio-economic brackets in their country. The child removal policies have resulted in a continuation of low socio-economic conditions, making the Aboriginal communities the poorest in Australia. Aboriginal communities in remote areas can live in conditions similar to those of

⁵⁹ Office of the High Commissioner for Human Rights, CCPR General Comment 17, 07/04/89, Rights of the Child (Art.24), Thirty-fifth Session 1989

⁶⁰ Art. 6, Art. 8 and Art. 30

⁶¹ Art.27(1)

⁶² Art.19

impoverished communities in third world countries.⁶³ The entrapment into a cycle of poverty is not only connected with history but is also linked to the perpetuation of institutional racism taking place at present. The former child removal policies and the contemporary treatment of the Indigenous population are not in compliance with international human rights instruments, which Australia has chosen to ratify. The view that the child removal policies and its effects are a human rights issue generating human rights obligations today is supported by the Human Rights Committee and international non-governmental organizations, such as Amnesty International.⁶⁴ These policies and practices involved serious and unresolved violations of fundamental human rights recognized internationally as early as 1945. The discriminatory practices amounted to a breach of the prohibition of discrimination in the UN Charter and the Universal Declaration of Human Rights.⁶⁵ The Universal Declaration further lays down the inherent right to dignity, life and liberty⁶⁶, provisions that were altogether disregarded. Additionally, Australia did not respect the provision stating that nobody should be subject to arbitrary interference with his privacy or family.⁶⁷

The ICESCR and the ICCPR contain similar provisions to the UN Charter and the Universal Declaration on Human Rights, but the former expand the human rights protection available in international law. Since the ICESCR and the ICCPR did not enter into force in Australia until 1976 and 1980 they cannot be applied with regard to the actual child removal policies, which existed until the late 1960's, but they are nonetheless important in relation to the discrimination and prejudice suffered by Indigenous people in contemporary child removals as well as in relation to the effects of the former policies. The discrimination and prejudice still existing in courts and among officials can be challenged by issuing a complaint according to the individual communications procedure under the ICCPR. The Human Rights Committee has expressed its concern about the continuing effects of the child removal policies and recommends that Australia guarantee that the victims and their families will be given proper remedy under the obligations set up in Art.2, 17 and 24.⁶⁸ This view strongly indicates that Australia has to take efforts in order to be in compliance with the prohibition on discrimination (Art.2), the provision stating that nobody shall be subjected to arbitrary or unlawful interference with his privacy or family (Art.17) and the provision declaring that every child shall have, without any

⁶³ Behrendt, L, " Meeting the Crossroads: Intersectionality, Affirmative Action and the Legacies of the Aborigines Protection Board", *Australian Journal of Human Rights*, Vol. 4 No. 1 December 1997, p. 105

⁶⁴ Amnesty International, *Australia: UN Human Rights Committee findings*, July 28, 2000, <http://web.amnesty.org/ai.nsf/Index/ASA120072000?OpenDocument&of=COUNTRIES/AUSTRALIA>, May 3, 2001

⁶⁵ Art.1, The UN Charter, Art.2 and 7, The Universal Declaration of Human Rights

⁶⁶ Art.3, The Universal Declaration of Human Rights

⁶⁷ Art.12, The Universal Declaration of Human Rights

⁶⁸ Concluding observations of the Human Rights Committee: Australia 28/07/2000, A/55/40,paras.498-528

discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state (Art.24).

In addition to the obligations under the ICCPR, the ICESCR requires states to take action in several matters of importance to Indigenous people. In a report issued by the Committee on Economic, Social and Cultural Rights it was concluded that the indigenous people of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education.⁶⁹ This shows that Australia must take action to satisfy Art.11, which states the right to an adequate standard of living, including adequate food, clothing, housing and to the continuous improvement of living conditions. Moreover, Australia must ensure the right of everyone to the highest attainable standard of physical and mental health as recognized in Art.12 as well as the right to education, set up in Art.13.

In spite of existing guarantees relating to economic, social and cultural rights in Australia's domestic legislation, the ICESCR does not possess legal status at the federal and state level, thereby obstructing the full recognition and applicability of its provisions. The Committee has therefore recommended that the Covenant be incorporated in the legislation in order to fully ensure the applicability of its provisions in the domestic courts of Australia.

4.2 The Issue of Racial Discrimination

Racial discrimination was recognized as contrary to international law as early as 1945, as the prohibition made part of the UN Charter.⁷⁰ In order to give a greater precision to what was already an injunction of international law, the International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly in 1965 and ratified by Australia in 1975.⁷¹ Racial discrimination is defined as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁷² The human rights and fundamental freedoms jeopardized could be *any* in the political, economic, social, cultural or any field of public life, which implies that the

⁶⁹ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia 01/09/2000. E/C.12/1/Add.50

⁷⁰ See Chapter 3.2.1

⁷¹ The United Nations Department of Public Information, *The United Nations and Human Rights 1945-1995*, New York 1995, pp.503-504

⁷² Art.1, The International Convention on the Elimination of All Forms of Racial Discrimination

article is to be interpreted in a broad sense.⁷³ The state parties undertake to prohibit and eliminate racial discrimination in all its forms by, for instance, taking effective measures to review governmental policies and amend or nullify laws and regulations of a discriminatory nature. Article 5 contains a typical catalogue of human rights with regard to which discrimination on grounds of race, colour or national or ethnic origin is prohibited. The rights mainly correspond to those set out in the Universal Declaration and should be interpreted in accordance with the rules accepted for the Declaration and the Covenants. The Racial Discrimination Convention goes further than both the Declaration and the Covenants in that the former grants the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of racial discrimination.⁷⁴ As stated in Art.7 states also accept to adopt measures, particularly in the fields of teaching, education, culture and information, aiming at combating prejudices which lead to racial discrimination.

The implementation of the Convention is supervised by the Committee on the Elimination of Racial Discrimination (CERD), which has not only the competence to review periodic reports by states but also has the power to consider individual petitions, provided that the state party has accepted this.⁷⁵ Furthermore, since 1993 the Committee has developed early warning and urgent procedures in situations where there is particular cause for concern.⁷⁶ CERD has been working systematically and effectively since its creation in 1969, especially with regard to the reporting system. The guidelines and recommendations made by the Committee have become a valuable and constructive scheme of control in the field of racial discrimination and a permanent incentive for states to work against racial discrimination. Furthermore, the Convention itself is strengthened by the universality originated in the principle, accepted as *jus cogens*, that racial discrimination must be eliminated worldwide. The common view is understandably that the Convention against Racial Discrimination is one of the most important instruments for the protection of groups at the international level.

The racial discrimination issue must be taken into account when examining the child removal policies adopted by the Australian states. The legislation set up a legal regime for the Indigenous children and their families, which was inferior to the regime applicable to non-Indigenous families. A court hearing prior to the removal would have provided basic protection, however only in theory because of the cultural partiality of the courts and the unavailability of legal aid at the time. The law discriminated against

⁷³ Lerner N, *Group Rights and Discrimination in International Law*, Martinus Nijhoff Publishers, The Netherlands 1991, p.49

⁷⁴ Art.6, The International Convention on the Elimination of All Forms of Racial Discrimination

⁷⁵ The individual petition procedure has been accepted by the Commonwealth of Australia.

⁷⁶ Pritchard S, Heindow-Dolman C, "Indigenous Peoples and International Law: A Critical Overview", *Australian Indigenous Law Reporter* Vol. 3 No. 4 1998, p.483

Indigenous people even in cases where a court hearing was necessary in that the courts failed to ensure that the families were aware of their right to attend and that they understood the nature of the proceedings.⁷⁷ Additionally, the criteria, which had to be established in order to legitimize a child removal, especially targeted the Aboriginal life style. It was expected that the Indigenous families would have the same values and standards as those of middle-class welfare workers. For instance, the neglect criterion was considered satisfied if the family subject to investigation had no visible means of support, no fixed residence or if it is without reasonable excuse not provided with sufficient and proper food, nursing, clothing, medical aid and lodging.⁷⁸ These definitions significantly target the Aboriginal way of life. By imposing these values on Indigenous families, practically any application to a court for a removal order would be successful. The introduction of legislation making poverty or homelessness grounds for removal was extremely unfair considering the history of colonial dispossession, segregation and control. Most Indigenous families had been forced into poverty, dependent on government social welfare and inadequate housing.

Clearly the fact that laws singled out Indigenous children for removal by administrative means because of their race or color proves that they were racially discriminatory. Considering the consistent use and impact of these laws and practices it can be concluded that the discrimination was also carried out in a systematic manner. This level of systematic racial discrimination amounts to a gross violation of human rights. The term gross refers to the severity, scope or size of the violations as well as the type of human rights being violated. Regardless of the lack of an international consensus on a complete list of gross violations, most lists include systematic racial discrimination.⁷⁹ It is immaterial whether the laws or practices were partially motivated by a compassionate purpose, since when deciding if the discrimination element is satisfied, the purpose or intention of the alleged discrimination is not the sole decisive factor. Discrimination refers to distinctions, which have the purpose or *effect* of impairing human rights.

The racially discriminatory practices carried out in Australia amounted to a breach of international law from 1945, when the UN Charter was adopted. Australia disregarded the prohibition against racial discrimination for many years after the adoption of the UN Charter, the Universal Declaration and the Racial Discrimination Convention. More specifically, legislation

⁷⁷ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading102>, May 1, 2001

⁷⁸ *Ibid.*

⁷⁹ Van Boven, Theo, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report submitted by Mr Theo van Boven, Special Rapporteur", UN Doc: E/CN 4/Sub 2/1993/8.

continued to provide a different and substandard regime for Indigenous children until 1954 in Western Australia, 1957 in Victoria, 1962 in South Australia, 1964 in the Northern Territory and 1965 in Queensland.⁸⁰ Overt exclusion of the Indigenous people continued until 1967, when Indigenous communities were given the same legal status in the Constitution as other Australian citizens.⁸¹ Regardless of the repealed legislation direct discrimination continued as welfare departments carried on implementing the same policies until 1969.⁸² Today, the presence of indirect discrimination in the child welfare system is a problem given the fact that Indigenous people are still being judged from an Anglo-Australian perspective with shortage of consideration of the Indigenous values and culture. The overrepresentation of Indigenous children in substitute care remains and the wish for the development of a genuine Indigenous child welfare legislation has not been realized. The current situation allows Aboriginal Community organizations to become part of the process, but there is a hope for the passing of an Act, which exclusively deals with Indigenous child welfare issues.⁸³ The enactment of the *Racial Discrimination Act 1975* as part of the implementation process of the Convention on the Elimination of All Forms of Racial Discrimination was welcomed, but concern has been raised over the fact that neither the *Racial Discrimination Act* nor the *Australian Constitution* prevents the Federal Parliament from enacting racially discriminatory laws.⁸⁴ The Act prevails over conflicting state legislation, but it does not protect against subsequent Federal legislation. Thus, it can be concluded that where international standards have been enacted domestically, mechanisms for ensuring compliance are fairly weak.

The compelling need to recognize and prevent the perpetuation of racism in Australia was addressed by CERD pursuant to its urgent measures and early warning procedure in 1999.⁸⁵ The Australian government rejected both the Committee's views and its request to visit Australia. CERD expressed in its Concluding Observations its concern over Australia's treatment of Indigenous people, including the fact that the Australian government does not support a formal national apology to the people affected by child removals. The Committee further recommended that Australia consider the

⁸⁰ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading102>, May 1, 2001

⁸¹ Behrendt, L, "Meeting the Crossroads: Intersectionality, Affirmative Action and the Legacies of the Aborigines Protection Board", *Australian Journal of Human Rights*, Vol. 4 No. 1 December 1997, p. 102

⁸² *Ibid.*

⁸³ Such legislation has been adopted in the United States under the jurisdiction of the Indian Child Welfare Act.

⁸⁴ This has raised the question whether there is a need for a Bill of Rights in Australia.

⁸⁵ CERD, Early Warning Procedure, Decision 2(54) on Australia, UN DOC A/54/18 para.21(2), 18/03/99

need to address the extraordinary harm inflicted by the racially discriminatory practices appropriately.⁸⁶

4.3 The Issue of Genocide

The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 was a direct response to the holocaust of the Second World War and was the first instrument to provide a detailed definition of the crime of genocide. Australia ratified the Convention in 1949 and it entered into force in 1951⁸⁷, thereby giving an undertaking to prevent and punish genocide as a crime under international law. By ratifying any international treaty, the Australian government is obliged to give it full effect in domestic law and practice. Australia has signed and put into domestic law some of the major international human rights treaties. However, the Genocide Convention, to give one example, has never been incorporated into domestic Australian legislation, although parliament passed legislation in 1949, which approved of ratification by Australia.⁸⁸ Australia's failure to carry out its obligation under the Convention to bring the provisions of the Convention into domestic law was highlighted in October 1999, when a Federal Court ruled that genocide is not a crime in Australian law.⁸⁹ Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. Therefore, due to the lack of legislation in Australia claims in Australian courts cannot be tried until the Genocide Convention is properly implemented. As a response to the Federal Court decision the *Anti-Genocide Bill* 1999 was introduced in order to bring the provisions of the Genocide Convention into force in Australia. The bill was then referred to the Senate Legal and Constitutional References Committee, which in its report in June 2000 recommended that anti-genocide legislation be implemented in Australia.⁹⁰ In April 2001 a second reading debate was held on the Bill but since it was not finalized another motion will now have to be moved by a Senator for the second reading to be resumed. However, it is unlikely that the Bill will progress any further firstly as government business matters will take precedence for the remainder of the year and secondly since a new election is coming up towards the end of the year. Consequently, unless there is no further debate prior to the election, the Bill will lapse and be removed from the Notice Paper.⁹¹

⁸⁶ CERD, Concluding Observations: Australia, UN Doc. CERD/C/304/ADD.101, 19/04/2000

⁸⁷ United Nations Treaty Collection, March 19, 2001, <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>, April 26, 2001

⁸⁸ *Genocide Convention Act 1949* No. 27

⁸⁹ *Nulyarimma v Thompson* [1999] FCA 1192

⁹⁰ Senate Legal and Constitutional Committee, *Humanity Diminished: The Crime of Genocide - Inquiry into the Anti-Genocide Bill 1999*, June 2000, http://www.aph.gov.au/senate/committee/legcon_ctte/anti_genocide/, May 8, 2000

⁹⁰ May 8, 2001

⁹¹ Interview with Mr Peter Verdon, Inquiries Supervisor at the Senate Table Office, Parliament of Australia, May 18, 2001

The General Assembly has expressed its concern over the fact that human beings continue to be victims of genocide, and has reaffirmed the significance of the Convention as an effective international instrument for the punishment of the crime. Genocide is defined in Art. 2 as any acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. It includes killing its members, causing them serious bodily or mental harm, deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children to another group. Art 3 states that not only the act of genocide shall be punishable, but also for example conspiracy to commit genocide, direct and public incitement and attempt to commit genocide. Art 4 stipulates that persons committing genocide or any of the acts enumerated in Art 3 shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. It is not possible to argue that the practice constituting genocide was lawful under the country's own laws.⁹²

While child removals were generally defined as being carried out in the children's best interest, the predominant aim was without doubt to eliminate Indigenous cultures as distinct entities. When determining whether the Australian practice of forcible transfer of Indigenous children to non-Indigenous institutions and families constituted genocide four different matters must be considered. Firstly, the fact that a forcible removal of children can amount to genocide as set up in Art 2 in the Genocide Convention must be mentioned. The approach adopted in the Convention is consequently that genocide can be committed by means other than actual physical extermination and does not necessarily mean the immediate physical destruction of a group or nation. As suggested in the preparatory work of the Convention, the objectives of different actions aimed at the destruction of the essential foundations of the life of national groups would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.⁹³ The forcible transfer of children does constitute genocide, provided that there is an intention to destroy, in whole or in part, the group as such. The principal common aim of the child removal policies was undoubtedly the elimination of a distinct culture in that there was an intention to absorb or assimilate the

⁹² Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading103>, April 26, 2001

⁹³ Storey M, "Kruger V the Commonwealth: Does Genocide require Malice?", *UNSW Law Journal* Vol. 4 No. 3 1998, <http://www.austlii.edu.au/au/other/unswlj/forum/1998/vol4no3/storey.html>, April 26, 2001

children into the wider, non-indigenous, community, leading to the disappearance of their unique cultural values and ethnic identities. The children were not removed out of real concern for their best interest but because Aboriginality was considered a problem. Consequently, removal of children with this objective is genocidal since it aims at destroying the cultural unit, which the Genocide Convention is intended to preserve.

A second essential matter to approach is the fact that plans and attempts can constitute genocide. Though the destruction was partial rather than total, meaning that not all Indigenous children were removed, the Convention would lose its purpose if it were to be interpreted as only prohibiting the total and actual destruction of the Indigenous population. It is immaterial to what extent the intention to destroy a group has been achieved. Genocide is committed even in cases where the destruction has not been accomplished. Nevertheless, the level of destruction can be relevant to the offender's intention in that the intention to destroy the group as such in whole or part must be proven. The prevailing view, though not universally accepted, is that an intention to destroy the group in part can be genocidal if the aim is to destroy it substantially.⁹⁴

A third issue to discuss is that of mixed motives. The question to be raised is if the Genocide Convention is applicable when the destruction of a particular culture was believed to be in the best interests of the children who were part of that culture or in cases where the child removal policies were intended to serve multiple aims, such as providing the children an education or job training while at the same time removing them from their culture. The debates at the time of the drafting of the Convention clearly establish that the existence of several objectives does not prevent the criteria of genocide to be established.⁹⁵ However, agreement could not be reached regarding the question if the genocidal motive must be the predominant one. It has later been suggested that the intent to destroy the group is sufficient to constitute the crime of genocide regardless of any underlying motives. This view endorses the fact that the reasons for perpetrating the crime and the ultimate purpose of the deed are irrelevant. The crime of genocide is committed whenever the intentional destruction of a protected group takes place, regardless of the possible existence of a beneficial motive.⁹⁶ Then, in assessing the assimilation, merging and absorption policies a specific intent can be established since there was a clear intention to absorb or assimilate the children into the non-indigenous community, whereas the continuing

⁹⁴ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading103>, April 26, 2001

⁹⁵ *Ibid.*

⁹⁶ Storey M, "Kruger V the Commonwealth: Does Genocide require Malice?", *UNSW Law Journal* Vol. 4 No. 3 1998, <http://www.austlii.edu.au/au/other/unswlj/forum/1998/vol4no3/storey.html>, April 27, 2001

practices into the 1970's and 1980's of preferring non-indigenous foster and adoptive families for Indigenous children involved a general intent in that the genocidal impact of these latter practices was reasonably foreseeable. This general intent is argued to be a sufficient criterion to establish the Convention's intent element.⁹⁷

It is, as a final matter regarding the genocide issue, relevant to examine how early the Australian policies and practices of child removals can constitute a breach of international law, since the policies derive from a time prior to the ratification of the Genocide Convention. Given that the Convention entered into force in 1951 it is clear that policies after that time would amount to a breach of international law. It is possible, however, that the prohibition of genocide was part of international law even before the ratification of the Genocide Convention, i.e. if the prohibition could be considered as customary law. In 1946 the UN General Assembly adopted a resolution, stating that genocide was already a crime under international law.⁹⁸ The existence of the prohibition of genocide might even have pre-dated the 1946 resolution. Although the international community rejected the wish for genocide to be declared a crime in 1933, it was generally conceded that it had emerged as a prohibition in international law before or during the Second World War.⁹⁹ It can then be concluded that the forcible removal policies were genocidal and therefore in breach of international law from at least 1946 and onwards.

4.4 Accountability under the Convention of the Rights of the Child

In addition to the violations already discussed the responsibility under the Convention of the Child is worthy to mention with regard to contemporary child removals. The overrepresentation of Indigenous children involved in the care and protection system today must be viewed against the past discriminatory practices. The forced separation of Aboriginal children from their families has caused widespread breakdown of family relationships and structures and loss of personal, family and cultural identity among Indigenous people. Past child removal policies, which tore apart families and communities, remain to have a negative impact on individuals, families and communities. The Convention requires Australia to provide an adequate standard of living and to undertake measures to promote physical recovery and social reintegration of a child subjected to neglect, exploitation or abuse. Failure to do so, as shown by today's alarming statistics of child removals as

⁹⁷ This view has strongly been argued by Dr Sarah Pritchard, who is a prominent Australian professor in Indigenous issues.

⁹⁸ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997,

<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading103>, April 27, 2001

⁹⁹ *Ibid.*

well as the continuous existence of racism or insensitivity to different cultural norms and child rearing practices among workers in family services departments, demonstrates that Australia is not satisfying the provisions set out in the Convention. This view is endorsed by the report issued by the Committee on the Rights of the Child on its consideration of Australia's initial report regarding the implementation of the Convention. The Committee expressed its concern about the special problems still faced by Aboriginals with regard to their living standard, particularly in the area of education and health, and recommends Australia to take further steps to improve the alarming situation.¹⁰⁰

Another area of concern is Australia's choice not to incorporate the Child Convention into domestic law, which has the result that its provisions are not directly enforceable in Australian law. The fact that individuals do not have a right to launch complaints in the local courts on the basis of the Convention has been criticized by the Committee, but Australia holds the view that the provisions of the Convention are fully implemented in the wide range of laws, programs and policies adopted at both the federal and state level affecting children.¹⁰¹ This might be true concerning the majority of the provisions, but in order to guarantee complete implementation of international instruments it is advisable to incorporate them in their entirety into domestic law.

The Aboriginal child placement principle is widely recognized but has not been enshrined in legislation in all states.¹⁰² However widespread the acceptance of the Aboriginal Placement Principle¹⁰³ is, it is not always followed, leaving the care agencies without influence regarding placement decisions concerning Indigenous children. Legislative recognition of the placement principle in all states would ensure that it is followed in the placement decisions.

In accordance with the Child Convention, the best interest of the child principle must be applied in all actions concerning children. Universal criteria as how to determine what is in the best interest of the child do not exist, but the state parties can use their own discretion when deciding how the principle should be interpreted. Considering the overrepresentation of Indigenous children in contact with the care and protection system it is questionable whether Australian child welfare departments take into consideration Aboriginal values in the decision process of a care application.

¹⁰⁰ Concluding observations of the Committee on the Rights of the Child: Australia, 10/10/97. CRC/C/15/Add.79

¹⁰¹ The Australian Law Reform Commission, *Seen and Heard: Priority for the Children in the Legal Process*, <http://www.austlii.edu.au/au/other/alrc/publications/reports/84/03.html#Head-9>, May 7, 2001

¹⁰² In NSW it is set out in *Children (Care and Protection) Act 1987* and in NT the *Community Welfare Act 1996*

¹⁰³ See Chapter 2.6

It seems that the criteria used to determine what is considered to be in the child's best interest is consistent with a westernised rather than an Indigenous view. In order to prevent continuance of harmful practices relating to Indigenous child welfare the criteria used when employing the principle might need reevaluation. Additionally, modifications in current policies and child welfare laws are also necessary. As of today, the current scope of such debate in Australia is far too limited.

In conclusion, the problem needs to be approached from two different angles. First, the existing policies and laws must be made friendlier to the Indigenous culture so that Indigenous people cease being as vulnerable and exposed to them as they are today. This can be achieved by allowing Indigenous representatives a more important role in the development of new standards. Secondly, efforts must be made to generally improve the socio-economic situation for the Indigenous people. The overrepresentation of Aboriginals in the child care and protection system is not only a result of current practices and policies but there is a strong link to the happenings of the past. The effects suffered by the families who were originally affected by the child removal policies were passed on to succeeding generations. The socio-economic situation for the Indigenous people, as a result of the child removal policies, must be fundamentally improved in order to prevent new generations from suffering from the past. More specifically, and in accordance with the Child Convention, Australia must take further action in the areas of housing, education, health and rehabilitation of families affected by the removal policies.

4.5 Australia's Response to Allegations of Human Rights Violations

With regard to Australia's liability and response to violations of human rights it is initially essential to point out that, since the power to handle Indigenous issues was put with the state governments, it was them rather than the federal government, which were legally responsible for removals of Indigenous children. Technically, the Federal government was only responsible for removals in the Northern Territory, since under all other jurisdictions children were separated from their families under state legislation.¹⁰⁴ However, while not suggesting that state governments should not take responsibility, the common view is that the Federal government has the primary responsibility. The fact that a national agreement was made in terms of an assimilation policy on the 1937 Conference¹⁰⁵ and that since the 1967 referendum¹⁰⁶ the national government has had paramount powers in Indigenous affairs support this view. Given the national dimensions of the issues at hand, any other approach would be fragmentary, unacceptable as

¹⁰⁴ Garkawe S, "Compensating the Stolen Generation", *Alternative Law Journal* Vol. 22 No. 6 December 1997, p.279

¹⁰⁵ See Chapter 2.4

¹⁰⁶ See Chapter 2.6

well as arbitrary. In order to properly address the issues relating to the child removals, action must be initiated at the federal level.

There is grave concern about the Australian Federal government's willingness to address appropriately serious violations of human rights. While the government accepts the need to acknowledge the wrongs of the past, referring to the child removal policies, it does not discuss these wrongs as violations of human rights. It is true that a \$63 million package aimed at assisting those affected by the past policies and practices (by for instance reuniting families and enabling Indigenous people to access archives and historical information about themselves and their families) was announced by the government as a response to the HREOC Report, but there has not been an adequate comment offered on the crucial questions of genocide and systematic racial discrimination. The findings of the CERD report in March 1999, issued according to the early warning and urgent procedure, as well as the Committee's request to visit Australia were altogether rejected by the Australian government.¹⁰⁷

Since the Convention on the Elimination of All Forms of Racial Discrimination, the ICCPR and the ICESCR were due for consideration in 2000, Australia appeared before several UN treaty monitoring bodies during that year. The reports, in which it was asserted that Australia does not comply with human rights standards, were met aggressively by Australia. Despite Australia's impressive record of ratifying international human rights treaties, the government has shown persistent indifference or even indignation with regard to any criticism by UN treaty monitoring bodies. As a result of the findings of the Committees the Australian government threatened to reduce cooperation with the entire UN system.¹⁰⁸ The most feared case scenario was that Australia would withdraw from the individual communications procedure under the ICCPR and the Racial Discrimination Convention. Even if this threat never was realized it is a legitimate question to ask, with regard to the government's attack on the UN system, how Australia can play a credible role in responding to UN efforts on human rights protection in other countries, such as Indonesia and East Timor, if it fails to seriously consider the findings of the UN Committees when they concern Australia.

Concern over Australia's response to the allegations of human rights violations and of the insufficiency of present human rights protection was intensified when the *Administrative Decisions (Effect of International Instruments) Bill 1999* was due before the Upper House in March 2001. Adoption of this controversial Bill would mean that individuals could not make use of international human rights standards when complaining about

¹⁰⁷ Amnesty International Annual Report 2000: *Australia*, 2000, <http://www.web.amnesty.org/web/ar2000web.nsf/countries/b097ca008c80112d802568f2005528fd?OpenDocument>, May 8, 2001

¹⁰⁸ Hearn J, "Shrinking to the Occasion: Australia Before UN Treaty Bodies", *Human Rights Defender*, Vol. 10 No. 1 March 2001, p.2

human rights violations in Australian courts.¹⁰⁹ The Bill was a response to the Teoh decision made by the High Court, in which it was held that entry into a treaty by Australia creates a legitimate expectation that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law.¹¹⁰ It was said that this was especially the case when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights.¹¹¹ The Commonwealth Government was of the opinion that the act of entering into a treaty should not give rise to such expectations. It was of the view that this development was not consistent with the proper role of Parliament in implementing treaties in Australian law. Under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations.¹¹² The Bill was introduced into the House of Representatives in September 1999 and was passed in that chamber in May 2000. It was then introduced to the Senate in June 2000 and in April 2001 there was a second reading debate, but the vote on the legislation has been delayed until June 2001.¹¹³ There is reluctance on behalf of the Opposition in Australia, but the Australian government is insisting to adopt the legislation in its current format. A future adoption of this Bill would be a further sign of the indifference showed by Australia to its obligations to provide effective remedies for any violations of their treaty rights.

The way in which Australia has persistently rejected the past child removal policies as constituting violations of human rights is clearly in line with recent developments on the federal level. In 1999 the Senate initiated an inquiry into the effectiveness and adequacy of Australia's response to the HREOC report and the government's response to the Senate inquiry was submitted by The Federal Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, in March 2000.¹¹⁴ In this submission, hereafter referred to as the Herron Report, the government strongly rejected the claims that child separation practices amounted to genocide. It was of the opinion that the requisite intent to destroy, in whole or in part, an ethnic or racial group is not satisfied, since much of the design and implementation of the policies and practices of child removal were directed at improving the situation for Indigenous children. Neither did the government accept that relevant policies and practices amounted to other violations of human rights. Moreover, the government response questioned the mere existence of a

¹⁰⁹ Art.5, the *Administrative Decisions (Effect of International Instruments) Bill 1999*

¹¹⁰ Minister of State for Immigration & Ethnic Affairs v Teoh P20/1994 (25 October 1994)

¹¹¹ *Ibid.*

¹¹² House of Representatives, *Administrative Decisions (Effect of International Instruments) Bill 1999*, Explanatory Memorandum, <http://www.aph.gov.au/legis.htm>, June 7, 2001

¹¹³ Interview with Mr Peter Verdon, Inquiries Supervisor at the Senate Table Office, Parliament of Australia, May 18, 2001

¹¹⁴ New South Wales Department of Aboriginal Affairs, *The Stolen Generations*, http://www.daa.nsw.gov.au/daa/media_6.html, May 9, 2001

stolen generation on the basis of lack of evidence as to the number of children being removed. Reservations were made as to the accuracy of the estimates in the HREOC report, which concluded a number of approximately one in three and one in ten in the period from 1910 until 1970.¹¹⁵ The government accepted a figure of one in ten children at best and emphasized that this did not constitute a generation. It was even claimed that this figure of 10 percent would include situations, which could not be referred to as children being stolen or even forcible removed, for example situations in which children were orphaned, genuinely surrendered for adoption or removed for their own protection.¹¹⁶ According to the government's view the treatment of separated Aboriginal children was essentially lawful and benign. The report, which created an outcry from the Indigenous people, was at first strongly defended by the Australian government. Due to the immense pressure from the Indigenous Community and Organizations, the Prime Minister, Mr. John Howard, chose to apologize to Aborigines offended by the claim there was no stolen generation.¹¹⁷ An apology does not however make void the government stand point there is no stolen generation. The denial of unlawful practices in the past remains and, therefore, so does the government's refusal to address properly human rights violations.

5. THE ISSUE OF REPARATION

5.1 The Right to Reparation in International Law

International human rights treaties and norms of customary international law impose obligations on countries to respect human rights standards and to prevent their violations and in case of a breach impose an obligation on states to offer the victims reparation. Many international instruments binding on Australia recognise this right to remedies and reparations, including Art. 8 of the Universal Declaration of Human Rights, Art. 2(3) of the ICCPR, Art. 39 of the Convention on the Rights of the Child and Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. A fundamental question with respect to human rights violations is in what cases a state can be held responsible for them. As a general rule a state is not responsible for actions committed by private

¹¹⁵ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading103>

¹¹⁶ Senate Legal and Constitutional References Committee, *Inquiry Into the Stolen Generation*, Federal Government Submission, Submitted by Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, March 2000

¹¹⁷ Grattan M, "Howard's Backflip Apology", *The Sydney Morning Herald*, April 7, 2000, <http://www.smh.com.au/news/0004/07/pageone/pageone01.html>, May 9, 2001

individuals. A human rights violation is regarded a state action if it is perpetrated by state bodies or officials acting within their lawful authority or *ultra vires*. Gross and large-scale human rights violations can also be tied to a state when committed by local bodies and officials, but the threat posed by such violations is vastly greater when they are perpetrated by, for example, a parliament adopting racist legislation or by pursuing cruel policies.¹¹⁸ When discussing human rights violations ordered or sanctioned by governments it is also important to keep in mind that the term government is to be used in a broad sense as including all higher organs of a state, especially the legislative and executive bodies and the officials employed in them.¹¹⁹

While the violation of any human right gives rise to a right of reparation, it has been discussed at the international level which particular violations should be included in the category of gross violations of human rights. Though an exhaustive list does not exist, it is widely recognized that both genocide and systematic racial discrimination are included in the notion of gross violations of human rights and fundamental freedoms.¹²⁰ Generally all systematic, large-scale human rights violations are considered gross in character. Additionally, violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and must accordingly be given due attention with respect to the right to reparation.¹²¹

Theo van Boven, former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, submitted a report on the issue of the right to reparation for victims of gross violations of human rights in 1993, proposing a set of basic principles and guidelines. In 1996 van Boven presented a draft of revised set of principles, the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*.¹²² This document asserts that the violation of any human right gives rise to a right to compensation for the victim and that special attention must be paid to gross violations of human rights. It further states that reparation may be claimed either individually or collectively by the direct victims of violations of human rights, the immediate family, dependants or other persons or groups closely connected with the direct victims. Reparation as interpreted in international law includes the right to restitution, compensation,

¹¹⁸ Chernichenko S, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Definition of Gross and Large-scale Violations of Human Rights as an International Crime*, UN Doc E/CN.4/Sub.2/1993/10

¹¹⁹ *Ibid.*

¹²⁰ Netherlands Institute of Human Rights, *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht March 11-15 1992, p.17

¹²¹ Van Boven T, *Summary of the Discussions* in Netherland's Institute of Human Rights Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Maastricht March 11-15 1992, p.9

¹²² UN Doc E/CN4/Sub2/1996/17, submitted by van Boven on May 24, 1996, pursuant to Sub-Commission resolution 1995/117, August 24, 1995

rehabilitation and guarantees of non-repetition and is expected to be proportionate to the seriousness of the violations and the resulting damage. In the case of a human rights violation one or several of the elements may be invoked, depending on the gravity and type of violation. Restitution shall be offered, to the extent possible, to re-establish the victim's situation as it appeared prior to the violations of human rights. Monetary compensation shall be provided for any economically assessable damage, such as physical or mental harm, pain, suffering and emotional distress, lost opportunities and harm to reputation or dignity. Rehabilitation shall include medical and psychological care as well as legal and social services. The state in breach must further give guarantees of non-repetition, which includes, for example, a verification of the facts, full public disclosure of the truth and acknowledgement of responsibility along with an apology.¹²³ Due to the gravity of gross violations of human rights there is also substantial support for the view that claims based on such violations should not be subject to statutes of limitations.¹²⁴

5.2 Justification for Monetary Compensation in Australia

There is a call for monetary compensation in Australia due to the human rights violations, which have taken place in previous years, especially the ones that constituted gross violations, genocide and systematic racial discrimination. Considering the fact that international law clearly and explicitly imposes an obligation to pay compensation as a measure of reparation for any acts, which constitute a violation of human rights and the principles elaborated by Professor Boven compensation claims are then legitimate and as a consequence the Federal government is bound to provide compensation for the stolen generations. Compensation is especially significant because measures of restitution cannot completely and strictly restore the status of those affected by the removal.¹²⁵

The appropriateness of monetary compensation has nevertheless been questioned. Some have argued that money is not the answer for the stolen generation, but that its members primarily need an apology, rehabilitation and counselling services.¹²⁶ It is true that the loss, grief and trauma suffered by Aborigines as a result of the separation laws, policies and practices can never be adequately compensated, but compensation is nevertheless of major significance for many victims. It has been suggested, from the

¹²³ Van Boven T, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, UN Doc E/CN4/Sub2/1996/17, May 24, 1996

¹²⁴ Pritchard S, "The Stolen Generations and Reparations", *UNSW Law Journal* Vol. 4 No. 3 1997, p.30

¹²⁵ Buti A, "Unfinished business: The Stolen Generations", *Murdoch University Electronic Journal of Law* Vol. 7 No. 4 December 2000, http://www.murdoch.edu.au/elaw/issues/v7n4/buti74_text.html#, May 16, 2001

¹²⁶ Garkawe S, "Compensating the Stolen Generation", *Alternative Law Journal* Vol. 22 No. 6 December 1997, p.277

victim`s perspective, that monetary compensation would involve a confirmation of government responsibility and an apology for the wrongs committed.¹²⁷ Taken into account the fact that Indigenous people are the most disadvantaged group in Australia, monetary compensation would also make a practical difference, in making the lives of communities as well as individuals easier. This is not to suggest that money alone will solve the existing problems, but it is to be seen as an essential part of a group of measures.

An argument raised against compensation is the difficulty in estimating the monetary value of losses, on the grounds that there is no comparable area of awards of compensation. The weakness of this statement can be shown by drawing analogies between the injustice committed to the children of the stolen generation and those that come before the Courts on a daily basis for assessment. For instance, a comparison with the assessment of damages for personal injuries caused by negligence is a helpful example and demonstrates that there is little difference between such cases and cases involving compensation to the stolen generation. In negligence judges are to make assessments of both economic and non-economic losses on a lump sum once and for all basis. In this context the assessment of non-economic losses such as damages for pain and suffering, damages for loss of the amenities of life, and damages for loss of expectation of life is of particular importance.¹²⁸ It is certainly a difficult task to estimate such damages, but the judges are nevertheless required to decide on these cases. There is no reason to believe that cases concerning compensation to the stolen generation would be more complicated to rule on than negligence cases.

Compensation schemes for victims of crime exist in every jurisdiction in Australia. The basic principle in these schemes is that every victim of a violent crime is entitled to a monetary award, guaranteed by the government. Because most removals of Indigenous people were carried out with the sanction of the law, the act of removal could not be considered a crime against prevailing domestic Australian law. Therefore, the members of the stolen generation do not constitute crime victims, except for the children subject to abuse while in children homes or in foster placement.¹²⁹ However, bearing in mind the obvious similarity in the crime victim scheme and the victims of human rights there is hardly any valid argument as not to offer the latter compensation.

¹²⁷ Danieli, Y, *Preliminary Reflections from a Psychological Perspective*, in Netherland`s Institute of Human Rights Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Maastricht March 11-15 1992, p.205

¹²⁸ Graycar R, "Compensation for the Stolen Children: Political Judgments and Community Values", *UNSW Law Journal* Vol. 4 No. 3 1998
<http://www.austlii.edu.au/au/other/unswlj/forum/1998/vol4no3/graycar.html>, June 8, 2001

¹²⁹ Garkawe S, "Compensating the Stolen Generation", *Alternative Law Journal* Vol. 2 No. 6 December 1997, p.279

5.3 The Australian Government's Position in relation to Reparation

The Federal government does not only fail to accept the “wrongs of the past” as human rights violations, but it also falls short on the international basic principles of the right to reparation. In particular, the government does not accept the right of victims to financial compensation, unless a legal liability can be established in individual cases through a proper process of claims assessment.¹³⁰ Neither has any state government agreed to provide compensation to the people affected. The applicability of the principles elaborated by Professor Boven was altogether questioned in the Herron Report. The government claimed that due to the lack of gross human rights violations in Australia and the fact that the van Boven principles do not have any formal status in international law, monetary compensation does not materialize. While the government strongly denies genocide, it does not however comment on the allegation of another gross violation of human rights, racial systematic discrimination. The lack of a proper response to the racial discrimination issue clearly indicates a weakness in the government's defence to allegations of human rights violations as well as to the denied applicability of the van Boven principles.

Compensation is further refused on other grounds, such as the difficulty in identifying persons who have suffered loss and estimating the monetary value of losses, the difficulty in gathering evidence due to the period of time, which have elapsed and the strain it would put on Australian economy if compensation were to be granted.¹³¹

Despite the government's rejection of compensation, it nevertheless finds itself to have some obligations on the issue of reparation to the stolen generations. In certain aspects the response by the Federal government is in fact consistent with its international reparations obligation. Specifically, the government “acknowledges the wrongs of the past” and feels obliged to address the problems, which now exist as a result of those wrongs. While denying compensation, the government has granted other forms of reparation, such as services and support programs and initiatives, amounting to a sum of \$63 million.¹³² The reparation scheme focused on the need for people to tell their stories and for their pain to be acknowledged, family reunions, access to personal and historical records and counselling and support if required. One measure taken to alleviate some to the resultant

¹³⁰ Senate Legal and Constitutional References Committee, *Inquiry Into the Stolen Generation*, Federal Government Submission, Submitted by Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, March 2000

¹³¹ Graycar R, “Compensation for the Stolen Children: Political Judgments and Community Values”, *UNSW Law Journal* Vol. 4 No. 3 1998, <http://www.austlii.edu.au/au/other/unswlj/forum/1998/vol4no3/graycar.html>, May 16, 2001

¹³² Senate Legal and Constitutional References Committee, *Inquiry Into the Stolen Generation*, Federal Government Submission, Submitted by Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, March 2000

suffering was the establishment of Link-Up. This organization has sought, by providing research, investigation and personal contact services, to reunite displaced people with their families and provide counselling for people going through the Link-up process.¹³³ The \$63 million is also to be used to promote reconciliation and to address the effects of socio-economic disadvantage suffered by indigenous people in the four significant areas of health, housing, education and employment.

The denial of violations of human rights on one hand and the consent to reparations on the other is clearly contradictory and could be interpreted as an implied, nevertheless involuntary, acceptance of responsibility, however with a discretionary choice as to how reparations should be made. While accepting the need for restitution, by offering practical assistance for family reunion - the indexing and preservation of indigenous family records, and rehabilitation, by offering for example counselling, the Federal government has not only denied compensation as part of a reparation scheme but also refused to give an apology. All state governments except one have apologized¹³⁴, and so have several local governments, police forces, government agencies, non-government organizations and church groups.¹³⁵ The Federal government has consistently refused to apologize to the stolen generations and their families. Instead the Federal Parliament passed in 1999 a statement of regret, in which it expressed its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of those practices.¹³⁶ The parliamentary statement made by the Prime Minister, Mr John Howard, fails to specifically mention those removed or utter the word "sorry".

Australia has equally failed to make guarantees of non-repetition of past practices in that the question remains whether the present systems of child welfare legislations, by their operation and practice, continue to result in the same human rights breaches as the previous practice of forcible removal.¹³⁷ In relation to the requirement of guarantees of non-repetition it has been suggested to introduce a Bill of Rights in Australia so as to safeguard fundamental rights and freedoms. There are, it seems, compelling reasons to secure constitutional protection to Indigenous rights. For example, even if the *Racial Discrimination Act 1975* prevails over inconsistent state legislation it does not protect against subsequent Federal legislation. Therefore there is a need to, by an amendment to the *Australian*

¹³³ Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, *New Link-Up Centres to Reunite Indigenous Families*, January 4, 2001, http://www.atsia.gov.au/content/media/releases/linkup_centres.htm, June 8, 2001

¹³⁴ The Northern Territory, which made a statement of acknowledgement.

¹³⁵ New South Wales Department of Aboriginal Affairs, *The Stolen Generations*, http://www.daa.nsw.gov.au/daa/media_6.html, May 16, 2001

¹³⁶ *Motion of Reconciliation*, August 26, 1999, <http://www.law.mq.edu.au/Units/law309/reconciliation.htm#mor>, May 17, 2001

¹³⁷ Cessation of continuing violations is part of the van Boven principle of guarantees of non-repetition.

Constitution, provide an explicit prohibition of laws, which discriminate on the grounds of race and establish guarantees of distinct Indigenous rights. This way the Commonwealth would be prevented from discriminating against, and interfering with, the rights of the Indigenous people.¹³⁸

5.4 Reparation – the International Experience

The right to reparations for gross violations of human rights has been recognized in several jurisdictions. For instance, Romany victims of forcible child removal in Switzerland have been granted a total of eleven million Swiss francs to be divided among almost 1900 victims by way of compensation. Germany has also provided reparations to victims of the Nazi and former German Democratic Republic regime. Victims of gross violations of human rights in Honduras, Kuwait and many other jurisdictions have also received reparations, including monetary compensation.¹³⁹ A case similar to the one in Australia existed in Canada, where Indigenous children were subject to a policy called the residential schooling policy. From the late 1870's until the 1960's Canadian governments implemented child welfare policies, which aimed at assimilation and integration. As in Australia, the scheme was to separate Indigenous children from their families and communities on an enormous scale and to attempt to eliminate their Indigenous identity. In order to implement these policies children were sent to church operated residential schools, in which children were brought up in conditions of constant neglect and suffered both sexual and physical abuse. It has been established that approximately 105 000 Indigenous children attended residential schools across Canada before the last schools were closed in the 1980's.¹⁴⁰

In response to a report issued by a Canadian Royal Commission in 1996, the Federal government has established the Aboriginal Healing Foundation, which grants funds to community based healing initiatives with aims at developing and delivering programs and services for the victims of residential schooling. The government has further assigned \$350 million for the Foundation to distribute and issued a formal national apology. Between 5000 and 8000 former residential school students have filed lawsuits against the Federal government. Initially the government fought these claims in courts, but due to the increased number of lawsuits, the costs of litigation and the fact that a number of test cases succeeded, the government began entering into settlement negotiations. A sum of \$20 million was paid as a result of settlements of 220 claims in 1997-98, and a further \$8 million was

¹³⁸ Reconciliation and Social Justice Library, *An Australian Bill of Rights*, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/arc/book4/Pages/04aabr01.htm>, June 5, 2001

¹³⁹ Public Interest Advocacy Centre, Submission to the Senate Legal and Constitutional References Committee, *International Experiences*, <http://www.austlii.edu.au/au/other/IndigLRes/2000/1/3.html#Heading21>, May 17, 2001

¹⁴⁰ *Ibid.*

paid out as the government settled another 70 cases in 1998-99. Settlements have ranged from \$20 000 to \$200 000.¹⁴¹

The Canadian government is currently developing alternative dispute resolution schemes to resolve further claims out of court. These schemes are exploring the possibility of negotiating group compensation deals, which involve victims who attended the same schools or live in the same communities.

The Canadian child removal policies have considerable similarities to them in Australia, but while the Canadian government has accepted its responsibility and addressed the issues of child removals adequately Australia remains unwilling to this aim. The Canadian example reflects a growing international recognition of the essential role of reparations in the process of reconciliation, and provides a model for consideration in the Australian context.

5.5 Mechanisms for the Distribution of Compensation

Since the Australian government has denied to voluntarily pay compensation to the stolen generations, civil claims is currently the only option available for victims.¹⁴² There are however several shortcomings in litigation with respect to compensation claims for past removals. One of the initial difficulties is overcoming the statutes of limitation, which apply to, for example, claims of negligence and breach of fiduciary duty.¹⁴³ Major evidentiary obstacles arise for the claimants because of the passage of time and the lack of records kept by governments. Even where government records exist they will not disclose the level of abuse, deprivation and racism that actually existed. Additionally, since the events occurred up to 50 years ago or more, witnesses might be dead or difficult to locate. Litigation also involves enormous costs, is very time consuming and is also limited in the outcomes it can provide. It exclusively allows for monetary compensation, excluding the broader concept of reparations, and it is only likely to provide compensation to a limited group of people. Litigation is therefore an inequitable and arbitrary mechanism for redressing the harm suffered by all members of the stolen generations, their families and communities.

By reason of the fact that litigation has significant limitations for people who are seeking redress for damage suffered as a result of forcible removal, alternatives to litigation have been proposed. HREOC elaborated in its report 54 recommendations relating to the stolen generations, of which recommendations 14-20 concern the issue of monetary compensation.

¹⁴¹ *Ibid.*

¹⁴² Regarding Australian case law on the issue, see Chapter 6.

¹⁴³ For a definition of negligence and fiduciary duty, see Chapter 6.3.1 and 6.3.2

Besides the recommendation that monetary compensation be provided to people affected by forcible removal there was also support for the establishment of a National Compensation fund to which affected people could apply for compensation. HREOC further suggested that this Fund be administered by a Board, constituted by both Indigenous and non-Indigenous people. If it is established that an Indigenous person was unduly removed from his or her family during childhood a minimum lump sum payment from the Fund should be issued. It is true that, in the determination of compensation, some practical difficulties might arise in assessing what qualifies as proof of removal and proof of loss. In many cases evidentiary material such as records may be difficult to obtain or have been destroyed. In these cases, as has been suggested by the HREOC, the burden of proof should be on governments to rebut otherwise credible claims. Governments should, according to this view, be able to defend a claim if they can establish that removal was in the best interests of the child.¹⁴⁴ Claims would not be subject to statute of limitations and the claimants would not be bound by the rules of evidence.

Even if the National Compensation Fund mechanism is intended as an alternative to the cumbersome and often prolonged processes of civil claims, the option for claimants to apply for compensation through courts should be retained.

As a second alternative to litigation the establishment of a Reparations Tribunal has been suggested. The Public Interest Advocacy Centre (PIAC) has proposed that the powers and the role of the claimant in the tribunal be more extensive than those of a National Compensation Board.¹⁴⁵ The proposed reparations tribunal would have the advantage of offering Indigenous people affected by forcible removal with a forum in which their sorrows can be heard and it would also assist in achieving public recognition and acknowledgement of their harm. It is also expected that a tribunal would provide outcomes, which reflect the wishes of those affected by forcible removal. Another advantage is that, since a tribunal would disregard statutes of limitations and require less concrete evidence than would a court, compensation would not only be granted to people who are “lucky” to have sufficient evidence for a court hearing. It would avoid the unfairness of requiring claimants to prove events on the basis of the availability and accuracy of written records and first hand oral evidence. Thus, findings would be less arbitrary and present an overall fairer result.

¹⁴⁴ Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen72.html>, May 17, 2001

¹⁴⁵ Public Interest Advocacy Centre, Submission to the Senate Legal and Constitutional References Committee, *International Experiences*, <http://www.austlii.edu.au/au/other/IndigLRes/2000/1/3.html#Heading27>, May 17, 2001

In line with the Australian government's view on compensation, the idea of the establishment of a Fund and a Reparations Tribunal were accordingly rejected. The government's opinion is that the courts are the right venues for compensation claims and unless legal liability can be established there in individual cases, an obligation to compensate does not exist. It was further stated that, since a tribunal would have to determine extreme complex factual and even legal matters, it would be ill-equipped to handle claims unless it operated in a similar manner to a court. The government agreed that the cost of a proper judicial assessment of claims is not inconsiderable, taking into account the difficulty in researching, reconstructing and adjudicating distant events, but considered that cost insignificant compared to the potential compensation costs of a less rigorous process. The government, referring to the cases which have already been tried by courts, emphasized the hazards of accepting compensation claims without thorough scrutiny and testing and concluded that a tribunal cannot be expected to be quicker, cheaper or avoid traumatic adversarial processes and therefore, would not provide any advantage over the regular litigation process.¹⁴⁶

6. AUSTRALIAN CASE LAW REGARDING COMPENSATION

6.1 In General

As mentioned in the previous chapter, the only possibility for the stolen generation to seek compensation at present is through the courts. Currently there are approximately 700 claims in Australia awaiting trial.¹⁴⁷ Judging from the cases already heard it has been proved extremely difficult to prove the plaintiffs' case and so far no case has been successful. The Australian government is persistently challenging every claim and the cost in the most recent case amounted to \$9 million.¹⁴⁸ The courts' dismissal of case after case has forced potential plaintiffs to take new approaches in order to find a way to invoke liability on the Commonwealth. The different approaches attempted to this point will be presented below.

6.2 The Constitutional Challenge

Alec Kruger, George Bray and seven other members of the Stolen Generations commenced legal proceedings in 1995. The action, hereafter

¹⁴⁶ Senate Legal and Constitutional References Committee, *Inquiry Into the Stolen Generation*, Federal Government Submission, Submitted by Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, March 2000

¹⁴⁷ Jopson D, Farrant D, *We'll fight on, vow stolen children*, August 12, 2000, <http://www.smh.com.au/news/0008/12/text/pageone1.html>, June 1, 2001

¹⁴⁸ New South Wales Department of Aboriginal Affairs, *The Stolen Generations*, http://www.daa.nsw.gov.au/daa/media_6.html, June 1, 2001

referred to as the Kruger and Bray case, challenged the constitutional validity of the *Aboriginals Ordinance 1918*, which provided the legal basis for the removal of Indigenous children from families and communities in the Northern Territory.¹⁴⁹ It is important to keep in mind that, with respect to this action, it is the validity of the Ordinance, which is the subject of the proceedings and, not any exercise of power under it.

The Ordinance had been enacted by the Commonwealth pursuant to section 13 (1) of the *Northern Territory Administration Act 1919*, which relied upon power given to the Commonwealth by section 122 of the *Australian Constitution* for its validity. Section 122 provides that the Parliament *may make laws for the government* of any territory surrendered by any state to and accepted by the Commonwealth and may allow the representation of such territory in either House of the Parliaments to the extent and of the terms which it thinks fit. A law made pursuant to section 122 must, in order to be within power, “be for the government of the territory in some meaningful sense”.¹⁵⁰ In Kruger and Bray the plaintiffs argued that the Ordinance was outside the scope of section 122 and therefore invalid. It was submitted that the Ordinance was not a law for the government of the Northern Territory, since its only purpose was “the arbitrary executive detention of Aboriginal citizens and the cultural and physical extinguishment or disintegration of that racial minority”.¹⁵¹ The High Court concluded that the extensive power conferred on the Commonwealth under section 122 was only subject to a requirement that there be a sufficient nexus between the law and the territory. Since the law operated exclusively on people, places and events in the Northern Territory, the legislation had sufficient nexus with that Territory and consequently satisfied the “law for the government of a territory” criterion.

The plaintiffs further argued that the Chief Protector’s power under the Ordinance to detain Aboriginal or half-caste children within a reserve or Aboriginal institution was properly described as a judicial power. The argument was that according to the chapter of judicature in the Constitution, the power to authorize detention in custody was a judicial power, and such power cannot be conferred upon an officer of the Commonwealth, but only upon courts constituted in accordance with the Constitution.¹⁵² The High Court however stated that the power to detain Aboriginal children in custody for the purpose of their welfare cannot be construed as an exclusively judicial power, and therefore the provisions in the Constitution need not be

¹⁴⁹ Kruger v The Commonwealth of Australia and Bray v The Commonwealth of Australia (1997) 146 ALR 126 (CTH)

¹⁵⁰ Schaefer M, “The Stolen Generation – In the Aftermath of Kruger and Bray”, *UNSW Law Journal* Vol. 4 No. 3 1998, <http://www.austlii.edu.au/au/other/unswlj/forum/1998/vol4no3/schaeffer.html>, May 22, 2001

¹⁵¹ *Ibid.*

¹⁵² Kruger v The Commonwealth of Australia and Bray v The Commonwealth of Australia (1997) 146 ALR 126 (CTH)

complied with. It was held that the Chief Protector could not legitimately make decisions under the Ordinance without regard to the interests of Aboriginals involved and those of the wider Aboriginal population. The fact that the actions of the Chief Protector did not promote the welfare of Aboriginals does not mean that the decisions made and the actions taken were of a judicial rather than an executive character.

With respect to the actual removals it was argued that the Ordinance was contrary to an implied constitutional freedom from removal and detention without due process of law. The Australian constitution does not seek to establish personal liberty and does not contain a guarantee of individual rights, such as the American Bill of Rights. Accordingly, the Constitution does not contain a general guarantee of due process of law. One of the judges presiding in Court added that since the power to detain in custody was not a judicial power, the power was not subject to a requirement of due process. The majority also rejected the plaintiffs' claim that the Constitution contained an implied constitutional right and/or guarantee of equality, freedom of movement and association and that the Ordinance was contrary to these rights/guarantees. Even if the Constitution does contain a provision stating that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion¹⁵³, the majority decision of the Court rejected the plaintiffs' contention that the Ordinance prohibited the free exercise of religion. The constitutional right is directed to the making of a law and not of the administration of the law. It was stated that an effect of the Ordinance might have been to impair or even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. Since a purpose to this effect could not be concluded from the wording of the Ordinance, it did not restrict the free exercise of religion. Thus, the constitution had not been infringed.

The plaintiffs then argued that the Ordinance was invalid because it authorized acts of genocide. With regard to this claim the Court held that although it may be taken that the Ordinance authorized the forcible transfer of Aboriginal children from their racial group there is nothing in the wording of the Ordinance that would justify a conclusion that it authorized acts "with intent to destroy, in whole or in part" this group.

In addition to seeking declarations of invalidity of the Ordinance the plaintiffs sought damages for their removal and detention. They contended that a right of action in damages arose by virtue of any breach of their constitutional rights and freedoms. The Court rejected this submission and held that the Constitution does not reveal an intention to create a private right of action for damages in case there is an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes of action enforceable by awards of damages are thus not created by the Constitution

¹⁵³ Section 116, *The Australian Constitution*

but by the common law (including the doctrine of equity) supplemented by statutes, which contain an intention to create such a cause of action for breach of its provisions.¹⁵⁴

6.3 A New Approach

6.3.1 The Williams Case

Since the High Court already has ruled that legislation used to remove Aboriginal children was not unconstitutional, a new direction had to be taken in subsequent cases. In 1993 a member of the stolen generations commenced proceedings for compensation against the state of New South Wales. This was the first action brought by an Aboriginal for a remedy for losses suffered as a result of the removal policies. The plaintiff filed a notice of motion seeking an order under the *Limitation Act 1969* to extend the period within which she could bring proceedings. The motion was denied, but was later granted by the NSW Court of Appeal.¹⁵⁵ The Court found the two requirements for an extension satisfied, i.e. it was established that Ms Williams was unaware of the fact, nature or cause of her injury at the time the limitation period expired and that it would be just and reasonable to extend the time limit.¹⁵⁶ The case was then brought up by the NSW Supreme Court in 1999.

The plaintiff, Ms Joy Williams, was in accordance with the *Aborigines Protection Act 1909* placed under the control of the Aborigines Protection Board and remained under its control until the age of eighteen. She spent her first four years in an institution for infant Aboriginal children and was thereafter placed in a home for white children. Ms Williams alleged that she had developed a Borderline Personality Disorder¹⁵⁷ as the result of her childhood experiences and that she as a child was denied bonding and attachment, had been a victim of maternal deprivation and further suffered a disorder of attachment. The plaintiff claimed that her psychiatric injury and suffering were due to the default of the state and sought damages for negligence, breach of fiduciary duty, breach of statutory duty and for trespass.¹⁵⁸ All the plaintiff's arguments failed. The trial judge held that the Protection Board did not owe a common law duty of care and that there was no actionable statutory duty. Further, the Protection Board did not owe the appellant any fiduciary duty and that even if this duty or any of the other duties relied upon had been owed, none was breached. The Court found that the authorities at the institutions, in which the plaintiff was brought up, had not conducted their institutions unsatisfactorily and that the appellant's

¹⁵⁴ In the Common law legal system the right to bring an action is founded in the common law, equity and legislation.

¹⁵⁵ *Williams v Minister, Aboriginal Land Rights Act 1983 (1994) 35 NSWLR 497*

¹⁵⁶ *Limitation Act 1969*, Section 60G(2)

¹⁵⁷ The illness is caused by a fundamental failure in parenting.

¹⁵⁸ *Williams v The Minister, Aboriginal Land Rights Act 1983 & Anor [1999] NSWSC 843 (26 August 1999)*

behaviour at these institutions was normal. It was also stated that there was insufficient evidence to establish a causal link between the psychiatric illness suffered by the plaintiff and her experiences as a ward. On the contrary, it was concluded that the plaintiff's need for care was filled in a loving devoted, charitable religious way by the staff at the institutions.

In relation to the claim in negligence the plaintiff maintained that the Aborigines Protection Board owed the plaintiff a duty of care which included to supervise her upbringing, to monitor at regular intervals the care she was receiving, to interview the plaintiff regularly for purposes of assessing her well being, to investigate or inquire into allegations of maltreatment and to take reasonable care to safeguard her mental and physical well-being. By failing to appropriately see to the child's well-being the Board, according to the plaintiff, had not fulfilled its statutory obligations under section 7¹⁵⁹ in the *Aborigines Protection Act* and had therefore been negligent.

Negligence is defined as a person who fails to act like the standard, ordinary, reasonable person. In order to be successful in a claim for negligence a person must show that someone owed them a duty of care, that this duty has been breached and that the person claiming has suffered some foreseeable loss as a result of this breach.¹⁶⁰ In determining the negligence issue, the Court emphasized the difficulties involved herein due to the fact that the events under assessment occurred in a society with different knowledge, moral values and standards and that the assessment is not based on one particular occasion, happening or incident but rather on alleged general negligent conduct. There is no existing category of negligence, which provides any analogy of the novel cause of action in negligence, the novel cause being the duty of care owed by a local authority in respect of the upbringing of a child. It has been submitted that in deciding whether to develop new categories of negligence the Court should proceed incrementally and by analogy with decided cases.¹⁶¹ Policy¹⁶² reasons and the evidentiary difficulties in combination with a general reluctance to create new categories seem to be the reasons for not introducing a category in this case. In the discussion on policy the Court made a comparison of the relationship between a parent and a child and that of an institution (bringing up the child) and a child. Since there is no action for negligence allowing the child to sue his or her parents for "bad upbringing", the Court saw no reason to allow such an action against an institution/Board. Were it to be otherwise,

¹⁵⁹ Section 7 states that the Protection Board were under the obligation to provide for her custody, maintenance and education and to exercise a general supervision and care over all matters affecting her interests and welfare and to protect her against injustice, imposition and fraud

¹⁶⁰ Luntz H, Hambly D, *Torts – Cases and Commentary*, Butterworths 4th edition 1995, p.117

¹⁶¹ *Caparo Industries PLC v. Dickman* (1990) 2 AC 605

¹⁶² A Policy Decision is a judgment founded principally on considerations of public policy expressed in legislation or judicial decisions or formulated to meet new conditions, taking into account matters of public morals, health, safety and welfare.

a higher duty would or could be imposed on the institution than on the natural parent. Another policy reason raised by the Court was the fact that the effects of imposing a duty in a case such as the present could have social, economic and resource consequences. An imposition of a duty of the type urged in the instant case could affect not only the Board but also have consequences for other child caring bodies. It might cause persons who are in the same position of the Board to adopt a more cautious, restrictive and defensive approach to their duties. To impose a duty of care might as well reduce the supply of child-care services, increase their cost or reduce standards. The Court further found that the impact of the imposition of a duty on the administration of the court system should not be overlooked. It is feared that the recognition of a duty of care in the area concerned in this case might well not only increase the number of cases to be processed by a crowded court system but also impose on it tasks, which it would find difficult to perform in view of the potential complexity and length of many of the cases. The wide potential impact of imposing a duty of care in the general area under consideration and the difficulty of administering litigation in which breaches of it are alleged, are probably not in themselves reasons for not recognizing it. However, they are reasons for delaying any decision of a recognition of a duty of care until substantial evidence is presented to support such a duty. Evidence of this character had not been presented in the present case and consequently no duty could be imposed.

Next the plaintiff claimed there was a breach of fiduciary duty. A claim for breach of fiduciary duty falls within the sphere of equity, as opposed to negligence which falls into the area of common law, and therefore is not strictly subject to the time periods specified in limitations legislation. A fiduciary duty can be imposed when someone undertakes to act for, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense.¹⁶³ Case law has also emphasized the notion of trust and vulnerability inherent in the fiduciary relationship.¹⁶⁴ The plaintiff claimed, on the basis of the same facts and circumstances relied upon to support the negligence claim, that there was a fiduciary relationship between her and the Aborigines Protection Board and that the Board had breached its fiduciary duty derived from this relationship. The Court found that there was no fiduciary duty, and even if there would have been, it was not breached. It stated that the facts in this case did not fit in any pre-existing fiduciary category and was reluctant to expand or create new categories to accommodate this case. Further, the Court reasoned that since it was found that the common law, relying on negligence in this case, did not impose a duty of care, then there is no reason why equity should intervene and impose such a duty. It was in the Court's opinion that fiduciary duties should not be found, additional to common law duties, merely for the purpose to avoid or circumvent limitation periods which

¹⁶³ Abrahams M, "A Lawyer's Perspective on the Use of Fiduciary Duty with regard to the Stolen Children", *UNSW Law Journal* Vol. 4 No. 3 1998, <http://www.austlii.edu.au/au/journals/UNSWLJ/1998/18.html>, May 25, 2001

¹⁶⁴ *ibid.*

would apply to common law actions or to fill a gap where such common law actions fail or are not available for different reasons.

Subsequently the plaintiff relied upon a claim of statutory duty, which is a duty imposed by legislation. The plaintiff held that the primary relevance of the provisions of the *Aborigines Protection Act* is that they impose duties on the Protection Board and associated powers to perform the duties. The statutory duties owed to the plaintiff were to provide for her custody, maintenance and education and to exercise a general supervision and care over all matters affecting her interests and welfare and to protect her against injustice, imposition and fraud.¹⁶⁵ There is however no action for breach of statutory duty unless the legislation confers a right of the injured person to have the duty performed. If no right is conferred, i.e. if there is not an explicit right to civil action in the legislation or if the relevant statute has not been passed through Parliament with the intention of conferring a right to civil action, the general rule is that there is no liability in damages.¹⁶⁶ The Court held that the provisions do not impose upon the defendant any special statutory duty or liability to the plaintiff enforceable by an action for damages independently of the ordinary principles of negligence, which exist in common law. The purpose of the *Aborigines Protection Act* was for the "orderly settlement and supervision of Aborigines for their benefit and for the benefit of the community under control of a public authority established under the Act".¹⁶⁷ Having regard to the general nature of the statutory duties relied upon by the plaintiff, the Court found it difficult to see how it can be properly submitted that a breach of such duties was intended sub-silento by Parliament to give rise to a private claim for damages. According to the Court, the alleged statutory duty does simply not arise in this case.

Next the plaintiff relied upon a cause of action in trespass, which in this case refers to wrongful or false imprisonment. The cause of action was based upon a claim of being taken from her mother in 1942 until her discharge from the institution in 1960. As regards this action in trespass, the plaintiff only maintained such an action in the event that the Court would find that the Board took control of the child without the mother's consent. Since the mother's signature appeared on the application form for her child's entry to an institution the consent criterion was established and thus the Board took control of the plaintiff with legal justification. The cause of action in trespass was consequently rejected.

The Court's ruling was later appealed to the New South Wales Court of Appeal, but it was dismissed.¹⁶⁸

6.3.2 The Gunner and Cubillo Case

¹⁶⁵ The *Aborigines Protection Act*, No 25, 1909, Section 7

¹⁶⁶ Northern Territory v Mengel (1995) 185 CLR 307 at 343-344

¹⁶⁷ Coe v Gordon (1983) 1 NSWLR 419 Lee J at 426

¹⁶⁸ Williams v The Minister Aboriginal Land Rights Act 1983 and The State of New South Wales [2000] NSWCA 255 (12 September 2000)

The claim by Mrs Cubillo and Mr Gunner, who were forcibly removed from their families at an early age, is based on a claim that the actions of government officers exceeded the legislation, motivated by a racist desire to biologically assimilate children taken into white society.¹⁶⁹ They claimed that the Commonwealth through the Director of Native Affairs failed to ensure that the *Aboriginal Ordinance 1918* enacted in the Northern Territory (NT) was observed. The Ordinance provided that the Director was entitled at any time to undertake the care, custody, or control of any aboriginal or half caste if it in his opinion was necessary or desirable in the interests of the aboriginal or half caste to take the child into care.¹⁷⁰ The plaintiffs submitted that the Commonwealth's removal policy shaped the exercises by the Directors of Native Affairs of their powers of removal and detention under the *Aboriginals Ordinance*. As a result there was no lawful justification for the plaintiffs' removal and detention. The plaintiffs also claimed that the Commonwealth was in breach of a legal duty and suggested four alternative sources to this aim. First, they claimed that there is a duty to take reasonable care arising from the general law, secondly a fiduciary duty to act in the best interests of the plaintiffs arising from equity, thirdly a statutory duty defined by the *Aboriginal Ordinance 1918* (NT) and last that the Commonwealth was vicariously liable for the actions of a statutory officer. On the first day of the trial in March 1999, the Commonwealth made an application to have the claim struck out on two grounds, the first being that the proceedings were an abuse of process in so far as there were limited prospects of success and the second being that the limitation period should not be extended. The strike-out application occupied 14 court days and ultimately failed.

The plaintiffs first alleged that their removal and detention involved a breach of duty of care. The difficulty with the plaintiffs' argument that the Commonwealth owed them a duty of care and that this duty arose as a consequence of their relationship with the Director is that there were no statutory powers vested in the Commonwealth. In order to impose a duty of care on a respondent it has been submitted in earlier cases that he or she must be in a position of control and under a statutory obligation.¹⁷¹ The Court found that, since the Commonwealth did not have any statutory power to act or any power to direct others to act¹⁷², it would be unjust to impose a duty of care upon it. The Court, relying on a precedent, further stated that a public authority is under no duty of care in relation to decisions, which involve or are dictated by financial, economic, social or political factors or constraints.¹⁷³ Where parliament has conferred a statutory discretion on a public authority it is for that authority and not for the courts to exercise the discretion. Consequently, nothing that the authority does within the ambit of the discretion can be actionable at common law. If the decision complained

¹⁶⁹ *Cubillo v Commonwealth* (2000) FCA 1084 (11 August 2000)

¹⁷⁰ The *Aboriginals Ordinance 1918* (NT), Section 6

¹⁷¹ *Crimmins v. Stevedoring Industry Finance Committee* (1999) HCA 59; 167 ALR 1

¹⁷² The Commonwealth's capacity to intervene was essentially limited to legislative change.

¹⁷³ *Crimmins v. Stevedoring Industry Finance Committee* (1999) HCA 59; 167 ALR 1

of falls outside the statutory discretion, it can (but not necessarily will) give rise to a common law liability. If the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Accordingly, even if the authority has acted ultra vires, a court cannot impose a duty of care if the decision made by the authority is based on policy. A common law duty of care in relation to the taking of a decision involving policy matters simply cannot exist.¹⁷⁴ When applying this to the present case, the Court found it impossible to impose a duty of care since there was no evidence showing that the Director had acted beyond his powers. It further found that the decision to remove the plaintiffs from their families involved a policy decision, which rendered it impossible to impose a common law duty of care. If he had acted beyond his powers and his decision was based on policy, the result would have been the same. One way in which a duty of care possibly could be established is if the Director acted within or beyond his powers and his decision relied upon operational matters. Operational decisions are decisions relating to the manner in which a duty is implemented in practice. A decision based on operational matters is described as an action or inaction, which is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.¹⁷⁵ A decision based on operational matters in the present case could then be decisions relating to the choice of which institution a child should be sent to (as opposed to the policy decision to actually remove the child). The distinction between policy and operational matters is blurry, which makes it easy to refer a decision to either policy or operational. The Court found that it had not been proved that the Director had made any errors in applying the Ordinance, but had acted appropriately. Consequently, there was no possibility to impose a duty of care.

The fiduciary relationship between the Commonwealth and each applicant was said to arise because of the role and functions of the Commonwealth's agents in the removal and detention of the applicants and because of the Commonwealth's power over Aboriginal people in the Northern Territory. It was also said to arise because of the powers, obligations and discretions of the Directors and the vulnerability of each applicant to the exercise of those powers and discretions. The plaintiffs alleged that the Commonwealth had in this regard a duty to act in the best interests of the child, not to make improper use of its position, appoint proper institutions or persons to fulfil the role and duties of a guardian of the plaintiff and properly supervise the institutions and persons into whose care an Aboriginal child was placed. The plaintiffs argued that the personal injuries and cultural losses suffered by them resulted from breaches of these duties. They also claimed that there was a breach on the basis of a conflict of interest. If the fiduciary has a conflict of interest it is arguable whether he can perform the required duties

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

connected to the fiduciary relationship. It was contended that the Commonwealth's main interests were to assimilate half-caste children into non-Aboriginal society, breed out half-caste Aboriginal people and destroy the connections of the plaintiff with his or her Aboriginal family. The plaintiffs intended to prove that an improper purpose existed on the part of the Commonwealth and that this conflict of interest resulted in a breach of the fiduciary duty. The Court rejected the existence of an improper purpose on the part of the Commonwealth and explained this by distinguishing between purpose and consequence. The fact that the plaintiffs had not established a failure on the part of the Director to comply with the provisions of the legislation meant that they had failed to prove that the purpose of their removals and detentions was to destroy their associations and connections with their families and culture. The Court accepted the plaintiffs' pain and suffering and their alienation with their culture due to the aborted contact with their families, but due to lack of evidence to the contrary, found that this destruction was a consequence of the lawful actions of the Director. Consequently, there was no fiduciary duty owed to the plaintiff. In addition to the reasons mentioned the Court relied upon the finding in the Williams case,¹⁷⁶ which involved similar circumstances to those in the present case.

The plaintiffs further submitted that there was a breach of statutory duty as it concerns the duty cast upon the Director to fulfil the role of legal guardian. It was argued that as a legal guardian, certain matters had to be considered when deciding to remove a child, for instance if a removal was in the best interest of the child. Mrs Cubillo and Mr Gunner also alleged that the Director had duties to monitor and supervise the institutions to ensure that satisfactory standards and care applied for the benefit of the children and to supervise each child within the relevant institution to ensure the safety and well being of each child. Since these alleged duties were not complied with, the plaintiffs argued that the removals and detentions by the Directors were in breach of their statutory duties as guardians. The Commonwealth was said to be responsible for those breaches of statutory duties because the Director of Native Affairs was an officer of the Commonwealth in relation to the exercise of his powers and the discharge of his duties and functions under the legislation. With regard to this claim of breach of statutory duty the Court referred to the difficulty of that submission, since the Ordinance did not specify any duties, which the Directors were to perform in their role of legal guardian. The Court then stated that, although there is no cause of action for breach of a statutory duty unless the statute confers a right on the injured person to recover compensation for its breach¹⁷⁷ (and there is no express provision for civil recovery in the Ordinance) such a right may arise by implication. Consequently, it will be sufficient to plead a breach of statutory duty where it can be established that there is a legislative intent for

¹⁷⁶ Williams v The Minister Aboriginal Land Rights Act 1983 and The State of New South Wales (2000) NSWCA 255 (12 September 2000), See Chapter 6.3.1

¹⁷⁷ Northern Territory v Mengel (1995) 185 CLR 307

there to be civil recovery for breach of the statutory duty. The existence of such a legislative intent can possibly be established if it can be shown that the statutory duty was imposed for the protection of a limited class of the public. With respect to the *Aboriginals Ordinance 1918* it could then be argued that it was enacted for a limited class of the public, the Indigenous population, but the Court went further and added to that passage that welfare legislation is to be recognised as being for the benefit, not just for the limited class that is directly affected by it, but also for society in general.¹⁷⁸ Additionally, by looking at the actual words used in the primary legislation to create the statutory duties relied upon the Court concluded that they are too inconsistent with any intention to create a private law cause of action. As in the Williams case, the statutory duty was not actionable in the case.

A further issue relates to whether or the extent to which the Commonwealth can be vicariously liable for the actions of a statutory officer. At common law, an employer is said to be vicariously liable for the actions of his or her employees performed in the course of their employment. An exception to the general rule is said to apply in relation to the liability of the Crown arising from actions of individuals appointed to statutory offices.¹⁷⁹ Consequently, the Court could not impose a vicarious liability on the Commonwealth

The Gunner and Cubillo case is subject to appeal and was heard by the full Court of the Federal Court in the beginning of May. The decision is however reserved but is expected to be handed down in a few months.¹⁸⁰

6.4 Expectations for Future Cases – Failure or Success?

The fact that all compensation cases have failed so far is of course a disappointment for the members of the stolen generation, but there is still hope for a compensation claim to be successful. As long as litigation in the courts is the only option available there is nothing that indicates that claims will not continue to be made. Some hope of success was generated from the Cubillo and Gunner case. There were several circumstances, which differentiated this case from the Williams case. Whereas in the Williams case there is no mention of the existence of the stolen generation, in the Cubillo and Gunner case the Court found that neither the evidence submitted in the trial nor the reasons for judgment denied the existence of the stolen generation and it accepted evidence of the plaintiffs' pain and suffering as being a result of their removal and detention.¹⁸¹ This fact produced confidence to successfully appeal against the decision to dismiss the

¹⁷⁸ *Cubillo v Commonwealth* (2000) FCA 1084 (11 August 2000)

¹⁷⁹ Interview with Mr Matthew Storey, Director of Law, Policy and Conciliation at the Northern Territory Anti-Discrimination Commission, June 5, 2001

¹⁸⁰ *Ibid.*

¹⁸¹ *Cubillo v Commonwealth* (2000) FCA 1084 (11 August 2000) (at 1)

compensation claims.¹⁸² The trial judge in the case considered it was essential to establish the actual state of mind of the Director of Native Affairs in order to determine matters relating to various of the causes of action that were pleaded. There was no shortage of evidence in relation to the actual removals, but it could not be ascertained whether the Director's intention was connected to policy or operational matters. As the Director(s) were dead the trial judge had no access to this information and, therefore, the plaintiffs were unsuccessful. It has been argued that the situation would have been the same if the events in question had taken place two years ago and the relevant official had recently died in a car accident.¹⁸³

There are however reasons for not showing a great degree of optimism of an appeal. The claim failed mainly because the plaintiffs could not prove that the Director failed to act in accordance with the provisions in the Ordinance. There was no way of establishing what went on in the mind of the Director when he participated in the removal and detention of the plaintiffs, since witnesses were dead and documents, if they ever existed, had been lost. Even if the courts accept the existence of the stolen generation, the evidentiary difficulties remain, rendering future cases limited prospects of success.

¹⁸² Jopson D, Farrant D, *We'll fight on, vow stolen children*, August 12, 2000, <http://www.smh.com.au/news/0008/12/text/pageone1.html>, June 1, 2001

¹⁸³ Interview with Mr Matthew Storey, Director of Law, Policy and Conciliation at the Northern Territory Anti-Discrimination Commission, June 5, 2001

7. CONCLUSIONS

The Indigenous peoples of the world have suffered considerably due to conquest and colonization and they are still experiencing inequities in the form of discrimination and deprivation of other fundamental human rights. However, in contrast to the situation as it appeared in the first half of the 20th century, there are now international instruments designed to protect the specific interests, such as the distinct cultures and traditions, of Indigenous peoples. This objective to safeguard the characteristics of the Indigenous peoples' cultures has in its turn influenced international law in the development of standards for the peaceful coexistence of all peoples. In the case of Australia it has been enthusiastic in ratifying new international instruments and has been regarded as a country with a satisfactory human rights record. It is a party to numerous human rights instruments and considers itself to be in compliance with them. The way in which Australia has treated its Indigenous population however puts the country in a somewhat different light. With regard to the treatment of and attitude towards Indigenous people Australia's human rights record is far from satisfactory. In-depth research carried out in recent years has revealed the horrors suffered by the Indigenous people during the period in which Australia applied the child removal policies. It has shown that the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-indigenous community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture. The effects of these practices are clearly visible in contemporary society, evidence of which can be found in the overrepresentation of Indigenous people in contact with the child welfare authorities and the juvenile justice system. The Indigenous population is further struggling with a life of poverty and is disadvantaged in the area of housing, education and health.

The child removal policies, its effects and the treatment of the Indigenous population in general have generated much discussion both nationally and internationally, but in spite of harsh criticism directed to Australia it has been unwilling to address the issues relating to the Indigenous people properly. Australia has refused to acknowledge that past child removal practices involved serious human rights violations and instead of taking the allegations seriously, made a political attack on the UN. It is true that some measures have been taken in order to improve the situation for the Indigenous people and the stolen generation in particular, but from a human rights perspective these measures are not sufficient. Even though the Federal government has made some positive responses it has failed to carry out its international legal human rights obligation in several key areas of Commonwealth responsibility. The funding for rehabilitation and restitution constitutes the bulk of the response, leaving many other components of reparation unresolved. Taking into consideration Australia's \$63 million contribution as opposed to Canada's \$350, it can even be questioned whether the funding provided in Australia, as part of a reparation scheme, is

sufficient and whether Australia has realized the wide effects that the child removals have actually had. The offer of rehabilitation and restitution is definitely welcome and will surely lead to improvements of the Indigenous people's difficult situation and bring reconciliation one step closer to reality. However, the lack of an official apology and acknowledgement of human rights violations, the failure to pay compensation, and the failure to guarantee non-repetition are substantial obstacles to a progress in the reconciliation negotiations. While other countries around the world are increasingly offering apologies and financial compensation to victims of past human rights violations, the Australian government's response to the stolen generation is strikingly weak. In addition to the need of a formal national apology, the Federal government should issue a proper, detailed response to the question whether the child removal practices constituted genocide. Furthermore, it should specifically comment on the issue of systematic racial discrimination and acknowledge that the practices constituted serious human rights violations. In order to comply with international law standards, Australia will be obliged to pay compensation to its victims of human rights violations. The current situation, which allows the victims a limited right to seek compensation from the domestic judicial system, does not satisfy the international obligations with regard to compensation. Taking into consideration the scope of the evidentiary difficulties involved when trying a case in the ordinary judicial system it becomes clear that, in order to avoid unfair and arbitrary results, there is a need for an alternative to litigation. The establishment of a Reparations Tribunal would serve as an appropriate alternative, since it would adopt procedures that involve a minimum of formality and hearings that are inquisitorial rather than adversarial in character. Furthermore, the procedures would likely be more culturally appropriate and tolerant than the procedures employed in the ordinary judicial system. As a consequence greater amounts of compensation claims would have the prospect of success, which would lead to an overall fairer result. The fact that the evidence requirements in a Reparations Tribunal would be less rigorous than in a regular Court has been criticized, but considering the time lapse between the actual removals and the moment when the extent of these removals was known, it would not be fair to impose requirements that are too strict. The victims have not had an opportunity to seek redress for the past happenings until recently, and should be entitled to seek compensation on fair and achievable terms. In terms of guarantees of non-repetition Australia will need to educate officials and the general population in order to fight race and class prejudice and create a higher level of understanding for the Indigenous population.

Additionally, with the purpose of safeguarding fundamental rights and freedoms provided in international human rights treaties to which Australia is party, it might be appropriate to introduce a Bill of Rights. In any consideration of a Bill of Rights, it will be necessary to consider the specific recognition of the rights of Aboriginals. It is generally recognized that, with regard to socio-economics, the Indigenous people in Australia suffer

considerable disadvantage compared to non-indigenous people. There is an apparent discrepancy in the enjoyment by Indigenous people of basic citizenship rights and equality rights, such as the right to a decent standard of health, education, housing and essential services. If a Bill of Rights is introduced it will need to guarantee the specific rights of Indigenous people to maintain and develop their ethnic and cultural characteristics, such as their religion and language. Taking into consideration the fact that the *Racial Discrimination Act* does not give satisfactory protection, there is a need to include a general guarantee of equality and freedom from discrimination. It should further guarantee the right to manage their own affairs to the greatest extent possible while at the same time enjoying all the rights that other Australian citizens do in the political, economic, social and cultural life. The introduction of a Bill of Rights including specific rights for the Indigenous people is definitely desirable. It would ensure that treaty rights under, for instance, the ICCPR and the ICESCR obtain legal status in Australia and that they subsequently could be invoked in domestic courts, filling gaps in Australia's current human rights system. Moreover, a Bill of Rights would most likely reduce the number of complaints about violations of human rights brought against Australia to international fora and provide judges and other decision-makers with clear guidelines and standards. As has been shown earlier, to date Australia has met its obligations under international human rights instruments to varying degrees. It has been established that Australia has failed to fulfil its obligations to protect relevant human rights, and constitutional entrenchment of a Bill of Rights could ensure that these obligations are fulfilled.

By Australia's ratification of the Genocide convention an obligation was imposed to reform the domestic laws so as to criminalize genocide. An issue of concern is Australia's failure to carry out its obligation to bring the provisions of the Convention into domestic law. It is clear from the recent decision of the Full Court of the Federal Court of Australia in *Nulyarimma v. Thompson* that genocide is not presently a crime in Australia, either as a statutory crime or as a crime recognised by the common law¹⁸⁴ Therefore, in the view of the Federal Court decision, the only way in which genocide can be made a crime in Australia is through legislation passed by Parliament. Given the international status of the crime of genocide, such legislation should be enacted at the national rather than at state level. Adoption of the proposed *Genocide Bill 1999* would ensure fulfilment of Australia's international obligations in respect of the implementation of the Convention. Considering the fact that Australia ratified the Convention over half a century ago, it is important that Australia adopts as a priority the enactment of this Bill. It is true that the Bill would not operate retrospectively, which means that it could not be used to prosecute the alleged perpetrators of genocidal acts against Indigenous people, but the implementation is nevertheless essential as a guarantee against future incidents of genocide.

¹⁸⁴ See Chapter 4.3

With regard to the compliance of international human rights instruments in general the implications of a possible enactment of the *Administrative Decisions (Effect of International Instruments) Bill 1999* should not be overlooked. It is by all means acceptable that the common law system requires that an international instrument be incorporated into domestic law to receive full effect. However, if Australia fails to acquire the incorporation requirement the adoption of the Bill would have the result that no attention or consideration at all could be given to a treaty if invoked in a specific case. The Australian government opposed the finding in the Teoh case¹⁸⁵, in which it was concluded that an entry into a treaty creates a legitimate expectation that government decision makers will act in accordance with the relevant provisions of the treaty in question. The creation of a legitimate expectation as a result of ratification does not automatically confer rights, benefits or obligations upon an individual. It does not compel the decision-maker to act in accordance of the expectation, but merely gives rise to a requirement of procedural fairness, i.e. a guarantee to be given an opportunity to argue a case and to comment on the issues relevant to the proposed decision. A ratification of an international instrument is a positive statement by the executive government of that country to its citizens and the international community that the executive government and its agencies will act in accordance with that international instrument. That positive statement is an adequate foundation for a legitimate expectation that decision-makers will act in conformity with the instrument. If ratification would have no impact on the way in which Australian citizens are treated the whole purpose of it would be undermined. It is disappointing and damaging to the future of human rights in Australia that the government has been unable to accept that the entry into international instruments should have consequences for Australia's decision-makers and has chosen to legislate itself out of the effects of the Teoh decision.

As a final remark, there is a need for a change of attitude in Australia with respect to human rights. The development of a culture that affirms human rights requires a transformation of society at all levels and new ways of thinking and acting. The decision in Teoh could be seen as an indication of a new line of thinking, but this new approach was instantly overturned by the government with the introduction of the *Administrative Decisions (Effect of International Instruments) Bill*. Considering Australia's imperfect human rights record and current attitude towards human rights protection, there is still a long distance to travel before Australia's culture is truly one that satisfactorily safeguards and promotes human rights of all people.

¹⁸⁵ See Chapter 4.5

SUPPLEMENT A

GENOCIDE CONVENTION ACT 1949

SECT. 1. Short title.

An Act to approve of Ratification by Australia of the Convention on the Prevention and Punishment of the Crime of Genocide, and for other purposes.

1. This Act may be cited as the Genocide Convention Act 1949.*

SECT. 2. Commencement.

2. This Act shall come into operation on the day on which it receives the Royal Assent.*

SECT. 3. Definition.

3. In this Act-
"the Genocide Convention" means the Convention on the Prevention and Punishment of the Crime of Genocide approved by the General Assembly of the United Nations at Paris on the ninth day of December, One thousand nine hundred and forty-eight, the text of which convention in the English language is set out in the Schedule to this Act.

SECT. 4. Approval of ratification.

4. Approval is hereby given to the depositing with the Secretary-General of the United Nations of an instrument of ratification of the Genocide Convention by Australia.

SECT. 5. Approval of extension to Territories.

5. Approval is hereby given to the depositing with the Secretary-General of the United Nations of a notification by Australia, in accordance with Article twelve of the Genocide Convention, extending the application of the Genocide Convention to all the territories for the conduct of whose foreign relations Australia is responsible.

SCHEDULE

[the text of the schedule is the official English text of the Convention for the Prevention and Punishment of Genocide]

Notes: *Act No. 27, 1949; assented to and commenced 12 July 1949.

SUPPLEMENT B

ANTI-GENOCIDE BILL 1999

Contents

A Bill for an Act to give effect to the Convention on the Prevention and Punishment of the Crime of Genocide, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the Anti-Genocide Act 1999

2. Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 **Amendment of the Genocide Convention Act 1949**

1 Section 3

Insert: Australia includes the external Territories.

2 Section 3

Insert: genocide means any of the following acts committed with intent to destroy, in whole or in part, a distinct group of people including, but not limited to, a national, ethnical, racial or religious group, or a group based on gender, sexuality, political affiliation or disability:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3 At the end of section 3

Add: (2) Except so far as the contrary intention appears, an expression that is used both in this Act and in the Convention (whether or not a particular meaning is given to it by the Convention) has, in this Act, the same meaning as it has in the Convention.

4 After section 5 Insert:

6 Application: This Act extends to acts done or omitted to be done outside

Australia.

7 Act binds the Crown: This Act binds the Crown in right of the Commonwealth or of a State.

8 Effect of this Act on other laws

Except as provided by this section, this Act is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

9 Offence of genocide

(1) A person who commits an act of genocide is guilty of an offence against this Act and is punishable on conviction by imprisonment for life.

(2) A person who conspires with another person to commit an act of genocide is guilty of an offence against this Act and is punishable on conviction by imprisonment for life.

(3) A person who publicly urges the commission of an act of genocide is guilty of an offence against this Act and is punishable on conviction by imprisonment for a period not exceeding 10 years.

(4) A person who attempts to commit an act of genocide is guilty of an offence against this Act and is punishable on conviction by imprisonment for life.

(5) A person who aids, abets, counsels or procures the commission of an act of genocide is guilty of an offence against this Act and is punishable on conviction by imprisonment for life.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

10 Only Australian citizens or persons present in Australia may be prosecuted

A person shall not be charged with an offence against this Act unless the person:

- (a) is an Australian citizen; or
- (b) is present in Australia.

11 Jurisdiction of courts and choice of law

Where a person is charged with an offence against this Act, then, for the purposes of:

- (a) determining whether a court of a State or Territory has jurisdiction in relation to the offence; and
- (b) an exercise of jurisdiction by such a court in relation to the offence; and
- (c) a proceeding connected with such an exercise of jurisdiction; and
- (d) an appeal arising out of, or out of a proceeding connected with, such an exercise of jurisdiction;

this Act has effect, in relation to an act that is, or is alleged to be, the offence, as if a reference in section 12 to a part of Australia were a reference to that State or Territory.

12 Alternative verdicts

(1) Where:

- (a) a person is charged with an offence against this Act; and
- (b) the offence is alleged to be an act that, under the law in force in a part of Australia at the time (in this subsection called the relevant time) when the act was alleged to have been done, would have constituted an offence of a particular kind if it had been done in that part of Australia at the relevant time; and
- (c) on the persons trial for the offence, the jury: (i) is not satisfied that the person is guilty of the offence charged; and (ii) is satisfied that the person is guilty of a different offence against this Act (in this section called the alternative offence) because the person has done an act that, under the law in force in that part of Australia at the relevant time, would, if it had been done in that part of Australia at that time, have constituted an offence (in this section called the local offence found to have been proved) of a kind different from the kind of offence referred to in paragraph (b); and
- (d) by virtue of the law in force in that part of Australia at the relevant time or at the time of the trial, a person charged with an offence of the kind referred to in paragraph (b) could in certain circumstances be found not guilty of the last-mentioned offence but guilty of an offence of the kind referred to in subparagraph (c)(ii);

the jury may find the person not guilty of the offence charged but guilty of the alternative offence.

(2) If the jury finds the person guilty of an offence under this Act in the circumstances referred to in subsection (1), it shall, when returning its verdict, tell the judge that it is satisfied as mentioned in subparagraph (1)(c)(ii) and specify to the judge the kind of local offence found to have been proved.

13 No defence of exceptional circumstances or superior orders

It is not a defence in a proceeding for an offence against this Act that:

- (a) the act constituting the offence was done out of necessity arising from the existence of a state of war, a threat of war, internal political instability, a public emergency or any other exceptional circumstance; or
- (b) in doing the act constituting the offence the accused acted under orders of a superior officer or public authority;

but the circumstances referred to in paragraphs (a) and (b) may, if the accused is convicted of the offence, be taken into account in determining the proper sentence.

14 Section 38 of Judiciary Act

A matter arising under this Act, including a question of interpretation of the Convention for the purposes of this Act, shall, for the purposes of section 38 of the Judiciary Act 1903, be deemed not to be a matter arising directly under a treaty

SUPPLEMENT C

Administrative Decisions (Effect of International Instruments) Bill 1999

Contents

A Bill for an Act relating to the effect of international instruments on the making of administrative decisions

Preamble

This Preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 a majority of the High Court held that the act of entering into an international instrument gives rise to a legitimate expectation at law that could form the basis for challenging an administrative decision. It also held that such a legitimate expectation could be set aside by an executive or legislative indication to the contrary. There is a need for certainty in making administrative decisions. Uncertainty is created by allowing decisions to be challenged on the ground that decision makers did not properly give effect to such legitimate expectations.

Australia is fully committed to observing its obligations under international instruments.

However, international instruments by which Australia is bound or to which Australia is a party do not form a part of Australian law unless those instruments have been validly incorporated into Australian law by legislation. It is the role of Commonwealth, State and Territory legislatures to pass legislation in order to give effect to international instruments by which Australia is bound or to which Australia is a party.

On 10 May 1995, the then Minister for Foreign Affairs and the then Attorney-General issued a joint statement concerning legitimate expectations and international instruments. On 25 February 1997, the present Minister for Foreign Affairs and present Attorney-General issued a further joint statement. Both statements said, on behalf of the Commonwealth, that the act of entering into an international instrument should not give rise to such legitimate expectations, and that legislation would be introduced to set aside any such legitimate expectations.

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the Administrative Decisions (Effect of International Instruments) Act 1999.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Application to external Territories

This Act extends to all the external Territories.

4 Definitions

In this Act, unless the contrary intention appears:

administrative decision means:

- (a) a decision by or on behalf of the Commonwealth, a State or a Territory;
- or
- (b) a decision by or on behalf of an authority of, or office holder of, the Commonwealth, a State or a Territory;

that is a decision of an administrative character (whether or not the decision is made under an enactment), and includes such a decision reviewing, or determining an appeal in respect of, a decision made before the commencement of this Act.

enactment means:

- (a) an Act passed by the Parliament, by the Parliament of a State or by a Legislative Assembly of a Territory; or
- (b) an instrument of a legislative character made under such an Act.

international instrument means:

- (a) any treaty, convention, protocol, agreement or other instrument that is binding in international law; and
- (b) a part of such a treaty, convention, protocol, agreement or other instrument.

5 International instruments do not give rise to legitimate expectations at law

The fact that:

- (a) Australia is bound by, or a party to, a particular international instrument;
- or
- (b) an enactment reproduces or refers to a particular international instrument;

does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision.

6 Exclusion where State or Territory coverage

Section 5 does not apply to an administrative decision by or on behalf of:

- (a) a State or Territory; or
- (b) an authority of, or office holder of, a State or Territory;

if provision having the same effect as, or similar effect to that which, section 5 would otherwise have in relation to the decision is made by an Act passed by the Parliament of the State or Legislative Assembly of the Territory.

7 Other operation etc. of international instruments not affected

To avoid doubt, section 5 does not affect any other operation or effect, or use that may be made, of an international instrument in Australian law..

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