AUSTRALIA

Silence on human rights: Government responds to "stolen children" inquiry

On 16 December 1997 the Australian Federal Government announced its formal response to the recommendations made in a landmark report by the national human rights commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*[1], published in May 1997. The three-year so-called "stolen children" inquiry investigated evidence of the removal from their families, "by compulsion, duress or undue influence" (terms of reference), of tens of thousands of indigenous children under past government policies effective up to 1970. The inquiry also examined the ongoing effects of these policies, including current juvenile justice issues, and reported on the physical and sexual abuse of removed children. The findings suggest that the experience of grave violations of human rights suffered by many of these children are among the unresolved causes of Amnesty International's long standing concerns about the human rights problems faced by Aborigines in Australia.[2]

This report examines the key human rights issues investigated by the Australian human rights commision inquiry as well as the Federal Government's response. The report also makes recommendations to the federal Australian authorities and to state and territory governments.

Amnesty International believes the government's announcement deserves commendation for accepting the obligation to make amends and for offering some practical remedies. However, the statement's failure to comment on the government's views on important

> *"The loss, grief and trauma experienced by Aboriginal people as a result of the separation laws, policies and practices can never be adequately compensated. The loss of the love and affection of children and parents can not be compensated. The psychological, physical and sexual abuse of children, isolated among adults who viewed them as members of a 'despised race' cannot be adequately compensated. The trauma resulting from these events have produced life-long effects, not only for the survivors, but for their children and their children's children. [...] Insofar as reparation and compensation can assist us to heal from the harms of separation, it is our right to receive full and just reparation and compensation for the systematic gross violation of our fundamental human rights."* Link-Up (NSW), an organization to assist victims of the removal policies,
> quoted in "Stolen Children" report, p. 278

[1] Generally known as the "stolen children" report. The report and briefing material is available from the Human Rights and Equal Opportunity Commission, GPO Box 5218, Sydney 2001, and on the internet via the commission's website at http://www.hreoc.gov.au.

[2] See for example, *Australia: A criminal justice system weighted against Aboriginal people*, Amnesty International, February 1993 (AI Index: ASA 12/01/93), *Australia: Deaths in custody: how many more?*, Amnesty International, June 1997 (AI Index: ASA 12/01/97).

human rights issues raised by the inquiry gives rise to concern about the government's willingness to address thoroughly serious violations of human rights. While the government accepts the need to "acknowledge the wrongs of the past", it does not discuss these wrongs as violations of human rights.

Key human rights violations raised by the inquiry

In its inquiry report the Australian Human Rights and Equal Opportunity Commission concludes that the policies of child removal constituted "genocide" and that there is evidence of systematic racial discrimination which continued long after Australia signed international treaties and declarations prohibiting such discrimination. The commission rightly points to international human rights standards which incorporate the duty of governments to investigate violations, take appropriate action against the violators, prevent future violations, and afford remedies and reparation to victims. The Australian Government's response, however, offers no comment on questions of genocide and systematic racial discrimination, or on evidence that the authorities of the day frequently failed to act on complaints about physical and sexual abuses of removed children by those responsible for their care and custody.

> *"The horror of a regime that took young Aboriginal children, sought to cut them off suddenly from all contact with families and communities, instil in them a repugnance of all things Aboriginal, and prepare them harshly for a life as the lowest level of worker in a prejudiced white community, is still a living legacy amongst many Aboriginals today, some of whom I have spoken to directly."* Commissioner J. H. Wootten, *Report of the Inquiry into the Death of Malcolm Charles Smith*, Royal Commission into Aboriginal Deaths in Custody, Sydney 1989, p. 15

The on-going relevance of these issues - 28 years after the policies were abolished - may be illustrated by the inquiry finding that the vast majority of the 300,000 Aboriginal people now living in Australia come from families which experienced the removal of children, in some cases over several generations. Many of these children never saw their parents again, and thousands are now searching for surviving relatives. The inquiry suggested an association between the past experience of forced removal and abuse, and today's high rates of imprisonment and deaths in custody of young Aborigines. In the two largest states (Western Australia and Queensland) more than half of all children in custody today are Aborigines, although they make up only five per cent of the population below the age of 18. In Amnesty International's experience, the effects of institutionalisation and family disruption through child removal are now being felt in the youngest generation. According to a June 1997 report by the Australian Institute of Criminology, nearly half of all Aboriginal young people aged 18 to 24 have been arrested by police at least once. The experience of incarceration in police or prison custody has become so widespread among Aboriginal youth that for most male Aboriginal teenagers it has almost become a part of growing up.

Aboriginal witnesses attending hearings of the "stolen children" inquiry expressed their concern to Amnesty International delegates visiting Australia in March 1996 that current juvenile justice and welfare laws led to a continuation, in effect, of past removal practices. In one study cited by the inquiry report, more than one third of Aborigines removed from their parents as children had had their own children removed and placed in care, police custody or juvenile detention.

Australian state and federal governments have been aware for more than 20 years of the fact that Aboriginal children are much more likely than other young Australians to be arrested and held in police cells or juvenile justice institutions. Australian studies have found that juvenile Aboriginal offending patterns and state legislation on sentencing are primarily responsible for this situation. Recent media reports highlighted cases of 12- to 15- year-old Aboriginal children in the Northern Territory who were facing imprisonment because their families had not paid fines imposed repeatedly for minor offences such as failing to wear a bicycle helmet. In another case from Western Australia, previously reported by Amnesty International[β], a 15-year-old boy was ordered by a magistrate to spend 30 days in custody "under observation" for stealing an ice-cream valued at A$1.90. He was released after 18 days by the Children's Court of Western Australia from a prison some 600 kilometres from his home town. The court ruled the boy's imprisonment "inappropriate" and criticised the fact that he had previously been detained twice for periods of 30 days under a law which only allowed detention for 21 days for psychological assessments.

Amnesty International believes the "stolen children" report lends further support to the organization's long standing concerns about the continuing systemic discrimination of Aboriginal people in the Australian criminal justice system for which Australian state and territory authorities are primarily responsible. While more recent figures are not available, 43 out of about 100 Aboriginal people who died in custody during the 1980s had been victims of removal policies as children. Since then, the annual Aboriginal death rate in prisons has increased albeit fewer Aborigines have died in police cells. The underlying causes of deaths in custody include on-going systemic deficiencies in care and custody, in particular regarding the health of prisoners, which in some cases may have amounted to cruel, inhuman or degrading treatment. Some of the

[3] "Aboriginal deaths in prison reach record high", *Amnesty International News*, February 1996, Vol. 26 No. 2.

authorities responsible have also been reluctant to implement preventive measures recommended by coro-ners, concerned police and prison officers, human rights groups and a Royal Commission into Aboriginal Death in Custody (1987-1991).

Removed as child - died in custody: no isolated case
Kim Nixon was about seven years old when he and two other children were taken away from his mother after their arrival in 1964 at a church mission governed under Western Australia's Native Welfare Act 1954. This law gave the government guardianship powers over all Aboriginal children in the state.

At the age of 37, Kim Nixon died of a serious heart condition at the East Perth Police lock-up after his arrest for a minor offence. He had been fined in court but not immediately released from police custody. A coroner's investigation established that he was unlawfully detained at the time of death and was critical of the police's failure to act properly on available information on his poor health condition.

For further details see Australia: Deaths in Custody-how many more? June 1997, AI Index: ASA12/04/97.

The link between removal as a child and the subsequent likelihood of imprisonment is reflected, for example, in a new initiative by the New South Wales Department of Corrective Services which offers assistance to Aboriginal prisoners to trace the families they were separated from as children. It also corresponds with the views expressed in 1989 by the Royal Commission into Aboriginal Deaths in Custody that measures to address the effects of the child removal policies "may help to reduce the gross over-representation of Aboriginals in juvenile institutions and in gaols and resultant deaths in custody".[4]

Systematic racial discrimination

By discriminating against Aborigines on racial grounds, the child removal policies violated provisions of the 1948 Universal Declaration of Human Rights and subsequent international human rights standards which probibit such discrimination. Many of the laws investigated by the Australian human rights commission[5] gave police, welfare authorities, churches and other agencies authority to remove babies, small children and young teenagers from their families by reason of their Aboriginal identity. After their removal, some were briefly held in police custody. Most of the children were then detained in institutions, such as orphanages, and many were later sent to work by government officials who administered their wages and controlled their movements and living conditions. "*The reality of* [government] *control over Aboriginal lives* [...]

[4] Commissioner J. H. Wootten, *Report of the Inquiry into the Death of Malcolm Charles Smith*, Royal Commission into Aboriginal Deaths in Custody, Sydney 1989, p. 57.

[5] Out of almost 150 laws and policies which affected the removal of children in the various Australian state jurisdictions over more than 100 years, some 50 individual laws specifically applied to indigenous people. Many of these explicitly discriminated against Aborigines on racial grounds.

was no less brutal for the fact that the policies which achieved the control were often justified by their authors on humanitarian or paternalistic grounds."[6]

While the legal basis for the policies varied between state and territory jurisdictions, and over time, the colour of the children's skin or their families' inability to maintain non-Aboriginal living standards were among the main grounds for removal. Methods employed in the removal practice included the use of force, compulsion or duress, and relatives could be punished by law for resisting the removal of a child. Removed children faced penalties if they spoke their parents' language or absconded to return to their families. There are indications that some police officers resented the inherent cruelty and inhumanity of their duty to take children away from their mothers. Others formally challenged the grounds for removal.

Where court hearings were necessary to effect the removal of a child, the proceedings usually did not allow for a fair trial for Aborigines. According to the Australian human rights commission report, "[a]lmost invariably courts failed to ensure that the families were aware of their right to attend, that they knew the date, that they understood the nature of the proceedings and that they had an opportunity to be legally represented" (p. 266). Aboriginal living conditions and cultural differences often made it impossible to meet the values and standards imposed by child welfare laws and used in court decisions.

Did the removal policies constitute "genocide"?

In Amnesty International's view, it is important to note that none of the laws and policies involved authorised the killing of children. Most of the policies sought to incorporate or assimilate "mixed-race" children into mainstream society with the aim to extinguish their racial and cultural identity. This aim was initially based on expectations that the Aboriginal race was destined to become extinct.

While removal from their families was generally defined as "in the children's best interest", the human rights commission report concluded "with certainty on the evidence" that its predominant aim "was to eliminate Indigenous cultures as distinct entities" (p. 273), and hence constituted "genocide" - as defined by article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The Convention's definition of

[6] Royal Commission into Aboriginal Deaths in Custody, *National Report*, Sydney 1991, Vol. 2, p. 502.

genocide includes the forcible transfer of children from one racial group to another, but depends on an intention to destroy the group as such. The Australian human rights commission argued that a principal common aim of the child removal policies was the elimination of a distinct culture which defined a racial group, *"so that their unique cultural values and ethnic identities would disappear* [...] *Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention is concerned to preserve"* (p. 273).

The commission pointed out that the policies and practices continued for 20 years after Australia in 1949 ratified the Genocide Convention, thereby giving an undertaking to prevent and punish genocide as a crime under international law. Like all other international human rights treaties ratified by Australia, the Convention has never been incorporated into domestic Australian legislation, although parliament in 1949 passed legislation which approved of the Convention's ratification by Australia. The inquiry report therefore recommended that the government "implement the Genocide Convention with full domestic effect". However, the government's response is silent on this recommendation. The only reference to the genocide issue in the response statement is contained in an appendix, a one-page table summarizing the commission's recommendations and government responses.

> Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, ratified by Australia in 1949, defined genocide as
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> *... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
> *(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; (...)*
> *(e)* *Forcibly transferring children of the group to another group*.

In this reference the government *"notes that in the Kruger case, the* [Australian] *High Court rejected assertions that the Northern Territory law authorised genocide",* but offers no further comment or explanation. In this test case, Alec Kruger and other Aborigines - removed as children from their families under the Northern Territory Aboriginals Ordinance 1918 - sought financial compensation from the government, partly on the grounds that the Ordinance was invalid under the constitution because it authorised genocide.

The Federal Government's brief reference to this case appears to imply that, as a result of the High Court's "Kruger" decision, there is no need for the government to discuss whether any of the child removal policies constituted genocide. Such an implication would fail to take into account a number of important facts. The High Court itself stated that the questions it had to

answer in the Kruger case regarded the constitutional validity of the Northern Territory law, and not whether the removal of children under this law constituted genocide. In Amnesty International's opinion, the court's finding that the Northern Territory policy was lawful at the time and did not *authorize* genocide does not answer the question, raised by the "stolen children" inquiry report, "*whether the Australian practice of forcible transfer of Indigenous children to non-Indigenous institutions"* (p. 271) constituted a form of genocide. In addition, the court was only considering one of more than 100 different laws and policies, applied across Australian jurisdictions at various times, under which Aboriginal children were involuntarily removed from their families. However, the government's statement makes no reference to any of these other policies.

Amnesty International believes that, in the light of the overall findings of the inquiry, the arguments put forward on the question of genocide by the Australian human rights commission deserve serious consideration. They should be adequately addressed by the Australian Government, in consultation with relevant independent experts. If the government does not accept the commission's findings on genocide, it should offer an explanation for its views which addresses the complex issues involved.

In Amnesty International's view the question whether the policy or practice of indigenous child removal constituted a form of genocide is not essential in order to recognize that these policies and practices involved serious and unresolved violations of fundamental human rights. In Amnesty International's opinion the evidence clearly shows that the authorities during the last decades of the practice were breaching contemporary human rights standards - internationally recognized from 1948 and endorsed by Australia - and that at least some officials were aware of these breaches. Again, the Australian Government's response offers no comment on, or acknowledgement of, these issues.

The Australian Government's response to the inquiry

Amnesty International welcomes the Australian Government's unreserved acceptance of its "obligation to address the consequences" of the child removal policies and commends the stated intention to "acknowledge the wrongs of the past and [to] address the problems that now exist as a result of those wrongs". By offering practical assistance for family reunion, for the preservation of records to help trace "lost" relatives and for the improvement of Aboriginal health and welfare, the government is giving priority to some of the "stolen children" report's most urgent and important recommendations. A total of A$63 million [US$ 46m] has been set aside over a period of four years to implement these measures.

Some recommendations made by the human rights commission have already been addressed by state or federal authorities, or are in the process of being addressed. For example,

Australian state and territory parliaments, as well as churches and other agencies which played a role in the administration of the child removal policies, have formally acknowledged their role and have extended public apologies to the victims and their families. While the Prime Minister expressed his personal sorrow about the effects of the policies, the government rejected an official apology, arguing that it would be inappropriate to apologise on behalf of many new citizens who were not living in Australia during the period of indigenous child removals.

The Prime Minister reportedly also believed that an apology could lead to financial compensation claims, although his principal legal adviser gave evidence in parliament that the government could extend an apology which would not provide grounds for compensation. Prior to the completion of the "stolen children" inquiry, the government had ruled out any financial compensation for victims of human rights abuses under the child removal policies because, in the government's view, "there is no practical or appropriate way to address this recommendation" of the human rights commission report.

In announcing its plans, the government stressed it would facilitate some initiatives for which state and territory governments bear primary responsibility, but rejected the inquiry's detailed recommendation to develop binding national standards for the treatment, care and custody of children, including those in police or prison custody. These recommendations in part support those made in September 1997 by a detailed study on children's legal rights, conducted jointly by the Australian Law Reform Commission and the national human rights commission, as well as the views expressed by the United Nations Committee on the Rights of the Child when it examined Australia's first report under the Convention on the Rights of the Child in October 1997. These recommendations have in common the call for a national approach to children's rights, which currently vary considerably among state jurisdictions.

The Federal Government "stolen children" response also stressed that the majority of the human rights commission's 54 recommendations are directed to the states and territories, churches and other non-governmental organisations involved in implementing the child removal policies. Announcing the government's initiatives, Senator John Herron expressed his confidence that the Australian state and territory governments will approach the report's recommendations "with goodwill and a determination to see positive outcomes for indigenous peoples".

Government response fails to address human rights issues

Initial public criticism in Australia of the government's announcements focused on the repeated refusal to extend an official apology and the rejection of compensation payments to victims. Amnesty International's concerns focus on the government's failure to comment on, or offer adequate explanations for, its views on important human rights questions raised by the inquiry. The government statement, which does not contain the words "human rights", essentially fails

to accept the "wrongs of the past" as violations of human rights, and falls short of international basic principles which provide guidance on the right to reparation for victims[7].

The right of individual victims to reparation, including financial compensation, is not accepted by the government. The government's 12-page response statement does not discuss any of the inquiry findings in the light of Australia's international human rights commitments which are detailed in the 689-page human rights commission report.

For example, the government statement's only reference to the commission's finding on genocide is contained in an appendix, a one-page table summarizing the commission's recommendations and government responses (see pp. 6-7). Apart from failing to address the genocide question, the government's response offers no comment on the evidence that the removal policies provided for systematic racial discrimination even after Australia had formally accepted its obligation under international treaties to end such discrimination. There is also no comment on the government's obligation to investigate cases of alleged physical and sexual abuse of children in state government care, nor on the many indications that the authorities failed to act on complaints about these abuses. Internationally recognized human rights standards[8] not only require investigation of such abuses, they also place an obligation on governments to bring those responsible to justice, and to provide for appropriate reparations.

The need for a national approach to reparations and remedies

Under Australia's federal system, the eight state and territory governments are responsible to act on some of these obligations. In Amnesty International's opinion, the Federal Government's response to the "stolen children" inquiry remains incomplete as long as most state and territory governments have not yet announced their plans in response to the "stolen children" inquiry. Amnesty International urges all Australian state and territory governments to give serious consideration to the human rights commission's recommendations and to offer adequate remedies to complement the federal initiatives. It is important that Australia's federal and provincial authorities accept their shared responsibility to address violations of human rights,

[7] A draft set of such principles, known as the "van Boven principles", have been developed since 1989 and endorsed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. They are scheduled for discussion at the 54th session of the United Nations Commission on Human Rights in 1998.

[8] Such as the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia in 1980, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by Australia in 1989.

irrespective of whether commitments under international human rights treaties were made by a federal government.

Recommendations

Amnesty International believes the Australian Government's response to the "stolen children" inquiry would remain incomplete if it continues to avoid a full answer to the questions about

- whether the child removal practice constituted genocide,
- what reparations victims and their families are entitled to for suffering racial discrimination, exploitation, physical or sexual abuse, and
- which measures are being taken to address the effects of separation of Aboriginal children from their families under the current criminal justice and welfare systems.

Amnesty International therefore calls upon the Australian Government to offer a thorough, written response which reflects the seriousness of these questions, and to adequately explain its reasons, particularly if it does not accept a recommendation made by the human rights commission inquiry.

Amnesty International urges the Australian Government to take positive action on the recommendations made in October 1997 by the UN Committee on the Rights of the Child "to create a federal body responsible for drawing up programmes and policies for the implementation of the Convention on the Rights of the Child, and monitoring their implementation," and on similar, more detailed recommendations made in September 1997 in the Australian Law Reform Commission report on children and the legal process.

The Australian Government should incorporate references to relevant aspects of the inquiry and the government's response into Australia's periodic reports to the (UN) Human Rights Committee under the International Convention on Civil and Political Rights (overdue since November 1991), and to the UN Committee against Torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (overdue since September 1994).

Amnesty International urges the government to reconsider its decision to rule out a formal apology which would be an important symbolic step towards national reconciliation and could help remove doubts about the government's willingness to accept its responsibilities for human rights violations committed under previous administrations.

Aboriginal organisations with regional representation should be given a formal role in the monitoring of government measures to address the inquiry recommendations. This would help

avoid a situation in which only federal and state government ministers are called upon to monitor the adequacy of their government's measures.

Amnesty International believes that by acting on these recommendations the Government could demonstrate its willingness to seize the opportunity offered by the "stolen children" inquiry for a comprehensive, national response which provides a full and just answer to the many unresolved questions raised by the removal of Aboriginal children from their families.