

With the Best of Intentions:
The Removal of Aboriginal Children and the Question of
Genocide

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I would like to thank Colin, Frances (a true patron of the arts), Jen, a computer wiz of extraordinary patience, and especially Stewart, for stepping in when he didn't have to.

Above all, thanks to Clair for keeping the faith despite everything. This is for you.

I declare that this thesis is all my own work and has not previously been submitted for assessment at a tertiary institution.

Contents

Introduction	1
Chapter 1 Introducing Genocide to Australia: The National Inquiry	7
The National Inquiry: Origins, Motives and Methods	
The Politics of History: The Commonwealth and Link-Up Submissions	
The Key Finding: The Report's Conception of Genocide	
Chapter 2 'The Crime Without a Name': Defining Genocide in International Law	28
Raphael Lemkin and the United Nations Convention	
The United Nations Definition of Genocide	
Clause IIe: The Removal of Children as Genocide	
Chapter 3 Determining Intent: The Rationale for Aboriginal Child Removal	43
The 1937 Commonwealth Conference: Solving the Problem of the 'Half Caste'	
Absorption, Assimilation and Genocide	
The 1970s: (Re)Asserting Aboriginal Identity	
Conclusion	64
Appendix 1 Text of the Genocide Convention	70
Bibliography	74

Introduction

Genocide is a word that evokes many responses. From fascination to revulsion, it provokes reaction. For many, it is the ultimate crime of humanity, the final denial of the most fundamental of human rights - that of a people to exist. Even a consensus on the meaning of genocide has yet to be reached, fifty years after the term was coined in the shadow of the Holocaust. Consideration of genocide continues, almost inevitably, to be affected by this, its ultimate expression, often in subtle, subconscious ways. The Holocaust we know to be genocide, a label which can also be comfortably applied to the bloody conflicts in Rwanda and Burundi. Such obvious tragedies - safely located in the past, or on the other side of the world - demand recognition in this way. The idea of genocide as part of our history is an idea that does not sit so easily.

Yet in 1997, it was alleged by a comprehensive National Inquiry that for much of the twentieth century Australia had committed this same crime against its Indigenous population. The forcible removal of Aboriginal children was found to constitute genocide according to international law, based on the United Nations definition. This allegation immediately raises a number of questions about the nature of genocide itself, but for Australia it brings into sharp focus fundamental issues concerning our history, the process of re-evaluating that history, and at the core of the issue, the nature of relationships between Aboriginal and non-Aboriginal Australians.

The basic question is whether Australia really can be seen as guilty of genocide. This is the central aim of the thesis - to investigate this claim of the National Inquiry, as

judged against international law. Does the forcible removal of Aboriginal children constitute genocide, as defined by the United Nations? Assumed in such a question is the validity of this specific framework. While broader notions of genocide are touched on throughout, for a number of reasons it will be shown that when discussing genocide, it is important to refer to the international crime as it is specifically defined by the United Nations. This is not only because its reference to removal of children appears to be immediately appropriate to the Australian case, but primarily because it remains the only internationally recognised definition of genocide. In exploring this central question of whether the Australian case constitutes genocide, the UN definition of genocide comes under scrutiny.

This problem is investigated because it may be, I believe, the first time the removal of Aboriginal children has been examined with specific reference to a detailed analysis of the crime defined by the United Nations. This is not surprising, given that most political scientists, historians and others lack a familiarity with the field of genocide studies, which continues to be dominated by the Jewish experience. Just as the number of publications on the Holocaust and other genocides remains prolific, the field of Australian history, and particularly Aboriginal history, has received increased attention over the past twenty years. However, there remain only a few scholars in Australia who have specifically discussed the Aboriginal experience with reference to genocide.¹ This situation may, in time change because of the of the National Inquiry into the Separation

¹ Most prominently Professor Colin Tatz and Dr Tony Barta. (For example see Tatz, 'Australia's Genocide' in *Social Education* Vol. 55, No. 2, February 1991. Barta, 'After the Holocaust: Consciousness of Genocide in Australia' in *Australian Journal of Politics and History*, vol. 31 no. 1, 1985. 154-161.

of Aboriginal and Torres Strait Islander Children from Their Families (the National Inquiry), which only handed down its Report in June 1997. The Report, *Bringing Them Home*, will not be not analysed in its entirety. This thesis will investigate the manner in which it raised the allegation of genocide, which, for my purposes, is its key finding.

Initially, the thesis attempts to establish the question of genocide as one with contemporary political significance. How is the allegation of a history of genocide received by different groups today? As a label, genocide can be a powerful mechanism not just in accruing a certain amount of ‘moral capital’, but also in claims for specific compensation. The allegation of genocide is placed in a contemporary context through an analysis of two major submissions to the National Inquiry. In approaching the positions outlined by the Commonwealth and the key Aboriginal organisation, Link-Up, genocide is situated as representing a particular historical narrative. The submissions are examined in terms of the way they engage with this narrative, which could be expected to coincide with contemporary political positions. The allegation of genocide corresponds with the ‘Aboriginal view’ of history, and in turn, it has a certain political usefulness for this group. On the other hand, a position which negates historical reassessment does not allow for a finding of genocide, allowing avoidance of any implications which may flow from the National Inquiry’s allegation. In viewing the National Inquiry in these terms, the political use of history emerges as an underlying theme of the thesis.

The question of genocide is primarily investigated on a theoretical basis. How does the UN definition apply to the policies of Aboriginal child removal, and more particularly, the rationale behind them? In order to answer this question, it is necessary to

thoroughly investigate the definition of genocide found in international law. To understand how it applies to Australia, it is argued here that we must first discover the origins of the word. How did it come about, and what did its founder, Raphael Lemkin, mean when he coined the term? In tracing genocide from its 'birth' to its emergence at the centre of a United Nations Convention, two major points become clear: firstly, the crime of 'genocide' passed into international law in order to protect the right of human collectivities to exist. Secondly, for the crime of genocide to be proven, a certain *intent to destroy* a group must be found. This notion of intent is at the centre of much of the theoretical discussion contained in the thesis. The fact that the 'forcible removal and transfer of children' is specifically listed as one of the acts that may constitute genocide is illustrative of the fact that the conception of genocide in international law is perhaps broader than its common usage. This clause also has particular implications for Australia, where the removal of Aboriginal children has for some years been an acknowledged part of Australia's past.

For the crime of genocide to be proven, however, not only the act be present, but also the intent. In Australia, removals were carried out for most of the twentieth century, under a range of policies which differed both between States, and over time. It is beyond the scope of this work to analyse the practice of seventy years of State and Federal legislation. The central question of proving or refuting the claim by the National Inquiry is approached then, from the perspective of trying to discover the rationale for removing Aboriginal children. What was the thinking behind removal policies? Was there evidence of 'intent to destroy' the Aboriginal people through the removal of children? It would be

impossible to establish uniformity of opinion over the course of many decades, on different sides of the continent, from the highest Canberra bureaucrat, to the lowest outback Patrol Officer. In determining the intent of removal policies, the focus is on certain key periods of change, and the policies they produced. The initial Aboriginal affairs Conference of 1937 is investigated because it brought together all the prominent thinkers in the field of Aboriginal policy. In establishing the new policy of 'absorption', the conference was unusually explicit in stating the intention of their policies. Similarly, the chief architect of the policy of assimilation, Paul Hasluck, clearly articulated the aims of his 'new' policy when it was officially adopted in the 1950s. The removal of Aboriginal and so called 'half caste'² children remained a prominent part of both these policies. While the removal of Aboriginal children stopped being part of official policy in the late 1960s, the period immediately following this is briefly examined in an attempt to discover whether policies of genocide have continued into the more recent past.

As stated, this thesis will attempt to determine the validity of the charge that the removal of Aboriginal children constitutes genocide, according to international law. It investigates the allegation in the context of a specific finding by a National Inquiry, which handed down its findings in June 1997. It does not investigate other examples of the historical experience of Aboriginal people which may constitute genocide, such as killings by settlers. The thesis is also not concerned with discussing specific reactions to the Report because these are still unfolding. At the time of writing (November 1997), no

² The use of language is problematic, an assumption almost inherent in any discussion of genocide. Terms such as 'half-caste', 'mixed blood', and 'half-breed' are used throughout this thesis, although it is recognised that today they could be offensive to Aboriginal people. It is considered important, however, to use these terms which have only recently been discredited to give a more realistic account of the thinking behind past policy.

comprehensive response had been given by the Federal Government. Given this omission, the Commonwealth and Link-Up submissions serve to broadly illustrate the 'Government' and 'Aboriginal' positions on the National Inquiry, and through it, the allegation of genocide.

Investigating the issue of genocide involves recognising certain difficulties which emanate from the term itself. Its often emotive usage has led to the situation where it can be embraced or rejected with little or no reference to its factual basis. When discussing the question of genocide it may be impossible to do so in a completely detached manner. In fact, given that we are dealing with the destruction of human life, such an approach may not be appropriate in any case. That said however, it is possible to apply a rigorous analytical framework to the question. Genocide is the subject of a United Nations Convention recognised by hundreds of states around the globe. As a signatory to that Convention, Australia is bound to observe the prohibition of genocide, which is a specifically detailed crime under international law. *Bringing Them Home* alleged Australia was guilty of that crime, not in the distant past, but in recent living memory. While genocide has previously been regarded as something that happened in other times or places, the National Inquiry was responsible for 'bringing it home' to Australia.

CHAPTER 1

Introducing Genocide In Australia: The National Inquiry

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was the latest in a long history of investigations into Aboriginal Australia. However, its grim portrayal of decades of systematic forcible removal of children in the name of ‘social engineering’ distinguished it from previous inquiries, reports or Royal Commissions. One longtime observer of Aboriginal affairs described it as “by far the starkest and strongest indictment” of the treatment of Aboriginal people in Australia.¹ For my purposes, its key finding was that the removal of Aboriginal children amounted to genocide, according to international law. This represented the first time such a strong allegation had been made about Australia’s treatment of its indigenous minority at an official level. While individual Aboriginal leaders had used the term intermittently and often emotively, the National Inquiry could be seen as marking the point at which genocide entered the public discourse in Australia. From the outset, the issue of genocide was a highly political question, with the allegation embraced by Aboriginal groups, but incompatible with the philosophy of the conservative Liberal government.

¹ Colin Tatz, ‘Genocide and the Politics of Memory’ in Tatz (ed.), *Genocide Perspectives I* (Sydney; 1997). 316.

The focus of this chapter is on the radically differing submissions of the Commonwealth, and the Aboriginal organisation, Link-Up (New South Wales).² These submissions are examined, not merely in terms of their acceptance or rejection of the question of genocide, but primarily in the manner in which this engagement (or non-engagement) takes place. By viewing the allegation of genocide as a particular historical narrative, it is argued that Aboriginal and conservative positions on this issue are largely determined by their different views of (and on) history, which in turn are exhibited in opposing political positions. Through an examination of the conflicting and competing views of the past illustrated in these submissions, the issue of genocide emerges as one with significance in terms of its contemporary political utility, rather than being a 'purely historical' question. Finally, the Report's position on genocide is seen to be sympathetic to the 'Aboriginal view', based as it is on a similar conception of history. Examining the Report's idea of genocide is also useful in introducing the issue's key terms and concepts. The substantial (or otherwise) basis for genocide will be an important determinant of its long term reception or rejection, rather than its immediate political utility.

² Link-Up works with Aboriginal adults who were separated from their families as children. They assist these people in gaining information about their family history, with a view to facilitating family reunions. The organisation was founded around 1980, when historian Peter Read and Coral Edwards, herself removed as an Aboriginal child, began to compare their research on removal policies. They soon became aware that large numbers of Aboriginal people were affected by the policies, and sought funding to assist their organisation. After employing its first full-time employees in 1983, Link-Up was finally incorporated under the Aboriginal Associations Act in 1985. Link-Up is now the peak organisation dealing with the issue of Aboriginal child removal, with representatives in all Australian States and Territories. (Link-Up (NSW), *In the Best Interest of the Child?*, Submission to National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1996. Hereafter referred to as 'Link-Up Submission'.)

The National Inquiry; Origins, Motives and Methods

The issue of child removal is one that has been seen as increasingly important by Aboriginal people. A number of significant events were responsible for gradually bringing the issue to the attention of the wider community. Firstly, in 1989, the United States murder trial of 'stolen child' James Savage was covered prominently by media around Australia.³ Then in 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADC) recognised this issue as being a major cause of past pain, as well as ongoing difficulty for Aboriginal Australia. 43 of the 99 deaths it investigated were of people who had been removed from their families. The Royal Commission found,

a regime that took young Aboriginal children, sought to cut them off suddenly from all contact from their families and communities, instil in them a repugnance of all things Aboriginal and prepare them for life at the lowest level of white society is still a living legacy among many Aboriginal people today.⁴

For many Aboriginal people, then Prime Minister Paul Keating's 'Redfern Park' speech in December 1992 was a significant moment in race relations in Australia. This marked the first official acknowledgment of state responsibility for forcible removing children. Keating emphasised the historical basis to many of the problems faced by

³ In August 1989, James Savage faced the death sentence in Florida, United States, on a charge of murder. Savage had been taken from his Aboriginal mother in Northern Victoria at the age of three weeks. His foster family moved to the United States, where he was abandoned as a troublesome teenager. The Secretariat of Aboriginal and Islander Child Care campaigned successfully to have the death sentence commuted to life imprisonment.

⁴ Commissioner J.H. Wooten quoted in Lorena Allam and Jim Brooks, 'Longing to Return Home: the Progress of the National Inquiry into the 'Stolen Generations'', *Aboriginal Law Bulletin*, Vol. 3 No. 86, November 1996. 6-7.

Aboriginal Australians. Solving these problems was to begin with an act of recognition by non-Aboriginal Australians:

Recognition that it was we who did the dispossessing.
 We took the traditional lands and smashed the traditional way of life.
 We brought the diseases. The alcohol.
 We committed the murders.
 We took the children from their mothers.
 We practiced the discrimination and the exclusion.
 It was our ignorance and our prejudice.⁵

Like the RCIADC, the National Inquiry was instituted largely as a response to pressure brought about by key Aboriginal organisations. Central among these groups were the Secretariat of National Aboriginal and Islander Child Care (SNAICC), and Link-Up, New South Wales. The Inquiry was immediately precipitated by the 'Going Home' Conference in Darwin. In 1994, members of the 'Stolen Generations' from all States and Territories met to share their experiences of removal, to devise strategies for improved services, and to increase awareness of the ongoing and specific problems faced by the Stolen Generations. This gathering was "a key turning point" in bringing about the Inquiry.⁶ A major area of concern to Aboriginal people was the fact that the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families.⁷ As well as responding to this Aboriginal pressure, genuine governmental concern appears to have been a motivating force in initiating the

⁵ Speech by Prime Minister Paul Keating. Australian launch of the International Year of the World's Indigenous People. Redfern, 10 December 1992.

⁶ HREOC, *Bringing Them Home*, (Sydney; 1997) 18.

⁷ *Ibid.*

Inquiry. Fully addressing the policy of child removal was seen as part of the process of facing up to the darker aspects of Australian history, and what then Prime Minister Keating described as "the delivery of long overdue justice to Aboriginal people."⁸ With bi-partisan support, the Inquiry was launched by the Keating Labor government in August 1995, and commenced hearings in December 1995. Its terms of reference were:

- (a) to trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress and undue influence, and the effects of those laws, practices and policies;
- (b) to examine the adequacy of, or need for changes in, current laws and services available to people affected by separation (including access to records, counselling and family reunion services);
- (c) to examine the principles relevant to determining the justification for compensation for persons affected by such separations;
- (d) to examine current laws, practices and policies affecting the care and placement of indigenous children, taking into account the principle of self-determination.⁹

The Inquiry was conducted through the Human Rights and Equal Opportunities Commission (HREOC). It was presided over by former High Court judge, Sir Ronald Wilson, together with Aboriginal Social Justice Commissioner Mick Dodson, assisted by fifteen state and regional commissioners. The Inquiry had a budget of \$3 million set aside over two years. Private and public hearings were held in every capital city, and several regional and smaller centres. Evidence was taken from Indigenous organisations and individuals, Government representatives, church groups and other non-government

⁸ Keating quoted on Cunneen, *Keeping Aboriginal and Torres Strait Islander Children out of Custody*. (Canberra; 1997) 237.

⁹ *Bringing Them Home*, 18.

organisations, and individual members of the community. The Inquiry was keenly aware of providing support for those witnesses directly affected by forcible removal.¹⁰ While the Commissioners did comment on financial constraints,¹¹ the calibre of personnel, the commitment of resources, and the lengthy hearing period all indicated the Inquiry was a serious attempt to thoroughly investigate the issue, rather than being a 'whitewash' in any sense.

Given the sheer volume of information received, the reporting date was extended from December 1996 to March 1997. The result of the National Inquiry, the 689 page report *Bringing Them Home*, was finally tabled in Parliament by the Howard Liberal government in June 1997. The Report reflects the evidence of a total of 777 people and organisations, including 535 written or oral submissions from Indigenous people, as well as privately commissioned research. The Report acknowledges that the evidence and submissions it received "could not be tested as thoroughly as would occur in a courtroom", due partially at least to the fact that much supporting evidence, especially official records, has been destroyed.¹² It was at pains to ensure that the Report's findings, conclusions and recommendations were "supported by the overwhelming weight of evidence." This was reflected in the historical nature of the final Report, which includes a commentary on all State and Commonwealth legislation relevant to Aboriginal child

¹⁰ *Ibid.* This was due to the "traumatic nature of their memories, and the inevitably confronting task of relating them to strangers". Counselling for witnesses was made available both before and after giving evidence, with the Report specifically acknowledging the role of local Aboriginal medical services in providing support during visits of the Inquiry. There was, however, some ongoing criticism of the level of counselling available to Aboriginal witnesses. This appeared to be a direct result of the financial constraints mentioned by the commissioners.

¹¹ *Ibid.* 19.

¹² *Ibid.* 20.

removal, as well as a State by State analysis of the policy and practice of removal, and hundreds of Aboriginal testimonies.¹³ Importantly for the Report's credibility, the Inquiry was concerned to "carefully report" the evidence given by Indigenous people, governments, and independent sources so as to ensure its report reflected the "different perspectives" on what has occurred.¹⁴ The extent of these 'different perspectives', and differing views on history, was clearly indicated by the submissions of the Commonwealth, and the Link-Up (NSW) organisation.

The Politics of History: The Commonwealth and Link-Up Submissions

The Submissions of the Commonwealth and the Link-Up organisation are important for a number of reasons. Firstly, these are the primary representatives of the most significant parties in this issue - those who did the removing, and those who were removed. As such, they may be expected to have differing views on the Inquiry, and the issue of genocide. Proving such an allegation could be advantageous for Aboriginal groups in a contemporary political sense. Similarly, negation of the charge of genocide could free the current Commonwealth representative from potentially costly claims for compensation which may flow from such a finding. That the submissions follow such a course is not surprising, then. Worthy of note, however, is the manner in which this takes place. Having recognised the political nature of the charge of genocide, we can see in

¹³ *Ibid.*

¹⁴ *Ibid.*

these submissions that such an 'historical truth' (or untruth) of genocide is proven (or avoided) through vastly differing interpretations of the past, in both its content and its relevance to today. The Link-Up submission can be seen as portraying the 'Aboriginal viewpoint', the incorporation of which is a major characteristic of what has been called the 'new Australian history'.¹⁵ Conversely, conservative opposition to this 'new history' is evident in the Commonwealth submission which displays a corresponding opposition to (or denial of) the question of genocide.

The first indication of these contrasting positions was received even before both submissions were released. After direct criticism by the Commissioners for its failure to co-operate with the Inquiry,¹⁶ the Federal government's submission was received, somewhat late, in October 1986. It ran to 35 pages, which compared with the Link-Up submission of 184 pages. Indicating the government's position, Prime Minister Howard was quoted as saying there was "no long term value and practical contribution" to be made by the Inquiry.¹⁷ On the other hand, Link-Up argued that fully investigating

¹⁵ In describing the 'new Australian history', Bain Attwood has argued "at the most fundamental level this narrative is characterised by the return of an Aboriginal past which had been suppressed by, and repressed in, the dominant history", in what anthropologist W.E.H. Stanner called 'the Great Australian Silence'. (Attwood, 'Mabo, Australia, and the end of History' in *In the Age of Mabo*, (Sydney; 1996) 103.) Characterised by the writing of historians such as Heather Goodall, Andrew Markus, and particularly Henry Reynolds, this 'new history' emerged in the 1970s, becoming more prominent in the 1980s. The Mabo decision overturning the previous historical 'truth' of *terra nullius* can be seen as both a result of, and an element in the construction of this 'new history'. In a similar manner, in this chapter I approach the National Inquiry as forming part of this 'new history', as well as being influenced by it. Rather than seeing 'history' as 'the past', history is viewed in this sense as a narrative discourse which constructs the past in the present. (*Ibid.* 100)

¹⁶ In a joint statement in September 1996, the Commissioners commended State and Territory governments "for their invaluable contributions, and [we] note the resources required to produce them...However, despite repeated invitations to do so, the inquiry has not yet received similar cooperation from the Federal government." (Cited in James Woodford, 'Coalition fails 'stolen children'', *Sydney Morning Herald*, 26/9/96.)

¹⁷ Significantly for such a sensitive national issue, this was perceived as an abrogation of the past bi-partisanship under which the Inquiry was established. Mike Secombe, 'Howard closes the door on 'Stolen Generations'', *SMH*, 9/10/96.

separation policies was a critical first step which must lead to “practical action to address the multiple and overlapping effects of separation.”¹⁸

Apart from criticising it directly, the government’s opposition to the Inquiry was indicated in public comments made by key members of the Coalition. At the time the Commonwealth submission was received by the Inquiry, the Prime Minister made a number of statements regarding the nature and role of Australian history. The key for John Howard was to downplay criticism of Australia’s past treatment of Aboriginal people, as well as weakening any connection between that past, and the present.. The Prime Minister “fundamentally” rejected the view that Australia had “a racist, bigoted past.”¹⁹ While admitting Aborigines were treated ‘badly’, he denied “we’re all part of” that history, due to the fact that Australians alive today “played no part in the maltreatment” of Aboriginal people.²⁰ Emerging representations of Aboriginal rather than European views of the past were “insidious attempts to rewrite history.”²¹ This ‘new’ history was simply fuelled by a “negative perception of Australia’s past.”²² Howard explicitly stated he preferred a more “optimistic” view.²³ With respect to the removals, this ‘optimistic’ approach included comparing the institutionalisation of Aboriginal children with the sending of white children to boarding school, and stressing

¹⁸ Link-Up Submission . ix.

¹⁹ Soon after entering office Howard made what was described as a “systematic” attack on what he termed the ‘black armband’ version of history. (Tatz, ‘Genocide and the Politics of Memory’ 334.) Howard viewed the incorporation of Aboriginal perspectives into mainstream historical discourse as “insidious attempts to rewrite Australian history” (Quoted by Gough Whitlam, ‘Double Trouble for Howard over ‘folly’ on racism’, *SMH*).

²⁰ Michael Millett, ‘PM rejects talk of our racist past’, *SMH*, 25/10/96.

²¹ John Howard quoted by former Prime Minister Gough Whitlam, ‘Double trouble for Howard over ‘folly’ on racism’, *SMH*, 28/10/96.

²² Millett, *ibid*.

²³ Cited in Kitney, ‘Lets look on the bright side says PM’, *SMH*, 25/11/96.

the benefits of removal. Aboriginal affairs Minister John Herron summarised the Commonwealth position by arguing “what’s done is done, and can’t be undone.”²⁴

This negation of the relevance of the past was graphically illustrated by the Commonwealth submission. No fewer than 28 of its 35 pages are set aside to describe the government’s *contemporary* initiatives in Aboriginal affairs. It recognises the position of Aborigines as “severely disadvantaged”, and thus the submission states “priorities to address *current* disadvantage.”²⁵ Past policy is barely mentioned, and 67 years of Commonwealth administration of the Northern Territory is covered in nine lines.²⁶ Apart from failing to engage with the impact of removal policies, the Commonwealth’s approach of outlining general Aboriginal initiatives appeared to ignore a significant factor in bringing about the inquiry, namely, recognition that the *specific* needs of victims of removal policies were not being met by governments.²⁷

The Link-Up submission argues for a divergent conception of history, which is aligned with its political position. Central to its viewpoint is the claim that not only was historical treatment of Aboriginal people devastating, but its impact is ongoing. For Link-

²⁴ Senator John Herron in Parliament, October 1996. Cited from ABC TV, *7.30 Report*, May 1 1997.

²⁵ Commonwealth of Australia, Commonwealth Government Submission to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, October 1996. 31. (Hereafter referred to as the ‘Commonwealth Submission’.)

²⁶ The Commonwealth admits the *Aboriginals Ordinance Act 1918-1957* gave the government “wide powers...to control many aspects of the lives of Aboriginal people”, including the power to “take an Aboriginal child into care...when...it was necessary or desirable to do so.”²⁶ No further information is offered as to what situations it was considered ‘necessary or desirable’ to ‘take an Aboriginal child into care.’

²⁷ This approach has been criticised for constructing Aboriginal people merely as passive recipients of welfare, rather than encouraging self-determination. (Mick Dodson, ‘Coalition’s policy a betrayal of Aborigines’, *SMH* 16/8/96) Frank Brennan described it as a return to “a more assimilationist approach, which sees Aborigines as disadvantaged citizens in need of temporary welfare assistance, rather than as an indigenous people within the life of the nation.” (Brennan, ‘PM must lead the way in ‘sharing our country’ *SMH*, 9/10/96.) The Commonwealth Submission makes no mention of self-determination.

Up, the core of removal policies was not just the racism and bigotry John Howard rejected, but genocide. This position is immediately argued in Link-Up's first two principal conclusions. These attempt to establish from the outset, that "separation is not in the past", and secondly, that removals "were genocidal, and part of a range of policies aiming to totally dispossess Aboriginal people."²⁸ If the policies did constitute an attempt 'to eliminate Aboriginal identity' as Link-Up claims, this presents a strong argument for specific reparation. Central to this claim is the argument that contrary to the Commonwealth view, the past was devastating, and it is not even past.

In re-examining the past, the Inquiry raised the complex issue of intergenerational guilt. The statements of conservative politicians rejected the notion that Australians should feel guilt or shame about their past, especially when they are 'not a part of' that past, an attitude implicit in the Commonwealth submission. John Howard made a number of references to "the guilt industry",²⁹ the purveyors of what he described as 'negative history'. However, Link-Up rejects the notion that the National Inquiry should "fill the wider community with guilt", stressing instead, the need for acknowledgment.³⁰ This position has been echoed by a number of Aboriginal leaders³¹ who are aware that demanding white Australia feel guilty about their past may be politically damaging. In

²⁸ Link-Up submission. xi.

²⁹ For example see David Passey, 'History, white or wrong', *SMH*, 26/10/96.

³⁰ Link-Up submission, v.

³¹ Professor Marcia Langton stated: "We are not asking white Australians to feel guilty but to understand the causal relationship...[between the historical] pauperisation of Aboriginal people...[and] the severe disadvantages which Aboriginal people suffer today." (Langton, 'Children must be taught the truth', *SMH* 25/10/96) Former chair of ATSIC Lois O'Donoghue said a 'true' version of history was "never intended to shame non-Aboriginals", and called for "mutual understanding, not guilt". Cited in Kitney, *ibid*.

raising the notion of guilt, opponents of 'the new history' label this reassessment of our past as divisive, as part of a strategy of denial.

These political usages are evident in the way both submissions address the issue of compensation. The Link-Up submission favours a broad conception of reparation, in line with its view that removals were equivalent to genocide, and have ongoing effects. Rather than simply dealing with financial compensation, key elements of redress are concerned with firmly embedding a contemporary reassessment of removals as part of the 'new Australian history'. This included "fully disclosing the truth about separation", acknowledgment by governments and an official apology, as well as ongoing education of the wider community. Monetary compensation is called for on the grounds that victims of removal suffered gross violations of their human rights. As such they are entitled to restitution, compensation and rehabilitation, as laid down by the UN.³² Despite its finding that removals amounted to genocide, Link-Up concentrates on restitution, rather than punishment. This failure to call for perpetrators to be punished led to the suggestion that on this ground alone, it is inappropriate to describe the removal of Aboriginal children as genocidal.³³

The Commonwealth rejection of compensation implicitly follows its rejection of the new Australian history. Attwood has argued that the Conservative preference for the 'old' Australian history is in part based on its perceived role in bringing the country together around a set of shared beliefs and traditions.³⁴ Compensating Aborigines for

³² Link-Up submission. 23.

³³ Dr Ron Brunton, Indigenous Issues Unit of the Institute of Public Affairs, Perth. Radio 2BL Weekend Show, 1/6/97.

³⁴ Attwood, *ibid.* 17.

actions of the past robs the traditional historical narrative of its 'unifying' role by recognising a separate (and negative) Aboriginal historical experience. In stressing this need for harmony rather than discourse, conservatives have consistently taken positions that de-emphasise a distinctly Aboriginal identity, preferring that Aboriginal people be treated 'the same' as other Australians.³⁵ In line with this attitude, the Commonwealth submission explicitly rejects compensation on the grounds that it may be "socially divisive",³⁶ and because it may not gain "wide community acceptance".³⁷ Despite the "significant failures or appalling results" of removal policies, redress must be balanced against "potential costs to the economy, society, and to other individuals."³⁸ While one commentator criticised the Commonwealth's view of justice as "extraordinary",³⁹ it does appear more logical when it is seen to flow from a view that regards compensation as an attack on the 'unity' of society, constituting as it does, a challenge to a view of history regarded as a paramount integrative force.

In the period the Commonwealth made its submission to the Inquiry, public comments were interpreted as indicating the government's "central concern" was the fear

³⁵ John Howard pledged as early as 1989 to repeal land rights legislation on the basis that no other group had such rights. Howard argued in the name of a just society, "there can be no special favours, no positive discriminations..." (Tatz, *ibid.* 336) Responding to the assertion by radio talk show host, John Laws, that Australians did not like anybody treated differently, Aboriginal affairs Minister John Herron stated, "Yes, you are absolutely right." On the issue of cut-rate pre-school fees aimed at improving longstanding Indigenous educational inequalities, Herron declared, "The principle is not right..." (Debra Jopson, 'Aborigines fighting to hold gains', *SMH*, 20/4/96.) Howard told Aboriginal representatives of the National Indigenous Working Group on Native Title, "We don't agree with your right to negotiate. No-one else has that right." (quoted in Ramsey, 'Wik: Shame, Howard, Shame', *SMH*, 3/5/97)

³⁶ Commonwealth Submission. 30.

³⁷ *Ibid.* 31.

³⁸ *Ibid.*

³⁹ The statement that compensating Aborigines may be divisive was reiterated by Attorney-General Daryl Williams. National political correspondent Margot Kingston felt it was "perhaps the most extraordinary claim ever made by an Australian legal officer...Thus the fundamental principle of our legal system's concept of justice - that it should be dispensed without fear of favour - is buried." (Kingston, 'Children's fate demands justice', *SMH*, 22/5/97.)

of compensation payouts.⁴⁰ Avoiding these claims was linked to a strategy of distancing the past from the present, just as Aboriginal claims for compensation were linked to the ongoing effects of past policy. The Commonwealth claimed, “it is inappropriate to compensate for past actions which may at a later time be considered unacceptable in the light of changed standards and values.”⁴¹ The argument that removals took place according to ‘prevailing standards’ of the time precluding any judgement today, served to deny compensation, and could be used to undermine the whole basis for the Inquiry. It is significant then, that Link-Up sought to dispel this notion of an overarching community consensus, arguing removal policies had dissenting voices at all times. It implicitly argues that what is manifestly wrong, was always manifestly wrong. In doing so, it highlighted those ‘dissenting voices’, and pointed out that the dangers of removal (for Aboriginal children) were raised “in every legislative debate” concerning the various versions of the Aborigines Protection Act in NSW.⁴²

In many ways, this argument about reassessing the past is at the heart of the National Inquiry, and the issue of genocide. By its very nature, the allegation of genocide requires a reassessment of past actions in terms of new standards. Never, at least in modern times, has a perpetrator admitted to a policy of genocide as it took place. By denying the legitimacy of historical reassessment (both explicitly and implicitly), the Commonwealth excuses itself from any responsibility for past laws and practices. It is significant that a major contributor to the narrative of the ‘new Australian history’, the

⁴⁰ Seccombe, SMH, 9/10/96.

⁴¹ Link-Up Submission. 26.

⁴² *Ibid.* 7.

Mabo case, argued against the equity of this approach. Speaking with respect to legal doctrine, Justice Brennan unambiguously stated that a past issue must be judged according to *contemporary standards*, and that if

founded on unjust discrimination [it] demands reconsideration It is contrary both to international standards and to fundamental values of common law [to continue] to support a discriminatory law...⁴³

Being historically based, the argument of the Link-Up Submission appears to be more substantial than that of the Commonwealth.⁴⁴ The fact that the National Inquiry subsequently found that removals amounted to genocide acts as further vindication of the Link-Up position. The finding of the National Inquiry could be interpreted as a rejection of the ‘white blindfold’ view of history, acknowledging both the wrongs of the past, and their ongoing impact. With such a finding, the charge of genocide could be used as a political weapon by Aboriginal groups in order to validate their view of the past, as well as the need for current initiatives to address that past. Yet it could also be viewed by others as representing an ‘extreme’ position, which discredited the Report as a whole.⁴⁵ As such, this finding of the National Inquiry attains significance not just in an historical sense, but in terms of the contemporary political scene. The basis for the allegation of genocide will be an important development in determining its reception. It is important to

⁴³ Brennan J. cited in Henry Reynolds, *Aboriginal Sovereignty*, (Sydney; 1996). 134.

⁴⁴ John Nader QC, a former judge of the Supreme Court of the Northern Territory described the Link-Up submission as “...the best report of this genre I have seen in 34 years of legal practice.” Link-Up (NSW), *In the Best Interests of the Child?*. Aboriginal History Monograph 4. 1997.

⁴⁵ Ron Brunton labelled the charge of genocide as “extreme” and a “moral absurdity” which did discredit other parts of the Report. Weekend Show, 2BL, 1/6/97.

look then, at how the report arrived at its finding. This serves also to introduce key questions and terms which will later be investigated and applied to the Australian case.

The Key Finding: The Report's Conception of Genocide.

While it was not the major focus of the National Inquiry, for my purposes, its key finding was that the removal of Aboriginal children by Australian governments and non-government agents amounted to genocide.⁴⁶ It reached this conclusion because "a primary objective" of removing children was to deny an Aboriginal community of the "chance to perpetuate itself in that child."⁴⁷ After reviewing both Australian history and relevant genocide literature, the Inquiry was in no doubt about this finding. It concluded "with certainty on the evidence"⁴⁸ the Australian practice of Indigenous child removal involved "both systematic racial discrimination and genocide as defined by international law."⁴⁹ From the outset it was established that the Report dealt with this specifically prescribed legal meaning of the term, rather than other 'commonly accepted' meanings. In discussing this finding, the Report identified four elements of genocide theory as most

⁴⁶ The Report does not concentrate on genocide, as does this thesis, thus discussion of the issue does not form a substantial part of the Report. In a practical sense, the Report found that the past policies and practices of removal affected both the individuals removed, as well as the families and communities left behind. These effects ranged from psychological harm, to loss of native title entitlements, and while some witnesses revealed that removal was a positive experience, "the bulk of evidence" detailed negative and damaging effects, with most suffering "multiple and profoundly disabling" problems as a result of removal. (*Bringing Them Home* 178)

⁴⁷ *Ibid.* 218.

⁴⁸ *Ibid.* 273.

⁴⁹ *Ibid.* 266.

relevant to the Australian case. Firstly, the Report noted that forcible removal of children *can* be genocide according to international law; secondly, that plans and attempts *can* be genocide; thirdly, that "mixed motives are no excuse";⁵⁰ and finally, Australia has liability under international law. In reviewing the Report's finding, it can be seen that while there is some degree of ambiguity about what may appear to be 'ethnocide', it displays a sophisticated understanding of the concept of genocide in international law and its theoretical underpinnings.

The Report does not discuss alternative definitions of genocide. It refers to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) as the time when genocide was "first defined in a detailed way", and it uses the UN definition.⁵¹ The Report's relatively brief discussion of this definition immediately points to apparent discrepancies between this specific definition, and what may be more popularly held views of the nature of genocide. For example, the Report initially makes the point that genocide "does not necessarily mean the immediate physical destruction of a group or nation."⁵² It establishes that genocide can be committed "by means other than actual physical extermination".⁵³ This may already conflict with notions of genocide that are based on episodes of obvious mass killing such as the Holocaust, or more recently in Rwanda and Burundi. In showing that forcible removals may constitute genocide, the report quotes a UN document which finds removing children and forcing a different

⁵⁰ *Ibid.* 273

⁵¹ *Ibid.* 270. The United Nations lists 'forcibly transferring children of one group to another group' as one of the acts which may constitute genocide, if committed 'with intent to destroy' that group. The UN definition will be discussed in detail in the following chapter.

⁵² *Ibid.* 271.

⁵³ *Ibid.*

culture and mentality upon them "at an impressionable age" tends to bring about the "disappearance" of a group as a cultural unit in a relatively short time.⁵⁴ The term disappearance has a particular resonance with the experience of many Indigenous peoples, whose decline in the face of forces such as colonisation has often been regarded as a sort of natural occurrence. In introducing a connection between the removal of children, the disappearance of a group, and genocide, the Report may be widening conceptions of genocide previously held by the reader.

This also serves to introduce the notion of intent, for if a disappearance is equivalent to genocide, it appears there must be a corresponding element of intent. In establishing that plans and attempts can be genocide, the Report discusses this idea. It regards the "essence" of the crime of genocide as "the intention to destroy the group as such", as opposed to "the extent to which that intention has been realised."⁵⁵ The extent of destruction is, however, regarded as relevant to establishing this element of 'intention'. The Report concurs with many genocide scholars that the intention to destroy the group 'in part' can be genocidal if the aim is to destroy it "substantially".⁵⁶ It also, perhaps inadvertently, introduces the notion that a policy of assimilation may be genocidal. In finding that the predominant aim of child removal was the "absorption or assimilation" of the children leading to the disappearance of their ethnic identities, it regards this aim to destroy 'the cultural unit' as constituting genocide.⁵⁷ It makes no reference to 'cultural genocide', but regards the aim of eliminating Indigenous cultures as distinct entities as

⁵⁴ UN Doc E/447 1947

⁵⁵ *Ibid.* 272.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 273.

constituting genocide. In doing so, it may open itself up to the charge that what it describes is the 'lesser' crime of cultural genocide, rather than genocide, *per se*.

A certain ambiguity is also evident in the Report's discussion of 'mixed motives'. The Report argues that to constitute an act of genocide, the planned extermination of a group "need not be solely motivated by animosity or hatred."⁵⁸ It appears to be attempting to establish that the UNCG still applies in cases where removal was considered 'in the best interests of the child', as in the Australian case. This is important in rejecting the assertion that the allegation of genocide can be avoided simply by claiming a particular course of action was felt to be 'the right thing at the time'. However, it also appears to indicate that some element of malice must be evident for a policy to constitute genocide. This is firmly in line with common perceptions of genocide. However, it will be shown that is another point of departure between these common perceptions and the UN definition, which does not require the issue of 'motive' to be addressed at all.

The potentially broad nature of the UN definition is indicated when the Report makes what appears to be a contentious claim. It finds the practice of preferring non-Indigenous foster and adoptive families for Indigenous children up to the 1980's, was "arguably genocidal".⁵⁹ It makes the claim by arguing that the genocidal impact of these practices was "reasonably foreseeable", and that a "general intent" (to destroy the group) can be established from proof of reasonable foreseeability.⁶⁰ The Report argues that this

⁵⁸ *Ibid.* 274.

⁵⁹ *Ibid.* 274.

⁶⁰ *Ibid.*

'general intent' is sufficient to establish the UNCG's element of intent. In concluding that even recent activities may have had a genocidal impact on Aboriginal people, the Report appears to be controversial, but shares the conclusions found in the submission of Link-Up (NSW), which were also based on an understanding of the UN definition of genocide.

Significantly, the Report establishes that a signatory to the UNCG cannot excuse itself from a charge of genocide by claiming that its actions were lawful under its own laws.⁶¹ This contradicts the statement of the Commonwealth submission that "if the separation of Aboriginal children from their families...was authorised by the *Aboriginals Ordinance* or other relevant legislation, there can be no legal liability to pay damages..."⁶² The Report notes Australia's obligation to uphold the Convention which was ratified by the Commonwealth in 1949. It found that "...any removals that occurred after that time with the intention of destroying Indigenous groups culturally would be in breach of international law." It also finds that "it is clear" that even earlier removals were in breach of international law.⁶³ This is because the UNCG recognised the crime of genocide *pre-dated* the Convention, as seen by its preamble which states the UNCG 'confirms' that genocide is a crime under international law. Taking as its 'start date' the UN resolution of 11 December 1946, the Report finds that, from this date,

The policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled 'genocidal' in breach of international law...⁶⁴

⁶¹ *Ibid.* 270.

⁶² Commonwealth Submission. 26.

⁶³ *Bringing Them Home*. 274.

⁶⁴ *Ibid.* 275.

This charge of genocide, coming as it did after a comprehensive and thorough investigation of removal policies and their impacts, is a significant allegation for Australia. Furthermore, it is an issue which has the potential to influence relations between Aboriginal and non-Aboriginal Australians as well as understanding's of Australia's past. This has already been evident in the submissions of the Commonwealth and Link-Up, which display radically differing positions on the issue of genocide. These immediate responses are understandable when genocide is seen as an issue that is far from politically neutral. In the longer term, reception (or rejection) of genocide will be more likely to depend on the degree to which the allegation can be supported by a theoretical framework. This prompts the need to carefully investigate how genocide is conceptualised within international law, and how it could be applied to the removal of Aboriginal children in Australia.

CHAPTER 2

‘The Crime Without a Name’: Defining Genocide in International Law

The National Inquiry’s finding that the policies of forced removal of Aboriginal children were ‘genocidal’ was entirely based on an understanding of genocide as it is defined in international law. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, (UNCG) represented the first time the concept of genocide received detailed attention. The definition it constructed remains the only internationally accepted definition of genocide. Before examining the Australian case of child removal, it is necessary to begin by establishing how the term ‘genocide’ came about, and exactly how it is defined by the UN. The fact that it specifically lists ‘forcible removal of children’ means the UN conception of genocide is especially relevant to Australia.

Raphael Lemkin and the United Nations Convention

As a mechanism for analysis, genocide poses a number of difficulties, not the least of which is the intended meaning of the term. Focussing on its finality, an Australian dictionary defined genocide as "extermination of a national or racial group

as a planned move".¹ This is correct in the literal sense: the word comes from the Greek 'genos' (race or tribe), and the Latin 'cide', meaning killing - hence the killing of a race.² Yet this definition raises as many questions as it answers, for if we apply it to the real world in a literal sense, there have been no genocides (at least in the twentieth century). Even the Nazis could not eliminate *all* Jews, despite their intent. Yet, this episode is generally understood as the ultimate expression of genocide.

The man who coined the term, the Polish jurist Raphael Lemkin, did so in the shadow of the Nazi regime. But his conception of genocide went beyond this extreme example. Lemkin had campaigned unsuccessfully since 1933 "to declare the destruction of racial, religious or social collectives a crime under the law of nations."³ It was not until the Second World War neared its end, and the Allies looked to punish the German government for what Churchill referred to in 1941 as 'the crime without a name',⁴ that the international community addressed the issue of genocide. Lemkin had created the term in his 1944 book, *Axis Rule in Occupied Europe*, to describe the essence of Nazi policy. Yet, he stressed the historical nature of the crime; he had, he wrote, created the term 'genocide' "to denote an old practice in its modern development."⁵ Given his role in creating today's term, we need to refer at some length to Lemkin's conception:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to

¹ Macquarie Dictionary, (Sydney; 1987) 745.

² Raphael Lemkin, 'Genocide', *The American Scholar*. Vol. 15 1945-6. 228.

³ Lemkin, 'Genocide as a Crime Under International Law', *The American Journal of International Law*. Vol. 41. 1947. 146.

⁴ Cited in Bunyan Bryant, 'Part1: Substantive Scope of the Convention', *Harvard International Law Journal*. Vol 16. 1975. 687.

⁵ Lemkin, *Axis Rule In Occupied Europe*. (Washington; 1944) 79.

signify a coordinated plan of different actions aiming at the destruction of the foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of the plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.⁶

Lemkin makes an important distinction between the crime of genocide and 'the actions involved' which make up that crime. Also notable is the fact that genocide is a specifically targeted policy - victims are chosen for no other reason than they are members of the collective marked for destruction. Lemkin stated he created the term 'genocide' to afford protection to human collectivities in the same manner as the crime of murder protects individuals.⁷ According to Lemkin's idea, victims of genocide may survive physically, though not as they previously were. He argued that genocide could take place in two distinct phases: firstly, the destruction of the national pattern of the oppressed group; and secondly, the imposition of the national pattern of the oppressor.⁸

In October 1946, Lemkin drafted a resolution for the fledgling United Nations. In working its way through the various legal-, sub-, and ad-hoc committees of the UN, a great deal of debate took place, concerning the nature of the crime to be recognised in international law. In defining genocide, contentious issues included the notion of

⁶ Lemkin, *Ibid.*

⁷ Lemkin, 'Genocide as a Crime', 149. As such, Lemkin's conception of genocide may be seen as a forerunner of later UN instruments concerned with the right of self-determination. Just as 'genocide' recognises the right of Indigenous peoples, for example, to exist, later instruments carried this concept further by recognising their right not only to exist, but to determine their own future (as a group).

⁸ Lemkin, *Axis Rule*. 79.

‘intent’, the question of whether ‘cultural genocide’ would be included, the problem of enforcement, and the omission of political groups as being covered by the Convention.⁹

In drafting the Convention, the question of ‘intent’ proved difficult to resolve. In the draft of the Ad Hoc Committee, genocide was said to refer to a number of "deliberate acts committed with the intent" to destroy a group "on grounds of the national or racial origin, religious belief, or political opinion of its members."¹⁰ The notion of intent was seen as necessary to distinguish from the 'inadvertent' destruction of a people. Intent (to destroy the group) was also seen to distinguish the international crime of genocide from the municipal crime of homicide.¹¹ The inclusion of intent had been felt to introduce an ambiguity in the definition by introducing a subjective element that would prove difficult to establish.¹² However, UN members ultimately agreed the element of intent was a necessary part of genocide, and addressing this issue is a critical element in examining genocide in international law.

Leo Kuper argues that specific reference to the removal of children in the Convention is a vestige of the original inclusion of ‘cultural genocide’.¹³ The first draft of the Convention by the Secretariat had originally listed ‘cultural genocide’ alongside ‘physical’ and ‘biological’ genocide.¹⁴ While the Soviet bloc pressed for inclusion of cultural genocide in the Convention, the concerns of colonial powers were

⁹ Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven; 1981) 24. While it is not specifically relevant to discussion of Aboriginal child removal and genocide, the exclusion of political groups from those protected by the UNGC has been regarded as its major failing. Thus the murder of millions of ‘kulaks’ in Stalin’s Russia, or the killing of communists in Indonesia in the 1960s do not strictly fit the UN definition of genocide.

¹⁰ Kuper, *Genocide its Political Use*, 32.

¹¹ Bryant, *ibid.* 692.

¹² Kuper, *International Action Against Genocide*, (London; 1984) 4.

¹³ Kuper, *The Prevention of Genocide*, (New Haven; 1985) 31.

¹⁴ Kuper, *Genocide: Its Political Use*, 30.

evident when Western European democracies succeeded in having it excluded. They argued that while groups should indeed be protected against attempts to destroy their culture, these protections should be offered through conventions on human rights and minorities.¹⁵ Cultural genocide or 'ethnocide',¹⁶ is not a crime that is specifically listed within the Convention. Thus the removal of Aboriginal children is investigated in this thesis in terms of whether or not it constitutes genocide, as defined in international law.

Controversies over wording proved indicative of the national self interest that would render the Convention practically ineffective, as genocides increased rather than disappeared. Perhaps the most fundamental factor which has prevented punishment of genocide, is that it is primarily a crime of state, and it is other states that are charged with enforcing the UNCG. As indicated by UN action (or inaction) on numerous other issues, member states are very reluctant to curtail the sovereignty of another state (as intervention is perceived), lest their own sovereignty be breached in the future.

Despite disagreements, consensus was finally reached. On December 11 1946, the UN adopted a resolution which "affirms that genocide is a crime under international law".¹⁷ The Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) was adopted by the General Assembly on December 9, 1948. It was described in the UN by Australia's representative, Herbert 'Doc' Evatt as "an

¹⁵ *ibid.* 31.

¹⁶ Beardsley in Kuper, *ibid.* 31, defines ethnocide as the commission of specified acts "with intent to extinguish, utterly or in substantial part, a culture. Among such ethnocidal acts are the deprivations of opportunity to use a language, practice a religion, create art in customary ways, maintain basic social institutions, preserve memories and traditions, work in cooperation towards social goals." It could be argued that Aboriginal people suffered all these acts.

¹⁷ Lemkin 'Genocide as a Crime', 150. *Bringing Them Home* found that Australia was bound to observe the UNCG after this date

epoch-making event in the development of international law."¹⁸ Australia registered no reservations to the Convention, and signed it 11 December 1948. It was ratified by Commonwealth parliament on 8 July 1949. Having gained the required twenty signatories, the Convention came into force on January 12, 1951.

The United Nations Definition of Genocide

In defining genocide, Article II of the UNCG states,

In the present Convention, genocide means 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 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.¹⁹

This remains the internationally recognised definition of genocide. It reflects both the preoccupation of member states with the recent horrors of the Holocaust, and the desire to punish Nazi perpetrators, as well as the particular concerns of individual member states. What emerged was a compromise definition of genocide that satisfied UN membership of the time. Flaws were certainly apparent even then, but there was a

¹⁸ Evatt also urged all delegates to work vehemently for parliamentary ratification of the Convention in their homeland. (cited in Martin, *The Man Who Invented Genocide*. (California; 1984) 189.) The Convention has yet to be made part of the municipal law of Australia.

¹⁹ See Appendix 1.

general feeling was that this was inevitable, and a flawed Convention was better than none at all.²⁰ By examining apparent ambiguities surrounding the idea of intent, the extent of destruction necessary, and the apparently broad nature of the definition, it can be seen to be more resilient to criticism than some commentators suggest.

Genocide scholars Frank Chalk and Kurt Jonassohn have argued the UN definition is too broad, and that the field of genocide studies should be confined to “extreme cases”.²¹ If genocide is restricted to those instances where the destruction of a group is attempted through mass killing, obviously the forcible removal of Aboriginal children does not constitute genocide. However, defining genocide narrowly, as Chalk and Jonassohn suggest, has the effect of excluding genocidal (or then ‘near-genocidal’) action which inevitably become diminished in international and historical eyes. Victims of these instances can then fall into what Charny has called a “conceptual black hole”, where they are forgotten.²² This is especially relevant to the destruction of indigenous peoples, which has traditionally been seen in terms of some sort of ‘natural disappearance’, unworthy of deeper analysis. This has ongoing repercussions, especially in terms of a greater willingness by many to accept the results of destruction and dispossession of indigenous peoples. A narrow definition restricted to observable instances of mass killing could allow authorities to overlook even systematic and coordinated actions which result in the extinction of indigenous groups.²³ Calls for a restrictive definition of genocide reflect the continued preoccupation with analysing the more ‘obvious’ cases of the crime (committed

²⁰ Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide*. (New Haven; 1990) 11.

²¹ Chalk and Jonassohn, *ibid.*, 23.

²² *Ibid.* 92.

²³ Robert K. Hitchcock and Tara M. Twedt, ‘Physical and Cultural Genocide’, in Charny (et al.). *Genocide in the Twentieth Century* (New York; 1995) 491.

through killing), rather than the more ‘subtle’ cases, such as those committed through removal of children.

Jonassohn has suggested intent is the most difficult definitional aspect to deal with.²⁴ With a crime such as genocide it is rare that perpetrators are willing to admit to their actions, and Germany remains the only modern example where a perpetrator government has accepted responsibility for a genocide.²⁵ Evidence of intent, then, will often be difficult to gather, with denial of intent a possible defence against a charge of genocide.²⁶ Taking an inclusive approach to the problem, it is possible to see, as Fein suggests, that the UN definition has much greater flexibility than is understood by some. It does not require that *specific* intent be determined - that is for political, ideological, economic or any other reason. It merely requires that the various destructive acts have a “purposeful or deliberate character” as opposed to “an accidental or unintentional character”.²⁷ Fein regards it as important to differentiate here between motive and intent - the UNGC does not require a motive to be determined, or even be evident. We do not need to ask why a particular genocide was committed. The nature of intent, having been proven, is also immaterial. The crime then, could just as easily be committed with the best of intentions, as with the worst. For Fein, intent is simply “purposeful action”.²⁸ Similarly, Reisman and Nordi argued that intent should simply be construed as “deliberate or repeated acts with foreseeable

²⁴ Jonassohn, ‘What is Genocide?’ in Helen Fein, *Genocide Watch* (New Haven; 1992) 20.

²⁵ *Ibid.*

²⁶ In 1974, Paraguay used this defence to avoid a charge of committing genocide against its indigenous Ache Indians. The Paraguayan Defence Minister stated “Although there are victims and victimiser, there is not the third element necessary to establish the crime of genocide - that is ‘intent’ Therefore, as there is no ‘intent’, one cannot speak of ‘genocide’” (Cited in Kuper, *Genocide*, 34) The question of intent is perhaps most problematic when looking at genocides that have occurred during colonisation, where the destruction of a people has been regarded as a natural part of the process, if it has been regarded at all. (Fein ‘*Genocide: A Sociological Perspective* (London; 1993) 15.)

²⁷ *Ibid.*

²⁸ *Ibid.*, 10

results, rather than motive."²⁹ Kuper regarded the element of 'intent' to be established "if the foreseeable consequences of an act are, or seem likely to be, the destruction of a group."³⁰ Often then, intent may not refer to the intention to wipe out a people, but the intention to commit a series of actions that *may reasonably be seen to lead* to the destruction of a people. This is a subtle and crucial difference that is often missed by those unfamiliar with genocidal theory, and one that is accommodated by the flexible nature of the UN definition.

This definition of genocide states the destruction of a group must be intended 'in whole or in part'. Again, this introduces a level of ambiguity, for just how much of a group must be targeted to constitute genocide? Strictly speaking, the forcible transfer of one child could amount to genocide, if it could be proven there was 'connecting aim'. Indeed this was the position of the French representative to the UN. Yet, the understanding given by the United States government was that the Convention referred to acts perpetrated against "a substantial part of the group concerned."³¹ Kuper agrees that there must be a "substantial" or "appreciable" number of victims, while also noting it would be quite repugnant to weigh up tragedy against tragedy in terms of mere numbers.³²

While acknowledging its limitations, there appear to be several good reasons why, when discussing the concept of genocide, we should refer to the definition provided by the UN. By addressing the difficulties within it, it can be seen to be more resilient to criticism than some commentators have suggested. Chalk and Jonassohn

²⁹ *Ibid.*

³⁰ Kuper, *The Prevention of Genocide*, 12.

³¹ Bryant, *ibid.* 691.

³² Kuper, *The Prevention of Genocide* 32. Similarly, Horowitz warns of the dangers of "moral bookkeeping" (Horowitz, *ibid.* 235), and Tatz points out the futility of constructing a "calculus of calamity". (Tatz, *ibid.* 240)

regard the UN definition as of “little use to scholars”, noting its “symbolic value”, but also its lack of “any practical effect”.³³ Yet, exploring concepts of genocide without any reference to this definition, means ignoring the only internationally recognised standard we have. Rather than confine the field to the most ‘extreme’ cases, the UN definition includes all those episodes where the destruction of a group was attempted, at least by the mechanisms enumerated in the Convention. It still limits genocide to specific and rare episodes - those where the existence of an entire group is threatened. If the goal in studying episodes of genocide is to better understand the phenomena with the ultimate aim of detecting and preventing it, we cannot ignore the central role of the UN in achieving this goal. Despite meticulously detailing its shortcomings, Leo Kuper has argued that the UN still represents “potentially the most effective channel for action to eradicate genocide”.³⁴ Creating new definitions which are not internationally recognised, is simply “unhelpful”.³⁵

In examining the forcible removal of Aboriginal children, for the reasons given above, I shall adopt the UN definition of genocide. This definition has immediate implications for Australia, as section IIe. of the UNCG specifically lists ‘forcibly transferring children of the group to another group’ as one of the acts that constitutes genocide.

³³ Chalk and Jonassohn, *The History and Sociology of Genocide*, 11.

³⁴ Kuper, *International Action*, 12.

³⁵ Kuper, *Genocide: Its Political Use in the Twentieth Century*, 39.

Clause IIe: Removal of Children as Genocide

Why did Article IIe of the UNCG specifically refer to the ‘forcible transfer of children from one group to another group’ as one of the acts that may constitute genocide? In the context of the Holocaust, there was no need to specify this element of Nazi policy. It was probably known that one aspect of the Germans criminal behaviour was the forcible removal of children, largely from Poland.³⁶ However, the removal of children in genocidal circumstances had initially taken place in Turkey, in the century’s first genocide, against the Armenians. At the time the UNCG was drafted there *were* precedents for including the removal of children as genocidal. While the UN debate made no direct reference to these instances, the inclusion of section IIe revealed a specific conception of genocide would be contained in the UNCG.

In the UN debate Venezuela summarised the views of those who supported the inclusion of the transfer of children:

The forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion, and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilisation...to a highly civilised group...yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly be committed.³⁷

The final inclusion of ‘the IIe case’ has been regarded as “particularly significant” because it clearly indicates that the UNCG is aimed at proscribing “not

³⁶ Nazi ideology prevented the removal of Jewish children who, along with their parents, were marked out for immediate physical destruction. Those Polish children deemed ‘racially valuable’ were forcibly removed to be ‘Germanized’, as discussed in chapter 3, note **37**.

³⁷ UN DOC A/AC6/SR83 (1948) in *Bringing Them Home*, 271.

only the more sensational and brutal methods of genocide but also less brutal though effective means.”³⁸ Contrary to more widely held conceptions, it means that according to international law, *genocide can take place without physical abuse or killings*.³⁹ What is necessary for the removal to be genocidal is that there be a corresponding element of ‘intent’.

Referring to the Australian situation, the question of intent is not simply whether the removal of Aboriginal children took place in order to destroy the Aboriginal people. Rather, it must be determined that the removal of Aboriginal children took place in a systematic and specific manner. It must be proven that Aboriginal children were removed *because they were Aboriginal children*. If this is found to be the case, the question then becomes whether the policy of removal could foreseeably have resulted in the destruction of the Aboriginal people. The fact that the removals may have taken place with the best of intentions will obviously influence how we view those that conceived and carried out the policy, but it is not strictly relevant in determining whether the policy amounts to genocide according to the UN. By its commonly accepted meaning, genocide is a crime of bad faith (*male fides*). Yet, there is nothing in the Convention that requires a bad intent. So long as genocide is found to be intentional, it may be the result of benign, rather than malevolent intentions. It is often claimed that the removal of Aboriginal children in Australia took place ‘with the best intentions’. This may well be true, but it is not a defence against the charge of genocide, as recognised by the UN. Similarly, the claim that removals took place according to the prevailing values of the time is not a valid defence. If found to be

³⁸ Bryant, *ibid*, 694.

³⁹ *Ibid*.

proven, Australia's removal of Aboriginal children may well be a unique case of 'benign genocide'.

Just what is intended by the term destruction is not often addressed by scholars. This may be because it appears to be self-evident: destruction means death, or killing. Yet, with reference to the removal of children, destruction may be said to refer to the cessation of existence, by other than direct denial of life. The removal and transfer of children may be intended to result in the destruction of a group over a number of generations. It still constitutes genocide in international law if the intention of removal was that the individuals ceased being what they were. Here, consideration of actions subsequent to actual removal are important. For instance, in Australia, the intention of placing children in 'assimilation houses' must be analysed.

In terms of the extent of destruction, the Australian case must satisfy the consensus of opinion that a 'substantial' segment of a group must be affected, to enable consideration of genocide according to the UN definition. The fact that perhaps 100 000 Aboriginal children were removed, and virtually all of the Aboriginal population remain affected by the policy, appear initially to suggest a substantial sector of the group was affected. Assessment of this question will be assisted by an examination of legislative and other mechanisms used in controlling groups of Aboriginal people.

The significance of clause IIe. for Australia is that it places a particular aspect of the treatment of our Indigenous population under the international spotlight. The domestic implications of our signing the UNGC on 11 December 1948, do not appear to have been widely debated at the time. However, the significance of the Convention was clear to Raphael Lemkin. He felt from the day it came into being, "the

international responsibilities of a government toward its citizens [were] changed fundamentally.”⁴⁰ He felt genocide, “by its very legal, moral, and humanitarian nature...must be considered an international crime.”⁴¹ While Australia has not enacted municipal legislation recognising the crime of genocide,⁴² it was argued shortly after the UNCG came into being, that ratification meant it would “become the supreme law of the land, and displace State constitutions and laws...”⁴³ More recently, Sarah Pritchard, an expert on international law as it applies to Indigenous peoples, has argued that even ratification is unnecessary. She found the prohibition of genocide is generally considered to be a “peremptory norm of customary international law”, and is thus binding on all States.⁴⁴ It is clear then, that Australia remains bound by the UNCG, and it is therefore appropriate to judge the removal of Aboriginal children against international law.

The UNCG lists both killing and removing children as acts that constitute genocide. What conflates these acts, what makes their impact the same, is their application as part of a wider policy. While both actions are committed against individuals, for them to constitute genocide, they must be committed *with intent to destroy a group*. In seeking to establish the veracity of the National Inquiry’s claim that the policy of removing Aboriginal children was genocidal, this notion of ‘intent’ emerges as crucial. Just what was the intention of removal policies? The definition of genocide contained in the UNCG remained faithful to Raphael Lemkin’s central contention that international law must recognise the right of human collectivities to

⁴⁰ Lemkin, ‘Genocide as a Crime under International Law’, 150.

⁴¹ Lemkin, ‘Genocide’, 228.

⁴² The *Genocide Convention Act 1949* (Commonwealth) approved ratification, and extended the provisions of the Convention to external territories.

⁴³ George Finch, ‘The Genocide Convention’, *The American Journal of International Law*. 735.

⁴⁴ Sarah Pritchard ‘International Law’ in *Laws of Australia* (Sydney; 1993) 30.

exist. The question for the Australian case then becomes, could the practice of removing Aboriginal children be seen as being intended to threaten that existence?

CHAPTER 3

Determining Intent:

The Rationale for Aboriginal Child Removal

This chapter investigates whether the finding of the National Inquiry that Australia's policy of removing Aboriginal children amounted to genocide, is appropriate, given the understanding of genocide in international law illustrated above. While implementation of removal policies was often ad-hoc and contradictory and differed from state to state, the assumptions which underpinned policy remained largely consistent. By focussing on the philosophy behind the removals, its articulation at the first national conference on Aboriginal affairs in 1937, and the workings of the assimilation policy under which most removals took place, it is possible to determine if removal policies contained the 'intent to destroy' the Aboriginal people. The period of the late 1960s and early 1970s is briefly examined in the context of a real change in Aboriginal policy. The introduction of policies of self-determination and self-definition were based on the recognition of an Aboriginal identity. Even if previous policies were found to constitute genocide, from the 1970s, this argument would be increasingly difficult to sustain.

The 1937 Commonwealth Conference: Solving the Problem of the 'Half caste'

My primary concern is with the policy of removal in the twentieth century, the period examined by the National Inquiry. It must be noted however, that the removal of Aboriginal children from their parents had been taking place at least since 1814, when Governor Lachlan Macquarie established his 'Native (educational) Institution' at Parramatta.¹ From the earliest periods of 'Aboriginal policy',² children were seen as agents capable of being 'civilised and Christianised' as part of a process designed to 'uplift' this inferior race. As early as 1858, distinctions were being made between 'half castes' and 'full bloods', and in 1861 the Board for the Protection of Aborigines in Victoria acknowledged its duty "to interfere at once [in relation to 'half castes'] to prevent them growing up amongst us with the habits of the savage..."³ This separation of the 'savable' from the 'doomed' would be the rationale for removing Aboriginal children for the next hundred years. By the end of the nineteenth century, the policy of differentiating between the 'full blood' who was to die out, and the increasing population of 'half castes' was in full swing.⁴

¹ Macquarie focussed his attention on Aboriginal children, in the hope of curbing their "wandering, idle and predatory Habits of Life", and training them to become "regular settlers". (Cited in Markus, *Australian Race Relations*, 23.)

² The terms 'Aboriginal policy' and 'Aboriginal affairs' are used to facilitate discussion, but are not intended to imply the existence of a coordinated set of policies and practice that were carried out in relation to the Indigenous population. On the contrary, 'Aboriginal affairs' remained a low priority until possibly the early 1970s, and until that time there existed a number of policy differences from state to state. It was the thinking behind these policies that was fairly consistent.

³ Quoted in Tatz, 'Australia's Genocide' in *Social Education*, Vol. 55 No. 2, February 1991. Markus notes that it was by about the 1850s that in the West a "distinct system of thought had begun to develop around the notion of race and its importance..." (*Ibid.* 25) It was also around this time that the 'doomed race' theory propounding Aboriginal extinction became ascendant in Australia. (*Ibid.* 1.)

⁴ Tatz, 'Australia's Genocide' *ibid.*

For most of its existence, the policy of removing Aboriginal children was based on unspoken assumptions about the inherently pathological nature of 'Aboriginal blood', as well as the superiority of 'European blood'. Thus the policy was at all times directed primarily at those Aboriginal children with some 'admixture of European blood'.⁵ However, the philosophy behind the removals was not officially articulated until the initial Conference of State Aboriginal authorities, in 1937. Attended by the foremost thinkers in Aboriginal affairs - including J.W. Bleakley of Queensland, A.O. Neville of Western Australia, and the Chief Protector of the Northern Territory, Dr C.E. Cook - the historic conference was intended to chart the future course of Aboriginal affairs.⁶ It must be stressed that this conference did not initiate the policy of removing Aboriginal children, it merely articulated the philosophy behind the policy that had been carried out for decades.

The proceedings of the Conference provide insight into the thinking behind the removal policies. The key resolution of the Conference was to establish the policy of the 'ultimate absorption' of Aboriginal 'half-castes'.⁷ 'Full-bloods' could safely be ignored, as their numbers were declining, and the process of evolution would take care of the

⁵ Generally, after the 1930s, the discourse surrounding removals was more anthropological than biological, with the increasing legitimacy of the 'science' of anthropology seen in the establishment of the chair of anthropology at Sydney University in 1925.

⁶ Examining these three individuals is significant as it was these men who vied for the 'title' of Australia's Aboriginal expert in the first half of the twentieth century. Bleakley was Chief Protector in Queensland from 1914-42, Cook in the Northern Territory from 1927-38, while Neville headed Native Welfare in Western Australia from 1915-1940.

⁷ The full resolution, under the title 'Destiny of the Race', read: "That this Conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end." Commonwealth of Australia, *Aboriginal Welfare*. (Canberra; 1937) 1.

remnants.⁸ But the increasing 'half-caste' population posed a problem for a number of reasons. Employment of 'half-castes' would be difficult.⁹ Also, their often close proximity to towns posed a "menace to the health and morals of the [white] community."¹⁰ Perhaps the greatest fear was of the "awful" proposition, that up against 'naturally quick breeding half-caste', "the white race...is liable to be submerged..."¹¹ To avoid the growth of an "untouchable population", the answer was to "merge these people into the white population."¹² With this agreed, the focus turned to how this would be best achieved. It was felt that while the "half-breed" may not have "the colour of the aboriginal", he "has his habits, and consequently cannot be happily absorbed into the white race."¹³ The removal of the young 'half-caste' was seen as effective in negating the influence of "black blood", and to ensure the success of the program, they should "never go back to their beginnings"¹⁴ - for removal to work best, it needed to be permanent. The policy was always regarded as a "long range plan"¹⁵ and it was likely to be increasingly successful "with the progressive elimination of aboriginal blood."¹⁶ Any doubts as to the

⁸ J.W. Bleakley stated the common view at the Conference, "...no matter what we do they will die out....The problem of the future will be not with the full-bloods, but with the coloured people of various degrees." (Bleakley, *ibid.* 16). The view was still held by 'experts' some years later, with A. O. Neville stating, "The fact that the full-blood people are apparently dying out, while the coloured people are increasing and all the time slowly approaching us in colour and culture lessens our problem of assimilation." Neville, *Australia's Coloured Minority*. (Sydney; 1947) 58.

⁹ Noting the increasing 'half caste' population in the Northern Territory, Dr Cook noted "the Northern Territory cannot absorb all those people in employment, and, consequently the question of disposing of the half-caste population arises." Cook, *Aboriginal Welfare*. 13.

¹⁰ Bleakley, *ibid.*, 6. Bleakley also regarded the prevention of disease among 'half castes' as of vital importance - "to the white community." (*ibid.*) C.D. Rowley argued that the focus on the impact of Aboriginal ill-health on 'whites' remained until about 1970. (Rowley, *The Destruction of Aboriginal Society*. (Canberra;1970) 197.

¹¹ Harkness, *Aboriginal Welfare*. 14.

¹² *Ibid.*

¹³ Bleakley, *Aboriginal Welfare*., 19.

¹⁴ Neville, *Aboriginal Welfare* , 20.

¹⁵ *Ibid.*, 10.

¹⁶ Harkness, *ibid.*, 23.

finality of the policy of 'ultimate absorption' are dispelled by A.O. Neville's view of Australia's future:

Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any aborigines in Australia?¹⁷

It must be remembered that this period, regarded as "a turning point" in Aboriginal administration,¹⁸ was also the high point of biological determinism in Australia.¹⁹ Notions of race were so strong that they not only rationalised behaviour and policy, Markus argues they may also have caused them.²⁰ The 1937 conference marked a significant victory for the small but highly influential group who accepted biological absorption as the most humane and practical way of dealing with the 'half-caste problem'.²¹ These men recognised Aboriginality as a barrier that would forever prevent entry into the Australian community. Absorption then, was a 'progressive' policy which, unlike 'protection', sought to allow Aborigines their 'rightful place' in Australian society. As such, it was trumpeted as a 'New Deal' for Aborigines. But this 'solution' was shaped by, and served to reinforce these biologically determinist ideas. The Aboriginal could take his or her place in white society, but only by immediately abandoning their cultural

¹⁷ Neville, *ibid.*, 11.

¹⁸ A. P. Elkin, *Citizenship For the Aborigines*, (Sydney;1944) 14.

¹⁹ Markus, *Australian Race Relations*, 128.

²⁰ *Ibid.*, 11.

²¹ This group included Neville, Cook, and Bleakley, as well as a few southern 'experts' such as anthropologist, Norman Tindale. Tindale articulated the prevailing view when he stated: "Complete mergence of the half-castes in the general community is possible without detriment to the white race...Two successive accessions of white blood will lead to the mergence of the Aboriginal in the white community...there will be no reversions to the dark Aboriginal type." (Tindale cited in Margaret Franklin, *Black and White Australians*, (South Yarra;1976) 123)

distinctiveness, and over time, their distinct physical characteristics. Removing children while young was thus regarded as vital. Keeping children away from their family permanently would halt the process of cultural transference. The final aim of absorption could then be achieved through 'breeding out the colour'. This meant a shift away from previous policy, to now encouraging marriages between 'half-caste' women, and white men. If such a program was diligently followed, Cook felt,

...by the fifth and invariably the sixth generation, all native characteristics of the Australian aborigine are invariably eradicated. The problem of the half-caste will quickly be eliminated by the complete disappearance of the black race, and the quick submergence of their progeny in the white...The Australian aborigine is the most easily assimilated race on earth, physically and mentally...*the quickest way is to breed him white.*²²
[emphasis added]

Perhaps the core belief that enabled removal, was that which assumed not only the inherent inferiority of Aboriginality, but its negative characteristics. By nature, Aboriginal people were popularly regarded as dirty, lazy, and untrustworthy. Even 'experts' largely guided by the emerging discipline of anthropology assumed the Aborigine to be only capable of the intelligence level of a European child.²³ The 'problem' for the Aborigine was that these negative were inherent, they were literally *in the blood*, and would be passed on. Even those of 'lesser blood', the 'half-caste' or 'coloured man', could not deny that which was part of him. He would rarely reach "our

²² Cook, cited in Markus, *Governing Savages*, (Sydney; 1990) 92. The continued use of the language of animal husbandry reflected implicit assumptions that, on the scale of things, Aborigines remained closer to the beasts than humans.

²³ For example, in 1913, Professor Baldwin Spencer stated, "The aboriginal is, indeed, a very curious mixture; mentally, about the level of a child who has little control...He has no sense of responsibility and, except in rare cases, no initiative." (cited in Tatz, *Aborigines and Uranium*, (Richmond; 1982) 13.)

social status", partly because of white prejudice, but "mainly owing to the fact that *he is a coloured man*."²⁴ [emphasis added] Absorption was not, therefore, primarily for the coloured adult, but the coloured child. Removing a child could, if it was permanent, "avoid the dangers of the blood call"²⁵ - that is, prevent the perpetuation of Aboriginality. Complete absorption would remove a specific population group whose very existence presented a "grave threat to white Australia".²⁶

Removal was also facilitated by the fact that while 'Aboriginal blood' had to be eliminated, 'white blood' had to be saved. The greater the evidence of 'white blood' (clearly indicated by white skin), the greater chance an individual had of making his or her way in Australian society.²⁷ The presence of 'near white' children consorting with Aboriginals was also regarded as offensive. Such children had to be saved from the 'degradation' of the black camp.²⁸ Removing children and 'breeding out the colour' were regarded then as positive mechanisms for enabling subsequent generations of (non-identifying, non-identifiable) Aboriginal people to take a place in Australian society. Paradoxically, the destruction of Aboriginality was seen to be 'in the best interests' of Aboriginal people. There was a distinct "duty" to those who had some 'European blood', especially children, to prevent them being "brand[ed] with the aboriginal stamp."²⁹

²⁴ Neville, *Australia's Coloured Minority*, (Sydney; 1947) 73.

²⁵ Bleakley, *The Aboriginal and Half-Castes of Central Australia*, (Melbourne; 1929) 29.

²⁶ Markus, *ibid.*, 37.

²⁷ So, while a 'half-caste' was "unmistakable as to origin", a 'quadroon' (or 'quarter-caste') was "almost like a white", and could even "pass for a Southern European." An 'octoroon' (or 'eighth-caste') was accorded the ultimate accolade of being "entirely indistinguishable" from European Australians. (Neville, *ibid.*, 59.)

²⁸ A.O. Neville noted in 1947 that much had been written about the Aboriginal camp, but "the worst accounts have not adequately described the dreadful conditions under which human life spawns and increases like an unhealthy fungus growth." (Neville, *Australia's Coloured Minority*, 133) They were "the ideal environment for the creation of useless human flotsam." (*Ibid.* 173)

²⁹ Bleakley, *The Aboriginals and Half-Castes of Central Australia*, 29.

Removing Aboriginal children with some 'European blood' was to ensure their "emancipation" from the prison of Aboriginality.³⁰

The application of the policy was riven with contradictions. Despite its aim of facilitating the entry of Aboriginal people into wider society, this was prevented for two major reasons. Firstly, it underestimated the extent of racism in Australian society. Even if he did discard his 'ancient' ways, and take a place in suburbia, Australians generally were not ready to accept entry of 'the coloured man' into their community. Those 'half-castes' who attempted to 'pass' often found themselves excluded to the margins of white society. On drifting back to their previous homes on missions and reserves, they could be charged with consorting with an Aboriginal. Secondly, new legislation served to strengthen the dividing line between the 'races', rather than remove it. Greater control was maintained over more people. Defining who was 'Aboriginal', 'half-caste', and even 'quarter-' and 'eighth-caste', had always served as the major mechanism for controlling the Aboriginal population. In this period, definitions were widened to include increasing numbers, rather than narrowed to 'free' those previously regarded as Aboriginal people. The "obsession" with checking the growth of the half-caste population, rather the desire to 'uplift a downtrodden race', dictated the reality of policy. Significantly, most of the legislation passed in this period of 'biological absorption' prevailed for thirty or forty years.³¹

³⁰ 'Emancipation' was a word often used to describe the goal for half-castes, especially by Neville. (See Neville, *Australia's Coloured Minority*. 124)

³¹ For example, the *NSW Aborigines Protection (Amendment) Act 1918* applied to "any full-blooded or half-caste aboriginal who is native of NSW." The 1934 amendment extended the definition to those resident outside NSW. The Act was repealed in 1969. (Cited in *Bringing Them Home*, 603.) In Queensland, the *Protection of Aborigines and Restriction of the Sale of Opium Act 1934* extended the provisions of the 1897 Act, as well as the powers of the Protector. Among other categories, it applied to "any half-caste

If this policy was fully implemented, the final intention of there being no Aboriginal people in Australia would be realised. It has been recognised in the North American context, that a policy of absorption is equivalent to genocide.³² In the Australian case, there is little doubt that that the removal and transfer of Aboriginal children took place largely to facilitate the demise of the Aboriginal people as a group. Absorption was designed to "merge" the Aboriginal 'race' into the European 'race', so Australia would have a homogeneous white population, with a homogeneous white culture. Failure "to wipe out forever an existing blot"³³ upon Australia, would result in "the creation of an incubus which future generations of the white population must carry."³⁴ The ongoing existence of an Aboriginal population as "an ethnic coloured whole"³⁵ would be "a constant sore spot on our civilisation..."³⁶

deemed to be aboriginal." The *Aboriginals Preservation and Protection Act 1939* further extended the powers of the Director of Native Affairs, and included the definition of a 'half-blood' as having "a strain of more than 25% of aboriginal blood but who has not a preponderance of such blood." It was replaced by the *Aboriginal and Torres Strait Islander Affairs Act 1965*, which continued to define people according to "strain of blood". (*Ibid.* 619-623) In Western Australia, the *Native Administration Act 1936* provided expansive definitions of a 'native', including "a person of less than quadroon blood who was born prior to 31 December 1936." (*Ibid.* 632) While in South Australia, the *Aborigines (Training of Children) Act 1923* expanded definitions of 'aboriginal' and 'half-caste', the latter including "any person, any of whose progenitors...was an aboriginal, and who in the opinion of the Chief Protector ought to be dealt with under this Act." (*Ibid.* 639) John McCorquodale's seminal work, *Aborigines and the Law: A Digest* (Canberra; 1987) cites all the relevant imperial, federal and state statutes that define 'Aboriginal'.

³² Horowitz found "[g]enocide as a technique for achieving natural solidarity takes various forms...In the United States, with respect to the Indian question, it is the absorption of 'backward tribal nations' into the general nation." (Horowitz, *Taking Lives*, (New Brunswick; 1982) 189.)

³³ Neville, *ibid.* 81.

³⁴ *Ibid.* 93.

³⁵ *Ibid.* 132.

³⁶ *Ibid.* 263.

Absorption, Assimilation and Genocide

For much of the post-war period, the removal of Aboriginal children took place under the rubric of an Aboriginal affairs policy guided by the philosophy of 'assimilation.' In theory, the policy was heralded by its most prominent advocate, Paul Hasluck, as a 'new deal' for Aborigines. Assimilation was intended as a departure from the previously 'negative' policy of protection, which one observer regarded as affording treatment of Aboriginal people akin to that of the Nazis.³⁷ In reality, there was far more continuity than change in the philosophy and practice of Aboriginal affairs. The term 'assimilation' had been used interchangeably with 'absorption' even before 1937.³⁸ Later, there was often no distinction between assimilation and its successor, 'integration', which was briefly in vogue until the early 1970s. This continued reliance on such terms suggests that

³⁷ In 1933, the Western Australian Parliamentary Debates recorded that Australian, Donald McKay had told the *Daily Telegraph* in London that "atrocities worse than the Germans" were being perpetrated on Aboriginal people in North West W.A. (Cited in Haebich, *For Their Own Good*. (Nedlands; 1989) 326) While the extent of the German racial ideology was not present in Australia, my research has revealed a number of philosophical and practical similarities between German and Australian child removal. For their book *The Fate of Polish Children*, (Warsaw; 1981), Roman Hrabar (et al) exhaustively studied hundreds of original Nazi documents in analysing the removal of 200 000 Polish children to Germany during World War II. Similar to the Australian case, the object was to incorporate 'racially valuable' children into the German state. Racial value was determined by the nature of 'blood'. Himmler stated in 1939, "Good blood had to be won, while bad blood was doomed to destruction..." (*Ibid.* 19.) German authorities then targeted those Polish children with 'Aryan blood', clearly indicated by features such as blue eyes and blond hair. Once removed, the children were to be separated permanently from their families, lest the "goal of Germanization be endangered." (*Ibid.* 23) This process was undertaken in National Socialist Social Welfare Centres, where the children were punished exhibiting elements of their 'removed culture', including speaking Polish, while being inculcated with German culture. Mechanisms of removal were also similar to Australia in that both relied on the fact that those being removed were a separate class of people under the law, thus normal sanctions did not apply. Both removals did, at times, recognise the need to provide the appearance of legality, and thus used the charge of 'neglect' to remove children. There is evidence to suggest that in both cases authorities were directly responsible for creating conditions of neglect, actively (in Germany) or passively (in Australia). (Compare *Ibid.* 24. with Tatz, *Aboriginal Administration*, 270.) In Germany, as in Australia, removals were explicitly justified as being 'in the best interests of the child'. (Hramar, *ibid.* 36).

³⁸ Paul Hasluck, *Native Welfare in Australia*, 56.

there was no radical change in the governance of Aboriginal people from a period when their disappearance was an overtly articulated aim of policy. The focus of this policy shifted from biology to lifestyle, in line with the gradual discrediting of racial theories.³⁹

As a practical policy, assimilation was notoriously poorly understood by those who carried it out.⁴⁰ Its implementation was constantly hindered by a failure to break it down into mutually consistent subordinate aims which could be achieved progressively over time.⁴¹ But in conceptual terms, the core of the policy was not universally clear even to those responsible for its administration. Hasluck noted the legacy of the 1937 Conference in indicating that the future for Aboriginal people lay as part of, not outside of, Australian society.⁴² It is generally felt that it was here that assimilation was adopted as a replacement for protection,⁴³ but it was not until the 1951 Native Welfare Conference that assimilation was officially adopted by all States and the Commonwealth.⁴⁴ Hasluck, as Minister for Territories, stated that assimilation meant that "in the course of time, *it is expected* that all persons of aboriginal blood or mixed blood in Australia *will* live like white Australians do."⁴⁵ [emphasis added] The proscriptive tone of the policy was to continue when, in 1961, a common definition was adopted which aimed at ensuring:

³⁹ Patricia Grimshaw, *Creating a Nation*, (Melbourne; 1994) 293.

⁴⁰ This confusion is seen in the writing of Colin Macleod, who was a Patrol Officer in the Northern Territory, in the 1950s. It is partly because many of those charged with the care of Aboriginal people were like Macleod in that they, as he admits, knew "absolutely nothing" about Aborigines. (17) But also because he had to administer a Welfare Ordinance that he himself regarded as a "bizarre piece of legislation" (28) Macleod, *Patrol in the Dreamtime*, (Kew; 1997).

⁴¹ Tatz, *ibid.* iii. Tatz' whole thesis focuses on the gap between policy aims versus administrative practice, with a key element being the ignorance of those 'on the ground', as to what it was they were implementing.

⁴² Hasluck, *ibid.* 42.

⁴³ Lorna Lippman, *Generations of Resistance*, (Melbourne; 1981) 24.

⁴⁴ Tatz, *ibid.* 12.

⁴⁵ Cited in Tatz, *ibid.*

all aborigines and part aborigines *will attain* the same manner of living as other Australians and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.⁴⁶ [emphasis added]

There is no doubt that Hasluck's notion of assimilation was backed by a genuine concern for Aboriginal people. As a policy, assimilation was intended to depart from that of 'protection', which he felt expressed nothing but despair for the future of the Aboriginal person.⁴⁷ Under assimilation, in theory, any form of segregation was to be avoided, including legislative mechanisms applying only to Aboriginal people. Any special measures were to be temporary means assisting the overarching aim of preparing Aborigines for entry into Australian society. Significantly, Hasluck stressed the need to stop viewing Aborigines as 'one class', or 'one race', but as *individuals* in need of assistance.⁴⁸ Different 'types' of Aborigine would adjust to Australian society at different rates over time. Assimilation, then, was to be a lengthy process by which "the blessings of civilisation" would be carried to "the savage".⁴⁹

It is here, of course, that the difficulty with assimilation lies. It remained based on assumptions of both the superiority of European ways, and the inferiority of Aboriginal social life which was 'inevitably' disappearing. It was still taken for granted that the future for Aboriginal people lay in discarding the remnants of their archaic culture.

⁴⁶ Cited in *ibid.*

⁴⁷ Hasluck, *ibid.* 31.

⁴⁸ *Ibid.* If this change in policy had taken place, it would have marked a shift away from previous policy regarded as genocidal.

⁴⁹ Hasluck, *ibid.* 17.

Despite assurances to the contrary by Hasluck and others, in practice, full assimilation was necessarily predicated on the destruction of Aboriginal society.⁵⁰ Further, the fact that the adoption of this new policy did not correspond with any real change in the personnel administering assimilation, their attitude, or the legislative and physical conditions under which they worked, meant the 'new deal' for Aboriginal people largely meant 'more of the same'.⁵¹

Continuity in practice meant Aborigines continued to be treated as a distinct and separate mass of people. In 1964, Fay Gale noted that despite the fact that South Australia had officially adopted 'assimilation' as its goal, there had been little change in law. "Fundamentally" the Act of 1911 remained the legal basis for Aboriginal policy in the state.⁵² In the Northern Territory, Tatz described how legislative provisions conflicted with policy aims to maintain segregation.⁵³ The changing of 'Protection Boards' to

⁵⁰ As early as 1953 Hasluck stated "[a]ssimilation does not mean the suppression of the aboriginal culture but rather that, for generation after generation, cultural adjustment will take place." (*Ibid.* 17) The reality of life on a government settlement in the Northern Territory was described somewhat differently, six years later: "The successful development of Australia's aboriginal-assimilation programme is inevitably linked with the dis-integration of the social pattern of traditional tribal life." (Welfare Branch, Northern Territory Administration, *Maningrida Settlement*, 1959.) This gap between policy and practice seems to disprove the claim made by Geoffrey Partington (and later Hasluck himself), that "...it is clear that Hasluck's policy was not to force a common Australianness on Aborigines, but to enable them to share that Australianness on something like equal terms if that was their choice..." (Partington, *Hasluck versus Coombs*, (Sydney; 1996) 45.) Partington points to a statement made by William McMahon in 1972 that "the Government recognises the right of individual Aborigines to effective choice about the degree to which and the pace at which they come to identify themselves with [Australian] society." (Cited in *Ibid.* 46) He argues that the statement was "little different" from Hasluck's policies, yet there is the fundamental difference of choice. McMahon's stated policy recognises that an Aboriginal person may choose *not* to identify themselves with 'Australian society' to *any* extent. Even when the element of choice was introduced to the official assimilation policy in 1965, it assumed Aborigines 'will choose' to live like other Australians. McMahon's statement could be interpreted as a forerunner of the recognition of self-determination in a way Hasluck's assimilation policies never could.

⁵¹ Aboriginal historian Barbara Cummings described the 'new deal' as a 'raw deal' for Aborigines. Cummings, *Take This Child*, (Canberra; 1990) 39.

⁵² Fay Gale, *A Study of Assimilation*, (Adelaide; 1964) 196.

⁵³ Tatz, *ibid.* iii.

'Welfare Boards' lauded by some was as cosmetic as the replacement of the *Aboriginals Ordinance* with the *Welfare Ordinance*.⁵⁴ While all references to Aborigines in the old Northern Territory legislation were now regarded as 'discriminatory', and thus removed, segregation and control of Aboriginal people was effectively maintained. Whereas under the Aboriginal Ordinance, Aboriginal people were legally classed as minors due to their Aboriginality, under the Welfare Ordinance they were controlled as a minors due to being their being classified as wards 'in need of care', under section 14 of the new Ordinance.⁵⁵ Thus, Aboriginal autonomy remained negligible, with the Director of Welfare maintaining the power to remove an Aboriginal person (including, of course, children), to or from an institution.⁵⁶ The dominant attitude of regarding Aboriginal people as a mass, with negative characteristics, prevailed.⁵⁷ Continuity was also evident in South Australia, where the term 'absorption', retained wide usage more than twenty years after the unofficial adoption of 'assimilation'. The term absorption was intended to suggest that

⁵⁴ In the 1930's and 40's the 'Chief Protector' became 'Director of Native Welfare' in Queensland and the Northern Territory, and the Commissioner for Native Affairs in Western Australia. In New South Wales, the Aborigines Protection Board changed its name to the Aborigines Welfare Board in 1940. Writing at the time, anthropologist A.P. Elkin felt the changes expressed a "more forward looking, less pessimistic attitude." (Elkin, *Citizenship for the Aborigines*, (Sydney;1944) 10) Twenty years later, E.H. Docker could see little change in policy, noting "the measures of today have their origin in the era of protection. The difference is that where the "various schemes devised by the protectors were starved of money, welfare has money lavished on it." (Docker, *Simply Human Beings*, (Brisbane; 1964) 207) Later, Anna Haebich saw the whole thing as nothing but a "cynical public relations exercise". (Haebich, *ibid.* 353)

⁵⁵ Tatz, *ibid.* 270. Section 14 of the Ordinance gave the Director of Welfare the power to declare any person a ward, and thus in need of care. Due to vigorous opposition to the exercise of such power, the Director had to be quite explicit in allaying the fears of the white community. "In short", he concluded the parliamentary debate, "it will only apply to the aborigines". (Cited in *ibid.* 25) This closely corresponds with Horwitz' identification of part of the genocidal process whereby delineation of outsider and insider groups must be made clear to lessen the fears of those who are not targeted. (Horowitz, *Taking Lives*, 35.) By 1960, only 1300 out of 15000 Aborigines in the Territory had not been declared wards, (Partington, *ibid.* 42) Both Tatz and Cummings note that while removal of children under the new Ordinance was supposed to take account of individual living conditions, in reality removals of 'half-caste' children continued as under the previous Aboriginal Ordinance. (Cummings, *ibid.* 94) (Tatz, *ibid.* 39)

⁵⁶ Tatz, *ibid.* 42.

⁵⁷ *ibid.*

"eventually...[Aborigines] will disappear and become an unrecognisable part of the wider community."⁵⁸ Whereas previously, 'disappearance' would come about through biological methods, under assimilation, it would be achieved through social engineering.

This, of course, meant removal of Aboriginal children continued, rather than ceased under assimilation. Peter Read argues that the policy of assimilation greatly facilitated removals, due to official and popular belief that a baby with white parents would obviously be more quickly assimilated than one with black parents.⁵⁹ This would also assist in the creation (or maintenance) of a homogeneous Australian society, a goal which remained embedded in Aboriginal policy and practice.⁶⁰ For Hasluck, as for those at the 1937 conference, the only alternative to absorption-assimilation as a successor to protection, was a policy of segregation. The maintenance of a population group with distinct physical and cultural Aboriginal characteristics *as part of* Australian society was unthinkable. Segregation, then, was again rejected because it would result in "the very situation in Australia which we have always sought to avoid, *namely the existence of a separate racial group...*"⁶¹ [emphasis added] Both organisations and individuals involved in Aboriginal affairs saw that assimilation was incompatible with Aboriginal survival.⁶²

⁵⁸ Gale, *ibid.* 200.

⁵⁹ Read, cited in *Creating A Nation*, 292.

⁶⁰ In 1959, Prime Minister Menzies stated: "It is our national desire to develop in Australia a homogeneous population...It is clearly the right of any nation to determine its own racial constitution..." (Cited in Markus, *Australian Race Relations*, 172.)

⁶¹ Hasluck, *ibid.* 18.

⁶² In 1960, the Victorian Aborigines Welfare Board spelt out that its administration of assimilation was firmly governed by the principle that "Australians look for a homogeneous society..." Anthropologist T.G.H. Strehlow saw no difference between assimilation as it was practiced in the 1960's, and the old and discredited methods of "forced culture change" that had been employed in Australia for the last century and a half. The result would be "both culturally and physically that no trace of their aboriginal culture and identity will remain". (Report of the Aborigines Welfare Board 1960, quoted in T.G.H. Strehlow, *Assimilation Problems: the Aboriginal Viewpoint*, (Adelaide; 1964) 4.

Hasluck himself appeared ambivalent as to whether the assimilation policy would lead to the physical disappearance of the Aboriginal people. He believed only time would reveal if complete "biological assimilation goes hand-in-hand with cultural assimilation", but his own feeling was that it would, indeed, "follow naturally."⁶³

In practical terms, assimilation, then, was not simply a benign policy that aimed at providing opportunities for Aboriginal people. In order to take advantage of the opportunities in European society, Aboriginal people were *expected* to become Europeans. They were told that that *shall* be their fate. The fact that it was regarded as inevitable, or that the policy was motivated by goodwill does not indicate that the policy does not amount to genocide. The question to be answered, is whether the deliberate policy of assimilation could foreseeable have resulted in the destruction of the Aboriginal people? The essence of the policy of 'assimilation' as it had been articulated in Australia, was the destruction of the pattern of Aboriginal life, and its replacement with the pattern of 'Australian' life. This closely corresponds with the two phases of genocide identified by Raphael Lemkin.⁶⁴ As such, it could be argued that official policy toward Aboriginal people until at least the late 1960s may have been genocidal in intent. That is, the policies of assimilation and integration, if achieved in full, could reasonably be foreseen to result in the destruction of the Aboriginal people.

⁶³ Hasluck, *ibid.* 57.

⁶⁴ It is recalled Lemkin stated: "Genocide has two phases: one, the destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor." (Lemkin, *Axis Rule*. 79)

The 1970s: (Re)Asserting Aboriginal Identity

The end of the assimilation policy roughly corresponds with the abandonment of forcibly removing Aboriginal children as part of official policy. The period of the late 1960s and early 1970s was, as with the 1930s, a period of changing attitudes in Aboriginal affairs. Just as absorption-assimilation was intended to replace the 'failed' policy of protection, the early 1970s saw 'self-determination'⁶⁵ take over from assimilation. While again, some remarked on the continuity rather than the changes in attitudes, in many ways this period does indicate a fundamental shift in policy. While separation of Aboriginal children from their families via the welfare and criminal justice systems continued at a greater rate than for non-Indigenous children, from the 1970s, it would be much more difficult to see these as constituting genocide in international law.

As part of the policy of self-determination, the shift to 'self-definition' of Aboriginal people was extremely significant in the context of a genocidal analysis.⁶⁶ From this period it would be impossible, or at least much more difficult, to control Aboriginal life in the manner of previous decades. The move to self-definition enabled individuals to determine their own identity, rather than identity being externally

⁶⁵ Initiated by the Whitlam Labor Government in 1972, Aboriginal affairs Minister Gordon Bryant defined self-determination as: "Aboriginal communities deciding the pace and nature of their future development within the legal, social and economic constraints of Australian society." (cited in Lippmann, *ibid.* 59) Lippmann noted that the policy appeared "radical", given "the paternalism and outright oppression that had gone before..." (*Ibid.*)

⁶⁶ After a number of states shifted away from definitions stressing 'degrees of Aboriginality' in the early 1970s, the Commonwealth accepted 'self-definition' of Aboriginality in 1978. Its new definition stated: "An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community with which he/she is associated." (cited in Lippmann, *ibid.* 88)

determined en masse. On a more fundamental level, for the first time official policy actually recognised a separate Aboriginal identity. This is why, for example, Dr H.C. (Nugget) Coombs regarded the 1975 Federal policy of the Liberal-National Party Coalition, as a breakthrough.⁶⁷ The conservatives stated,

We recognise the fundamental right of Aborigines to retain their traditional lifestyle, or where desired to adopt a partially or wholly European lifestyle.⁶⁸

For the first time in official policy, Aboriginal people were explicitly given the choice of not becoming European, but retaining their separate identity. That it was necessary to make such a statement recognising the right of a collective to exist as they wish, says much about the historical experience of Aboriginal people.

For some, that historical experience continues to have a relationship to genocide. Criminologist Chris Cunneen views continued high rates of Aboriginal incarceration in this light. He regards the current process of “criminalisation” of Aboriginal people as the most recent “mode of intervention” in the “implementation of a process of genocide.”⁶⁹ Yet, he argues that while previous policies were “incontrovertibly genocidal”, police practices today “may be similarly genocidal in their impact, if not in their conscious intent.”⁷⁰

⁶⁷ Partington, *ibid.* 46.

⁶⁸ Cited in *ibid.* 48.

⁶⁹ Cunneen, 128.

⁷⁰ *Ibid.*,

As we have seen, the intent to destroy a group because they are that group is a critical element of the international legal definition of genocide. Cunneen appears to concede that even if this intention was a part of Australian society in the past, it is no longer present. Contentious though it is, even if we accept Cunneen's view that 'criminalisation' of (especially young) Aboriginal people is a conscious policy, it would be difficult to argue that it could foreseeably result in the destruction of the Aboriginal people. Removing children through policies of absorption and assimilation were arguably genocidal because they directly targeted a distinctly Aboriginal identity, and could, over time, have resulted in a situation where there were no Aboriginal people in Australia. In the same manner, current separation policies do not appear to be genocidal because they lack the necessary element of intent to destroy the Aboriginal people. While wider Australian society has certainly not abandoned all the racism evident in past policy, it is simply not possible to deny Aboriginal identity as it once was. In fact the aggressive rejection of this notion has been seen in the assertion of a number of Aboriginal identities since the 1970s. No longer told who they are, or what they will become, Aboriginal people have been able to choose the particular identity that suits them. These are often complex and multi-dimensional, sometimes embracing a feeling of pan-Aboriginality and other times stressing regional affiliations such as Koori, Murri, Nyoongar and Yolgnu, or even particular tribal or language groups such as Kurnai or Wiradjuri.⁷¹

⁷¹ These identities do not necessarily exclude an Australian identity, but may be interwoven with it. For example ex-footballer Arthur Beetson described himself as "...an Australian first, a Queenslander second, and Aboriginal third..." cited in Tatz, *Obstacle Race*. (Sydney;1995). 26.

Crucial to this assertion of identity has been a reclaiming of the past. Not only have Aboriginal peoples reclaimed their 'lost' cultures, in what has been describes as a 'cultural renaissance',⁷² they have repositioned themselves as an important part of Australia's history. John Morton identified Aboriginal agency as vital in overturning not only the previously dominant white views of past policy, but the policies themselves. He felt the most hated of these policies was that of removing Aboriginal children which took place largely under the

...so-called assimilation policy designed to 'breed-out' Aborigines by 'thinning' Aboriginal blood and steering mixed-race children to their paternal 'white side'. It is no coincidence that these genocidal and ethnocidal influences ...officially died at about the same time that Aboriginal history emerged to re-create an Aboriginal presence in the 1960s and 1970s.⁷³

The removal of Aboriginal children was based on core assumptions of the inferiority of Aboriginality. For much of the twentieth century, official policy took the view that the existence of a distinctly Aboriginal identity as part of a modern Australian society was incongruous. The fact that a comprehensive National Inquiry could find the removal policies of its own government were genocidal less than thirty years after they were abandoned, represents an important repudiation of these racist philosophies. There is no doubt that Aboriginal people have come to be recognised as a distinct part of Australian society, to the point where Indigenous identities now influence notions of a wider 'Australian identity'. In fact, ongoing reassessments of our past which have

⁷² Ann McGrath (ed.), *Contested Ground*. (Sydney; 1995). 9.

⁷³ John Morton, 'Aboriginality, Mabo and the Republic: Indigenising Australia' in Attwood, *ibid*. 125.

resulted in the writing of a 'new Australian history', have largely come about due to increased recognition of the need to rediscover Aboriginal perspectives in our history. The National Inquiry's allegation of genocide will continue to be disputed, illustrating the fact that even as the 'new Australian history' questions previously accepted beliefs, it will, itself, be continually challenged. However, the fact that 'genocide' will now be debated as part of Australia's history means *Bringing Them Home* has made an important contribution to this process.

Conclusion

The central conclusion of this thesis is that the removal of Aboriginal children constitutes genocide according to international law. Furthermore, the key finding of the National Inquiry is appropriate, given the United Nations conception of genocide. Genocide is proven because removals could foreseeably have resulted in the destruction of the Aboriginal people as a group.

In arriving at this conclusion, the United Nations definition of genocide was shown to be a specialised definition which differed from commonly accepted conceptions of genocide. This definition was found to be more resilient to criticism than some in the field of genocide studies believe, and it remains the only internationally recognised definition of genocide. For the purposes of this thesis, it has provided the central framework for examining the question of genocide in Australia. It specifically refers to the forcible transfer of children as an act which constitutes genocide.

In analysing the policy and practice of Aboriginal child removal, several points relevant to an investigation of genocide became clear. Firstly, genocide is a specifically targeted crime where individuals are chosen because of their membership of a wider group. Aboriginal children were not removed primarily out of concern for their specific welfare. Individual removals took place as part of a systematic policy which was directed at Aboriginal people en masse *because they were Aborigines*.¹ This systematic policy was concerned at solving 'the Aboriginal problem', and more specifically, from the 1920s and 30s, 'the problem of the half caste'. In simple terms, the 'Aboriginal problem' was their existence. In a state that remained officially committed to the aim of a homogeneous

¹ Tatz, quoted in *Bringing Them Home*, 273.

population until at least the late 1960's,² the perpetuation of a distinctly Aboriginal population was untenable. Thus, the permanent removal of Aboriginal children from their family and community, and their 'ultimate absorption' into the white community, was intended to result in a situation where, ultimately, there were no Aboriginal people in Australia. They would be, in A.O. Neville's words, 'a distant memory'.

Pseudo-scientific evolutionary notions dictated that the problem of 'full blood' Aboriginals would take care of itself - they would die out. The increase in the 'half caste' or 'mixed blood' population however, was a cause for great concern. The removal of those children with some degree of 'European blood' was thus considered both a duty to that child, and a mechanism of checking the growth of this segment of the Aboriginal population. This focus on saving the 'most white', rather than the most neglected children refutes the argument that removals were only concerned with the welfare of the children. Policies of removal were largely determined by a philosophy which saw no value in Aboriginality. The forcible removal and transfer of Aboriginal children constitutes genocide for the simple reason that it can, as a considered, deliberate, widespread policy, be seen to have been intended to result in the destruction of the Aboriginal people.

This notion of 'intent' was found to be at the core of the UN definition. Determining intent was crucial to establishing Aboriginal removals as genocidal. While it is almost universally accepted that Aboriginal children were removed from their families, the charge of genocide has been widely rejected because removals were motivated by 'the best of intentions.' In fact the UN definition allows a situation where genocide can be perpetrated

² Then Prime Minister Billy Snedden said in 1969: "We must have a single culture...we are essentially a British nation with British ways and traditions, and we want to keep it that way..." (Markus, *Australian Race Relations*, Sydney;1994. 175) The White Australia [Immigration] Policy was not officially abandoned until 1973. Andrew Markus argued that domestically, it meant "the pursuit of policies likely to bring about the extermination of some groups, or at the very least, limit the their opportunities for reproduction..." (Ibid., 110)

with good will, rather than strictly malevolent intent. To satisfy the definition's 'intent to destroy', the act being examined must be deliberate, and its reasonably foreseeable consequence must be the elimination of a group. In Australia, not only was the removal of Aboriginal children a deliberate policy, it was specifically targeted at Aborigines as a group. It passes the test of 'reasonable foreseeability' because this outcome, the destruction of the Aboriginal people, was not only inferred in the policy of 'ultimate absorption', it was *openly articulated* by those who formulated Aboriginal policy in the 1930s. In this sense, the policy of absorption could be said to display not only the 'general intent' shown through reasonable foreseeability, but a *specific intent* to destroy the Aboriginal people.

The policy of assimilation, on the other hand, did not display this specific intent, although it was found to be genocidal, according to the UN definition. This is because, if carried out in full, it could foreseeably have resulted in the destruction of the Aboriginal people. It was certainly a deliberate policy that was specifically targeted at Aboriginal people as a mass. After absorption, the focus merely shifted from biological engineering to more acceptable mechanisms of social engineering. It was found to be a policy that would force Aboriginal people to relinquish their distinct identity in favour of a more acceptable 'European' identity. Assimilation per se, would not necessarily be equivalent to genocide in international law. The reason that child removals carried out in Australia under this policy were found to constitute an act of genocide was mainly due to the fact that in philosophy and practice, it gave Aboriginal people no opportunity to retain their distinct identity. The resilience of assumptions about the archaic nature of Aboriginality meant the success of this policy was predicated on the abandonment of distinctly Aboriginal characteristics. While the focus of assimilation was primarily a cultural one, it could reasonably be foreseen over time to have resulted in the complete 'biological assimilation' of the Aboriginal people also. The

chief architect of the policy, Paul Hasluck, felt this complete elimination of a distinctly Aboriginal identity was a 'likely' outcome of assimilation.

There was undoubtedly an amount of good will toward so called 'half-caste' children. Removals were intended to enable them to be trained for entry into the privileged world of white Australia. The alternative was to live in the 'degradation' of a black camp, and grow up to face a life determined by rigid control, restriction of freedom, and often, poverty. At the time they were proposed, both absorption and assimilation were 'progressive' policies which aimed at increasing opportunities for Aboriginal people. The reality was that these opportunities could only be grasped by abandoning their Aboriginal identity. Thus, elimination of the Aboriginal people was regarded by policy makers for many years as a necessary result of progress. Paradoxically, the destruction of the Aboriginal people was regarded as being in their own best interests. This question of 'motivation' was found to be not strictly relevant when determining intent in a genocidal sense, but it is certainly relevant in assessing those who carried out the policy of genocide, and dealing with the issue today. In so far as it was carried out 'with the best intentions', Australia's removal of Aboriginal children may be a unique case of 'benign genocide'. Tacit acknowledgment of this can be seen in the fact that even members of the 'stolen generations' themselves have not called for perpetrators to be punished. This could be expected to assist in the contemporary process of dealing with the allegation of genocide.

This process, in so far as it has been played out to date, has illustrated the political nature of genocide, with reception of the allegation found to proceed along predictable lines. The version of Australia's history represented by the finding of genocide inevitably found favour with Aboriginal groups, while it was rejected by the Coalition government. For Link-Up, a finding of genocide means accepting responsibility for this international crime, and

offering some form of restitution to the victims. The Commonwealth view, on the other hand, was that the Inquiry, and therefore its finding of genocide, have 'no practical value.' Compensating the 'stolen generations' was rejected, like the version of history they represent, because of the divisive effects on Australian society.

Bringing Them Home's finding of genocide, which this thesis found to be supported by substantial historical evidence, may create problems for a government determined to treat the removal issue as a domestic political matter. It has received a comprehensive national report which, after a close consideration of international law, has found that one aspect of Australia's treatment of its Indigenous population amounted to genocide. According to the UN, this imposes a number of obligations on the perpetrator state to acknowledge the crime, ensure non-repetition, and make restitution to the victims.³ The fact is, there remains no international tribunal to oversee such reparation, and the likelihood of another State charging Australia with genocide remains very slim. This may discharge Australia from a strict legal obligation to facilitate compensation, but, arguably, there remains a strong moral obligation to acknowledge the victims of the removal policy.

The experience of 'truth and reconciliation' commissions, such as that in South Africa suggests one of the keys to a harmonious and reconciled future may lie in the acknowledgment of the past. Painful as the process of historical reassessment can be for a nation, its alternatives may, in the long term, be worse. Failure to address an issue of such fundamental contention may lead to greater division within Australian society. Certainly, the effects of the current government's ahistorical approach to Aboriginal affairs have aroused international interest. In October 1997, for instance, South Africa - once the centre of world

³ As determined in the UN's 'Van Boven Principles', which sets out: "Basic Principles and Guidelines on the Right of Reparation for Victims of Gross Violations of Human Rights Under Humanitarian Law." See *Bringing Them Home*, 649-651.

criticism for its racial problems - offered to mediate in an attempt to resolve the division between Aboriginal leaders and the Howard government.

No-one is yet speaking of Australia taking up the role of the new 'international pariah'. However, with human rights being viewed more and more as an international issue, and specific rights in international law being accorded Indigenous peoples, we will increasingly be judged overseas by the treatment of our indigenous minority. There is significant evidence to suggest that in forcibly removing Aboriginal children from their families and transferring them to white families, Australia has committed genocide according to international law. Removing Aboriginal children from their parents was intended to result in the elimination of a distinctly Aboriginal identity as part of Australia's future. However, Aboriginal people have survived, and the memory of genocide survives with them. Whether or not we recognise it as genocide, the issue of the Stolen Generations will continue to haunt Australia as long as we refuse to confront it.

Appendix 1

Text of the Genocide Convention

The Contracting Parties

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required;

Hereby agree as hereinafter provided

ARTICLE I

The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention, genocide means 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;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

ARTICLE XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XII

Any Contracting Party may at any time by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territory for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Appendix I

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in article XI.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

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