

Genocide in Australia

**A submission to the Senate Legal and
Constitutional References Committee
Inquiry into the Anti-Genocide Bill 1999**

**from the
Human Rights and Equal Opportunity Commission**

February 2000

This submission

This submission is made by the Human Rights and Equal Opportunity Commission in response to the Committee's call for submissions dated 9 December 1999. The Commission acknowledges its reliance on the research conducted by its consultant Dr Sarah Pritchard for the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (October 1996) in the preparation of this submission.

The submission covers

1. The Human Rights and Equal Opportunity Commission and its previous discussions of genocide.
2. The background and coverage of the Genocide Convention.
3. Defining Genocide and the Commission's recommendations.
4. Responding to Genocide and the Commission's recommendations.
- 5. Retrospectivity and the Commission's recommendations.**

1. The Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission (HREOC) was established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA). It is constituted by

- a President, currently Professor Alice Tay
- an Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Bill Jonas
- a Race Discrimination Commissioner, Dr Jonas is acting
- a Human Rights Commissioner, Chris Sidoti
- a Sex Discrimination Commissioner, Susan Halliday
- a Disability Discrimination Commissioner, Ms Halliday is acting
- a Privacy Commissioner, Malcolm Crompton.

The Commission's functions include

- to examine enactments and proposed enactments for the purpose of ascertaining whether they are inconsistent with or contrary to any human right: HREOCA section 11(1)(e)
- to inquire into any act or practice that may be inconsistent with or contrary to any human rights: section 11(1)(f)
- to promote an understanding and acceptance, and the public discussion, of human rights in Australia: section 11(1)(g)
- to undertake research and educational programs and other programs for the purpose of promoting human rights: section 11(1)(h)
- to report to the Minister and the Parliament as to the laws that should be made on human rights matters: section 11(1)(j)
- to report to the Minister and the Parliament as to the action which needs to be taken by Australia to comply with human rights instruments: section 11(1)(k).

The Aboriginal and Torres Strait Islander Social Justice Commissioner's functions include

- to report annually to the Minister and the Parliament regarding the enjoyment of human rights by Indigenous people: HREOCA section 46C(1)(a)
- to promote discuss and awareness of human rights in relation to Indigenous people: section 46C(1)(b)
- to examine enactments for the purpose of ascertaining whether they recognise and protect the human rights of Indigenous people: section 46C(1)(d).

The Social Justice Commissioner must have regard to the international instruments scheduled to or declared under HREOCA, including the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*: section 46C(4)(a). The Commissioner must also have regard to the *Universal Declaration of Human Rights*, the *International*

Covenant on Economic, Social and Cultural Rights and “such other instruments relating to human rights as the Commissioner considers relevant”: section 46(4)(b).

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families

In May 1995 the then Attorney-General instructed the Commission to inquire into the forcible removal of Aboriginal and Torres Strait Islander children from their families. The terms of reference were amended in August 1996 and required the Commission to inquire into and report as follows:

- (a) 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 or undue influence, and the effects of those laws, practices and policies;
- (b) examine the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal and Torres Strait Islander peoples who were affected by the separation under compulsion, duress or undue influence of Aboriginal and Torres Strait Islander children from their families, including but not limited to current laws, practices and policies relating to access to individual and family records and to other forms of assistance towards locating and reunifying families;
- (c) examine the principles relevant to determining the justification for compensation for persons or communities affected by such separations;
- (d) examine current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.

The inquiry’s report, *Bringing them home*, was published in May 1997. The inquiry concluded, among many other findings, as follows

Denial of common law rights

The Inquiry has found that the removal of Indigenous children by compulsion, duress or under influence was usually authorised by law, but that those laws violated fundamental common law rights which Indigenous Australians should have enjoyed equally with all other Australians. As subjects of the British Crown, Indigenous people should have been accorded these common law liberties and protections as fundamental constitutional rights.

Breach of human rights

The Inquiry has further found that from about 1950 the continuation of separate laws for Indigenous children breached the international prohibition of racial discrimination. Also racially discriminatory were practices which disadvantaged Indigenous families because the standards imposed were standards which they could not meet either because of their particular cultural values or because of imposed poverty and dependence.

Finally, from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide. From this period many Indigenous Australians were victims of gross violations of human rights (*Bringing them home* pages 277-278).

In light of these findings and in response to term of reference (c) requiring the Commission to examine the principles relevant to determining the justification for compensation for people affected, the Inquiry recommended that 'compensation' should "be widely defined to mean 'reparation'" and that 'reparation' should "be made in recognition of the history of gross violations of human rights" (Recommendation 3, page 282). In accordance with the proposed *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* (the 'van Boven Principles') 'reparation' should consist of

1. acknowledgment and apology
2. guarantees against repetition
3. measures of restitution
4. measures of rehabilitation
5. monetary compensation (Recommendation 3, page 282).

One guarantee against repetition, the Inquiry recommended, would be to give full domestic effect to the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention). Although Australia ratified the Genocide Convention in 1948, its provisions have not been incorporated in Australian law. The *Genocide Act 1949* (Cth) merely approved ratification of the Convention and constrains the activities of Australian armed services personnel working overseas. It has no effect on Australian territory and no effect in permitting the prosecution of non-Australians.

In 1992 the Human Rights Subcommittee of the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade concluded that it is difficult "to know ... whether the failure to legislate has been a matter of neglect or purposeful inaction". The Committee also recommended that the Australian Government introduce legislation to implement the Genocide Convention.¹

¹ Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, 1992, page 32.

The Bill currently being considered, the *Anti-Genocide Bill 1999*, would give effect to the recommendations of the Commission's National Inquiry and the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade.

2. The Genocide Convention

In this section we detail relevant background to the Genocide Convention, overview its provisions and consider the obligations it imposes on ratifying States.²

Background to the Convention

The notion of crimes against humanity can be traced back at least to the 1907 *Convention (No. IV) Respecting the Laws and Customs of War on Land*. The 'Martens Clause' in the preamble provides

Until a more complete code of the laws of war has been issued ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

The Clause envisaged evolving 'laws of humanity' regulating the treatment of combatants and civilians which transcend the explicit requirements of the laws of war.

Following World War I the Preliminary Peace Conference at Versailles appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into violations of the laws and customs of war. The Commission determined that the forces of the Central Empires and their allies had engaged in "barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity".³ The Commission recommended prosecution of those responsible for such acts and that the tribunals should apply the principles of the law of nations resulting from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience.⁴

In 1933 the Polish jurist Raphael Lemkin proposed to the International Conference for Unification of Criminal Law in Madrid that the destruction of racial, religious or social collectivities should be declared a crime under the law of nations.⁵ Lemkin envisaged two international offences: the crime of barbarity consisting of the destruction of racial, religious or social collectivities, and the crime of vandalism entailing the destruction of the artistic and cultural works of these groups. His proposals were rejected at the time, however.

² The text of the Convention is at http://www.unhchr.ch/html/menu3/b/p_genoci.htm

³ (1920) 14 *American Journal of International Law* 95, page 95.

⁴ Id, pages 116-117 and 121-122.

⁵ Raphael Lemkin, 'Genocide as a Crime under International Law' (1947) 41 *American Journal of International Law* 145, page 146.

The prosecution of World War II criminals before the International Military Tribunal at Nuremberg was based on concepts and norms, some of which had deep roots in international law and others of which represented a significant development of that law, underlying later formulations in international human rights instruments.⁶ Article 6(c) of the IMT's Charter provided the first formal definition of crimes against humanity: "namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds ...".⁷ War crimes were also defined (article 6(B)).

The use of the phrase 'crimes against humanity' represented an important innovation. At the core of the IMT Charter lay the concept of international crimes for which there would be 'individual responsibility'. This was a sharp departure from then existing customary law and treaties which gave prominence to the duties of, and sometimes sanctions against, nations.⁸ Although the term 'genocide' was not used in the Charter, genocide was included among crimes against humanity by way of the inclusion of the extermination of any civilian population.⁹

In his 1944 study, *Axis Rule in Europe*, Raphael Lemkin extended the notion that international law contains certain unarticulated 'laws of humanity' and argued for recognition of an international crime of genocide. In this monograph Lemkin proposed that the term genocide be used to describe "the destruction of a nation or of an ethnic group".¹⁰ He noted the "specific losses to civilization in the form of cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics" and characterised genocide as "one of the most complete and glaring illustrations of the violation of international law and the laws of humanity".¹¹

On 11 December 1946 the UN General Assembly adopted a resolution formally recognising genocide as a crime under international law. Resolution 96(I) affirmed

Genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and

⁶ H Steiner and P Alston, *International Human Rights in Context*, Clarendon Press, Oxford, 1996, page 99.

⁷ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal*, 8 August 1945, 82 UNTS 284, page 288. Crimes against humanity were defined similarly, but not identically, in *Allied Control Council Law No. 10* under which Nazi war criminals were prosecuted in occupied Germany.

⁸ H Steiner and P Alston, *op cit*, page 101.

⁹ See L Kuper, *The Prevention of Genocide*, Yale University Press, New Haven/London, 1985, page 9.

¹⁰ Page 79.

¹¹ Page 147.

whether the crime is committed on religious, racial, political or any other grounds – are punishable.

According to Lippman, Resolution 96(I) “clearly recognizes that the prohibition on genocide is a component of customary international law which is binding on all states”.¹²

Coverage of the Convention

The *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted by the UN General Assembly on 11 December 1948.

The Convention defines genocide in article II (discussed below) and contracting parties “confirm that genocide ... is a crime under international law” (article I). The following acts are made punishable by article III:

- genocide
- conspiracy to commit genocide
- direct and public incitement to commit genocide
- attempt to commit genocide
- complicity in genocide.

Article IV confirms that no-one can escape punishment for genocide or a genocide related crime, including “constitutionally responsible rulers”, and article VI provides that they are to be tried either by a competent tribunal of the State in which the crime is alleged to have occurred or by an international tribunal with appropriate jurisdiction.

Obligations imposed on States

The Genocide Convention was ratified by Australia on 8 July 1949 and entered into force on 12 January 1951. There are 130 parties to the Convention.

Each of them has undertaken “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 V). Australia has failed to honour its undertaking under article V.

¹² M Lippman, ‘The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later’ (1994) 8 *Temple International and Comparative Law Quarterly* 1, pages 10-11.

3. Defining genocide

The Genocide Convention defines genocide in article II. 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.”

The elements of the definition are, therefore

- doing one of the following acts – killing, causing serious bodily harm, causing serious mental harm, inflicting conditions of life calculated to destroy physically, preventing births or forcibly transferring children
- directed at members of a group defined by national, ethnic, racial or religious characteristics
- with the intention of destroying the group
- whether totally or partially
- as a group defined by the relevant characteristics.

The Commission’s National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families reviewed in detail the international law relating to genocide by forcible transfer of children of one group to another group (see *Bringing them home*, chapter 13). The following discussion also sheds light on other critical aspects of the genocide definition, notably what is meant by the element of intent.

Forcibly transferring children of the group

During the drafting of the Convention a number of delegates commented on the importance of including paragraph (e) on the forcible transfer of children. The Greek delegate noted that the forced transfer of children is as effective as imposing measures intended to prevent births or inflicting conditions of life likely to cause death.¹³ The US delegate asked what difference there was between measures to prevent birth half an hour before birth and abduction half an hour after birth. He noted that, from the point of view of the mother, there is little difference between prevention of birth by abortion and the forcible abduction of a child shortly after its birth.¹⁴

The Venezuelan delegate to the General Assembly summarised the views of the countries supporting the inclusion of the forcible transfer of children in the definition of genocide.

¹³ UN Doc. A/AC 6/SR 82 (1948), pages 186-187.

¹⁴ *Id.*, pages 187-189.

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 civilization ... to a highly civilized group ... yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.¹⁵

With respect to motive, it is clear from the debate during drafting that acts of genocide may be animated by a number of motives. It was decided not to attempt an enumeration of motives because any such attempt would enable perpetrators of genocide to claim a motive other than one specified and thus escape liability. Thus, in order to constitute an act of genocide, the destruction of a group need not be solely motivated by animus or hatred.¹⁶

With respect to the extent of destruction, it is clear that the entire group need not be destroyed. The essence of genocide is not the actual destruction of a group, but the intent to destroy the group "in whole or in part". In a commentary published in 1950, Robinson observed

According to [article II], the aim need not be the total destruction of the group. Thus, genocide is not characterized by the intent to destroy a whole group, but to eliminate portions of the population marked by their racial, religious, national or ethnic features ... The intent to destroy a multitude of persons of the same group must be classified as genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial because the aim of the convention is to deal with action against large numbers, not individuals even if they happen to possess the same characteristics.¹⁷

There are different views as to the extent of the requisite partial destruction. According to Dinstein

The murder of a single individual may be characterized as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belongs.¹⁸

According to Bryant

¹⁵ UN Doc. A/AC6/SR83 (1948) page 195.

¹⁶ Lippman, *op cit*, pages 22-23.

¹⁷ N Robinson, 'The Genocide Convention: Its Origins and Interpretation' reprinted in *Hearings on the Genocide Convention Before a Subcomm. Of the Senate Comm. On Foreign Relations*, 81st Congress, 2d Session 487, page 498.

¹⁸ Y Dinstein, 'International Criminal Law' (1975) 5 *Israel Yearbook on Human Rights* 55, page 55.

From the ordinary meaning of article II of the Genocide Convention, it would seem that the killing of a single person could be considered genocide if the killing were done with the intent to destroy, in whole or in part, the national, ethnical, racial or religious group of which the victim was a member. On the other hand, without this intent to destroy the group, in whole or in part, mass killings of members of the group would presumably not constitute genocide under the Convention.¹⁹

Other commentators, including Robinson and Lemkin, have suggested that "destruction in part must be of a substantial nature".²⁰ Whatever view is taken of the extent of the necessary 'destruction in part', it is clear that an unsuccessful attempt to eradicate a group as such is punishable under article III(d). Practically speaking, as Bryant has noted, the number of victims may be of evidentiary value with respect to proving the necessary intent.²¹

With respect to the issue of premeditation, it is clear from the debate during drafting that the definition of genocide in article II does not require premeditation. It was thought that a premeditation requirement would draw an undesirable distinction "between the action of the instigators who had premeditated the crime and the action of the agents whose intent might have been purely monetary".²² Thus, genocide "does not require persistent thought devoted to the attainment of a goal one had set for oneself". In setting the appropriate punishment, however, premeditation might be considered an aggravating circumstance.²³

Particular difficulties of interpretation have arisen with respect to the requirement of intent in article II. These difficulties relate, among other things, to the need to prove intent.

On one view, it is argued that genocide requires a specific intent to destroy a group *qua* group.²⁴ Governments accused of genocide invariably plead innocence on the ground of absence of specific intent.²⁵ On this view,

¹⁹ B Bryant, 'Substantive Scope of the Convention' (1975) 16 *Harvard International Law Journal* 686, page 691.

²⁰ R Lemkin, 1950 letter to the Foreign Relations Committee, cited in C Joyner, 'The United States and the Genocide Convention' (1987) 27 *Indian Journal of International Law* 411, page 443; L le Blanc, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding' (1983) 77 *American Journal of International Law* 341, page 378.

²¹ Bryant, *op cit*, page 692.

²² UN Doc. A/AC 6/SR 72 (1948), pages 87-88 (Mr Bartos of Yugoslavia).

²³ Lippman, *op cit*, pages 25-26.

²⁴ 'US Reservations and Understandings to the Genocide Convention' (1989) 28 *International Legal Materials* 782; Joyner, *op cit*, pages 422-424; le Blanc, *op cit*, page 541.

²⁵ See, for example, the responses of Brazil and Paraguay to charges of genocide against the Guyaki and Yanomami Indians: Minority Rights Group, *International Action Against Genocide*, Report No. 53, 1984, page 5; R Arens, 'A Lawyer's Summation' in R Arens (ed)

negligent or reckless acts which result in the destruction of a group do not satisfy the requirement of specific intent.

Genocide was characterized by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide ... it was important to retain the concept of *dolus specialis*.²⁶

On another view, it is sufficient to establish general rather than specific intent to destroy the group. This view, supported by a weight of authority, is consistent with the proposition of Anglo-American criminal law that an accused cannot avoid liability for the foreseeable consequences of a deliberate course of action. According to Kuper, intent is established if the foreseeable consequences are, or seem likely to be, the destruction of the group.²⁷ The virtue of this approach is that it covers a situation in which intent has not been express.²⁸

Recommendations

The five acts covered by the definition of genocide proposed by the Bill under consideration are identical to those in the Genocide Convention. The Commission would strongly oppose any proposal to delete or reword any of the five acts.

The definition in the Bill differs from that in article II of the Genocide Convention in three critical respects. First, by inserting the word "distinct" as a qualification on target groups it potentially narrows the range of groups which are protected. The word is not defined and its interpretation is uncertain. Since the Convention itself does not qualify the national, ethnical, racial and religious groups protected, **the Commission recommends** that the Bill should not attempt to do so. The word "distinct" should be deleted from the Bill's definition of genocide.

A second change is the omission of the notion of destruction of a group "as such". Destruction of a group strongly connotes physical destruction.

Genocide in Paraguay, 1976, pages 8-16; Kuper, op cit, pages 12-13; le Blanc, op cit, pages 380-381.

²⁶ UN Doc. A/AC 6/SR 72 (1948), page 87 (per Mr Armado of Brazil).

²⁷ Op cit, pages 12-13.

²⁸ In the case of forcible removal of Aboriginal children there is considerable contemporary and official expression of destructive intent. For example, the Chief Protector of WA, A O Neville, implemented a coordinated plan to eradicate the State's 'half caste' population over time by progressive inter-breeding with whites. The belief that it was 'for their own good' to lose contact with their traditions, languages, cultural values and lands reinforces rather than undermines the finding of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families that this intent, and those similarly expressed in other jurisdictions, was genocidal.

Destruction of a group “as such” envisages that the members of the group may survive but lose their group identity and affiliation.

Genocide does not necessarily mean the immediate physical destruction of a group or nation. The Polish jurist Raphael Lemkin defined the term as “a coordinated plan of different actions aimed at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves”.²⁹ The objectives of such a coordinated plan would be “the 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”.³⁰

Lemkin defined genocide to include “deliberate separation of families for depopulation purposes subordinated to the criminal intent to destroy or to cripple permanently a human group”. Genocide, he stated, typically comprises two phases: the destruction of the cultural and social life of the ‘oppressed group’ and the imposition of the national pattern of the ‘oppressor’.³¹

Lemkin’s approach was adopted in the Genocide Convention. Genocide can be committed by means other than actual physical extermination. It is committed by the forcible transfer of children, provided the other elements of the crime are established. As the UN Secretary-General explained, the separation of children from their parents results in “forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.”³²

Omission of the words “as such” potentially substantially dilutes the comprehensiveness of the Bill’s incorporation of the Genocide Convention. It also risks failing to meet legitimate Indigenous expectations as reflected in the *Draft Declaration on the Rights of Indigenous Peoples*. Article 6 of the Draft Declaration confirms that

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

Article 7 provides, further

²⁹ *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Division of International Law, Washington, 1944, page 147.

³⁰ *Id.*, page 79.

³¹ *Id.*, page 147.

³² UN Doc. E.447 (1947).

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

This is not to argue that the Genocide Convention itself covers all forms of ethnocide. In fact, at the time of the UN's adoption of the Genocide Convention peaceful and voluntary assimilation of Indigenous peoples was viewed as a highly desirable goal. Even then, however, that was not to be achieved by force or violence including the forcible removal of children. The point here is that without the words "as such" the definition of genocide in the bill offends Indigenous expectations of cultural survival and actually dilutes the content of the Genocide Convention definition itself. **The Commission recommends** re-insertion of the words "as such" in the Bill's definition of genocide.

The third issue is the Bill's extension to groups defined by reference to gender, sexuality, political affiliation and disability. The Committee is well aware, of course, that this extension is not authorised by the Genocide Convention. However, it is well accepted in international law that discrimination on these grounds is prohibited. The *Universal Declaration of Human Rights* guarantees human rights and fundamental freedoms to all "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (article 2). This guarantee is repeated in the *International Covenant on Civil and Political Rights* (article 2). Both instruments also declare the right to equality before the law and the equal protection of the law (articles 7 and 26 respectively). The extension of the Bill's definition to other major social groupings is consistent with the prohibition of discrimination against members of such groups and the Commission supports it because these attributes also relate to *group* identity and culture. They are not only personal attributes but also group identifiers similar in nature to those in the Convention. They are also attributes on the basis of which, historically, groups have been identified for destruction. **The Commission recommends** that the Bill's extension of

genocide to groups defined by their shared gender, sexuality, political affiliation or disability be retained.

4. Responding to genocide

The Bill, like the Genocide Convention itself, satisfies itself with requiring States Parties to prevent it from occurring and to punish it when it does occur (article I). Article IV stipulates that persons committing genocide are to be punished and article V requires domestic legislation to provide “effective penalties”. Article VI requires each State Party to have in place a competent domestic tribunal but also envisages that an international penal tribunal may be an alternative forum for prosecution of genocide. However, the Convention did not address remedies for the victims of genocide.

More modern international human rights instruments do address remedies. For example, article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination* provides

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation of satisfaction for any damage suffered as a result of such discrimination.

In 1989 the lack of provision for remedies for genocide and other gross violations of human rights impelled the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to commission Professor Theo van Boven to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of such violations.³³ As Special Rapporteur Professor van Boven was requested to explore the possibility of developing basic principles and guidelines with respect to these matters. He presented his report in 1993³⁴ in the hope that it would contribute to the drafting and adoption of an international instrument to strengthen the right to reparations. At the request of the Sub-Commission, Professor van Boven revised his report and the final document, *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, was submitted in 1996.³⁵

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families adopted and adapted the ‘van Boven principles’ in response to its finding that the forcible removal of Indigenous children was a gross violation of human rights from late in 1946. **The Commission recommends** that the Anti-Genocide Bill be amended to

³³ Sub-Commission resolution 1989/13.

³⁴ *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/Sub.2/1993/8.

³⁵ UN Doc. E/CN.4/Sub.2/1996/17.

provide for remedies for victims of any of the criminal acts covered as well as for criminal prosecution of alleged perpetrators. The movement of international human rights bodies towards the adoption of reparations principles and the existence of an obligation to make reparations in international instruments dealing with individual violations of human rights support the argument that incorporation of a right to reparations is a matter incidental to effective incorporation of the Genocide Convention into Australian law.

5. Retrospectivity

The Anti-Genocide Bill as currently drafted does not have retrospective effect. Even if reparations for victims were to be included, members of the 'Stolen Generations' would not have any entitlement to claim.

Criminal retrospectivity

The general principle with respect to making criminal law retrospective is set out in article 15.1 of the *International Covenant on Civil and Political Rights*.

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed ...

This general principle permits retrospective national legislation in relation to crimes against humanity which were recognised in international law at the time of the act although not covered by domestic legislation. Article 15.2 provides

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families did not address the issue of criminal punishment of perpetrators of genocidal acts against the 'Stolen Generations' because it was clearly outside the terms of reference. The Inquiry did, however, consider whether, in spite of the absence of domestic law on the topic, the acts in question could be described as genocide and could give the victims an expectation of an appropriate remedy. Did the forcible removal of Indigenous children amount to genocide at the time it occurred? The answer to that question generally is yes, if it violated binding principles of international human rights law at the time it occurred.

Binding principles of international human rights law are of two relevant kinds: treaties from the date of ratification or of entry into force if that date is later and rules of customary international law. The Genocide Convention has been binding on Australia since 12 January 1951. The Commission asserts confidently that from that date Australia was under an obligation to create the domestic offences relating to genocide and that from that date forcible removal of Indigenous children, with the relevant intent, violated the international prohibition of genocide. Offences occurring after 12 January 1951 could properly be punished and the Anti-Genocide Bill could properly make the criminal provisions retrospective to that date.

Dr Pritchard's research, moreover, revealed that the prohibition on genocide pre-dated the Genocide Convention's entry into force. Adopting the Convention on 11 December 1948 the General Assembly 'confirmed' "that genocide ... is a crime under international law" (article I). In doing so the General Assembly expressed the consensus that the Convention was codifying existing international principles. These principles date from before 11 December 1946 when the UN General Assembly resolved that "[g]enocide is a crime under international law...". That resolution recognised that genocide was already a crime. It is not possible, however, to identify a fixed date before then when genocide might have first become a crime. Therefore, while legal principle would not prevent retrospectivity applying to an earlier date, the Commission considers that a more conservative approach should be taken in the proposed legislation. There can be no doubt that from at least 11 December 1946 the forcible removal of Indigenous children, with relevant intent, violated the international prohibition of genocide and could properly be punished under legislation introduced in Australia now. The relevant intent is not malice or ill will but the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group". Whether or not the perpetrators thought they were acting for the benefit of the individuals or the group concerned is not relevant to culpability, only to penalty.

Reparations retrospectivity

Whether or not the criminal provisions of the Anti-Genocide Bill are made retrospective, the right to claim reparations suggested by the Commission should be.

The Commission recommends that the Bill should be amended to permit the prosecution of alleged perpetrators of acts of genocide from 11 December 1946 and to create a right to reparation for the victims of genocide from no later than that date.

6. List of recommendations

The Commission recommends

1. The five acts which can amount to genocide as set out in the Bill should be retained.
2. The Bill's definition of genocide should be amended by deleting the word "distinct" and by inserting, after "religious group", the words "as such". In other words the Bill's definition should more closely match that of the Genocide Convention.
3. The Bill should be amended to provide for remedies for victims of any of the criminal acts covered as well as for criminal prosecution of alleged perpetrators.
4. The Bill's extension of genocide to groups defined by their shared gender, sexuality, political affiliation or disability should be retained.
5. The Bill should be amended to permit the prosecution of alleged perpetrators of genocide pre-dating the Bill's entry into force and to create a right to reparation for the victims of genocide pre-dating the Bill's entry into force.