WHO CARES ABOUT THE FACTS?

Officials do not usually record facts they are ashamed of. That is why competitors for the truth about colonial politics and Aboriginal history - Reynolds, Ryan, Windschuttle or Manne - have had to swim for the moral high ground through a murk of unknowing. We will never know as a fact how many Tasmanian Aboriginals were slaughtered by settlers or the secrets and whispering in the hearts of the dead.

Courts are not much good at finding and addressing old wrongs. The *terra nullius* principle satisfactorily rebutted the preposterous suggestion that Aboriginals had been dispossessed, throughout the late 20th century. The High Court's blazing demolition of that principle in *Mabo* was smothered by a legislative blanket that has also dimmed the light of human rights and public respect for alternative dispute resolution and specialist tribunals. Aboriginal survivors of the 'stolen generations' have not been able to prove their right to damages in civil courts and under 'white man's justice'. How can you prove an official policy, passing from one government to another, to remove Aboriginal children from their culture, when the witnesses are dead and the memories are 50 years old, and the dusty, partial files show that custodians consent to the removal of particular children?

What if it could be proved that Aboriginal children were taken *illegally* under the laws of the time; detained by force and deception *without lawful authority*; and their parents and kin were *unlawfully* deprived of their children? What if there was credible evidence that this was knowingly done to countless children and their families, because it was thought that it was morally acceptable to break the law?

So long as there is argument about the facts we can dither about the relative merits of a justice or welfare response to the misery of Aboriginal and Torres Strait Islander people. 'Practical reconciliation' assumes it is proper to address the needs rather than the rights of indigenous children and their families. But if cultural dispossession, murder and the removal of those children did happen, though it is necessary it seems an ethically inadequate aim merely to seek better health, education, living and housing standards for Aboriginal and Torres Strait Islanders. A just Australia for the survivors and their children would seem entitled to more than the capital Western Australia has invested in response to the shattering 2002 report of the Gordon Inquiry into the abuse of Aboriginal children in their communities today: a cluster of 'multi-function' police stations in remote areas.

There isn't much of a market for Aboriginal people's memoirs, but I've just read an unpublished manuscript by Rene Powell and Bernadette Kennedy with an unusually thorough and thoughtful review of the law. The story is not uncommon: a life spoiled by the removal and institutionalisation of a four year old Aboriginal girl from Warburton Ranges in Western Australia. When she next met her mother, 17 years later, they shared no language. She wandered away. Decades later she started looking for her 'file' and a reason for her sadness, and recently she has gone back to her country.

The WA Native Administration Act at the time originally defined a 'native' in terms of descent, physical characteristics and lifestyle. The Minister was made guardian of any native child. He could by warrant direct any 'native' to be removed to and between reserves, districts, institutions or hospitals, 'and kept therein' without judicial or other review.

In 1936 the Act was amended to define a 'native' in terms of 'caste', so clumsily that though a person who was less than 'quarter-caste' (or a quadroon) who was born after 31 December 1936 *was* a 'native', a person of more than 'quarter

caste' born after that date, was *not*. Institutions where 'natives' could be kept had to be gazetted. One of these gazetted in 1937 was Sister Kate's Home in Perth, where light-skinned children were taken to be educated and trained to 'pass for white' and be absorbed into the mainstream community.

In April 1948 the Acting Commissioner for Native Affairs asked the Crown for a legal opinion about his right in law to refuse to release 'light hued' but quarter-caste Aboriginal children who had been transferred to Sister Kate's Home without their mothers' consent. He was aware that they were not 'native' children under the Act. The Crown Prosecutor advised that he had no right at all to detain children who were not 'natives in law' within the 1936 definition.

The Commissioner wrote that he felt he should have such a power and that he intended to have the Act amended. He brought the anomaly to the attention of the Minister for Native Affairs, the Hon Ross McDonald QC, in a June 1948 memo that identified both Sister Kate's Home and the Convent and Holy Child Orphanage at Broome as places where such children were being unlawfully detained. He also acknowledged that he did not have the power to reclaim a child who was not a 'native' if a parent removed them. He did not say whether he had instructed the managers of such institutions either to release such children or inform parents of their entitlements. The Minister acknowledged and initialled the Commissioner's advice.

The definition of 'native' remained unchanged for ten more years despite significant other statutory amendments (it became the 'Native Welfare Act' in 1954)

Why was nothing done? The Minister was also a QC and Attorney General. He apparently did act after the Commissioner's November 1950 advice, which he personally referred to his Premier. In this memo the Commissioner reveals the

real policy underlying the application of the Native Administration Act provisions to the removal of Aboriginal children:

> *'It is, in my opinion, questionable if the use of the Ministerial warrant is permissible in the case of children being removed to a Settlement or Mission in the interests solely of their physical and spiritual welfare, education and training. Fortunately it has never yet been challenged, but native parents are rapidly becoming more enlightened on the matter of what may be their just and lawful rights within a white community and it would not surprise me if the Department was called upon soon to defend its action by the issue of a Writ of Habeas Corpus before a Court of Law. Such legal action would, I think, have quite a reasonable change of success*. [Emphasis added]. *. [T]he Department would be placed in an embarrassing position by the mere fact of its administrative act, however well-intentioned, being challenged by the very people whose welfare and protection represents its most important function. '*

In the same memorandum the Commissioner records that certain country JPs had *'already quite illegally committed children and natives'* direct to certain native institutions, and the need for ensuring that such illegally removed children be brought before a children's court. Perhaps he assumed that a children's court order could retrospectively validate unlawful removals and detention. It could not. The Commissioner proposed that the 'native institutions' be designated child welfare institutions too, to empower authorities to deal with the children (and their maintenance needs) under child welfare laws.

There could hardly be a clearer admission.

On 18 November 1954 Hansard records the Hon HC Strickland telling the WA Parliament that in about 1950 the Minister had indicated that his statutory warrant

should not be used because of its potential to legitimate indeterminate civil detention. The Minister had also directed that 'native' children should be removed from their parents through the Children's Court. The 'warrant' provision was repealed in 1954.

However the Minister's instructions were apparently not effective. In a 1958 Commissioner's memorandum about proposed amendments to the Child Welfare Act – i.e. eight years after the Minister was told about the anomalous definition of 'native' and had directed no further arbitrary and unappealable apprehensions – the Commissioner wrote that child protection proceedings had been and were still being made by unauthorised persons – native welfare officers – in the purported exercise of powers that only child welfare officers possessed. These children, too, were unlawfully apprehended and detained.

To cure such serious defects one might expect authorities to have reviewed the apprehension, detention and circumstances of all Aboriginal children and to ensure that any anomaly be brought to their parents' attention. This did not occur. Commissioner Middleton directed his officers to 'encourage' parents to sign 'voluntary agreements' for the admission of their children to missions to be educated, which were later claimed to empower these institutions to refuse to return the children. In 1955 he acknowledged that these 'agreements' were not enforceable and authorised 'consent' forms in their place. No 'consent' can deprive a parent of his or her natural guardianship rights and obligations, either.

The pattern is clear enough. From 1st January 1937 it would seem that a kind of benevolent inertia continued to drive a native welfare bulldozer over the civil and human rights of uncountable, because uncounted, Western Australian Aboriginal children and their parents. Their removal, transfer and detention without hearing or right of review was, to the knowledge of the Crown Law Department, the Commissioner for Native Affairs, the Minister for Native Affairs, the Attorney General and the Premier, against the law. Parents of Aboriginal children were

misled about their legal entitlements and remedies, if not always by actual misrepresentation then through official silence.

The final hypocrisy of 'agreements' and 'consents' induced from parents with enforceable legal rights but who had been accustomed to complete powerlessness by government officers who were aware that these accords were unenforceable, is overwhelming.

This is a small spotlight upon the fragility of the rule of law in our times. Between 1st January 1937 until 1960 government officers broke laws meant to protect Aboriginal people, severed the bond between parents and children without a proper process and sometimes with neither right nor need to do so, flouted the absolute human right not to be subject to arbitrary arrest and detention, and failed to rectify grave wrongs when they became aware of them.

What should be done? Perhaps a group of interested Aboriginal people should ask the Western Australian Supreme Court for a declaratory judgment. The Attorney General should be asked to consent to the application being lodged so long outside the limitation period. It must be in the public interest to know what else is to be found of the motivations and acts of ministers, cabinet and governor in council beyond these overlooked 'administration' files. Was there a removal policy based on 'race'? Were children removed and detained illegally? If so, did government authorities know? How far did that knowledge go? Was any person under a duty to put it right? If so, what should they have done? What, if anything, did they do?

A clear finding by one State Supreme Court might soften our impatient political ethos. Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission when it conducted the **Bringing Them Home** inquiry, and its report, have both been nastily dismissed as baseless and emotional. How harshly we judge those whose parenting, confidence and life skills are in consequence of

what may at last be a provable fact: that successive Western Australian governments did have a removal policy; that the law was repeatedly and knowingly broken; that it was 'pragmatic' but immensely discriminatory; and that the same forces are still denying it, today.