Submission No 19

INQUIRY INTO REPARATIONS FOR THE STOLEN GENERATIONS IN NEW SOUTH WALES

Organisation: Herbert Smith Freehills

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Inquiry into reparations for Stolen Generations NSW

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1 Background to Herbert Smith Freehills' submission

1.1 Herbert Smith Freehills' work with Stolen Generations clients

Herbert Smith Freehills (**HSF**) is an international law firm operating from more than 20 offices across Asia Pacific, Europe, Middle East and North America. HSF was formed on 1 October 2012 by a merger between the UK-based firm Herbert Smith and Freehills, an Australia-based firm with offices in Sydney, Melbourne, Perth, Brisbane and Singapore.

HSF lawyers have been working with Aboriginal clients who identify as survivors of the Stolen Generations in NSW for over 10 years. In 2004 HSF partnered with Women's Legal Services NSW (**WLS NSW**) to advocate for 2 Aboriginal clients who were removed from their families and sent into domestic service. From the late 1890s until 1969, the NSW Aborigines Protection Board and later Aborigines Welfare Board (the **Board**) had the power to send children to work, often into domestic or farm service, and collect wages on their behalf to be held in trust. Our clients alleged that the NSW state government owed them money for unpaid wages that were held in trust accounts.

In 2004 HSF and WLS NSW collaborated to draft submissions and advocate for a systemic approach to the issues of unpaid wages held in trust. These submissions contributed to the establishment of the NSW Aboriginal Trust Fund Repayment Scheme (**ATFRS**) to repay to Aboriginal people and their descendants money that was put into trust accounts and never repaid. The primary focus of our submission was the impact of intergenerational disadvantage on Indigenous communities and the need for any repayment scheme to extend to descendant claimants.

The operation of the ATFRS will be explored in detail in **section 5** of this submission and in **section 6** we provide our observations on the lessons learned from the AFTRS.

Justice Connect, then known as the Public Interest Law Clearing House (**PILCH NSW**) along with the Public Interest Advocacy Centre (**PIAC**) co-ordinated community outreach and legal training to connect potential ATFRS claimants with legal representation.

Between 2006 and 2012 HSF assisted 45 clients with a total of 75 claims before the ATFRS. Many of the clients were elderly and living in regional and remote NSW.

Our firm also researched and provided many of the legislative resources used by the ATFRS Unit to perform its calculations for Aboriginal people where the wages records had been lost. HSF was also asked by the Director of the ATFRS to address a range of legal 'test' issues that became the basis for a number of the ATFRS' decisions.

Through the duration of the ATFRS, HSF worked collaboratively with PIAC, PILCH, other firms and legal representatives to share expertise and to provide training to new firms wishing to represent clients before the ATFRS.

One of the more significant pieces of collaborative work undertaken by HSF under the ATFRS was to represent a number of clients who had been sent to Kinchela Boys Home in Kempsey. We collaborated with practitioners in other private law firms, community legal centres and Legal Aid to draft submissions on behalf of 2 distinct categories of claimants who had attended the Kinchela Boys Home.

We have continued to worked closely with the Board and management of the Kinchela Boys Home Aboriginal Corporation on a range of legal and non-legal matters since the ATFRS closed in 2012.

1.2 Our work with Aboriginal and Torres Strait Islander clients

At HSF, our vision for reconciliation is to work together to foster a culture of friendship between HSF and Aboriginal and Torres Strait Islander peoples, organisations and communities and the broader community in which we work.

As a law firm we have traditionally been very active in relation to pro bono legal support for Aboriginal and Torres Strait Islander clients. We also have long-standing community partnerships with organisations such as Clontarf Aboriginal College and Yalari that focus on educational outcomes and Jawun which focuses on community empowerment, partnership and skills-transfer.

Since launching our first Reconciliation Action Plan (**RAP**) in August 2011, our engagement with Aboriginal and Torres Strait Islander peoples, organisations and communities has broadened and deepened. Developing a RAP has enabled HSF to take a whole of business approach to reconciliation and to be more active in areas such as cultural competency, employment and supplier diversity.

In May 2015 we launched our third RAP which was endorsed with ELEVATE status by Reconciliation Australia.[1]

[1] As described by Reconciliation Australia, *"An Elevate RAP is for organisations with a long, successful history in the RAP Program; a current Stretch RAP and a willingness to significantly invest in reconciliation. Elevate RAP organisations are among an elite group of leaders driving reconciliation in their sector."*

2 Our submission

2.1 Terms of reference

General Purpose Standing Committee No. 3 (the **Committee**) has commenced an Inquiry into reparations for the Stolen Generations in New South Wales (the **Inquiry**) in the following terms:

1 *That General Purpose Standing Committee No. 3 inquire into and report on reparations for the Stolen Generations in New South Wales, and in particular:*

(a) the New South Wales Government's response to the report of the 1996 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families entitled 'Bringing them Home' and the recommendations made in the report regarding reparations;

(b) potential legislation and policies to make reparations to members of the Stolen Generations and their descendants, including approaches in other jurisdictions, and

(c) any other related matter.

2 *That for the purposes of paragraph 1, the committee adopt the definition of 'reparations' contained in recommendation no. 3 of the 'Bringing them Home' report, which states that reparation should consist of:*

(a) acknowledgment and apology

(b) guarantees against repetition

(c) measures of restitution

(d) measures of rehabilitation, and

(e) monetary compensation.

The definition of reparations adopted by the Committee is based on recommendation 3 of the 'Bringing them Home' report[2] which in turn was premised on the principles identified by United Nations Special Rapporteur Theo van Boven as essential for reparation for gross violations of human rights and humanitarian law. We endorse this definition as applicable to any reparations framework in NSW and suggest that all proposals should be measured against these principles.

We will address these 5 pillars of the reparations framework in turn below in the context of the NSW Government's response to date and also in reference to the effectiveness of reparations frameworks in other jurisdictions.

We note that the term 'Stolen Generations' includes both children who were removed from their families by authorities and taken to institutions controlled by the Board[3] and also those who were sent into domestic or farm service, fostered and/or adopted without consent.

2.2 Focus of this submission

Our primary focus in making this submission is to share our observations of the NSW Government's response to the Bringing Them Home Report and, in particular, the

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2 *Bringing them home:* Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia, 1997, (**Bringing Them Home Report**).

3 The Bomaderry Children's Home, Cootamundra Girls Home and Kinchela Boys Home.

operation of the ATFRS at both a procedural level and at a human level in terms of the impact on the clients we have represented over many years. This experience is relevant not only in relation to any monetary compensation element of a reparations framework but also more broadly in terms of understanding community attitudes and expectations regarding reparations.

We also set out an overview of relevant experience and lessons learned in other jurisdictions, nationally and internationally. Whilst we have not been involved directly in representing clients in these jurisdictions, we have briefly summarised some of the available commentary that the Committee may find instructive in considering a reparations framework for NSW.

We make this submission on the basis of our collective experience as legal practitioners in working closely with a number of Stolen Generations survivors as well as organisations and communities that having been working to support those clients over of period of many years.

As well as acting for Stolen Generations survivors in regional and remote communities, we have continued to worked particularly closely with the Board and members the Kinchela Boys Home Aboriginal Corporation. Notwithstanding these important ongoing relationships, it is important to note that *we do not purport to speak for or on behalf of any specific individual, organisation, or community in making this submission.*

We are available to meet with members of the Committee to clarify any aspect of this submission, our work with Stolen Generations clients or our observations on the operation of the ATFRS.

2.3 Structure of submissions

In response to the terms of reference for this Inquiry, we set out the following:

(a) an Executive Summary of our submissions (**section 3**);

(b) a brief overview of the New South Wales Government's response to the Bringing Them Home Report (**section 4**);

(c) an overview of the operation of the NSW Aboriginal Trust Fund Repayments Scheme (**ATFRS**) (**section 5**);

(d) a discussion of lessons learned from the NSW ATFRS (**section 6**);

(e) a brief discussion of practical suggestions to form part of a reparations framework based on our experience working with Stolen Generations survivors including:

  (1) processes and procedures around access to personal records held by the NSW government (**section 7**); and

  (2) appropriate consultation of Stolen Generations members and consideration of bespoke or interim reparations approaches (**section 8**);

(f) consideration of the right to reparations from an international human rights law perspective (**section 9**);

(g) an examination of approaches taken in other jurisdictions to legislation and policies to make reparations to members of the Stolen Generations and their descendants (or comparable systems involving reparations for human rights abuses), including:

  (1) Tasmania (**section 10**);

  (2) South Australia (**section 11**);

(3) The Commonwealth (**section 12**);

(4) Canada (**section 13**);

(5) South Africa (**section 14**); and

(6) Ireland (**section 15**).

3 Executive summary

After more than 10 years working with clients who identify as Stolen Generations survivors, Herbert Smith Freehills (**HSF**) welcomes this opportunity to make submissions to the Inquiry into reparations for the Stolen Generations in New South Wales. We commend the NSW Parliament for endorsing this Inquiry on a bi-partisan basis.

The key submissions we wish to make are developed in detail in this paper but can be summarised as follows using the broad categorisation of the terms of reference for this Inquiry:

3.1 Terms of Reference – 1(a)

The New South Wales Government's response to the report of the 1996 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families entitled 'Bringing them Home' and the recommendations made in the report regarding reparations.

(a) The NSW Government's response to date has been ad hoc. We suggest that the Inquiry should not devote undue time and resources to assessing the adequacy of the NSW Government response to date. The survivors of the Stolen Generations have told their stories repeatedly in a range of government forums[4] for decades and their concerns have not been comprehensively addressed. The Inquiry should be forward looking and cohesive. There is an urgency to act as many of the Stolen Generations survivors are passing away. In addition, the benefit of the long-term impact of a reparations framework can take a generation to come to fruition.[5]

(b) Detailed consultation, preferably using an outreach model, with stakeholder groups and the organisations which support them is necessary to adequately address the question of reparations. Stolen Generations survivors, their families and communities should be given an opportunity to participate in a meaningful way to the design of any reparations framework. This is an important element of healing, rehabilitation and empowerment and draws on the positive experiences of overseas models where this occurred.

(c) Any reparations framework should address needs at the individual, community and national level and should extend to family and descendants of the survivors in order to break the cycle of intergenerational disadvantage. Full and extensive consultation will reveal the particular needs at each of these levels and will ensure that a framework is developed that meets stakeholder needs and is usable and accessible.

(d) The ATFRS had a narrow economic focus. It did not function, nor purport to function, as a reparations scheme for Stolen Generations survivors in a holistic sense. The ATFRS was characterised as a systematic approach to the

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4 We note that the NSW Government recently granted funding for a four-year Australian Research Council (**ARC**) project to "produce a landmark social history of the Aboriginal experience of the Protection / Welfare Board". We suggest that the Committee should:

- ensure that the stakeholder consultation to be conducted for this Inquiry does not duplicate this information gathering process or place unnecessary burdens on the survivors of the Stolen Generations; and
- ensure that the records generated through the ARC project form part of the public recognition and education element of any reparations framework.

5 In Canada, the final report into the Aboriginal Healing Foundation concluded that real change requires a minimum ten years of continuous activity in a community on average and that: "*the minimum time line projected to implement the priorities set out above and reach a new, healthier steady state is 30 years*" - Marlene Brant Castellano, Final Report of the Aboriginal Healing Foundation, vol. 1, A Healing Journey: Reclaiming Wellness (2006), page 217.

repayment of unpaid trust monies. It did not address the broader experience of the claimants under the Board's regime or provide compensation for those experiences and associated injury and trauma. This area of government reparations to the Stolen Generation remains unaddressed. In the words of the former Aboriginal and Torres Strait Islander Social Justice Commissioner Mr Tom Calma:

> *'If NSW can provide reparation to those whose wages were stolen, why can't it do the same for the children who were stolen?'*.[6]

(e) Any reparations framework should build upon the existing body of knowledge obtained by the NSW government and its agencies through the operation of the ATFRS and information which has come to light subsequently. The Committee should review and understand this material, in consultation with stakeholder groups to avoid duplication and to draw on existing knowledge, research and experience. The pain and injury suffered by Stolen Generations Survivors is beyond question. The consultation process should be framed in terms of establishing the current and future needs of these communities, their families and their descendants.

(f) As part of the restitution and reparations process it is important for members of the Stolen Generations to be able to remedy inaccuracies and deficiencies in official government records. Establishing a streamlined system to allow individuals to supplement their personal information in government records would provide historical accuracy in the records and allow family members to understand the complex social and historical picture of Stolen Generations survivors' experiences. We suggest that this could be achieved in part through the Privacy and Personal Information Protection Act 1998 (**NSW**) (**PPIP Act**) which would allow individuals to supplement and 'complete' the full picture of their life as reflected in their file. This issue could be addressed by the NSW government on a stand-alone basis (as an interim reparation) and before a final report is prepared in response to this Inquiry.

(g) A reparations framework ought be responsive and not 'one size fits all'. We suggest that there is merit in exploring bespoke options to satisfy the specific needs of particular Stolen Generations stakeholder groups. Specific responses by the NSW government could address clear and present needs of particular communities.[7] For example, the Kinchela Boys Home Aboriginal Corporation has identified the potential to establish a funeral fund for members which would be administered by the Corporation.

3.2 Terms of reference – 1(b)

Potential legislation and policies to make reparations to members of the Stolen Generations and their descendants, including approaches in other jurisdictions

Human Rights framework

The Bringing Them Home Report acknowledged that the forced removal of Indigenous children from their families and communities was systemic discrimination on the basis of race and resulted in "gross violations of human rights". The Bringing Them Home Report accepted that any reparations framework should be formulated and assessed with reference to international human rights principles and, in particular, the Basic Principles

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6 Tom Calma, 'Ten Years Later: *Bringing Them Home* and the Forced Removal of Children' Conference Customs House, Sydney, 28 September 2007.

7 This is consistent with United Nations Basic Principle 13: In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law developed by United Nations Special Rapporteur Theo van Boven.[8] In 2005, a revised version of these Basic Principles and Guidelines was ultimately adopted by the UN General Assembly. We suggest that these Basic Principles provide a 'checklist' of elements which the Committee should consider in any potential legislation and reparations policies. We also note as a foundation principle that a reparations framework should be context specific:

> "*The Basic Principles require that the provision of reparations be 'proportional to the gravity of the violations and harm suffered'...While international and comparative law can provide guidance, reparations have an ad hoc nature, which makes it difficult to draw firm conclusions about how reparations schemes should be designed. Although international reparations practice is unable to provide strict guidance, it does serve to affirm the general obligation to provide reparations. Governments should therefore work to develop context appropriate reparations schemes that are informed by the international principles of reparations.*"[9]

In the context of the Stolen Generations in NSW, we suggest that any reparations framework:

- Should adopt a holistic reparations framework that includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Basic Principles 19 to 23).
- Should be mindful of holistic needs regarding psychological care as well as legal and social services (Basic Principle 21).
- Should not restrict the ability to pursue a civil claim (Basic Principle 7).
- Should extend to family and descendants of the survivors in order to break the cycle of intergenerational disadvantage (Basic Principle 8).
- Should provide for individual access to factual information regarding the violations (Basic Principle 11).
- Should provide for a degree of broader public access to all NSW Government archives and records concerning the Stolen Generations as an integral part of the truth telling process (Basic Principle 24). This would need to be balanced with privacy concerns.
- Should publicise the existence of any reparations framework in urban, regional and remote parts of NSW and interstate across a range of media (Basic Principle 12a).
- Should take measures to minimise inconvenience and trauma to survivors by operating on an outreach model (Basic Principle 12b).
- Should provide multi-faceted support systems for survivors and their families to address physical and psychological safety in light of the possibility of potential re-traumatisation and vicarious trauma (Basic Principle 12b).
- Should establish an effective and accessible legislative mechanism for making claims for reparations which extends to the heirs of claimants (Basic Principle 12d).
- Should include verification of the facts and full and public disclosure of the truth (Basic Principle 22).

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8 *Bringing Them Home Report,* above n 2, Chapter 14.

9 Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, page 84.

- Should include an official declaration restoring the dignity, the reputation and the rights of survivors and persons closely connected with the survivors as well as a further public apology, including acknowledgement of the facts and acceptance of responsibility and commemoration and tributes to the survivors (Basic Principle 22).
- Should include an inclusion of an accurate account of history in educational materials at all levels (Basic Principle 22).

Other jurisdictions

In developing policies and legislation to make reparations to members of the Stolen Generations, several jurisdictions (in Australia and overseas) provide guidance in relation to approaches adopted in developing reparations frameworks. In summary:

(a) **Tasmania** - remains the only state that has legislated specifically to compensate for removal of Aboriginal children. However, Tasmania adopted a narrow framework exclusively concerned with payment of a fixed fund of $5 million of monetary compensation. It did not include any initiatives for healing, acknowledgment or commemoration at an individual, community or national level.

(b) **South Australia** – has proposed draft legislation for ex gratia payments for members of the Stolen Generations and their descendants which improves upon the Tasmanian Act in a number of key respects. A Preamble includes language of acknowledgement, due weight can be given to oral testimony, compensation payments are not based on the equal distribution of a finite pool of funds and decisions are subject to administrative review. That said, it does not provide a holistic framework for reparations and is potentially problematic in terms of certain threshold questions of entitlement to payments.

(c) **Commonwealth** – did not enact legislation. The debate surrounding the Federal bills was instructive as there was recognition that a reparations framework should follow van Boven principles and be guided by the experience of other jurisdictions. The Reparations Tribunal Bill included elements of acknowledgment and apology, healing, community awareness and counselling in addition to monetary compensation to survivors and their descendants. The scheme had a realistic timeframe and decisions were reviewable.

(d) **Canada** – adopted a holistic model of reparations which included monetary compensation, encouraged self-empowerment through Aboriginal-designed and directed programs, promoted healing through public recognition, education and development of comprehensive historical records.

(e) **South Africa** – included limited financial compensation but did approach rehabilitation and rehabilitation by adopting a holistic 'Truth and Reconciliation' model including symbolic reparations at an individual, community and national level.

(f) **Ireland** – is not a truly analogous context as it was non-racial, but is a useful example of a relatively generous scheme of compensation administered by an independent Board and included broader community healing proposals such as memorials, education and counselling services and family tracing services.

4 New South Wales Government's response to the Bringing Them Home Report

4.1 What is meant by reparations?

As noted above, reparation should consist of:

(1) acknowledgment and apology;

(2) guarantees against repetition;

(3) measures of restitution;

(4) measures of rehabilitation; and

(5) monetary compensation.

Since publication of the Bringing Them Home Report in 1997, the NSW Government has responded with a range of initiatives that address aspects of these recommendations. As far as we are aware, there has been no substantive monitoring or reporting on the implementation of the recommendations of the Bringing Them Home Report for approximately 10 years. For this reason, it is difficult to gauge the full extent and efficacy of the response.

We set out below an overview some of the aspects of the response of which we are aware. This does not purport to be an exhaustive list, rather it is a reflection of the more publicly visible aspects of the response and those of which we are aware through our clients. We acknowledge that there may have been other less visible and / or more targeted responses at grassroots level in communities.

We will also reference observations on the adequacy of this response by academics and social commentators.

We emphasise, however, that the focus for this Inquiry should be forward-looking. There is limited value in evaluating the success of any steps taken towards reparations in NSW to date and it would not be the most efficient use of resources.

4.2 Acknowledgment and apology

The Bringing Them Home Report identifies that "*the first step in any compensation and healing for victims of gross violations of human rights must be an acknowledgment of the truth and the delivery of an apology*".[10]

At the time of publication of the Bringing Them Home Report in 1997, out of all Australian governments, only the NSW Government had extended an apology. On 14 November 1996, NSW Premier Bob Carr, in a speech on reconciliation in the NSW Legislative Assembly stated:

> "*I re-affirm in this place, formally and solemnly as Premier, on behalf of the government and the people of New South Wales, our apology to Aboriginal people. And I invite the House to join with me in that apology, and in doing so, acknowledge, with deep regret, parliament's own role in endorsing policies and actions of successive governments which devastated Aboriginal communities and inflicted, and continues to inflict, grief and suffering upon Aboriginal families and communities. I extend this apology as an essential step in the process of reconciliation.*"

[10] Bringing Them Home, above n 2, page 246

Many years later, on 11 March 2004, NSW Premier Bob Carr, on behalf of the NSW Government, issued a further formal apology specifically for the failure to repay wages and other money belonging to Aboriginal people that were paid into the Aboriginal Trust Funds by the Aborigines Protection Board and the Aborigines Welfare Board between 1900 and 1969 and never repaid:

> "*When in the years up to 1969 Aboriginal people sought to gain access to their accounts they were rarely paid. After 1969 payments ceased completely. For those reasons I take this opportunity to formally apologise to the Aborigines affected and offer the assurance that any individual who can establish they are owed money will have it returned.*"

Government departments such as the NSW Department of Family and Community Services have also publicly re-affirmed their apology to the Stolen Generations and Community Services' involvement in these separations.

On 13 February 2008, then Prime Minister Kevin Rudd moved a motion of apology to the Stolen Generation and became the first Australian Prime Minister to publicly apologize to the Stolen Generations on behalf of the Australian federal government.

Whilst the NSW Government apologies address to some extent the recommendations of the Bringing Them Home Report,[11] we note that apology and acknowledgment needs to be an ongoing and continual process that is recognised as being a substantial and integral part of any reparations framework – in both written and oral form. Ongoing apology and acknowledgment is particularly important in addressing the intergenerational issues faced by the families and descendants of members of the Stolen Generations.

4.3 Measures of rehabilitation and restitution

(a) Access to personal and family records

The Link-Up (NSW) Aboriginal Corporation was established in 1980 as an organisation dedicated to assisting Aboriginal people find information about their history, heritage, families and traditional lands, and to help them discover where "home" is.

The Bringing Them Home Report further recognised the need for individuals and communities to have access to personal and family records and made a number of recommendations on access guidelines and stated:

> "*Access to knowledge can assist: to reinstate pride in family experiences; enhance a stronger sense of identity; re-establish contacts with family members; reaffirm interaction with broad family networks; revive and maintain Aboriginal traditions ...; understand the historical background of contemporary personal issues ...; re-claim ownership of material pertaining to family life...*".

Following publication of the Bringing Them Home Report, The Family Records Unit of Aboriginal Affairs was established by the NSW Government to enable Aboriginal people, particularly members of the Stolen Generations, to access government records about personal and family histories under the 'Finding Your Mob' application process.

Access to personal and family records will be considered in greater detail in **section 7** below.

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[11] In particular recommendation 3, in relation to "acknowledgment and apology", and recommendation 5a in relation to acknowledgment of responsibility of government predecessors for the laws, policies and practices of forcible removal.

(b) The significance of healing

In August 2011, the NSW Government established the Ministerial Taskforce on Aboriginal Affairs to provide advice on possible areas of reform in education, employment and service delivery. Underpinning the recommendations of the Taskforce, is OCHRE (Opportunity, Choice, Healing, Responsibility, Empowerment), the NSW Government plan for Aboriginal affairs released in 2013.

The central pillar of OCHRE is "Healing". The Healing Foundation identifies that healing means different things to different people, but recognises that "*recovery from trauma*", "*coming to terms with events of the past*" and "*a process of returning to physical, emotional, spiritual and cultural wellbeing*" as being consistent themes in the definition of healing. It is significant that NSW was the first state to formally incorporate healing into its Aboriginal affairs policy through OCHRE and important that the commitments made to healing through this policy are fulfilled in any proposed reparations framework. We understand that amongst agencies supporting the survivors of the Stolen Generations there is a perception that, in practice, the healing element of the OCHRE policies has not been adequately developed and therefore has had limited impact.

Throughout the Bringing Them Home Report, healing is recognised as an important component of making reparation, and the NSW Government, through OCHRE has undertaken a number of initiatives – such as the organisation and promotion of the 2014 OCHRE Healing Forum, and ongoing support of The Healing Foundation.

There have also been a number of ad hoc initiatives that have contributed to the healing of particular Stolen Generations survivor groups. For example, in October 2014 former NSW Aboriginal Affairs Minister, Victor Dominello, presided over a highly symbolic and emotionally charged chain-cutting ceremony at the gates of the Kinchela Boys Home in Kempsey. Richard Campbell, one of the Kinchela Boys Home survivors in attendance noted: "*This weekend is about healing and the acknowledgment that these things happened to us*".[12]

In addition, Mr Dominello also approved $38,000 in funding to Kinchela Boys Home Aboriginal Corporation to enable around 20 men who lived at the home to record and share their stories through film. As Mr Dominello said "*if they recount what they went through, not only do they come to grips which what they had to endure but they show the world they have survived, and they pass learnings on to other communities*".[13]

4.4 Monetary Compensation

The ATFRS was established in 2005 as a unit of the NSW Premier's Department to repay to Aboriginal people and their descendants money that was put into trust accounts held by the Board and never repaid.

The ATFRS had a narrow economic focus. It did not function, nor purport to function, as a compensation scheme for Stolen Generations survivors in a holistic sense. The ATFRS was characterised as a systematic approach to the repayment of unpaid trust monies. It did not address the broader experience of the claimants under the Board's regime or provide compensation for those experiences and associated injury and trauma.

Due to some of the perceived deficiencies in the processes of the ATFRS in terms of scope and reach, some have called for the scheme to be re-opened on account of 'unfinished business'. From our own work with Stolen Generations clients we are aware of potential claimants who did not make a claim under the ATFRS as they were either

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12 Rick Feneley, *United, the Kinchela boys remember their horrors*, Sydney Morning Herald, October 24, 2014.

13 Rick Feneley, *Stolen boys to tell their stories of life in hell.* Sydney Morning Herald, November 30, 2013.

unaware of its existence or unable to participate within the timeframe by virtue of their remoteness, trauma related health issues and/or incarceration.

The operation of the ATFRS and lessons learned will be explored in detail in **sections 5** and 6 below.

4.5 Guarantees against repetition

The rates of Aboriginal and Torres Strait Islander children placed on 'care and protection orders', which can lead to their removal from their families, has jumped dramatically, from 11.3 per 1000 children in 2003-04 to 49.3 per 1000 children from 2012-2013.[14]

The daily average detention rate for Aboriginal and Torres Strait Islander youth in 2012-13 was 365 per 100,000 10–17 year olds, around 24 times the rate for non-Indigenous youth.[15]

Collectively these trends have caused social commentators and community members to express concern over a second or 'continuing' Stolen Generation. The trauma experienced by Stolen Generations survivors is compounded by the experience of separation or risk of separation from their own children and grandchildren.

We understand that this will be the focus of submissions to the Committee by other parties. Accordingly, we do not intend to comment on this aspect of reparations other than to emphasise the need for these trends to be considered as part of the Inquiry.

4.6 Preliminary observations

The response to date can be characterised as a series of ad hoc initiatives rather than a comprehensive and cohesive response pursuant to a holistic reparations framework.

As noted in the Commonwealth context:

> *"The history of reparations for Indigenous Australians removed from their families has been sporadic, piecemeal and devoid of any national conviction…*
>
> *Australia's ongoing failure to address the magnitude of the moral wrong perpetuated against victims of removal policies and the enduring harm and disadvantage borne by successive generations stands out as a significant lost opportunity for a nation to realise its commitment to the prerequisites of reconciliation."*[16]

The Inquiry presents an opportunity to take a fresh look and learn from experience to date. Any reparations framework to be applied in NSW going forward ought to systematically address all of the 5 key reparations elements articulated in the Bringing Them Home Report.

Most significantly, the development of a reparations framework should consider the needs of Stolen Generations stakeholder groups and include active participation from those groups in the design phase.

In recent years, Kinchela Boys Home Aboriginal Corporation and survivors of the Cootamundra Girls' Home in particular have developed extensive strategic and support structures such that they have the capacity to assist with developing what a holistic approach should look like.

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14 Productivity Commission Report, Overcoming Indigenous Disadvantage: Key Indicators 2014. Overview page 20.

15 Ibid, page 21.

16 Andrea Durbach, 'The cost of a wounded society: reparations and the illusion of reconciliation' (2008) 21(1) Australian Indigenous Law Review.

We understand that some Stolen Generations survivors and support organisations have been frustrated and disappointed with the lack of consultation undertaken prior to the announcement of the terms of reference for this Inquiry. Now that the process of Inquiry has begun it is critical that these, and other organisations and community groups, be consulted in developing any approach to reparations. It is essential for Aboriginal communities to be given the opportunity to be heard as part of any proposed solution in order for an appropriate holistic and long-term approach to be developed.

5 NSW Aboriginal Trust Fund Repayment Scheme overview

In this section we provide an overview of the operation of the Aboriginal Trust Fund Repayment Scheme in NSW. In **Section 6** below, we set out the lessons learned from our work with claimants under the ATFRS and how that experience may be applied in the context of this Inquiry.

5.1 Summary

(a) Original NSW Scheme

Guidelines for the Administration of the ATFRS made in February 2006 (**Original Guidelines**) set out the framework under which Aboriginal people in NSW could make a claim for unpaid money held in Trust Funds.

The ATFRS was evidence based and direct (living) claimants were eligible if:

- there was certainty, strong evidence or strong circumstantial evidence that an amount of money payable to or held on behalf of the direct claimant at any time was paid into the Trust Funds between 1900 and 1969; and
- there was no evidence, or no reliable evidence, that the full amount of the money was either paid out to the direct claimant or expended on behalf of the direct claimant.

The descendants of deceased direct claimants could also make a claim.

The Scheme was administered by the Aboriginal Trust Fund Repayment Scheme Unit (**ATFRS Unit**) and the Aboriginal Trust Fund Repayment Scheme Panel (**Panel**). The final decision as to whether a payment of trust monies was to be made to claimants was determined by the Minister for Finance (**Minister**).

In the experience of HSF lawyers representing applicants, under the Original Guidelines the ATFRS Unit and Panel were:

- approachable and non-adversarial in their approach to resolving claims;
- willing to liaise with other government agencies in the repayment of claims;
- unaware of key resources that could assist in the resolution of claims;
- burdened by the prospect of administering a high volume of descendant claims;
- over-reliant on documentary evidence of the existence of a Trust Fund;
- reluctant to exercise discretion to give weight to oral evidence in the absence of documentary evidence of a Trust Fund, notwithstanding the acknowledged deficiencies in the official written records; and
- reluctant to publish decisions or provide reasons for their decisions in writing.

(b) Revised NSW Scheme

The NSW Government issued revised Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme in June 2009 (**Revised Guidelines**). Significant changes included:

- a final closing date for applications (section 2.1);
- a standard lump sum payment of $11,000 to be awarded to eligible claimants (section 1.7);
- greater weight to be given to non-documentary evidence (section 1.9.);
- greater discretion to be granted to the ATFRS Unit and the Minister in the consideration of claims (sections 9.2, 9.3 and 12.1); and

- the streamlining of the descendant claim process (section 6).

In the experience of HSF lawyers representing applicants, under the Revised Guidelines the ATFRS Unit and Panel exhibited a willingness to place greater emphasis on non-documentary evidence and to exercise greater discretion.

5.2 Overview of the Original Guidelines (2006 – 2009)

(a) How the ATFRS was conceived

In 2003 PIAC obtained documents from the NSW Department of Community Services under Freedom of Information procedures. A draft cabinet minute was obtained which outlined a proposed Aboriginal Trust Fund repayment scheme.

In March 2004, the NSW Government issued an apology to Aboriginal people whose wages or other payments had been paid into Trust Funds by the Aborigines Protection Board and the Aborigines Welfare Board between 1900 and 1969 and never repaid to them. Following the Government's formal apology, the first Panel was established.[17] Over a period of five months, the Panel consulted with Aboriginal people and made recommendations on the design of a scheme to repay money held in the Trust Funds to the Aboriginal people.

On 15 December 2004, the Government announced the establishment of the Scheme to be administered by the ATFRS Unit, the second Panel[18] and the Minister. The Original Guidelines were made in February 2006.

(b) Eligible claimants

Section 4.1 of the Original Guidelines provided that the following people could make a claim under the Scheme.

(1) direct claimants;

(2) authorised representatives of direct claimants; and

(3) descendants or authorised representatives of direct claimants, where the direct claimant is deceased.

The Original Guidelines set up the procedure for responding to claims made under the Scheme and established the roles of the ATFRS Unit and the Panel, which remained largely consistent under the Revised Guidelines.

(c) The role of the ATFRS Unit

Under section 2.1 of the Original Guidelines, the ATFRS Unit was made responsible for:

(1) receiving and processing applications made pursuant to the Scheme;

(2) investigating the applications and compiling information relevant to a claim; and

(3) preparing an interim assessment in relation to applications which is then submitted to the Panel.

In the process of reviewing an application and making a recommendation, the ATFRS Unit was required to make all reasonable attempts to collect all information and records relevant to the application. In doing so it was required to seek assistance from the Department of Aboriginal Affairs (**DAA**) and State Records NSW. It could also seek assistance from independent experts and was permitted to conduct an interview with the claimant or another person who may have had information relevant to the application.

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17 Comprised of Sam Jeffries, Terri Janke and Brian Gilligan.

18 Comprised of Sam Jeffries, Robynne Quiggin and Aden Ridgeway.

After assessing the evidence and preparing a summary of the information found in the course of its investigation, the ATFRS Unit made an interim assessment and recommended the amount to be paid. The interim assessment, reasons for the assessment and any documents found were provided to the claimant and the claimant was afforded an opportunity to respond. Following this process, the ATFRS Unit made a recommendation to the Panel.

(d) The role of the Panel

The key role of the Panel was to endorse or reject the ATFRS Unit's interim assessments. It met 12 times per year and its decisions were determined by majority.

The Panel had discretion to review the facts in each case using all available evidence, including, notably, oral evidence. It could also review recommendations made by the ATFRS Unit at the request of claimants.

Following its review of the materials, the Panel prepared a summary of the information that it considered in reviewing the application and made a recommendation as to whether payment should be made providing reasons for the recommendation. The Panel's recommendation was then forwarded to the Minister.

(e) Ministerial determination

On receiving a recommendation from the Panel, the Minister determined whether or not a payment should be made and the amount to be paid.

(f) Principles

Section 11.1 set out the principles that the ATFRS Unit and Panel should have regard to when considering applications. These considerations included:

(1) the length of time that has elapsed and the consequent difficulty that claimants may have in substantiating their claim;

(2) any deficiencies in the official written record relating to the claim;

(3) the importance of oral evidence;

(4) the purpose of the Scheme;

(5) any available evidence that money (payable to the direct claimant) was paid into the Trust Funds;

(6) any available evidence that money was paid out of the Trust Funds (to the direct claimant or descendant of the direct claimant); and

(7) the reliability of the evidence.

(g) Direct claims

Under section 12.1 of the Original Guidelines, the ATFRS Unit or the Panel could make a recommendation to the Minister that a payment be made to a direct claimant if:

(1) there was certainty, strong evidence or strong circumstantial evidence that an amount of money payable to or held on behalf of the direct claimant at any time was paid into the Trust Funds between 1900 and 1969; and

(2) there was no evidence, or no reliable evidence, that the full amount of the money was either:

- paid out to the direct claimant;
- expended on behalf of the direct claimant; or
- paid out to an authorised representative of the direct claimant.

Monies expended from the accounts of indentured children and indentured wards on food, clothing, lodging, dental and medical care did not affect the question above.

(h) Descendant claims

Before making a recommendation that a descendant claimant be paid a payment, the ATFRS Unit or the Panel needed to be satisfied under section 13.1 that it would have made a payment to the deceased person themselves.

Following that, the Panel or ATFRS Unit could recommend to the Minister that a payment be made in accordance with the deceased person's will, if a will existed. Alternatively, the Panel or the ATFRS Unit could make a recommendation that payment be made in accordance with Appendix B to the Original Guidelines. This set out the order of distribution of payments to descendants where there was no valid will.

In instances where a descendant made a claim but died before it was determined, the application did not continue for the benefit of his/her estate.

5.3 Overview of the Revised Guidelines (2009 – 2012)

On 30 March 2009, the NSW Government announced some changes to the ATFRS in an attempt to ensure the more efficient and effective operation of the Scheme. In June 2009 the NSW Government amended the Original Guidelines and issued the Revised Guidelines.

Extracts from an ATFRS Fact Sheet produced by the NSW Government provided some background as to the reasons behind the changes to the Scheme:

> '*The main issues were problems with the records and processing of descendant claims. The old records of the AWB or APB often lack sufficient information, or in many cases are non-existent, and this creates difficulties for Aboriginal people making claims, especially those who were removed and placed in institutions by the Board.*'

Significant changes were made to the Original Guidelines, notably:

(a) Time frame

Under section 2.1 of the Revised Guidelines, a finite closing date for applications to the Scheme was set at 31 May 2009. That said, the Revised Guidelines also included a new section 6.8 which provided that the ATFRS Unit may accept a late application if it was satisfied that it was in the interests of justice and equity to do so.

(b) Calculation of repayments

Pursuant to section 1.7 of the Revised Guidelines, a standard lump sum repayment in the amount of $11,000 was be awarded to eligible claimants where a repayment was found to be owed. The award of a payment of $11,000 altered the position under the Original Guidelines which had provided that repayments would be made in the current dollar value (indexed using the Office of the Protective Commissioner conversion rate).[19]

Importantly, the NSW Government decided that any claimant who received a repayment of less than $11,000 under the Original Guidelines would have their repayment topped up to $11,000. The NSW Government also declared that all claims which were previously unsuccessful under the Original Guidelines were to be reassessed under the Revised Guidelines.

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[19] Under that rate, $100 owed in 1969 was indexed as being worth $3,521 in 2005.

(c) Greater emphasis on non-documentary evidence

A most significant change to the Scheme under the Revised Guidelines was the provision for non-documentary evidence to be considered by the ATFRS Panel in the assessment of applications.

Section 1.9 was a new section which provided that the Panel would be able to expressly take into account non-documentary evidence including statutory declarations and oral evidence when considering applications. This change attempted to remedy some of the difficulties claimants experienced due to poor record keeping by the Board, the existence of records which lacked sufficient information or in many cases non-existent records.

(d) Greater discretion granted to the ATFRS

Another significant change to the Original Guidelines as provided for under the Revised Guidelines is the greater discretion granted to the ATFRS Unit and the Minister in the investigation and consideration of applications.

Greater discretion was granted to the ATFRS Unit under sections 9.2 and 9.3 of the Revised Guidelines which provided that the ATFRS Unit had absolute discretion in forwarding copies of documents to claimants following the making of an assessment and recommendation.

Section 9.3 also changed the position under the Original Guidelines which required the ATFRS Unit to forward to a claimant all documents used in the assessment of their claim to allow the claimant to respond to the assessment. Instead, under the Revised Guidelines the ATFRS Unit now had a discretion as to whether to provide these documents to the claimant or not. In effect this put the onus on the applicant rather than the ATFRS to obtain the documentary records that may establish a claim.

The Revised Guidelines also allowed the Minister a greater exercise of discretion as to the making of a payment to relevant claimants. Under section 12.1, the Minister could determine, in his absolute discretion, whether to make a payment or not on receiving certain documentation from the Panel.

(e) Descendant claims streamlined

One of the most significant changes made by the Revised Guidelines was the streamlining of the descendant claim provisions.

Under section 6.3 of the Original Guidelines, a successful claimant could not receive their payment until the ATFRS Unit had published a notice of the payment in an Indigenous publication or other appropriate media. This notice was to outline the details of the claimant and was to indicate that any descendant of the claimant was entitled to make an application for a payment as a descendant claimant. Section 6.3(b) also stipulated that repayment could not be made until all of the descendants identified in a Births, Deaths and Marriages check had been located and contacted.

These provisions under the Original Guidelines rendered the claims process extremely complex, time-consuming and administratively unworkable.

As a result, several changes were made to the descendant claim scheme under the Revised Guidelines. Most significantly, under section 6.2 of the Revised Guidelines if a repayment in relation to a descendant claim was assessed as being owed, a repayment of $11,000 was only to be distributed to those eligible living family members who had registered with the ATFRS by 31 May 2009. This change reallocated the responsibility for the distribution of descendant claim repayments from the ATFRS to the claimants themselves in respect of contacting family members who might be entitled to payment as a descendant claimant.

6 Lessons learned from the ATFRS

This section of our submission sets out the lessons learned from our work with claimants under the ATFRS and how that experience may be applied in the context of legislation, policies and procedures to make reparations to members of the Stolen Generations and their descendants pursuant to a holistic reparations framework.

6.1 Summary

In particular we will focus on:

(a) The importance of consultation in defining the scope of any reparations framework and ensuring its capacity to address needs at the individual, community and national level.

(b) The significance of Indigenous engagement in the operation of any reparations framework. We suggest that this is likely to enhance the credibility of any framework, increase a sense of empowerment for the participants and encourage community members to engage with the process and make claims.

(c) The need for a coherent communications strategy. Eligible claimants will only come forward if they are aware of the process and think it actually has the capacity to meet their multi-faceted needs in a holistic manner.

(d) The need for the material gathered under the ATFRS to be reviewed and understood by the Committee prior to the commencement of any oral hearing stage of the Inquiry in order to avoid any unnecessary re-telling of painful stories and covering of 'old ground' by the members of the Stolen Generations.

(e) The respective roles of written and oral evidence. In any reparations framework, primacy should be given to oral evidence. In light of deficiencies in the official contemporaneous written records, undue weight should not be given to documentary evidence. In some instances written records were not created when they ought to have been. Other records have been destroyed, lost or falsified, whether by Government agents or third parties.

(f) The need for any reparations framework to extend to descendants of Stolen Generations survivors in all facets (consultation, design, fact finding/truth telling and monetary compensation). Otherwise, the disadvantage suffered by Stolen Generations survivors will continue to be compounded and perpetuated through subsequent generations.

(g) The delicate balance to be struck between consistency, transparency and discretion in decision making.

6.2 Consultation

Over a period of five months of consultation with Aboriginal people, recommendations were made on the design of a scheme to repay money held in trust funds which became the ATFRS.

Notwithstanding that consultation process, the ATFRS was ultimately relatively narrow in scope. It focused exclusively on the repayment of monies held by the NSW Government in trust accounts. This resulted in a sense of frustration for some applicants who had broader expectations and needs from the process.

The vast majority of the clients represented by HSF under the ATFRS showed less regard for the monetary aspect of their claim than the fact finding and truth telling aspect. Of particular significance was the access to government documents and the role of this information in shaping our clients' sense of personal and family identity. When taking statutory declarations on behalf of clients we found they wanted to tell their whole story – not just the elements that related to work and/or unpaid wages.

Making a claim to the ATFRS was a challenging and emotional experience for every single client represented. Some noted it was the first time that they had told their story to someone outside their family let alone to a non-Aboriginal person. We regularly received feedback that what our clients wanted most was to be heard, believed and better understood through the process. Some spoke of wanting to have their "day in court". We took this to mean a day of reckoning in a formal setting more so than actually within the civil justice system.

HSF lawyers perceived a collective desire from our clients to be heard, believed and understood not just within the ATFRS process but by the wider Australian community. Many clients were conscious of the link between the difficulties of their childhoods and some of the trauma and impacts of trauma they had suffered in later life. In some cases our clients attributed family breakdown and periods of incarceration to the loss of family and cultural identity they had suffered as children. They saw it as important that the broader community better understand that link and not stand in judgement.[20]

There needs to be in depth consultation with Stolen Generations survivors, their families and Indigenous communities to provide an opportunity to participate in a meaningful way to the design of any reparations framework. This consultation and input is essential to develop a framework that meets stakeholder needs, is usable and accessible.

Furthermore, if the underlying philosophy behind a reparations framework is to right the wrongs of the past, including Stolen Generations survivors in design phase can be an important element of healing and empowerment.

Care should be taken to ensure that the introduction of a reparations framework is not perceived as a further exercise of government decision making and service provision unilaterally imposed upon Stolen Generations survivors in NSW.

Any reparations framework should expressly address needs at the individual, community and national level.

6.3 Aboriginal leadership and engagement

The ATFRS Panel had 2 distinct phases of operation. In the initial consultation phase the 3 member Panel comprised 2 Indigenous panellists.[21] In the subsequent operational phase all 3 panellists were Indigenous.[22]

In addition, the primary point of contact for initial inquiries on the ATFRS free call telephone number, was also Indigenous. This was a key element in the accessibility of the scheme and helped claimants to feel more at ease throughout the process. It also gave decisions of the ATFRS a sense of cultural legitimacy.

It will be important to consider the role of Indigenous leadership and participation in the administration of any reparations framework. Any reparations framework ought seek to

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20 This was further reflected in comments from survivors of the Stolen Generations who attended the 'Stolen Generations Inquiry Panel' organised by PIAC and held at NSW Parliament house on 17 September 2015. Indigenous panellists and members of the audience expressed disappointment and frustration regarding what they perceive to be a lack of action by the NSW Government.

21 Sam Jeffries and Terri Janke. The other panellist was Brian Gilligan.

22 Sam Jefferies, Robynne Quiggin and Aden Ridgeway.

maximise the appointment of Indigenous staff as leaders, key decision makers and administrators throughout the process.

As was the case with the ATFRS, this will enhance credibility, feelings of empowerment and encourage community members to engage with the process and make claims.

6.4 Notification, awareness and outreach

The ATFRS was communicated through advertising in the Koori Mail, the National Indigenous Times, the Sydney Morning Herald and the promotional opportunity provided by the first ATFRS Panel's community consultation meetings.

Organisations such as PIAC also held community forums and meetings around NSW in 2005 and 2006, with PIAC aware of at least 150 claims that arose out of those meetings. However in their ongoing interactions with Aboriginal communities around NSW (including potential claimants), PIAC frequently found that people had never heard of the ATFRS.

We are similarly aware of potential claimants who did not make a claim under the ATFRS as they were either unaware of its existence or unable to participate within the time frame by virtue of their remoteness, trauma related health issues and/or incarceration.

To be successful in each of the design, awareness raising and participation phases, any reparations framework will require a comprehensive and intensive communication strategy. As a minimum, this would include targeted outreach to known stakeholder groups[23] and the organisations which support them, community meetings, radio and television advertising, articles and advertisements in local newspapers and ongoing outreach to Indigenous communities in person.

Outreach will play a critical role in engaging Stolen Generations survivors. The legacy of the Stolen Generations is such that some survivors and their families have experienced a myriad of issues as a result of sustained trauma, such as poor physical health, poor mental health, substance abuse, involvement in the criminal justice system and incarceration. Due to these diverse needs, effective outreach will require interagency co-operation and funding to reach the key stakeholder groups in urban, regional, rural and remote parts of NSW.

Ultimately the effectiveness of any reparations framework hinges upon the effectiveness of its consultation and communications strategies. Eligible claimants only come forward if they are aware of the process and think it actually has the capacity to meet their multi-faceted needs in a holistic manner.

6.5 Access to documentary and other evidence

(a) Collection of relevant factual information, research, documents and evidence prior to implementation

At various stages of the ATFRS, HSF provided directly relevant legal research or factual evidence to the ATFRS to provide context to various submissions.

For example, HSF provided:

- summaries of relevant primary and secondary legislation (Aborigines Protection Acts from 1909 to 1969 and associated regulations);
- summaries of wage rates applicable to wards/apprentices from 1909 to 1969;

[23] For example, the Kinchela Boys Home Aboriginal Corporation, the "Cootamundra Girls" and the Stolen Generations Council of NSW & ACT.

- copies of Commonwealth Government gazettes from 1935 to 1965 in relation to unclaimed funds;
- factual research in relation to work practices at Kinchela Boys Home; and
- a Board report from 1938 outlining a large accumulation of family endowment funds held in trust.

Although the ATFRS Unit welcomed and took into consideration these materials in deciding claims, those critical resources ought to have been known to and at the disposal of the ATFRS as a result of independent research prior to the implementation of the scheme.

In addition, it is our understanding that part way through the implementation of the ATFRS there were an additional 105 boxes of correspondence from the Chief Secretary's department discovered in archives. These were urgently indexed and some claims were reconsidered in light of the discovery, however this is far from an ideal situation and outcome, and there may have been other claimants who would have been assisted by such evidence.

A vast body of documentation and knowledge was gathered during the course of the ATFRS. Many applicants made personal statements in the form of a statutory declaration. This body of knowledge will form an important background resource in the wider context of reparations to the Stolen Generations. Any reparations framework should build upon this existing body of knowledge through the systematic collection of relevant factual information, research, documents and evidence prior to implementation.

Since the operation of the ATFRS much more information has come to light, formally and informally, through healing forums and other initiatives. Independent research should be conducted, in consultation with stakeholder groups, in order to gather as much of this new material as possible.

It is essential for this body of material to be reviewed and understood by the Committee prior to the commencement of any oral hearing stage of the Inquiry in order to avoid any unnecessary re-telling of painful stories and covering of 'old ground' by the survivors of the Stolen Generations. The pain and injury suffered by the Stolen Generations survivors is not in doubt so the consultation should be framed in terms of establishing the current and future needs of these communities and their descendants.

It may also be useful for the Committee to consult with and draw on the extensive knowledge held by the directors[24] and staff who were responsible for management and administration of the ATFRS.

That said, the need for a systematic approach to information gathering should be balanced with the need for expedition owing to the number of potential claimants who are ageing and/or in ill health and the length of time it has taken to respond to the recommendations of the Bringing Them Home Report.

(b) Provision of evidence to claimants

Under the original ATFRS guidelines, the ATFRS Unit would conduct an initial search of relevant documentary records and supply relevant documents to the claimant along with an interim assessment of their claim.

The ATFRS was widely criticised for not providing full copies of or access to the complete records identified by the DAA and the State Records in response to a claim. It was inefficient and duplicative as some claimants, particularly those with legal representation, then separately applied for access to their entire records.

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[24] Such as Ms Marilyn Hoey and Mr Ross Bennett, Former Directors of the ATFRS.

In HSF's experience, it was often the case that material which was not deemed to be relevant by the Unit, in fact contained valuable information. The files would frequently contain further circumstantial evidence pointing to the fact that our client had been sent to work. Whilst not evidence of a trust account per se, this was indirectly relevant and often very useful in establishing that by law there should have been a trust fund set up by the Board on their behalf.

The ATFRS processes in relation to fact finding and access to documents may have led to potential claimants being dissuaded from making a claim, and for useful evidence to be missed if claimants did not have legal representation.

Under any reparations framework, the onus should be on the scheme itself to gather and provide evidence (whether it considers it relevant or not) to the claimant at no cost. Documentary evidence can be supplemented with an applicant's own oral testimony and personal recollections. In the event of inconsistency between documentary evidence and oral testimony primacy ought be given to the applicant's own account.

(c) Weight to be attributed to oral evidence

The ATFRS Panel showed a reluctance to rely on oral evidence in the absence of written records evidencing monies paid into a trust fund. Contrary to principle 11.1 (c), the Panel was reluctant to attribute weight to oral evidence under the Original Guidelines.

Many claimants were frustrated that the Panel attributed great weight to documentary evidence that money was paid into trust funds, and attributed relatively little weight to their own direct oral testimony despite widely and publicly acknowledged deficiencies in the written record.

Poor record keeping by the Board was detrimental to many claims. As early as the 1940s a Government report noted that *'the records of the Department in respect of [Aboriginal] apprentices are not as complete as they should be'*.[25] Claimants faced significant evidentiary challenges in establishing a claim as a result of the failure to properly document transactions and maintain records relating to trust funds. Although the Original Guidelines allowed for consideration of and reliance on oral evidence to determine claims, the Panel generally rejected claims lacking historical records confirming the existence of a trust fund account, and the approach to evidence was generally unfavourable to claimants where the records were inadequate.

For example, under the Original Guidelines, HSF had two similarly situated clients who were making claims under the ATFRS. They grew up in the same rural area in North West NSW and both had documents in their files which proved they were under the care of the Board and were sent out into domestic service. Both clients made statements to the ATFRS that they had never been paid for the work. Client 1 had correspondence in her file which showed she made inquiries with the Board in the 1950s in relation to her trust fund. There was no documentation of a final balance of her trust fund but it was possible to calculate what she should have been paid by reference to the regulations that set out wage rates for wards. The Panel made an award of $20,000. Client 2 did not have any documentary evidence that she had a trust fund and her claim was denied under the Original Guidelines.

It was consistently argued by PIAC, HSF, other law firms and advocacy groups that claims should focus on whether there was reliable circumstantial oral and/or documentary evidence to support findings that a claimant worked or was owed entitlements. In such circumstances the law mandated that a trust account should have been created.

Whilst Client 2's claim was reviewed and ultimately determined positively under the Revised Guidelines (which to some extent took account of the concerns expressed), by this stage Client 2 had passed away. Her descendants may have received the financial

[25] Public Service Board of NSW, *Aboriginal Protection: Report and Recommendations of the Public Service Board of New South Wales* (1940), page 19.

benefit of the claim but, more significantly, our client did not live to see that her evidence was ultimately accepted and considered sufficient in the eyes of the government.

In any reparations framework, primacy should be given to oral evidence. In light of deficiencies in the official contemporaneous written records, undue weight should not be given to documentary evidence. In some instances written records were not created when they ought to have been. Other records have been destroyed, lost or falsified, whether by Government agents or third parties.

Perhaps most significantly, the oral record has already been significantly depleted by the death of many Stolen Generations survivors. It is essential that it is widely acknowledged that the surviving records of the government are incomplete and they contain inaccuracies. This is important so that, when giving evidence, claimants do not feel limited to responding to that which is shown on the written record, and are willing to openly share their own knowledge of the events in question.

Given the acknowledged deficiencies with written records, there is scope for any reparations framework to incorporate an opportunity for Stolen Generations survivors to formally supplement records held about them by the Department of Aboriginal Affairs. The process could involve a statement in the individual's own words being added to the relevant files held by Aboriginal Affairs. See further **section 7** below.

All persons involved in any reparations framework would need to be trained in cultural competency and the impacts of trauma. There is grave potential for re-traumatisation of Stolen Generations survivors when telling their stories. This risk will be exacerbated unless evidence is taken in an environment of cultural and psychological safety. Regard should also be had to the potential for vicarious trauma for those supporting claimants and/or administering any reparations framework.

6.6 Descendant claims

In 2004 HSF collaborated with Women's Legal Services NSW to draft submissions during the consultation phase leading up to the establishment of the ATFRS. The primary focus of our submissions was the effect of intergenerational disadvantage on Indigenous communities and the need for any repayment scheme to extend to descendant claimants.

As noted above, one of the most significant changes made by the Revised Guidelines was the streamlining of the descendant claim provisions. In some respects the Revised Guidelines clarified practices in respect of descendants.

However, even under the Revised Guidelines if a descendant died before a decision was made, the claim did not pass to their estate. That is, the claim was extinguished. This was criticised as an unjust outcome for those descendants who are similarly likely to have suffered social and economic disadvantage as a result of intergenerational trauma.

It is critical that any reparations framework extends to descendants of Stolen Generations survivors in all facets (consultation, design, fact finding/truth telling and monetary compensation). Otherwise, the disadvantage suffered by Stolen Generations survivors will continue to be compounded and perpetuated through subsequent generations. In relation to intergenerational disadvantage, it has been commented that:

> *"Injustice can cast a long shadow. It harms not only its immediate victims. Descendants of these victims are likely to lack resources or opportunities that they would have had if the injustice had not been done, or to have been adversely affected in other ways by the suffering of their parents and grandparents, or by other more indirect social ramifications of the wrong."*[26]

[26] 'Taking responsibility for the past: reparation and Historical Injustice' by Janna Thompson, November 2002, Policy Press, page 104.

Further:

> *"What happened to their ancestors matters to people; recalling the injustices done to their family or community can cause distress. A history of injustices can be demoralising, destructive of esteem, or the cause of depression."*[27]

6.7 Informal and non-adversarial Panel hearings

The ATFRS was fundamentally an administrative as opposed to a statutory scheme. Its key characteristics included its speed, procedural flexibility, informality and a lack of accountability. For the most part, this was an unusual and relatively informal way to assess claims in terms of the individual claimant's experiences.

In speaking of the ATFRS at a hearing of the Senate Committee on Legal and Constitutional Affairs Inquiry into Indigenous Stolen Wages, Mrs Valerie Linow said:

> *"Going to the panel takes a load off you. If you went to court, it would be more traumatic. I thought the panel were going to knife me, but they were understanding and compassionate people. I did not realise that I was brought up in an environment where non-Indigenous people turn against Aboriginal people. I did not realise that there are people in this world who have an understanding towards Aboriginal people. I found that the panel was very good. It was easy for me."*[28]

In addition, informality and non-adversarial Panel hearings for the ATFRS were welcomed by claimants who felt empowered and understood. One lawyer acting for a claimant recalled that "*the informality and non-adversarial approach of the Panel meetings was good, and made a difference for the clients*".[29]

However, as reported by PIAC, for some claimants the experience was not a positive one. For example, in situations where a claimant was abused as a child. One particular client was dissatisfied with the ATFRS process, and PIAC considered this to mainly stem from the fact that, having travelled a long distance to attend her panel meeting, she did not feel comfortable enough to tell the Panel about the sexual abuse she had suffered as a child. Other claimants said they did not want to be judged by younger Aboriginal people.

Another lawyer noted:

> *"The experience was clearly daunting and stressful for my client. It was difficult for her to recount a period of her life that was so long ago and not a particularly happy time for her, before a group of people she did not know. She also had to travel over an hour to the Panel hearing. While my client did not say as much as I think she would have liked to have said during the hearing, she seemed more comfortable when one of the Panel members shared his experience of living in some of the rural areas of NSW that my client was familiar with. While time constraints may limit it, it may be useful for the Panel members to have a short conversation about other matters before commencing the main part of the hearing to make the claimant feel more comfortable."*[30]

One particular procedural concern in relation to the Panel procedure raised in PIAC's report, was the attendance of the original decision making ATFRS Unit members at Panel

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27 Ibid, page 106.

28 Public Interest Advocacy Centre Ltd, submission to the Hon John Watkins MP, Minister responsible for ATFRS, 'Settling Accounts: the effectiveness of the Aboriginal Trust Fund Repayment Scheme in addressing stolen wages in NSW'. 11 June 2008, (**PIAC submission**), pages 10-11.

29 Ibid, page 11.

30 Ibid, page 12.

hearings. As the Panel hearing was supposed to be a review process which was to some degree independent of the original decision, the attendance of the ATFRS Unit did not give this impression and was often considered inappropriate.

Overall however the fact that the ATFRS Unit and Panel were generally approachable and informal, and took a non-adversarial approach to resolving claims, was considered to be a positive aspect of the ATFRS.

Another positive aspect of the ATFRS Unit and Panel approach was that they showed a flexible approach in relation to liaising with other government departments. For example, in some cases, the ATFRS found that a trust fund existed but was administered by an agency other than the Aborigines Protection Board or Aborigines Welfare Board such as the Department of Community Services.

Any reparations framework needs to balance the need for accessibility and informality with the need for transparency, independence and consistency in decision making.

As noted above, an outreach model should be applied to any 'Panel' style hearings, rather than having claimants travel to a hearing located in Sydney CBD, which could potentially cause stress and hardship to the claimants.

6.8 Transparency

Under the ATFRS decisions and reasons were not published. Firstly, this made it difficult to understand any variation in the amount awarded between the interim assessment made by the ATFRS Unit and that made by the Panel. In HSF's experience this also made judging the value and likelihood of success of subsequent claims difficult. Furthermore, the fact that the evidence relied upon by the ATFRS Unit or Panel in coming to a decision was not identified detracted significantly from the perception of objectivity and fairness of decision makers and accountability of the ATFRS in general.

Decisions and reasons relating to the monetary compensation element of any reparations framework should be published (de-identified if necessary) to add to the certainty, transparency and accountability surrounding any scheme.

6.9 Quantum and consistency

A criticism of the operation of the ATFRS under the Original Guidelines was that it lacked consistency in awarding of payments. Consistency is important so as to not to engender inequity, confusion and resentment in the community as to how payments are awarded.

This was particularly acute in the case of Kinchela Boys Home. Some claimants were able to make successful claims and had documents to prove they had trust monies owed, yet other similarly situated claimants did not. This created a heightened sense of injustice since those 'brothers' who experienced those institutions together share a bond and do not readily distinguish their experiences from one another.

These inconsistencies were sought to be addressed under the Revised Guidelines by setting a streamlined payment amount of $11,000 and clearer rules of entitlement. In terms of the quantum of repayment, we understand that $11,000 was chosen as it was the average repayment under the Original Guidelines. The highest repayment for an HSF client under the Original Guidelines was $20,000, with most sitting under the revised $11,000 threshold.

The fact that under the Revised Guidelines the ATFRS no longer had to find a final account balance in every individual case opened the door to the greater exercise of discretion to allow claims in the interest of justice and equity even where there was little or no documentary evidence of a Trust Fund.

Our experience under the Revised Guidelines was that the ATFRS Unit and Panel did in fact shown a willingness to place greater emphasis on oral testimonies and to exercise greater discretion.

A significant number of our clients volunteered that they planned to spend their $11,000 payment on buying headstones to honour Elders passed.

In respect of monetary compensation within a broader reparations framework a suggested way of addressing the need for a consistent, streamlined approach and retaining some discretion in the amount awarded could be to have a 'common experience' base payment amount which a claimant is entitled to by reason of their removal. There could then be a further discretionary payment element with various aggravating factors increasing that payment up an incremental scale. Aggravating factors might include if the person suffered abuse, the length of time in an institution and age at removal.

Such a mechanism has the important function of recognising that not every Stolen Generations experience is the same, and true reparations should acknowledge and account for this. The tests for entitlement should adequately and fairly address the particularities of the individual injustice they are designed to redress. However it is important that any such sliding scale mechanism be clearly published and known to claimants to ensure transparency and certainty.

In this regard the experience from Canada is instructive, see further **section 13** below.

6.10 Timing

In HSF's experience of the ATFRS, many claimants were elderly, disadvantaged through limited education and with poor literacy levels. Many lived in regional and remote areas of NSW and had difficulties understanding and responding to the process within the limited time frame. Many wanted further information about their claims, before making a decision about whether to apply to remain under the Original Guidelines or Revised Guidelines (which limited claims to $11,000). The time frame did not always allow claimants sufficient opportunity to access or examine their records, to seek comprehensive advice from a lawyer or to consult with family members before making a decision.

For some claimants under the ATFRS, the process was very lengthy and time spent in processing claims meant that some claimants died before a decision was reached. For example, in HSFs' experience one client passed away before her direct claim was determined. Despite the fact that HSF had a statutory declaration from our client and her son could pursue the claim, the opportunity to supplement our client's evidence was lost by the fact that she passed away before it could be given.

Under both the Original Guidelines and Revised Guidelines of the ATFRS, there was a cut-off date for receipt of claims. This was found to disadvantage claimants who were unable to prepare a supported application quickly enough or did not learn about the ATFRS until late in the process.

It is important that any reparations framework strikes an appropriate balance between resolving claims in an expeditious manner and providing enough time for claimants to consider their claim and any evidence or other materials which they may present with their claim. The claim process should be designed to be as simple as possible. An accessible streamlined process is necessary to minimise disruption and emotional upheaval to claimants.

6.11 Call to action

Perhaps most significantly, the operation of the ATFRS in NSW from 2006 to 2012 represents a broader call to action. In the words of the former Aboriginal and Torres Strait Islander Social Justice Commissioner Mr Tom Calma:

> *"If NSW can provide reparation to those whose wages were stolen, why can't it do the same for the children who were stolen?"*[31]

[31] Tom Calma, 'Ten Years Later: *Bringing Them Home* and the Forced Removal of Children' Conference Customs House, Sydney, 28 September 2007.

7 Reparations - access to information and altering inaccuracies in personal records

7.1 Overview

As noted in section 4.3(a)above, access to personal and family records is an important element of the restitution and rehabilitation process. Access to personal records for members of the Stolen Generations, and the provision of a simple mechanism to correct inaccuracies in those records, forms an important part of the rehabilitation and 'truth telling' element of the reparations process.

The Family Records Unit of Aboriginal Affairs was established as part of the NSW government response to the Bringing Them Home Report to enable Aboriginal people, particularly members of the Stolen Generations, to access government records about personal and family histories. Through our work with Stolen Generations clients we have become familiar with the process of obtaining records from the Family Records unit under the 'Finding your Mob' Personal Family History application process.

On receipt of their records, concerns have been expressed by some of our clients about the tone, accuracy and completeness of the documents contained on their personal files. In addition, there is a significant level of concern around the possibility of family members seeking to access these unbalanced files in the future.

As part of the restitution and 'truth telling' aspect of any reparations framework it may be possible to create an accessible mechanism for individuals to formally amend or supplement their official files with their own personal stories.

We have identified a provision within existing legislative frameworks - in the Privacy and Personal Information Protection Act 1998 (NSW) (**PPIP Act**) – through which this may be achieved, enabling individuals to 'complete' the full picture of their life as reflected in their file. This mechanism is in fact currently being used by a number of NSW Government Departments and Agencies.

This could be a relatively low cost initiative which responds to a specific and widespread concern.

7.2 Significance of Family Records

Through our work with Stolen Generations survivors we have learned the significance that personal records hold for our clients and many other former wards of the state. In fact we have heard them being likened to a person's 'resume'.

In the case of Stolen Generations survivors, separated from their families and communities, the information contained on their records can play a part in informing their identity and helping them to make sense of their past.

Naturally, the information is also of a very personal and at times sensitive nature and it can be upsetting for the individuals concerned to read information on those files that they consider to be only one side of the story, not giving the complete picture. In addition to deficiencies in the official written records by way of incomplete, inadequate or missing information, personal files can often contain very distressing information.

This situation is problematic on two counts:

(a) First, at a **personal level**, having only the Board's account contained on the files and having that account go unaddressed, can cause serious distress for that individual and further compound the trauma they may have suffered. This is both for personal reasons but is also significant when family members of the Stolen Generations survivors seek to access their files in the future.

(b) Secondly, on a **historical** level. In that context it could be said that the information contained in those records reflects a particular social and historical perspective and by facilitating the records being supplemented it would enable the records to reflect a more full account of historical events that occurred during that era.

7.3 Significance of telling personal stories in the healing process

As noted above, the process of healing is a focus of many NSW government and other initiatives as a way to help to improve the lives of Stolen Generations survivors.

In addition to the role of making personal and family records and information easier to access, another path to healing identified in Federal and NSW government reports and initiatives is providing avenues and resources to assist people in telling their stories.

This value was recognised by the former NSW Minister for Aboriginal Affairs, Mr Dominello, in his approval of funding for Kinchela Boys Home Aboriginal Corporation to enable around 20 men who lived at the home to record and share their stories through film.

7.4 Potential framework for supplementing records

The PPIP Act applies to the release of records of the Board to authorised applicants (under s 14).

Under the PPIP Act, there is provision for individuals to apply for alteration of personal information (whether by way of corrections, deletions or additions) held about them by a NSW government agency.

Section 15 provides:

> A person may make an application to a public sector agency to make appropriate amendments to ensure the personal *information is accurate and* ***having regard to the purpose for which*** *the information was collected (or is to be used)…. is complete and not misleading.*

The key points to note are:

- the ability to amend records by the addition of material; and
- the specific mention of the "purpose for which the information... is to be used".

If the public sector agency is not prepared to amend personal information in accordance with a request, the agency must take reasonable steps to attach a statement provided by the individual of the amendment sought (s 15(2)).

It appears that these provisions are intended to give individuals some control over personal information that may be held about them by public sector agencies. This is of particular relevance to members of the Stolen Generations.

Our understanding is that the records no longer serve a government or administrative purpose beyond being a record of historical events.

One of the **fundamental purposes** of the records is to provide information to family members and descendants of the Stolen Generations survivors after that individual has passed away. Facilitating individuals being able to supplement their personal information would help to ensure the records are complete having regard to the purpose for which the information is to be used, being to allow family members to understand the complex social and historical picture of Stolen Generations survivors experiences.

7.5 Application process

There does not appear to be an existing mechanism to apply for this kind of alteration to personal information through the Aboriginal Affairs or Department of Education websites.

However, other NSW government departments provide links to application forms under section 15 of PPIP Act on their websites:

- Human Services/Community Services Division of the Department of Family and Community Services 'Application for Amendment of Personal Records' form[32]. We understand this application process was established at least in part to enable former wards of the state to access and alter information contained on personal records held by the Department of Family and Community Services.
- Other forms on NSW Government Department websites are called 'Amendment/Notation of Personal Records'[33] located on the Roads & Maritime Services website and 'Amendment of Personal Information Request Form'[34] located on the Department of Justice/Corrective Services NSW website.

A similar application form could exist for Stolen Generations members to supplement records held about them by Aboriginal Affairs.

The application process could involve a statement in the individual's own words being added to the relevant files held by Aboriginal Affairs. This would be the preferred option. Alternatively, a protocol could be established that such a statement be read together with the Aboriginal Affairs file. This would in effect 'complete' the records by allowing those people to give their personal account of events referred to on their file.

7.6 Practical matters

As a practical matter, we understand that there is no such thing as a static file relating to an individual, with all relevant documents held together in one archive location. On receipt of a Finding Your Mob application, files are pulled together from various sources at the point in time that an application is made. As such, the personal file an individual receives will not always be exactly the same; it has the potential to evolve over time. It is therefore conceivable that personal histories can effectively be 'added' to the virtual files.

As with all initiatives under any reparations framework, there is a need to provide for a simple, accessible process that can be brought into effect expeditiously. Many of the Stolen Generations survivors are elderly and/or infirm. If their personal experiences are not captured quickly, they may be lost forever. This would represent a profound loss at the family, community and national level.

7.7 Observations

The Bringing Them Home Report specifically contemplates personal stories being added to supplement individuals' official records by saying '*people may be entitled to write a statement correcting false information and have the statement put on their file.*'[35]

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32 Located at: http://www.community.nsw.gov.au/DOCSWR/_assets/main/documents/GIPA_AMENDMENT_FORM.PDF.

33 Located at: http://www.rms.nsw.gov.au/documents/about/forms/45062563-amendment-notation-of-personal-records.pdf.

34 Located at: http://www.correctiveservices.justice.nsw.gov.au/Documents/Related%20Links/information-access-and-privacy-unit/Forms/amendment-of-personal-information-request-form.pdf.

35 Bringing Them Home Report, above n 2, page 292.

The Bringing Them Home Report also supports the view that supplementing rather than altering is the correct approach: '*no information, even false information, can or should be deleted. There is much value in retaining even false information, as well as derogatory and racist language, so that the true quality of administration can always be understood.*'[36]

We suggest that this issue be addressed by the NSW government on an urgent basis (as an interim reparation) and before a final report is prepared in response to this Inquiry

[36] Ibid 292, 293.

8 Reparations - Consultation

8.1 Consultation

We wish to emphasise the need for genuine consultation of Stolen Generations survivors and support groups to occur on a culturally appropriate basis and time frame in order to develop an effective and impactful reparations framework. A reparations framework ought be responsive and not 'one size fits all'. We suggest that there is merit in exploring bespoke options to satisfy the specific needs of particular Stolen Generations stakeholder groups.

As noted above, we do not purport to speak for any of the members of the Stolen Generations in terms of how reparations should be framed. However, our work with certain stakeholder groups has made it clear that specific responses by the NSW government could address clear and present needs of particular communities.[37]

For example, our work with the Kinchela Boys Home Aboriginal Corporation has identified the potential to establish a funeral fund for members to be established which would be administered by the Corporation.

8.2 Funeral Funds

A key concern expressed by a number of our Stolen Generations clients is the ability to honour Elders and family members passed. This includes the costs of funerals.

As noted above, a significant proportion of our Stolen Generations clients spent the $11,000 payment received through the ATFRS process on headstones for their deceased loved ones. Honouring the memory of their brothers and sisters who pass plays an important role in the healing process and provides a level of communal honour and recognition which was absent during their childhood as members of the Stolen Generation. Our clients have informed us that it is a cause of great distress when former 'Kinchela Boys' and their families see their brothers pass on and are not able to adequately honour their memories. The Kinchela Boys Home Aboriginal Corporation has expressed an interest in establishing and managing a funeral fund for members and we suggest that this suggestion should be explored as part of this Inquiry.

A burial in Sydney can cost anywhere in the vicinity of $5,000-$10,000 and a cremation alone can cost upwards of $3,000. This is a significant expense at what is already an emotionally difficult time for family members and friends of Stolen Generations survivors. Many Stolen Generations survivors are also concerned about leaving their families with the burden of meeting costly funeral expenses.

There are currently various sources of possible funding support for funerals. These are complicated and not easy to navigate. Our clients have informed us that it is a source of significant hurt, stress and shame that they are left to 'scrounge around' these sources (and comply with significant 'red tape') looking for funds to provide their brothers and sisters with an appropriate and dignified funeral after all that they have been through as members of the Stolen Generations. In our submission the current sources of government funding for funerals do not adequately address the needs for recognition and remembrance required by survivors of the Stolen Generations.

We suggest that Government support for funerals for members of the Stolen Generations should be considered as part of the reparations framework. We also suggest that this

[37] This is consistent with United Nations Basic Principle 13: In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

issue be addressed by the NSW government on an urgent basis (as an interim reparation) and before a final report is prepared in response to this Inquiry.

As Committee Chair of this Inquiry, Ms Jan Barham MLC, stated at the recent PIAC forum at Parliament House, a final report is not likely for at least 15 months. Many members of the Stolen Generations are likely to pass during this time.[38] Ensuring, on an expedited basis, that appropriate funds are in place for funerals for members of the Stolen Generations would be a positive step towards rehabilitation and provide a tangible response by government to the distress and shame experienced by members of the Stolen Generations (and their descendants) when they bury their loved ones.

[38] To highlight this issue we note that, to date during 2015, 2 women from Cootamundra Girls' Home and 4 men from Kinchela Boys' Home have passed.

9 The right to reparations from a human rights perspective

9.1 Summary

The widespread, systematic and repeated removal of Indigenous children from their families and communities by the Aborigines Protection Board and later Aborigines Welfare Board (the **Board**), can properly be characterised as systemic discrimination on the basis of race and therefore constitutes a violation of human rights.

Even if 'well-intentioned' in some cases (when judged against contemporaneous social norms), the discrimination was systemic, carried out over a considerable period of time and repeated.

When human rights are violated by States this gives rise to a right to reparation:

> "*... the obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches. The principal right these victims are entitled to under international law is the right to effective remedies and just reparations*".[39]

Until an adequate and effective reparations framework is introduced by the NSW Government, these human rights abuses will remain unaddressed and the rights of the Stolen Generations survivors will remain unrecognised.

The human rights framework is an important means of measuring the NSW government response to Stolen Generations survivors. It reveals the inadequacies of the response to date and provides a checklist of elements necessary in future reparations policy and legislation. Set out below is a summary of international instruments and human rights law principles. We suggest that these principles are relevant to both items 1 and 2 of the terms of reference for this inquiry – i.e. as a measure of progress to date and the necessary elements of future reparations frameworks.

9.2 Systemic racial discrimination as a violation of international human rights law principles

There are various international instruments which impose obligations upon Australia in relation to the elimination of racial discrimination.

(a) United Nations Charter of 1945

Racial discrimination was recognised as contrary to international law pursuant to the establishment of the United Nations (**UN**) in 1945. The UN Charter, which Australia ratified in that year, provides that:

> "*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote*:
>
> ...
>
> (c) *universal respect for, and observance, of human rights and fundamental freedoms for all without distinction as to* ***race****, sex, language or religion*" (Article 55)

[39] van Boven, T, 1993: Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report submitted by Mr Theo van Boven, Special Rapporteur, UN Doc: E/CN.4/Sub.2/1993/8 paragraph 45.

(b) **Universal Declaration of Human Rights of 1948**

Article 1 of the 1948 Universal Declaration of Human Rights provides that: "*All human beings are born free and equal in dignity and rights*". Article 2 states that:

> "*Everyone is entitled to all the rights and freedoms set forth in this Declaration 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.*"

Furthermore, Article 8 states that:

> "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted...by the constitution or by law*"

The Universal Declaration set out a catalogue of human rights to which everyone is entitled without any distinction based on race. Indigenous Australian families and children under the auspices of the Board were arguably denied equal enjoyment of virtually all the rights recognised by the Universal Declaration.

(c) **International Convention on the Elimination of All Forms of Racial Discrimination of 1965**

The International Convention on the Elimination of All Forms of Racial Discrimination, finalised in 1965 and ratified by Australia in 1975, gave greater precision to principles that were already acknowledged as part of international law. Article 6 of the Convention provides:

> "*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*** *or satisfaction for any damage suffered as a result of such discrimination.*"

The Racial Discrimination Act 1975 (Cth) implements the International Convention on the Elimination of All Forms of Racial Discrimination into Australian law.

(d) **Observations**

It was clear from 1945 onwards that the prohibition of systemic racial discrimination and the right to an effective remedy for such breaches of human rights were both internationally recognised legal norms.

Notwithstanding the introduction of instruments such as the UN Charter, the Universal Declaration and the International Convention, Stolen Generations survivors are still awaiting meaningful reparations for the systematic removal of Indigenous children from their families and communities over decades. This failure is in breach of international legal norms. This breach is particularly reprehensible considering the number of Stolen Generations survivors who have passed away over recent years.

9.3 United Nations human rights principles – the van Boven report (1993)

Over the past 25 years the United Nations has been developing a set of basic principles and guidelines on the right to reparation for gross violations of human rights and humanitarian law (see Schedule 1).

The initial incarnation of these principles was drafted by Special Rapporteur Mr Theo van Boven, and attached to his 1993 report to the UN Commission which stated:

"1. *Under international law,* ***the violation of any human right gives rise to a right of reparation for the victim****. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the*

following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and ***systematic discrimination****, in particular based on* ***race*** *or gender."* [40]

The van Boven Report identified indigenous rights as an issue of special interest and attention:

> "*Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the* ***entitlement of indigenous peoples to compensation in the case of damages*** *resulting from exploration and exploitation programmes pertaining to their lands, and* ***in cases of relocation of indigenous peoples***."[41]

The van Boven Report concluded:

> "*It appears that large categories of victims of gross violations of human rights, as a result of the actual contents of national laws or because of the manner in which these laws are applied,* ***fail to receive the reparation which is due to them****. Limitations in time, including the application of statutory limitations; restrictions in the definition of the scope and nature of the violations; the failure on the part of authorities to acknowledge certain types of serious violations; the operation of amnesty laws; the restrictive attitude of courts; the incapability of certain groups of victims to present and to pursue their claims; lack of economic and financial resources: the consequence of all these factors, individually and jointly, is that the principles of equality of rights and due reparation of all victims are not implemented.*"[42]

In the context of Stolen Generations survivors in Australia it is an unfortunate reality that as a result of intergenerational trauma there has been a collective incapacity to present and pursue claims in a systematic fashion.

9.4 Principles and guidelines on the right to reparations

Around the same time as the Bringing Them Home Report in 1996, Special Rapporteur van Boven published a set of revised basic principles and guidelines on the right to reparation for gross violations of human rights and humanitarian law. These included the following relevant principles:

"1. *Under international law* ***every State has the duty to respect and to ensure respect for human rights and humanitarian law****.*

2. *The obligation to respect and to ensure respect for human rights and humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to* ***afford remedies and reparation to victims****. Particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law.*

...

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40 United Nations document number E/CN.4/Sub.2/1993/8 page 56.

41 Ibid, page 9. paragraph 17.

42 Ibid, page 49, paragraph 124.

Reparation

6 *Reparation may be claimed individually and where appropriate collectively, by the **direct victims, the immediate family, dependants** or other persons or groups of persons connected with the direct victims.*

7 *In accordance with international law, **States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations**. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. **Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.***

8 *Every State shall make known, through public and private mechanisms, both at home and where necessary abroad, the available procedures for reparations.*

9. *Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. **Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations**."*

Following further consultative meetings with interested states and NGOs, the Commission on Human Rights adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (**Basic Principles and Guidelines**).

On 16 December 2005, upon recommendation of the Third Committee, the United Nations General Assembly adopted the Basic Principles and Guidelines.[43] These are set out in full at Schedule 1 to this submission.

9.5 United Nations commentary on Australian Stolen Generations issues

Australia's failure to provide adequate reparations of members of the Stolen Generations has been noted by United Nations Committees and Rapporteurs who have drawn attention to this unresolved issue and urged Australia to comply with its international human rights law obligations.[44]

In April 2009, the United Nations Human Rights Committee released its concluding observations following a review of Australia's compliance with the International Covenant on Civil and Political Rights (**ICCPR**). The recommendations included the need to make adequate reparations to the Stolen Generations. The Committee urged Australia to establish a national compensation scheme.[45]

In August 2010, the UN Committee on the Elimination of Racial Discrimination released its concluding observations following a review of Australia's compliance with ICERD. The recommendations included the implementation of an appropriate compensation payment scheme to the Stolen Generations.[46]

In June 2010, UN Rapporteur James Anaya released a report on Australia's human right's record. He referred to the findings of the Bringing Them Home Report and stated that significant steps are required to implement the 54 recommendations of the Report

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43 Resolution 60/147, adopted without a vote. The Basic Principles and Guidelines are listed at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

44 James Anaya, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, 1 June 2010.

45 See CCPR/C/AUS/CO/5, 7 May 2009.

46 See CERD/C/AUS/CO/15-17, 13 September 2010.

and to move towards genuine healing and reparation. In particular, he concurred with the recommendation of the UN Human Rights Committee and stated that Australia:

> "*should adopt a comprehensive national mechanism to ensure that adequate reparation including compensation, is provided to the victims of the Stolen Generations policies*".[47]

James Anaya's recommendation is that the government should collaborate with the Australian Human Rights Commission to ensure that adequate remedies, including compensation, are provided as a matter of urgency to the Stolen Generations survivors.

The ICCPR is scheduled to the Australian Human Rights Commission Act 1986 (Cth) (the AHRC Act), and the Australian Human Rights Commission is responsible for monitoring Australia's compliance with the ICCPR. Since 1986, the Commission has had the powers to investigate alleged violations of the ICCPR, although it has no power of penalty or enforcement. The Commission also has other powers to monitor Australia's compliance with the ICCPR, including the power to examine whether federal legislation complies with Australia's obligations under the ICCPR.

The absence of an appropriate reparations framework for Stolen Generations, leaves the right to an appropriate remedy, as recognised under the ICCPR, unfulfilled in Australia.

9.6 United Nations Declaration on the Rights of Indigenous people (UNDRIP)

UNDRIP is an international instrument adopted by the United Nations on September 13, 2007, to enshrine (according to Article 43) the rights that "*constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world*". The Declaration is the product of almost 25 years of deliberation by United Nations member states and Indigenous groups.

The UNDRIP was adopted by 144 countries, with 11 abstentions and 4 countries voting against it. These four countries were Canada, the USA, New Zealand, and Australia. Over 2009 and 2010, Australia, New Zealand, Canada and the United States reversed their positions, and now support the UNDRIP.

Australia's official statement of support for UNDRIP in 2009, reversing its previous position, stated this decision was made in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians, building trust and moving forward toward a new future as well as showing our faith in a new era of relations between states and Indigenous peoples grounded in good faith, goodwill and mutual respect.

9.7 Observations

The Australian government should therefore uphold its in principle commitment to reparations:

> *"The Basic Principles…now provide a clear compilation of the international human rights law on reparations and specific guidance on implementation of these obligations. Importantly, the obligations contained within the Basic Principles, although not binding, do contribute to a growing 'reparations ethos' and subsequently, to the development of customary international law, but also because states, as voluntary actors in the international legal system, should act consistently with the principles they develop. Australia, has contributed to the development of international law reparations norms by becoming a signatory to the major international human rights instruments, by endorsing UNDRIP, and by*

[47] James Anaya, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, 1 June 2010.

consenting to a no-vote adoption of the Basic Principles in the relevant UN bodies."[48]

We suggest that the Committee should have close regard to the Basic Principles and Guidelines adopted by the United Nations General Assembly and develop a comprehensive and holistic response to the need for reparations for the Stolen Generations.

Any reparations framework to be applied in the context of Stolen Generations in NSW:

- Should adopt a holistic reparations framework that includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Basic Principles 19 to 23)
- Should be mindful of holistic needs regarding psychological care as well as legal and social services (Basic Principle 21)
- Should not restrict the ability to pursue a civil claim (Basic Principle 7)
- Should extend to family and descendants of the survivors in order to break the cycle of intergenerational disadvantage (Basic Principle 8)
- Should provide for individual access to factual information regarding the violations (Basic Principle 11)
- Should provide for a degree of broader public access to all NSW Government archives and records concerning the Stolen Generations as an integral part of the truth telling process (Basic Principle 24). This would need to be balanced with privacy concerns
- Should publicise the existence of any reparations framework in urban, regional and remote parts of NSW across a range of media (Basic Principle 12a)
- Should take measures to minimise inconvenience and trauma to survivors by operating on an outreach model (Basic Principle 12b)
- Should provide multi-faceted support systems for survivors and their families to address physical and psychological safety in light of the possibility of potential re-traumatisation and vicarious trauma (Basic Principle 12b)
- Should establish an effective and accessible legislative mechanism for making claims for reparations which extends to the heirs of claimants (Basic Principle 12d)
- Should include verification of the facts and full and public disclosure of the truth. The responsibility should be on the NSW Government to identify potential survivors on the basis of NSW Government records (Basic Principle 22)
- Should include an official declaration restoring the dignity, the reputation and the rights of survivors and persons closely connected with the survivors as well as a further public apology, including acknowledgement of the facts and acceptance of responsibility and commemoration and tributes to the survivors (Basic Principle 22)
- Should include an inclusion of an accurate account of history in educational materials at all levels (Basic Principle 22)

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48 Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, page 85.

10 Approaches in other jurisdictions – Tasmania

10.1 *Stolen Generations of Aboriginal Children Act 2006* (TAS)

Whilst all states have apologised to the Stolen Generations, only Tasmania has implemented legislation that specifically provides for *ex gratia* payments to be made to the Stolen Generations of Aboriginal Children due to their removal.

The Tasmanian *Stolen Generations of Aboriginal Children Act* 2006 (TAS) (**Tasmanian Act**) became operational on 15 January 2007.

Tasmania, Queensland and Western Australia have also introduced redress programs providing *ex gratia* payments for the abuse of children in institutional care wards of the state. It has been commented that Indigenous applicants constitute a large number of claimants under these processes, often around 50 percent. Nonetheless, only the Tasmanian Act provides redress for 'assimilative' policies that enabled the systematic wrongful removal of children from their families.[49]

10.2 Quantum

The Act established a $5 million Stolen Generations Fund to enable the Tasmanian Government to make *ex-gratia* payments to members of the Stolen Generations and their descendants.

Pursuant to section 11(1)(b), successful applicants shared equally in the amount remaining in the Stolen Generations Fund after the deduction of payments to descendants of the Stolen Generations (discussed further below).[50]

The amounts awarded were not assessed on the basis of individual experience or injury. Critics of this approach have argued that applicants with widely diverse experiences should not be awarded equal amounts of compensation. This reasoning accords with the UN Basic Principles which provide that reparations be '*proportionate to the gravity of the violation of the harm suffered*'.[51]

Recognising individual circumstances and experiences should be balanced against the risk of creating divisions and distress that may arise if Stolen Generations survivors perceive they have had a similar experience, yet received dramatically different outcomes.

Our observation in the context of the NSW ATFRS was that our clients placed equal, if not more, value on the recognition and acknowledgement of past wrongs than they did on amounts of monetary compensation.

10.3 Eligibility

There are 3 categories of eligibility (section 5):

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49 Stephen Winter, '*Australia's ex gratia redress*' (2009) 13(1) AILR, 49. See also, Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, page 90.

50 Of the 151 applications, 106 were found to be eligible for payment. Of those, 84 were survivors and 22 were the children of survivors. A further 45 claims were rejected. The 22 children shared $100,000 and the remaining $4.9 million was split equally among the 84 living applicants, giving them about $58,000 each. Joel Gibson, '*Tasmania pays $5m to stolen generations*', Sydney Morning Herald, 23 January 2008.

51 Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, 90 referring to UN Basic Principle 15.

Category 1:

Applies to Aboriginal persons who were removed from their families between 1935 and 1975 under the *Infants Welfare Act* 1935, the *Children, Young Persons and Their Families Act* 1997 or the *Children Welfare Act* 1960.

In addition, the person must have been alive on 16 October 2006, have remained a child or ward of the state for a continuous period of 12 months or more, and must not have been in the care of an Aboriginal family during that period.

Category 2:

Applies to Aboriginal persons who were removed while under the age of 18 years between 1935 and 1975 as a result of active intervention of a State Government agency.

Under this category the assessor must have been satisfied that the child was removed without the approval of their parents or that duress or undue influence was applied by a State agency to bring about the removal.

In addition, the person must have been alive on 16 October 2006, have remained a child or ward of the state for a continuous period of 12 months or more, and must not have been in the care of an Aboriginal family during that period.

Category 3:

Applies to living biological children of a deceased Aboriginal person who would have otherwise been eligible under Category 1 or 2 of the Act.

10.4 Definition of 'Aboriginal Person'

Section 3 defined an 'Aboriginal person' to be a person who satisfies *all* of the following criteria:

(1) Aboriginal ancestry;

(2) self-identification as an Aboriginal person; and

(3) communal recognition by members of the Aboriginal community.

The Stolen Generations Assessor, who was appointed to assess applications made under the Tasmanian Act, observed that in practice the issue of Aboriginality was a *'very difficult and sensitive issue in the assessment process'*.[52]

Further, the Stolen Generations Assessor noted that the *'communal recognition'* requirement was especially problematic for the Stolen Generations.[53] Often pre-existing communal recognition cannot be established because Aboriginal children were removed entirely from their Aboriginal community at a young age.

PIAC and AHRC estimated that at least 10% of the applications under the Tasmanian Act were rejected because the applicants could not satisfy the Stolen Generations Assessor of their Indigenous descent.[54] This was so even though the Stolen Generations Assessor said he believed all the applications to be 'genuine'.

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52 Department of Premier and Cabinet, Parliament of Tasmania, *Report of the Stolen Generations Assessor* (2008), page 15.

53 Ibid, pages 14-16.

54 Public Interest Advocacy Centre and Australian Human Rights Centre, Submission No 69 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Stolen Generations Compensation Bill*, 9 April 2008, page 16.

10.5 Descendants of the Stolen Generations

Under section 5(3)(b), 'a living biological child of a deceased person' who would have been eligible for an *ex gratia* payment is also eligible for an *ex gratia* payment.

Pursuant to sections 11(1) and 11(2), descendants of deceased members of the Stolen Generations are eligible for compensation payments up to $5,000 each, capped at $20,000 per family.

This section of the legislation has received approval on the basis that it "*recognises the relational and intergenerational impact of wrongful child removal and distributes economic resources in a manner that may strengthen communities*".[55]

However, limiting eligibility to biological children is potentially too narrow in scope as:

- it does not adequately reflect the close non-biological kinship structures within some Indigenous communities;
- it can be very difficult to prove identity and biological lineage in a Stolen Generations contexts where birth records can be absent, unreliable or inaccurate; and
- it will likely disadvantage the earliest members of the Stolen Generations, whose only surviving family may be their grandchildren and subsequent generations.

10.6 Exclusion of Persons Found Guilty of the Commission of an Offence

Sections 5(4) and 5(5) provide, respectively:

- If an applicant for an *ex gratia* payment was removed from his or her family as a result of being convicted of an offence, the applicant is not eligible for an *ex gratia* payment.
- Subsection (4) does not apply to an applicant who was convicted of being a neglected child under the *Infants' Welfare Act 1935* or the *Child Welfare Act* 1960.

In relation to the above sections, the Stolen Generations Assessor in Tasmania noted in his report that:

> *"When considering this issue, the Assessor examined the wording on the face of any court record to determine whether or not the removal resulted from a 'conviction' for an offence. In many cases where minor offences were involved, the Children's Court did not proceed to a formal conviction and the word 'conviction' did not appear on the record. In those cases, it was determined that Section 5(4) did not apply."*[56]

In a number of cases applicants who, aside from being convicted of being a neglected child, otherwise satisfied the remaining criteria of the Act, were eligible to receive *ex gratia* payments. We consider that there is some merit in this approach.

10.7 Time Period to Make an Application

Section 6(3) provides for a 6-month time limit to apply for an *ex gratia* payment. The Act did not provide for any extensions of time to apply.

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55 Stephen Winter 'Australia *Ex Gratia* Redress' (2009) 13(1) *Australian Indigenous Law Review* 49, page 55.

56 *Report of the Stolen Generations Assessor* above n 2, page 14.

The 6-month time limit was explicable in the context of the Tasmanian Act as there was a finite $5 million Stolen Generations Fund. The time limit in the Tasmanian Act therefore had to balance two competing interests: allowing sufficient time for applicants to make an application, whilst ensuring that the time limit imposed did not unduly delay the making of payments.

The application period has drawn criticism from some commentators who regarded it as unnecessarily short, especially since the duration of the application process is also relevant to its awareness raising and educational capacity.[57]

There are several reasons why a longer period of engagement may be necessary in the NSW Stolen Generations context, including:

- the greater number of potential applicants;
- time required in order to obtain documentation and/or establish identity;
- the historically fraught relationship between Stolen Generations survivors and authorities including the related suspicion and mistrust of government programs;
- a not insignificant number of Aboriginal people suffer from mental health issues as well as issues related to drug and alcohol abuse;
- the process of applying for reparations can often be traumatic for survivors who may need more time to emotionally prepare for the experience; and
- many Aboriginal people will need to travel long distances given that it is not uncommon for Aboriginal communities to be located in remote areas.

A longer application period allows for an extensive outreach program to ensure that the relevant Stolen Generations survivors and communities are properly informed.

In the context of the NSW ATFRS, applications were open from 2006 to 31 May 2009. There were still potential applicants who were not aware of the ATFRS due to their remote location and/or the various impacts of trauma including mental health issues, drug and alcohol dependency and/or incarceration.

It would seem prudent to make provision for a discretion to extend the time period for applications in appropriate circumstances. Delays in making an application could arise for any number of legitimate reasons, as outlined above.

10.8 Stolen Generations Assessor

Under section 15 of the Tasmanian Act, the Stolen Generations Assessor was empowered to determine applications for an ex gratia payment.[58] The Tasmanian Premier appointed the Hon. Ray Groom AO as Stolen Generations Assessor in December 2006.[59]

Mr Groom was a former Premier of Tasmania and so had a considerable public profile within Tasmania. There were a number of perceived advantages regarding the appointment of Mr Groom. These included the consistency in decision-making that flowed from having a single person consider and decide all applications, the additional publicity that the scheme attracted by having someone of Mr Groom's stature appointed as Stolen

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57 Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, 89.

58 *Stolen Generations of Aboriginal Children Act 2006* (Tas) s 15.

59 *Report of the Stolen Generations Assessor* above n 2, page 2.

Generations Assessor,[60] and the insight and understanding that Mr Groom developed in his role and which is captured in his reflections on the Act.[61]

That said, for reasons noted above in respect of the NSW ATFRS, decision making and administration should involve Indigenous participation where possible. The appointment the Hon. Ray Groom AO may have lacked cultural legitimacy for some commentators.

A common criticism of the Tasmanian Act is that it did not allow for public hearings at a local level or other means of public disclosure.[62] The healing effect of a reparations framework that provides Stolen Generations survivors with an opportunity to share their stories and that truly acknowledges their pain and suffering through a process built around listening and understanding will be more effective at healing at an individual, community and national level.

For that reason, a Tribunal or panel model comprised of both high profile Indigenous and non-Indigenous members may be the most appropriate and effective forum in which Stolen Generations survivors could tell their story and have their experiences acknowledged.

10.9 Time for Deciding Applications

Section 8 provides that the Stolen Generations Assessor '*must make his or her decision in relation to eligibility for ex gratia payments within 12 months after the commencement of the Act*'. Given that applicants had up to 6 months in which to make an application under the Tasmanian Act, this meant that the Stolen Generations Assessor could have had as little as 6 months in which to make a decision with respect to an application.

The timeliness of decision-making is particularly important in a context where many of the applicants may be elderly or experiencing financial difficulties. A fixed timeframe for the making of decisions provides certainty for applicants and reduces the scope for undue delays in the decision-making process.

10.10 Review

The decision of the Stolen Generations Assessor in relation to an application was final and not subject to review, judicial or otherwise (section 13).

In a Stolen Generations context difficult and complex distinctions sometimes need to be drawn on the basis of eligibility. The absence of any avenue of review or appeal is potentially problematic.

In the Tasmanian context of a 'Stolen Generations Fund', each individual decision on eligibility had the potential to impact upon quantum of compensation paid to all other applicants. A protracted review or appeals process would have had the potential to delay all payments.

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60 Tasmanian activist and lawyer Michael Mansell commented that Tasmanian Aborigines had great respect for Mr Groom, who was premier from 1992 to 1996 and introduced land rights legislation in 1995, two decades after it was passed on the mainland. Joel Gibson, '*Tasmania pays $5m to stolen generations*', Sydney Morning Herald, 23 January 2008.

61 *Report of the Stolen Generations Assessor* above n 2, page17.

62 Ramona Vijeyarasa, 'Facing Australian History: Truth and Reconciliation for the Stolen Generations' (2007) 7 *International Journal on Human Rights* 127, 137; Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, page 89.

10.11 Observations

Tasmania remains the only state that has legislated specifically to compensate for removal.

However, Tasmania adopted a narrow framework exclusively concerned with payment of a fixed fund of $5 million of monetary compensation. The Tasmanian Act did not address the broader elements of a holistic reparations framework. Specifically, it did not include:

- any contextual preamble or other words of acknowledgement;
- any commitment to commemoration at a community or national level;
- provisions relating to access to information or documentation;
- public hearings or any other initiatives geared towards healing at an individual, community or national level; or
- any measures designed to guarantee against non-repetition.

11 Approaches in other jurisdictions - South Australia

11.1 Introduction

On 15 October 2014, the Hon Terry Stephens MLC introduced the Stolen Generations (Compensation) Bill 2014 (**SA Bill**) into the Legislative Council. The SA Bill provides for *ex gratia* payments to be made, on application, to certain Aboriginal persons who were removed from their families prior to 31 December 1975, or their biological children where such persons are deceased.

On 4 December 2014, the SA Bill was received by the House of Assembly having been passed by the Legislative Council.

On 18 December 2014, the South Australian Parliament was prorogued. As a result, the SA Bill lapsed.

We outline below the main provisions of the SA Bill and relevant commentary.

11.2 Scope

The SA Bill opened with a Preamble including words of acknowledgement:

1. *The Parliament of South Australia recognises that:*

   (a) former State and Commonwealth policies condoning or encouraging forcible removals were racist and caused emotional, physical and cultural harm to the Stolen Generations; and

   (b) Indigenous children should not, as a matter of general policy, be separated from their families; and

   (c) *The distinct identity of the Stolen Generations should be recognised.*

2. *In further recognition of the experiences of members of the Stolen Generations, and the impact of that experience on them and their families, it is the intention of the Parliament of South Australia to make ex gratia payments to eligible members of the Stolen Generations and their children.*

11.3 Quantum

Pursuant to section 8(1)(a), the SA Bill provides that the Minister may make an *ex gratia* payment not exceeding $50,000.

The payment structure contemplated under the SA Bill is for:

- a lump sum payment of up to $50,000 in recognition of the experience of being a member of the Stolen Generations and the impact of that experience; or
- a payment of an amount of $5,000 for each year, or part of a year, during which the applicant did not live with his or her family as a consequence of being forcibly removed (up to $50,000).

11.4 Eligibility

Under section 6(1), a person is eligible for an *ex gratia* payment if he or she:

- is an Aboriginal person who was, as a child, removed from his or her family prior to 31 December 1975 (where the removal was carried out, directed or condoned by the State government or an agent of the State government); or

- is the biological child of a deceased person contemplated by the above paragraph.

Section 6 also contains exclusionary criteria, such that a person will not be eligible for an *ex gratia* payment:

- 'unless he or she is living' at the time the Act comes into operation: s 6(2);
- 'if the Minister determines that the person's removal from his or her family was genuinely in the person's best interests': s 6(3); or
- 'if the person's removal from his or her family arose out of the person having been found guilty of the commission of an offence': s 6(4).

11.5 Descendants of the Stolen Generations

Under section 6(1)(b), 'the biological child of a deceased person' who would have been eligible under section 6(1)(a) is also eligible for an *ex gratia* payment.

We note that under section 8(2), *ex gratia* payments to the biological children of a particular deceased person are to be capped at $50,000.

If this provision were extended more broadly to living descendants, it is arguable that this would give rise to difficulties in administering payments. Subject to a limitation on the time to apply, the amount payable to each individual descendant would not be known until all descendants had come forward.

A limitation period in respect of descendants' claims may be desirable as it would balance the need to ensure eligible claimants are given an opportunity to register their claims with the need to ensure claims are paid in a timely manner. A similar process was applied in the 2009 Guidelines for the NSW Aboriginal Trust Fund Repayment Scheme.

11.6 Removal for a Person's 'Best Interests'

Under section 6(3), a person will not be entitled to an *ex gratia* payment under the SA Bill if the Minister determines that the person's removal was 'genuinely in the person's best interests'.

While the phrase 'best interests of the child' is used in a number of contexts (particularly in the family law context), the phrase has the capacity to produce perverse outcomes. For example, the language of 'best interests' of the child was commonly used to justify removal of children during the periods of the Stolen Generations, when in fact children were removed due to a fundamental misunderstanding and disregard for Indigenous traditions and culture. Including a subjective assessment of merit based on 'best interests' in the reparations framework risks re-victimising members of the Stolen Generations. We note the comments of Kent Roach, a special advisor to the Canadian Truth and Reconciliation Commission, in relation to this provision of the SA Bill:

> *"Forced assimilation was based on the racist idea that removal from Indigenous families and culture was often in the child's best interests. This provision unfortunately replicates such colonial conceits."* [63]

11.7 Exclusion of Persons Found Guilty of a Commission of an Offence

Under section 6(4), a person whose 'removal from his or her family arose out of the person having been found guilty of the commission of an offence' will not be eligible for an *ex gratia* payment.

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63 Kent Roach, 'Australian states can do better for the Stolen Generations', The Conversation.Com, November 14, 2014.

We consider section 6(4) may be cast too broadly in two respects:

- first, it may inadvertently exclude persons who were removed on the grounds that they were 'destitute' or 'neglected', definitions that may have been applied to the detriment of Aboriginal children due to a lack of respect for understanding of Aboriginal culture and traditions; and
- second, by using the language of 'commission' of an offence, as opposed to 'conviction', an applicant may be deprived of an *ex gratia* payment even where they were removed due to a minor or trifling offence.

11.8 Rules of evidence

In determining whether an applicant is eligible the Minister is not bound by rules of evidence and may inform himself or herself on any matters as he/she thinks fit (section 8(4)). Further, the Minister must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

This informal approach to procedure maximises the scope of information available to the Minister and allows appropriate weight to be accorded to oral evidence.

11.9 Time Period to Make an Application

Under section 7(3), an application 'must be made within 6 months of the commencement of this section'. The SA Bill does not provide for any extensions of time.

As discussed above, this time limit does not take into account the particular problems of evidence gathering from remote communities and the difficulties in obtaining records from this period.

11.10 Relevant decision-maker

Under section 4, the Minister has the function of determining 'whether an applicant is eligible for an *ex gratia* payment under this Act and, if so, to determine the appropriate amount of the payment'. Section 5 allows the Minister to delegate this function.

Again, it should be note that decision making and administration under any reparations framework should involve Indigenous participation where possible.

11.11 Time for Deciding Applications

The SA Bill does not impose a time limit on the Minister or his or her delegates in which to decide applications.

11.12 Review

A review of the decision of the Minister falls within the review jurisdiction of the Tribunal under section 34 of the *South Australian Civil and Administrative Tribunal Act* 2013 (section 12(2)).

In contrast to the Tasmanian Act, this approach is not problematic as the SA Bill does not contemplate a finite fund that is equally divisible between eligible applicants.

11.13 Observations

Although certain elements of the draft SA Bill are problematic (as discussed above), it represents an improvement on the Tasmanian Act in the following key respects:

- the preamble contains language of acknowledgement;
- an informal approach to procedure maximises the scope of information available to the Minister and allows appropriate weight to be accorded to oral evidence;
- compensation payments would take account of individual factors with more than one methodology for calculating quantum;
- compensation payments would not be based on a finite pool of funds. This avoids the difficultly that delay in one application impacts all applicants and time frames are therefore expressed to be narrow; and
- decisions are expressly subject to administrative review.

12 Approaches in other jurisdictions – Federal

12.1 Overview

The Federal Parliament has not enacted a reparations scheme for survivors of the Stolen Generations. However, there have been two private member Bills that were introduced into the Senate on the subject:

- the Stolen Generations Compensation Bill 2008 introduced by Senator Andrew Bartlett and which was the subject of an inquiry by the Standing Committee on Legal and Constitutional Affairs; and
- the Stolen Generations Reparations Tribunal Bill, versions of which were introduced by Senator Rachel Siewert in 2008 and 2010.

While this is a NSW inquiry, and we consider that the issue warrants a bespoke state-based response, we set out briefly the key elements of the two Bills.

12.2 Stolen Generations Compensation Bill 2008

The Stolen Generations Compensation Bill 2008 (**2008 Bill**) proposed a compensation model for ex gratia payments to be made to survivors of the Stolen Generations. In particular, the 2008 Bill provided for:

- an application process and eligibility criteria for receipt of ex gratia payments;
- the establishment of a Stolen Generations Fund out of which ex gratia payments would be made; and
- the establishment of a Stolen Generations Tribunal to consider applications for ex gratia payments.

The 2008 Bill was a significant contribution to the debate surrounding the best approach to provide reparations to survivors of the Stolen Generations. However, in our view, the 2008 Bill in providing for a compensation-only model, was one-dimensional in its approach to reparations.

Eligibility criteria

Under the 2008 Bill, eligible applicants included:[64]

- Aboriginal or Torres Strait Islander persons who were subject to the Aborigines Ordinance (1911 or 1918) and were removed from their family;
- Aboriginal or Torres Strait Islander persons who were not subject to the Aborigines Ordinance 1911 or 1919, but were subject to similar legislation which resulted in their being forcibly removed from their family prior to 31 December 1975;
- Aboriginal or Torres Strait Islander persons who were removed from their families prior to 31 December 1975, were under the age of 21 years at the time of their removal and who the Tribunal is satisfied were subject to duress by a state agency as a consequence, in whole or in part, of race-based policies operating at the time;

64 Stolen Generations Compensation Bill 2008 (Cth), cl 5.

- Aboriginal or Torres Strait Islander persons who were subject to the Aborigines Ordinance 1911 or 1918 or similar legislation which permitted forcible removal of children from their family; and
- Aboriginal or Torres Strait Islander persons who are living descendants of a deceased person who would have satisfied one of the preceding criteria.

Amount of ex gratia payments

The amount of an ex gratia payment in respect of an applicant was capped at $20,000 for a "common experience payment" and $3,000 for each year of institutionalisation.[65]

Other notable aspects of the 2008 Bill

Other notable aspects of the 2008 Bill included:

- a 7-year time limit for the making of an application;[66]
- a requirement that the Tribunal determine applications within 12 months;[67] and
- expressly providing for judicial review of decisions of the Tribunal.[68]

Report of the Standing Committee on Legal and Constitutional Affairs

While the Standing Committee recommended that the 2008 Bill not proceed in its current form, the Committee noted that other compensation models, such as the Canadian Indian Residential Schools Scheme and a reparations tribunal model proposed by PIAC *"might provide valuable frameworks for consideration in the development of any reparations scheme"*.[69]

12.3 Stolen Generations Reparations Tribunal Bill

The Stolen Generations Reparations Tribunal Bill (**Reparations Tribunal Bill**), versions of which were introduced into the Senate in 2008 and 2010, provided for the establishment of a Stolen Generations Reparations Tribunal with broad-ranging powers. In so doing, the Reparations Tribunal Bill sought to give effect to a number of stated principles including that "*reparation for the effects of forcible removals should be guided by the van Boven Principles*".[70]

Functions of the Tribunal

Under the Reparations Tribunal Bill, the Stolen Generations Reparations Tribunal was to consist of a Chair and 6 other members, at least 3 of whom would be Aboriginal or Torres Strait Islander persons.[71] The functions of the Tribunal included:[72]

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65 Stolen Generations Compensation Bill 2008 (Cth), cl 11. While the text of proposed section 11 of the 2008 Bill appears to suggest that these monetary caps only applied to descendant claims, the Explanatory Memorandum to the 2008 Bill indicates that the caps were intended to apply to all eligible applicants: see Explanatory Memorandum to the Stolen Generations Compensation Bill 2007.

66 Stolen Generations Compensation Bill 2008 (Cth), cl 6(3).

67 Ibid cl 8.

68 Ibid cl 13.

69 Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Stolen Generation Compensation Bill 2008* (2008), 47 – 48.

70 Stolen Generations Reparations Tribunal Bill 2008, cl 5(e); Stolen Generations Reparations Tribunal Bill 2010, cl 5(e).

71 Ibid, cl 6.

72 Ibid, cl 10.

- deciding whether a claimant was eligible for reparation or an ex gratia payment;
- deciding on the appropriate reparation and appropriate amount of any ex gratia payment to be made in response to a claim;
- providing a forum and process for truth and reconciliation by which Indigenous persons affected by forcible removal policies could tell their story, have their experience acknowledged and be offered an apology;
- considering proposed legislation referred to the Tribunal and reporting on whether the proposed legislation or any of its provisions would be contrary to certain stated principles; and
- inquiring into prejudicial policies and practices.

Forms of reparation

Under the Reparations Tribunal Bill, the Tribunal could award reparation in the form of:[73]

- funding for Stolen Generations groups to provide culture and history centres, or healing centres;
- funding for community education programs about the history of forcible removals;
- funding for community genealogy projects for Indigenous communities to help identify membership of the Stolen Generations and their dependants;
- monetary payments for individuals to meet current needs such as funding to travel to see family;
- funding for access to appropriate counselling services, health services, or language and culture training;
- funding for memorials that appropriately reflect the views of members of the Stolen Generations;
- monetary compensation; or
- any other form of reparation the Tribunal considered appropriate.

The Reparations Tribunal Bill separately empowered the Tribunal to award ex gratia payments to eligible claimants. The ex gratia payments were capped at $20,000 for a common experience payment and $3,000 for each year that a child was removed from his or her family and community while under the age of 18 years.[74]

Eligibility for an ex gratia payment or reparations

Under the Reparations Tribunal Bill, eligible claimants for reparations or an ex gratia payment included:[75]

- a person who was, as a child, removed from his or her family under legislation that applied specifically to Aboriginal or Torres Strait Islander persons;
- an Aboriginal or Torres Strait Islander person who was, as a child, removed from his or her family prior to 31 December 1975, if that removal was carried out, directed or condoned by an Australian government or an agent of an Australian government; or
- an Aboriginal or Torres Strait Islander person who is:

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73 Ibid, cl 28.

74 Ibid, cl 29.

75 Ibid, cl 30.

- a living descendant of a deceased person who would have satisfied the preceding criteria; or
- a relative, family member or descendant of a person who would have satisfied the preceding criteria and who the Tribunal is satisfied suffered or was harmed as a consequence, in whole or in part, of the removal of that person from his or her family.

The Reparations Tribunal Bill also allowed for joint claims for reparation.

Other notable aspects of the Reparations Tribunal Bill

Other notable aspects of the 2008 Bill included:

- a 10-year time limit for the making of an application;[76]
- a requirement that the Tribunal determine applications within 12 months;[77]
- granting the Tribunal power to *"do all things necessary or convenient to be done to perform its functions"* including obtaining information from Australian governments and government agencies.[78] The Tribunal could exercise its powers notwithstanding any other Australian government legislation relating to the confidentiality or privacy of information;[79] and
- expressly providing for judicial review of decisions made by the Tribunal.[80]

Observations

Although neither Bill progressed and, in our submission, a State-based response is preferable in order to be tailored to the specific needs of NSW survivors of the Stolen Generations, we note the following in relation to the Federal approach to reparations:

- The 2008 Bill was narrow and one-dimensional in its focus providing only for monetary compensation but the Standing Committee did observe that the Canadian model (discussed below at **section 13**) and a reparations tribunal model proposed by PIAC were worthy of consideration.
- The Reparations Tribunal Bill had a broader focus and expressly acknowledged that a reparations framework should be based on van Boven principles and include elements of apology, healing, community awareness, counselling and public acknowledgment in addition to monetary compensation to survivors and their descendants. The scheme had a realistic timeframe and decisions were reviewable.

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76 Ibid, cl 22(3).

77 Ibid, cl 31.

78 Ibid, cl 13(1).

79 Ibid, cl 13(3).

80 Ibid, cl 32.

13 Approaches in other jurisdictions – Canada

13.1 Overview

The reparations framework in Canada comprised a range of different initiatives – broadly spanning from 1996 - 1998 with the Royal Commission (and the Government's report in response) through to the commencement of the Indian Residential Schools Settlement Agreement in 2007.

The focus of much of the Canadian approach has been in response to the institutionalisation of Aboriginal children in the Residential School system[81] The system had strong parallels with the experience of the Stolen Generations in Australia so an analysis of the effectiveness of the government approach to reparations is instructive.

13.2 Canadian Indian Residential Schools system

The Residential Schools system was established in the period following the introduction of the Indian Act in 1876 and operated until the late 20th century. The system operated in partnership between the Government of Canada,[82] which funded the network of schools, and a number of church groups that administered the schools. The schools operated in all Canadian provinces and territories except Prince Edward Island, New Brunswick, and Newfoundland.[83]

The Residential Schools system operated along assimilationist principles and has strong parallels with the experience of the Stolen Generations in Australia. The Residential Schools system separated Aboriginal children from their parents, families and communities and by doing so weakened their identity, depriving them of their familial bonds, culture and ancestral languages. The children (known as 'survivors') were often subjected to poor living conditions, malnutrition, manual labour and received inadequate education. Many suffered physical and sexual abuse by staff – both clergy and lay staff – as well as other students.

Children between the ages of 4 and 16 attended Indian residential schools. Over the course of the system's existence, an estimated 150,000 were placed in residential schools nationally.[84]

There are 139 Indian residential schools identified within the Indian Residential School Settlement Agreement.

13.3 The Royal Commission on Aboriginal Peoples (RCAP)

In Canada, Aboriginal peoples are divided into 3 broad groups, although there are many diverse cultures and languages within these: First Nations (often referred to as 'Indian'), Inuit (northern people formerly referred to as 'eskimos'), and Métis (people of mixed French and Indian blood who originally settled in western Canada).

In 1991 the Canadian Government convened a Royal Commission on Aboriginal Peoples (RCAP) in response to growing community discontent at the treatment of Aboriginal people. Conflicts such the Oka Crisis, a dispute over the proposed expansion of a golf

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81 There have been other agreements entered into between the Canadian Government and various Aboriginal groups focussed on reconciliation.

82 Department of Indian Affairs. After 18 May 2011 called Aboriginal Affairs and Northern Development Canada.

83 Statement of apology to former students of Indian Residential Schools (11 June 2008), the Prime Minister of Canada, the Right Honourable Stephen Harper.

84 Ibid.

course and property development on traditional land, played an important role in the Commission's establishment.

The Royal Commission's objective was to:

> '*investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Metis), the Canadian government, and Canadian society as a whole.*'[85]

The commissioners appointed to the Royal Commission examined a wide range of issues arising from the historical relationship between Aboriginal and non-Aboriginal Canadians including the Indian Act, land rights, and fundamental considerations for any future relations such as treaties, governance, lands and resources and economic development.[86]

RCAP visited 96 communities, conducted 178 days of public hearing, heard from 1,400 witnesses[87] and consulted large numbers of experts, commissioned research studies, and reviewed many past inquiries and reports. A consistent theme arising from this process was the trauma suffered by many through operation of the Indian Residential Schools.

In November 1996, the Royal Commission released a *Report of the Royal Commission of Aboriginal Peoples* which included a number of recommendations. In relation to Indian Residential Schools, their recommendations included remedial action by governments and the responsible churches including: issuing apologies; compensating communities to design and administer programs that help the healing process and rebuild their community life; and funding for treatment for individuals and their families.[88]

In January 1998, the Government of Canada responded to the Commission's recommendations with a number of initiatives under the title *Gathering Strength – Canada's Aboriginal Action Plan*[89] which starts with a 'Statement of Reconciliation' acknowledging past mistakes and injustices. It also established the Aboriginal Healing Foundation.

13.4 Aboriginal Healing Foundation (AHF)

The Canadian Aboriginal Healing Foundation (AHF) was incorporated on 31 March 1998 as a not for profit private corporation, established by the Canadian Government in response to the Royal Commission into Aboriginal peoples.

The AHF's mission was to:

> ..... "*encourage and support Aboriginal people... in building and reinforcing sustainable healing processes that address the legacy of physical, sexual,*

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85 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission of Aboriginal Peoples* (1996) Volume 1 - Looking Forward Looking Back. Available on the Government of Canada, Aboriginal Affairs and Northern Development Canada website: http://www.aadnc-aandc.gc.ca/eng/1307458586498/1307458751962

86 Ibid, Volume 1,Volume 2.

87 DeGagné, Michael, Implementing reparations: International Perspectives, speech delivered by Executive Director, The Aboriginal Healing Foundation to national conference Moving Forward - achieving reparations for the stolen generations held on 15 & 16 August 2001 in Sydney. Hosted by the Australian Human Rights Commission, the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Public Interest Advocacy Centre (PIAC).

88 *Report of the Royal Commission of Aboriginal Peoples,* above n 85,Volume 1 - Looking Forward Looking Back , Part Three 'Building the Foundation of a Renewed Relationship', Appendix E Summary of Recommendations in Volume 1.

89 Government of Canada, Minister of Indian Affairs and Northern Development, Gathering Strength: Canada's Aboriginal Action Plan (1997).

mental, cultural, and spiritual abuses in the residential school system, including intergenerational impacts".[90]

The AHF was granted a lump sum of **$350 million** and an 11 year mandate.[91]

At incorporation there was an interim board composed of 9 members who signed the funding agreement they had negotiated with the federal government. From June 1998, the AHF was governed by a 17-member Board of Directors made up of Aboriginal people appointed by Aboriginal political organisations, the federal government and Aboriginal communities.[92] The AHF was also largely staffed by Aboriginal employees.

Aimed at self-empowerment through Aboriginal-designed and directed programs (not just program delivery), the AHF granted funding to community based healing initiatives for use in developing and delivering programs and services for survivors of the Residential Schooling system. The projects ranged from media and other creative and cultural projects to therapeutic services such as counselling and healing circles as well as education and training. They also undertook research studies and organised regional 'gatherings' to discuss particular ideas, initiatives or call for proposals. By the end of its operation the AHF had approved 1,345 grants.[93]

A further $40 million was granted to the AHF in 2005 as well $125 million under the Indian Residential Schools Settlement Agreement in 2007. These funds were used to extend existing projects.[94] In addition to funding from the Government, and the interest generated on those funds, the AHF also received close to $15 million from the Catholic Entities[95], through the Indian Residential School Settlement Agreement.

The Aboriginal Healing Foundation ceased operation on 30 September, 2014.[96]

13.5 Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools

In November 2003, the Government formally launched a Dispute Resolution (ADR) process to compensate survivors of the Residential School system, as recommended in the Royal Commission's report and in fulfilment of the Government's Statement of Reconciliation.

It signed agreements with a number of church groups outlining how each was to contribute to the funding of compensation for claims of physical and sexual abuse.

The Dispute Resolution process created 2 bases of settlement according to the nature of injuries and/or abuse.[97] Following introduction of the Indian Residential Schools

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90 Quoted in Spear, Wayne K, Full Circle: The Aboriginal Healing Foundation & the Unfinished Work of Hope, Healing & Reconciliation (2014). Published by the Aboriginal Healing Foundation, 130.

91 Aboriginal Healing Foundation website (now archived version): http://www.ahf.ca/, FAQs

92 Spear, Wayne K, Full Circle: The Aboriginal Healing Foundation & the Unfinished Work of Hope, Healing & Reconciliation (2014), 36.

93 Aboriginal Healing Foundation Annual Report (2014), page 4.

94 Ibid.

95 Ibid, page 16.

96 Aboriginal Healing Foundation (AHF) website (now archived version): http://www.ahf.ca/, FAQs.

97 Category 'A' applied to claims for physical abuse with injuries lasting more than 6 weeks or requiring hospitalization or serious medical treatment and sexual abuse, or both. Total compensation was capped at $245,000 if the abuse occurred in British Columbia, the Yukon or Ontario and $195,000 if the abuse occurred any of the other provinces or territories. The cost of future care was capped at $25,000. For cases of 'serious' physical and sexual abuse, the amount of compensation was calculated by awarding points depending on the severity and consequences of the injuries. See: Allard, Violet A, A Different Kind of Advocacy: Indian Residential Schools Resolution Canada Alternative Dispute Resolution Process (24 April, 2006), page 5.

Settlement Agreement (discussed below), the Government announced it would no longer be taking Dispute Resolution applications after 21 March 2007.

13.6 Indian Residential Schools Settlement Agreement (IRSSA)

(a) Background and approach to IRSSA

In November 2003, the Assembly of First Nations released a *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*. It outlined its criticisms of the Dispute Resolution process and detailed recommendations for a system of 'fair and reasonable compensation' and for 'truth-telling, healing and public education'.

These recommendations provided the backdrop to a wide-ranging agreement between the Canadian Government, Assembly of First Nations, Aboriginal organisations and the legal representatives of churches and former residential school students. Former Supreme Court Judge Justice Frank Iacobucci was appointed to represent Canada in negotiations with legal counsel for the other parties.

The final Settlement Agreement received Federal Court approval on 21 March 2007, taking effect on 19 September 2007. It is the largest class action settlement in Canada's history.

Some of the amounts church groups committed to pay under the settlement agreement included: The Corporation of Catholic Entities – $29 million[98] and the United Church - about $6.9 million[99].

(b) IRSSA provisions

The Indian Residential Schools Settlement Agreement, provided a holistic reparations framework with a total value of more than CND/CAD $2 billion. In particular, it provided for:

(1) Monetary compensation through a **'common experience payment'** (CEP). All eligible former students who resided at one or more recognised residential schools could receive $10,000 for the first year (or part thereof) of institutionalisation plus an additional $3,000 for every subsequent year of institutionalisation (or part thereof).[100] An initial 'designated amount' of $1.9 billion was allocated for CEPs (which could be increased). If less than the designated amount was distributed in CEPs, , successful claimants can receive 'Personal Credits' of up to $3,000 to be used for personal, family or group education services. Any other residual funds in the $1.9 billion designated amount were to be given to Aboriginal organisations for educational purposes.[101]

Between 19 September 2007 and 31 March 2015 a total of $1,621,788,106 CEP Payments were made (including Advance Payments) representing 79,286 applications paid (excl. illegible). The

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(b) Category 'B' applied to claims of physical abuse that did not result in injury lasting more than 6 weeks or that required hospitalization or serious medical treatment and to claims of wrongful confinement. The maximum amount of compensation for Category "B" physical abuse and wrongful confinement was $1,500or up to $3,500 where aggravating factors were present.: See: Allard, Violet A, A Different Kind of Advocacy: Indian Residential Schools Resolution Canada Alternative Dispute Resolution Process (24 April, 2006), page 5.

98 Spear, Wayne K, Full Circle: The Aboriginal Healing Foundation & the Unfinished Work of Hope, Healing & Reconciliation (2014), page 215.

99 United Church of Canada website , Frequently Asked Questions: The Settlement Agreement on Residential Schools http://www.united-church.ca/aboriginal/schools/faq/agreement

100 Indian Residential Schools Settlement Agreement (April 2008), page 44.

101 Ibid, pages 47 and 48.

average CEP Payment was $20,455. 'Personal Credits' were also provided for in accordance with the terms of IRSSA. As of 31 March 2015, claims totally $4.4 million had been processed.[102]

(2) Further monetary compensation through an additional **Independent Assessment Process** (IAP) payments, awarded to former students who suffered sexual or serious physical abuse, or other abuse that cause serious psychological effects. The IAP replaced the ADR process. Awards range from $5,000 to a maximum of $275,000 plus an additional $250,000 award for actual income loss. Up to $15,000 was available for future care, and up to 15% of the total award was available to cover legal costs. There was also a right of review.[103]

Between 19 September 2007 and 31 March 2015 a total of $2.782 billion was approved in IAP Payments. The average IAP Payment, including legal costs is $113,324.This includes continuing ADR claims.[104]

(3) establishment of a **Truth and Reconciliation Commission with** an allocation of $60 million.[105]

(4) $20 million for **national and community commemorative projects**.[106]

(5) **measures to support healing** such as Health Canada's Indian Residential Schools Resolution Health Support Program and an endowment of $125 million to the Aboriginal Healing Foundation.[107]

(c) Truth and Reconciliation processes

The Truth and Reconciliation Commission of Canada (TRC) was an important part of the Indian Residential Schools Settlement Agreement.

The Commission was given the responsibility for:

(1) Telling Canadians what happened in the Indian Residential Schools

(2) Honouring the lives of former students and their families; and

(3) Creating a permanent record of the Indian Residential School legacy.

One function of the TRC was to gather statements from former students of the Indian Residential Schools and anyone else who felt that they had been impacted by the schools and their legacy. The TRC received over 6,750 statements[108] from survivors, members of their families and others with experience of the residential schools. Many were video and audio recorded. They range in length from several minutes to a few hours.

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102 Aboriginal Affairs and Northern Development Canada website: Statistics on the Implementation of the Indian Residential Schools Settlement Agreement - Information Update on the Common Experience Payment (From September 19, 2007 to March 31, 2015).

103 Indian Residential Schools Adjudication Secretariat website: http://www.iap-pei.ca/former-ancien/how-comment-eng.php

104 Aboriginal Affairs and Northern Development Canada website: Statistics on the Implementation of the Indian Residential Schools Settlement Agreement -Information Update on the Independent Assessment Process (From September 19, 2007 to March 31, 2015).

105 Indian Residential Schools Settlement Agreement (April 2008), page 23.

106 Ibid, page 24.

107 Ibid, page 23.

108 Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future, Final Report (May 2015), page 29.

The majority of the statements were gathered at TRC National and Regional Events and at TRC Community Hearings. Others were made publicly in Sharing Panels and Sharing Circles. Some were made privately. Statements could also be submitted online. They can be withdrawn if an individual chooses to do so.

Once the TRC came to the end of its mandate in June 2015, all of the statements it gathered were to be safely stored at the National Research Centre on Indian Residential Schools at the University of Manitoba. Students, researchers and members of the public will be able to access the statements to learn about residential schools and their legacy. Personal identifying information will not be available unless permission to disclose that information was granted.

13.7 Apologies and acknowledgment

(a) Government – Prime Minister

On 11 June 2008, the Prime Minister of Canada, Stephen Harper, made a Statement of Apology to former students of Indian Residential Schools, on behalf of the Government of Canada.

(b) Church groups

Apologies from church groups have included: The United Church of Canada 'Apology to First Nation' issued in August 1986; The Oblate Missionaries of Mary Immaculate apology in 1991; The 'Anglican Church of Canada's Apology to Native People' delivered by Archbishop Michael Peers in 1993; The Presbyterian Church's 1994 Confession, which recognised the need for healing and The United Church in 1998.

13.8 Analysis of the Canadian approach

We set out below some of the perceived advantages and disadvantages of the respective elements of the Canadian model from the perspectives, and in the words, of those involved.

(a) Aboriginal Healing Foundation

There were a range of positive factors identified in relation to the operation of the AHF, these included:

(1) Its establishment as an independent, not for profit Aboriginal Corporation

..... "*non-political arms-length agencies (like the Aboriginal Healing Foundation) are in fact a useful public policy instrument...that* ***aboriginal-designed and managed public agencies, accountable to aboriginal people and communities, are a viable alternative to service delivery through the federal Aboriginal Affairs bureaucracy***."[109]

(2) Its holistic approach focussed on self-empowerment

"Providing therapeutic services through a "holistic approach" that meets the long-term healing needs of the local population—including the special needs of the elderly, youth and women. This approach went beyond mere program delivery, yielding as it did the prospect of community self-empowerment. ***The idea itself that aboriginal people would now be taking control of their healing was inherently therapeutic;*** *one might even call it subversive, a tipping over of the prevailing order in which a program is developed by well-*

[109] Spear, Wayne K, Full Circle: The Aboriginal Healing Foundation & the Unfinished Work of Hope, Healing & Reconciliation(2014), page 3

meaning Ottawa bureaucrats, following consultation, to then be sprinkled upon a passive clientele.[110]

*As the final report puts it, "**research conducted as part of this study supports the conclusion that culture is good medicine.**"*[111]

(3) Its responsiveness to feedback showed inherent goodwill

*"Within a year of the first round of submissions the Foundation had addressed the major concerns of applicants, creating a simpler application form, effectively doing away with deadlines, removing the restrictive program themes, increasing staff assistance to applicants, introducing multi-year funding and targeting high needs and under-served areas (Inuit and Métis). **These decisions together addressed the principal grievances of applicants and generated a large degree of good will.**"*[112]

Naturally there were also a range of challenges associated with the operation of the AHF. These included:

(1) Initial community perceptions

In the first year of its operations, the Aboriginal Healing Foundation was subjected to a degree of suspicion and hostility:

"Since the Aboriginal Healing Foundation was created and funded by Government, it was perceived as yet another government department, nothing more than an adjunct to Indian Affairs and Northern Development."[113]

(2) Rigid and complex application process for project funding

The board realized that the initial program themes were too restrictive and that a more flexible approach was needed. To some extent this was addressed by the revision of the 1999 Program Handbook. Within a year a simplified 2nd edition was produced. While the program themes were retained, their status was demoted to that of a guide to help provide ideas.[114]

(3) Time constraints on applicants

In theory the AHF aimed to get funding flowing into communities quickly and imposed a 6 week turnaround time for initial proposals. In practice this was perceived as being unreasonably demanding.

Remote communities, and especially remote Métis and Inuit communities, complained (not without justice) that they were at a disadvantage relative to more experienced and resourced applicants.[115]

(4) Time and financial constraints on AHF

As noted by AHF Board member Richard Kistabish, there was a finite funding pool to be discharged within a mandatory period of 5 years:

"I was very disappointed at the beginning, when the proposals arrived and the amount requested was one billion plus, and we had only $350 million. And, above all, it was the fact that we had to spend it within five years. Wow! I felt

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110 Ibid, page 132.

111 Ibid, page 135 quoting Linda Archibald, Final Report of the Aboriginal Healing Foundation, vol. 3, Promising Healing Practices in Aboriginal Communities (2006), 114

112 Ibid, page 65.

113 Ibid, page 92.

114 Ibid, page 64.

115 Ibid, page 61.

depressed for quite a while as a result. $350 million: I thought it was a lot of money. Heavens, it wasn't very much…turned me upside down to be aware of the needs of the communities faced with the amount of money we had."[116]

In the final analysis, the 5 year time frame called into question the adequacy of the commitment to genuine intergenerational change. The final report into the AHF concluded that real change requires a minimum ten years of continuous activity in a community on average and that: "*the minimum time line projected to implement the priorities set out above and reach a new, healthier steady state is 30 years.*"[117]

(b) Dispute Resolution plan to compensate for abuses in Indian Residential Schools

The Assembly of First Nations' Report on Canada's Dispute Resolution framework summarised some of the perceived positives and negatives of the government's Dispute Resolution Compensation Plan between November 2003 and March 2007.

There were a range of positive factors identified in relation to the operation of the Dispute Resolution framework, these included[118]*:*

(1) The idea of the out-of court process to settle claims;

(2) The provision for Canada to pay a percentage of legal fees;

(3) The provision of the commemorative fund

There were also a range of challenges associated with the operation of the Dispute Resolution framework. These included that:

(4) It treats survivors unequally by compensating some up to 100% of their settlements and others only 70%;

(5) It treats survivors unequally by virtue of the province in which the abuse took place. If it took place in B.C., the Yukon or Ontario, survivors receive up to $50,000 more for the same injuries than survivors who live in the other provinces of Canada;

(6) It assigns more than twice as many compensation points to abusive acts than it does to the consequences of the abuse while restricting compensation to a narrow range of acts, effectively lowering the amount of compensation payable. In comparison with Ireland which has a similar problems of state responsibility for mass abuses in residential schools, Canada is spending proportionately 25 times less than the government of Ireland on its compensation plan for residential school survivors. In fact, the architect of the Irish compensation model called the Canadian level of compensation ***de minimis and grudgingly given****;*

(7) It fails to address or compensate for emotional abuse, loss of family life, forced labour, and the loss of language and culture;

(8) It does not have provision for interim awards;

(9) The process takes too long and its administration costs are disproportionately high in comparison with the amount of awards paid out;

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116 Ibid, page 99, quoting AHF Board member Richard Kistabish (emphasis added).

117 Ibid, page136, quoting Marlene Brant Castellano, Final Report of the Aboriginal Healing Foundation, vol. 1, A Healing Journey: Reclaiming Wellness (2006), page 217.

118 Assembly of First Nations (AFN), Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools (18 November 2004), page 2.

(10) The application forms are intimidating, unnecessarily complicated and confusing;

(11) It does not sufficiently take into account the healing needs of the survivors and their families;

(12) It does not take gender differences into account;

(13) It mistakenly limits compensation by requiring that abuse be measured by the "standards of the day";

(14) It does not address the need for truth-sharing, public education and awareness for non-Aboriginal Canadian public about residential schools;

(15) It incorporates legal concepts in a way which perpetuates racist stereotypes.[119]

(c) Indian Residential Schools Settlement Agreement

There were a range of positive factors identified in relation to the operation of the IRSSA. These included:

(1) A holistic approach to reparations

There seems to have been a genuine appreciation of the need for a holistic framework:

> "*We were stepping way outside the law here,"* recalls Kathleen Mahoney, "*Because we knew there was much more required than just money. The law could only take you so far.* ***Canada had to take this on in a much more holistic approach, beyond legal remedies and into a much deeper policy and historical relationship type of thinking.***"[120]

(2) Approach to eligibility for compensation payments

The threshold eligibility for compensation appears to have been based on having attended one of the schools:

> *"What I'm getting at is that a key part of the proposal from the Assembly of First Nations is not only the money. I think you're getting consensus here that eligibility for compensation should only be based on proof of attendance. If you can show that you were a student during these periods at these residential schools,* ***we can assume that you've been victimized and no one else will make you relive that***".[121]

(3) Taking account of research and learnings from other jurisdictions

> "*made a point of hearing the views of everyone from survivors of institutional abuse to senior government officials, both in Canada and abroad.* ***Today she*** [i.e. *Kathleen Mahoney,* Aboriginal Healing Foundation lawyer and University of Calgary professor] ***recalls the words of an Irish minister of education. He said, "if you can bring back one message from me to the Canadian government officials, it's simply this: be generous.***"[122]

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119 Assembly of First Nations (AFN), Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools (18 November 2004), page 3.

120 Spear, Wayne K, Full Circle: The Aboriginal Healing Foundation & the Unfinished Work of Hope, Healing & Reconciliation,(2014), page 184, quoting Kathleen Mahoney, Aboriginal Healing Foundation lawyer and University of Calgary professor (emphasis added).

121 Ibid, page 182, quoting NDP Critic for Indian Affairs, Pat Martin (emphasis added).

122 Ibid, page 176, quoting Kathleen Mahoney, Aboriginal Healing Foundation lawyer and University of Calgary professor (emphasis added).

(4) Need for truth and reconciliation as part of reparations framework

"The second thing that the Assembly of First Nations is calling for is a truth and reconciliation healing process, not only for you to tell your story and hopefully tell the world what happened, but for us too, for the general population, for Canadians to be part of that healing process. Would you say that's part of your message today, to call for not only fair, reasonable compensation, but a national conciliation and truth-telling forum as per the Assembly of First Nations document?"[123]

(5) Reparations regimes are the beginning of a long process, not the end point

"Canada needs to recognize that the Settlement Agreement does not compensate the pain and suffering, but it is only a small token to acknowledge this travesty. Canada needs to acknowledge that it may take a number of generations for First Nation, Métis and Inuit families to recover and Canada will NOT '... wash their hands' of what they did. The commitment is to do all they can to make things right."[124]

There were also a range of challenges associated with the operation of the IRSSA framework. These included:

(1) Documentary requirements

One key issue was the widespread inability of survivors to meet the government's requirement for school records proving residency. Elderly applicants for the Common Experience Payment were being asked to provide records pertaining to their childhood records they had never seen and which, in many cases, had been lost to fires, floods, and misplacement by the government and churches who ran the schools.[125]

(2) Focus only on residential schools and some Aboriginal groups

There were some notable exclusions to the IRSSA including:

- Indian day schools (which in number far exceeded the residential schools);[126]
- Aboriginal children placed by child welfare agencies into the homes of non-aboriginal families;[127] and
- the Métis Nation.[128]

(3) **Lack of detail and enforceability around settlement sums**

...two years after the approval of IRSSA, not only had none of the funds agreed to by the Catholic Entities yet to materialize, the Catholics didn't even have a mechanism for fulfilling their obligations....The reality of the terms under which the Catholic Entities had entered the Settlement Agreement is that they were near unenforceable. With the exception of the Canada-wide fundraising

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123 Ibid, page 182, quoting NDP Critic for Indian Affairs, Pat Martin.

124 Ibid, page 197, re-quoting open letter to Prime Minister Stephen Harper, published by Ted Quewezance, Executive Director of the National Residential School Survivors' Society (NRSSS).

125 Ibid, page 223.

126 Ibid, page 217.

127 Ibid, page 217.

128 Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future, Final Report (May 2015), quoting President of the Métis National Council Clement Chartier.

campaign (which four years into its seven-year mandate was reporting a loss of over $1 million), no timeframe was provided, nor was a schedule of payments specified. There were no explicit consequences for non-compliance. Although the AHF was the recipient, it had no powers or authority in matters related to collecting funds. There were merely vague, unspecified commitments. [129]

To appreciate the uncertainty that the Corporation of Catholic Entities posed, one must realize that the Government of Canada was no longer providing funds to the Aboriginal Healing Foundation, and therefore beyond 2012 the business of the AHF would be sustained exclusively by the funds received from the Catholic Entities. The healing centres too would be at the mercy of an agency—the CCE—which had proved itself over and again to be at best unreliable. The CCE lawyers were creating headaches for the Aboriginal Healing Foundation, as well as uncertainty. In early 2014, the Government of Canada intervened, taking the Corporation of Catholic Entities to court. [130]

(4) Questions over ongoing commitment to reconciliation

"*at the end of the day, the government wanted this door to be closed once the Settlement Agreement was done. They didn't want a healing foundation that could sustain itself through the interest. That was another huge act of colonization and oppression.*"[131]

(5) Insufficient support around financial management

For some recipients the reality of suddenly having access to large amounts of disposable income was an overwhelming experience. The consequences in some cases included family conflict, substance abuse and even suicide. Whilst unintended and unfortunate, these outcomes were not entirely unforeseeable.

The intergenerational trauma experienced by survivors and their families meant that some families were not well equipped with either financial management or conflict resolution skills.

Access to financial management support and family mediation services may have gone some way to mitigating these unintended impacts relating to the IRSSA payments.

13.9 Truth and Reconciliation Commission

There were some positive factors identified in relation to the operation of the TRC:

(a) Providing a forum for Aboriginal people to be heard

"The Commission heard from more than 6,000 witnesses, most of whom survived the experience of living in the schools as students....shaming and pointing out wrongdoing were not the purpose of the Commission's mandate. Ultimately, the Commission's focus on truth determination was intended to lay the foundation for the important question of reconciliation. Now that we know about residential schools and their legacy, what do we do about it? Getting to the truth was hard, but getting to reconciliation will be harder... "[132]

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129 Spear, Wayne K, Full Circle: The Aboriginal Healing Foundation & the Unfinished Work of Hope, Healing & Reconciliation, 2014, page 214.

130 Ibid, page 216, citing John Barker, "Federal government suing Corporation of Catholic Entities Party to the Indian Residential Schools Settlement for $1.5 million," Thompson Citizen (February 7, 2014).

131 Ibid, page 233 quoting Marjorie (Maggie) Hodgson, AHF board member.

132 Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future, Final Report (May 2015), Preface.

(b) Creating understanding between Aboriginal and non-Aboriginal Canadians

For non-Aboriginal Canadians who came to bear witness to Survivors' life stories, the experience was powerful. One woman said simply, "*By listening to your story, my story can change. By listening to your story, I can change.*"[133]

There were also some challenges associated with the operation of the TRC, not least its inability to heal division created in other areas of policy:

> *"Although some progress has been made, significant barriers to reconciliation remain. The relationship between the federal government and Aboriginal peoples is deteriorating. Instead of moving towards reconciliation, there have been divisive conflicts over Aboriginal education, child welfare, and justice."*[134]

13.10 Observations

There were a variety of initiatives in operation in Canada between 1996 and 2015. These collectively went some way to addressing the 5 pillars of a reparations framework:

(a) acknowledgment and apology

Apologies were given by the Prime Minister in June 2008 and various church groups at various times. The initiatives also provided numerous forums for acknowledgment by allowing Aboriginal people the opportunity to be heard and for the broader population to be educated about their history through permanent records of the Indian Residential School legacy.

(b) guarantees against repetition

The powers and funding given to the TRC and AHF along with the extensive education program and record keeping processes provided a solid framework and self-empowerment for the Aboriginal people in relation to non-repetition

(c) measures of restitution and rehabilitation

The Aboriginal Healing Foundation was granted a lump sum of $350 million and an 11 year mandate. It gained acceptance as a non-political, arms-length agency which had a genuinely holistic approach to healing and encouraged community self-empowerment. The Truth and Reconciliation Commission was funded with a grant of $60 million and played an important role in educating the broader population, honouring the lives of survivors and creating a permanent record of the legacy.

(d) monetary compensation

Despite what appears to have been a fairly widely criticised initial Dispute Resolution framework, the Indian Residential Schools Settlement Agreement offered a holistic and wide-ranging approach to reparations.

The 'common experience payment' (**CEP**) and the Independent Assessment Process (**IAP**) payments detailed under it seemed to go some way to addressing the fact that anyone who lived in a Indian Residential School was a survivor and was deserving of compensation with the provision for further compensation for specific instances of abuse.

This compensation structure seems to be broadly consistent with the recommendations in the Bringing Them Home Report for a:

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133 Ibid, page 21 AVS, Anonymous, Statement to the Truth and Reconciliation Commission of Canada, Regina, Saskatchewan, 17 January 2012, Statement Number: SP036.

134 Ibid, page 8.

- Minimum lump sum: That an Indigenous person who was removed from his or her family during childhood by compulsion, duress or undue influence be entitled to a minimum lump sum payment from the National Compensation Fund in recognition of the fact of removal.
- Proof of particular harm: That upon proof on the balance of probabilities any person suffering particular harm and/or loss resulting from forcible removal be entitled to monetary compensation from the National Compensation Fund assessed by reference to the general civil standards.

However, the intergenerational trauma experienced by survivors and their families meant that some families were not well equipped with either financial management or conflict resolution skills. Access to financial management support and family mediation services may have gone some way to mitigating the unintended impacts relating to the IRSSA payments.

14 Approaches in other jurisdictions – South Africa

Although certain elements of the South African Truth and Reconciliation Commission (TRC) have been criticised there is relatively broad acceptance that the restorative justice and reconciliatory approach to rehabilitation and reparation was a powerful unifying force in the South African democratic process. The approach taken is instructive and useful in the context of the NSW Inquiry, and with reference to the principles of reparation identified in the Bringing Them Home Report, because the TRC addressed reparations on a holistic basis at an individual, community and national level.

14.1 Truth and Reconciliation Commission overview

The TRC was created to investigate human rights violations under the apartheid regime. It was established under the *Promotion of National Unity and Reconciliation Act No.34* of 1995 and was comprised of seventeen commissioners: nine men and eight women and chaired by Archbishop Desmond Tutu.

The key truth-finding functions assigned to the TRC were to:

(a) establish "*as complete a picture as possible of the causes, nature and extent of the gross violations of human rights*" which were committed during the period between March 1960 and May 1994, "*including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings*";[135] and

(b) compile a comprehensive report providing an account of its activities and findings about the gross violations of human rights along with its execution of its other functions.[136]

The TRC collected information through a number of avenues. These included a process of statement taking which "*involved hundreds of interviewers visiting numerous communities and collecting statements from over 22,000 victims.*"[137] Claims were then verified by follow-up investigations. Investigations and research were also carried out into "*window cases*"[138] (particular types of crimes or incidents) in an effort to understand broader patterns. Investigations were also carried out in relation to applications for amnesty.

As recognised by Mr Dullah Omar, a former Minister of Justice in South Africa:

> *... a commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.*[139]

14.2 Truth and Reconciliation Commission structure

The TRC's mandate was effected through 3 committees:

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135 Hugo van der Merwe and Guy Lamb, *Transitional Justice and DDR: The Case of South Africa*, Research Unit – International Center for Transitional Justice (June 2009), pages 18-19.

136 Ibid, page 19.

137 Ibid

138 Ibid

139 Statement by Mr Dullah Omar, Available: http://www.justice.gov.za/trc/legal/justice.htm

(a) **Human Rights Violation Committee**: *"The task of the* [Human Rights Violation] *Committee was to investigate human rights abuses that took place between 1960 and 1994, based on statements to the TRC. The Committee established the identity of the victims, their fate or present whereabouts and the nature and extent of the harm they suffered; and whether the violations were the result of deliberate planning by the state or any other organisation, group or individual. Once victims of gross human rights violations were identified, they were referred to the Reparation and Rehabilitation Committee."*[140]

(b) **Reparation and Rehabilitation Committee**: *"The enabling act empowered the* [reparation and rehabilitation committee] *to provide victim support to ensure that the Truth Commission process restores victims' dignity; and to formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and communities at large."*[141]

(c) **Amnesty Committee**: Applicants could apply to the Amnesty Committee for amnesty from prosecution for any act, omission or offence associated with a political objective committed between 1 March 1960 and 11 May 1994."[142]

14.3 Operation

The TRC's Final Report was published in 1998.[143] The Final Report included testimony from over 22,000 victims and witnesses. The Report covered the structural and historical background of the violence, individual cases, regional trends and the broader institutional and social environment of the apartheid system. In addition, the report named individual perpetrators.

In the Final Report, the TRC identified that one of the unique features of the TRC had been its "*open and transparent nature*".[144] It was also recognised:

> *"This report has been constrained by a number of factors - not least by the extent of the Commission's mandate and a number of legal provisions contained in the Act. It was, at the same time, driven by a dual responsibility. It had to provide the space within which victims could share the story of their trauma with the nation; and it had to recognise the importance of the due process of law that ensures the rights of alleged perpetrators. Several court rulings emphasised the importance of the latter. Obviously, the Commission respected these judgements. They did, however, sometimes make our efforts to obtain information about the past more difficult. This, in its turn, caused us to err on the side of caution in making our findings. Despite these difficulties, however, we can still claim, without fear of being contradicted, that* ***we have contributed more to uncovering the truth about the past than all the court cases in the history of apartheid.***"[145] (emphasis added)

The TRC process also incorporated a 'Register of Reconciliation'. Mrs Mary Burton, the TRC Commissioner who proposed the establishment of the register, explained:

> *"The register has been established in response to a deep wish for reconciliation in the hearts of many South Africans – people who did not perhaps commit*

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140 TRC, *Committees of the TRC*. Available at: http://www.justice.gov.za/trc/trccom.html

141 Ibid

142 Ibid

143 A copy of the Final Report is available at: http://www.justice.gov.za/trc/report/

144 Volume One, *Truth and Reconciliation Commission of South Africa Report* at [3]. Available at: http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf

145 Ibid at [7]

gross violations but nevertheless wish to indicate their regret for failures in the past to do all they could have done to prevent such violations; people who want to demonstrate in some symbolic way their commitment to a new kind of future in which human rights abuses will not take place.

We know that many South Africans are ready and eager to turn away from a past history of division and discrimination. Guilt for wrongdoing needs to be translated into positive commitment to building a better society – the healthiest and most productive form of atonement."[146]

14.4 Reparation and Rehabilitation Committee - guiding principles

The *Promotion of National Unity and Reconciliation Act No.34* of 1995 provided that the TRC must aim to make proposals for measures that will give reparation to victims of human rights violations and rehabilitate and give back the human and civil dignity of people who suffered human rights violations.

The Reparation and Rehabilitation Committee was established to address these aims and its proposals were guided by a number guiding of principles:

(a) ***Development centred**: a development centred approach to ensure that individuals and communities are assisted to take control of their own lives. This includes providing individuals with knowledge and information about available resources helping them to use these resources in a way that benefits them most.*

(b) ***Simple, efficient and fair**: proposals for reparation and rehabilitation need to be simple, efficient and fair. This means that the available resources will be used in a way which gives the most benefit to the people who receive them.*

(c) ***Culturally appropriate**: the services that are developed as a result of the proposals for reparation and rehabilitation should be sensitive to the religious and cultural benefits and practices of the community.*

(d) ***Community based**: Community based services and delivery should be strengthened and expanded to have a lasting effect on communities.*

(e) ***Capacity development**: Community resources which are developed should focus on local capacity building as well as the delivery of services.*

(f) ***Promoting Healing and Reconciliation**: The activities that come out of these proposals should aim to bring people together and to promote understanding and reconciliation.*[147]

14.5 Reparation and Rehabilitation Committee – proposals

Each committee of the TRC developed a series of proposals and it was then left to the President and the Parliament to decide if and how to implement such proposals The proposals developed by the Reparation and Rehabilitation Committee included:

(a) **Interim Reparation**: this was designed to help those in urgent need because of the gross human rights violations they suffered.

(b) **Individual Reparation Grant (IRG)**: the Committee proposed that each victim (as designated by the Commission), would receive a grant paid out over a period of six years. If the victim had passed away, this grant was to be paid to

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146 Available at: http://www.justice.gov.za/Trc/ror/index.htm

147 South African TRC, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be considered by the President*, Section 4.2. Available at: http://www.justice.gov.za/trc/reparations/summary.htm.

dependants and/or relatives who had applied for reparation. The IRG would be calculated according to a formula. The formula would take the following factors into account:

(1) ease of access to services and facilities; and

(2) a daily living costs subsidy based on the socio-economic circumstances of the applicant, including:

- the number of dependants and/or relatives; and
- differences in the living costs in rural and urban areas.

(c) **Symbolic Reparation**: The Committee recognised that symbolic reparation is to help communities remember the pain and the victories of the past. This could include setting aside a day for national remembrance and reconciliation as well as the building of memorials and monuments. These could include:

(1) Individual actions

Issuing of death certificates: Many people who made statements to the Commission said that they did not have death certificates for their relatives who had died or been killed.

Exhumation, Reburials and Ceremonies: People who died during the conflicts were often buried in unmarked graves, and their relatives were not present at the burial. The Committee recognised that it was important for these bodies to be given a proper burial. The costs of the reburial and ceremonies were taken from the IRG.

Headstones and Tombstones: The costs were taken from IRG.

Declarations of death: Declarations could be made for those who disappeared during apartheid.

Clearing of criminal records: Many victims had criminal records because of their political activities. Criminal records based on political activity were cleared.

Resolving outstanding legal matters related to the human rights violations including:.

(2) **Community actions**: such as: renaming of streets and facilities; memorials/monuments; culturally appropriate ceremonies.

(3) **National actions:** including renaming of Public facilities; monuments and memorials and a day of remembrance and reconciliation.

(d) **Community Rehabilitation** – the Committee developed a series of proposals to establish community-based services and activities to promote healing and recovery.

14.6 TRC approved measures

The 2013-2014 Annual Report of the President's Fund[148] (a fund established under the Promotion of National Unity and Reconciliation Act No.34 of 1995) identified that Parliament approved the following measures following the tabling of the final two volumes of the TRC Reports:

148 Department: Justice and Constitutional Development – Republic of South Africa, *President's Fund – Annual Report 2013-14*. Available at: http://www.justice.gov.za/reportfiles/other/presfund-anr-2013-14.pdf.

(a) "*One-off individual grant of R30,000*[149] *to those individuals or survivors designated by the TRC.*"[150]

(b) "*Systematic programs to project the symbolism of the struggle and the ideal of freedom through academic and formal records of history, cultural and art forms, as well as erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names*".[151]

(c) "*Medical and other forms of social assistance programs to provide for medical benefits, education assistance and the provision of housing, as well as other social benefits to address the needs of victims identified by the TRC*".[152]

(d) Regulations providing for assistance to families of missing persons, whose remains were exhumed and reburied.

Further, the Department of Justice and Constitutional Development has recently called for TRC-identified victims to apply for assistance with tuition fees for basic higher education and training.[153] This includes dependants of a person declared a victim by the TRC.[154]

14.7 Analysis of the TRC

(a) Process

Hugo van der Merwe and Guy Lamb of the Research Unit of the International Center for Transitional Justice identify the following issues in relation to process:

- The Commission *"did not develop a system of integrating its various sources of information. One key obstacle in this was that the Amnesty Committee did not approach its work in terms of a systematic research process. Its members saw their role as simply verifying whether the applicant was telling the truth in a particular case. They did not collect information about the applicants' military history and did not ask key questions about the line of command or other information that might have led to a more systematic understanding of the patterns of abuse."*[155]
- "*Other than the final report, the TRC showed a reluctance to engage directly with civil society in relation to its truth-seeking process. While it drew on civil society organisations for information, it did so in an ad hoc manner. The main reason for this was that the TRC was very careful to protect its image as impartial, and association with civil society organizations would be seen as relying on anti-apartheid sources.*"[156]

  "*Similarly, the Commission also shied away from working with civil society organizations when engaging with statement-taking or reconciliation process, preferring to work with church structures. The one exception was that it employed a number of Khulumani Support Group members to assist in*

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149 Estimated to be USD$6000 at the time: *Transitional Justice and DDR: The Case of South Africa,* above n 135, 21

150 *President's Fund – Annual Report 2013-14,* above n 148.

151 Ibid

152 Ibid

153 See: http://www.justice.gov.za/trc/

154 Ibid

155 *Transitional Justice and DDR: The Case of South Africa*, above n 135

156 Ibid at pages19-20.

statement taking, as the TRC was concerned that not enough statements had been collected by its own interviewers."[157]

(b) Monetary payments

In terms of monetary compensation, the Regulations concerning the one-off individual grant of R30,000 were promulgated and gazetted in November 2003.[158] The fact that the amnesty process operated more quickly than the reparation process was a source of considerable frustration within the community.[159]

Furthermore, the individual grants that were offered did not make any assessment of the needs of the victims or the state of ongoing hardship of the victims.

Another issue that has arose in relation to these grants related to a threshold question of which victims were entitled to the grants. The grants were limited to those on the official list of TRC victims. In the Final Report, the Commission observed that as it was "anxious to impose a huge burden on the government" it had adopted a "closed-list" policy.[160] The Commission recognised that many victims were not able to access the Commission – some were not aware of the process before it had been finished and others were unable to gain access to a statement-taker.[161] The Commission was notified that more than **8,000 statements** had been taken by victims groups between December 1997 and January 2002 from victims who were unable to access the Commission.[162]

(c) Community

The TRC arguably did not focus sufficiently on the rehabilitation of whole communities, (focussing instead on certain individuals within those communities) which suffered intense acts of violence and destruction and are still in distress. Therefore, there remains a perceived need for such communities to be rehabilitated through various programs initiated and supported by Government.[163]

Dissatisfaction with the state of the reparation regimes led to events such as the 2012 "*National Dialogue on Reparations: A Critical tool in dealing with our Past and Building our Future*". According to the South African Coalition for Transitional Justice this National Dialogue was intended to *"provide space for reflection and for a review of strategies and processes to develop an inclusive approach to reparations amongst critical role players and stake holders, both in the state and in civil society*".[164]

The South African National Dialogue on Reparations has the following objectives based on state commitment and responsibility to protect and promote human rights:

- Securing consensus on the need to revisit reparations as the tool for the social inclusion of survivors and victims of apartheid atrocities;
- Refining and adopting a framework and parameters for a parliamentary debate on revisiting reparations; and

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157 *Transitional Justice and DDR: The Case of South Africa*, above n 135, at page 20.

158 President's Fund – Annual Report 2013-14, above n 148, page 6.

159 *Transitional Justice and DDR: The Case of South Africa*, above n 135.

160 Volume Six, Section 5, Chapter 7, Truth and Reconciliation Commission of South Africa Report at [36]. Available at: http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf

161 Volume Seven, Truth and Reconciliation Commission of South Africa Report at page 2. Available at: http://www.justice.gov.za/trc/report/finalreport/victims_main_vol 7.pdf

162 Volume Six, Section 5, Chapter 7, Truth and Reconciliation Commission of South Africa Report at [36]. Available at: http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf

163 President's Fund – Annual Report 2013-14, above n 148.

164 See: http://www.khulumani.net/khulumani/statements/item/725-national-dialogue-on-reparations-a-critical-tool-in-dealing-with-our-past-and-building-our-future-to-be-held-on-the-4-6-december-2012.html

- Developing a process to achieve advances in reparations for the gross human rights abuses of the past, informed by and compliant with international legal considerations on reparations.[165]

165 Ibid

15 Approaches in other jurisdictions – Ireland

15.1 Context

We note at the outset that the events that occurred in Ireland did not occur in an Indigenous context as part of the systematic forcible removal of children in accordance with a Government policy of assimilation.

Nonetheless, we suggest that Ireland's approach to survivors of church run institutions is instructive to a degree in terms of the considerations relevant to the development of a reparations framework for systemic abuse. At least in financial terms, the framework for reparations in Ireland has been regarded by some commentators as a relatively generous approach which has made a significant contribution to the healing and rehabilitation process for survivors.

15.2 Background

Between the 1920s and into the mid-1990s, a network of Church-run 'residential institutions' operated in the Republic of Ireland. These schools were in many cases supervised by the Irish Department of Education (they had legal responsibility under the Children Act 1908) and included industrial schools, reformatories, orphanages, hospitals, children's homes and any other place where children were cared for other than by their families.[166] Unmarried mothers were often included in this group. The number of children admitted to these institutions is estimated to be more than 30,000 and there were widespread claims of physical and sexual abuse.

15.3 Apology and Commission to Inquire into Child Abuse (CICA)

On 11 May 1999 The Taoiseach [or Prime Minister] of Ireland, Bertie Ahern, issued an apology on behalf of the Irish state to the survivors of child abuse.

In May 2000 his government passed the Commission to Inquire into Child Abuse Act which established the Commission to Inquire into Child Abuse (**CICA**), commonly known in Ireland as the Ryan Commission after its chair, Justice Seán Ryan. This Inquiry is analogous to the Royal Commission on Institutional Responses to Child Sexual Abuse being conducted in Australia.

The CICA was given a number of functions including[167]:

(a) to hear evidence of abuse from persons who allege they suffered abuse in childhood, in institutions, during the period from 1940 or earlier, to the present day;

(b) to conduct an inquiry into abuse of children in institutions during that period and, where satisfied that abuse occurred, to determine the causes, nature, circumstances and extent of such abuse; and

(c) to prepare and publish reports on the results of the inquiry and on its recommendations in relation to dealing with the effects of such abuse.

CICA's investigations were made through two sub-committees, both of which aimed to be as informal as is possible in the circumstances.[168] A witness (complainant) could choose to give evidence to one of the committees, but not both.[169]

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166 Commission to Inquire into Child Abuse Act (2000) s1(1) This Act was amended in 2005 by the Commission to Inquire into Child Abuse (Amendment) Act (2005)

167 Ibid s4(1)(a) and (b)

(1) A **Confidential Committee** that allowed the complainants to recount their experiences in a confidential setting. This committee's report was not permitted to identify witnesses, persons against whom they made allegations, or the institutions in which they alleged they were abused.[170]

(2) A more pro-active **Investigation Committee**[171] that heard evidence from witnesses who wished to have their allegations investigated. Respondents from religious orders and others could also give evidence and might be compelled to attend and/or produce documents. All parties were entitled to legal representation and to cross examine.

The Commission's work started in May 1999[172] and it published its final report on 20 May 2009 containing 43 conclusions and 20 recommendations (many of which focus on future prevention of abuse of children in care).

The recommendations that focus on addressing the effects of those who suffered abuse include erecting a memorial, learning the lessons of the past, making counselling and educational services available, and continuing family tracing services (both offered through National Office for Abuse Victims (**NOVA**)).

15.4 Compensation

The Residential Institutions Redress Board (**RIRB**) was established in December 2002 under the Residential Institutions Redress Act (2002) (as a no fault scheme) to '*make fair and reasonable awards to persons .... abused while resident in industrial schools...*'. [173] Abuse is defined in the Act as covering 4 kinds: any sexual, physical, emotional abuse or neglect[174] that causes a child to suffer.

The RIRB first assessed the severity of the abuse including the presence of a medically verified physical/psychiatric illness, psycho-social impacts and loss of opportunity. The RIRB then categorised survivors into 'bands' of eligibility for compensation: (1) up to €50,000; (2) €50,000-€100,000; (3) €100,000 - €150,000; (4) €150,000 - €200,000; and (5) €200,000 - €300,000. An additional loading of up to 20% could be made for exceptional cases.[175] Awards were normally paid in one lump sum. A Review Committee was also established.

The RIRB processed more than 16,000 claims. The average award was approx. €63,000 (reached through settlement or a hearing) with the largest being €300,500.[176] It ceased accepting new applications in September 2011.

The RIRB also paid solicitors' reasonable fees. By 31 December 2014 the Board had approved legal costs to 1,020 firms of solicitors in respect of 15,064 applications[177]

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168 Ibid s 4(6).

169 The Commission to Inquire into Child Abuse website: http://childabusecommission.ie/about/index.html

170 Commission to Inquire into Child Abuse Act (2000) s 16(2)(a).

171 Ibid s 14.

172 Initially on an administrative basis and chaired by Justice Mary Laffoy until January 2004

173 Residential Institutions Redress Board, website: http://www.rirb.ie/

174 Residential Institutions Redress Act (2002), s 1(a). This Act was amended in 2005 by the Commission to Inquire into Child Abuse (Amendment) Act (2005)

175 Residential Institutions Redress Act (2002) (Section 17) Regulations (2002)

176 Annual Report of The Residential Institutions Redress Board (2013), page 13

177 Ibid, page 53

(approx. 97% of applicants were legally represented).A total of approx. €192.9 million has been paid.[178] The Board also paid medical expenses and all costs reasonably incurred in making an application.

Survivors could apply to the RIRB as well as pursue claims against the Church (or individuals) for damages in a civil action. However, if they accepted compensation from the RIRB, the survivor had to waive their rights to pursue any court action against the same institutions or persons.[179] If the damages to which they were entitled from court proceedings were lower than the RIRB award, the survivor could not reapply to the Board.

In June 2002 the Government entered into a Congregational Indemnity Agreement with 18 religious orders, the Conference of Religious in Ireland (CORI) under which the CORI agreed to contribute €128 million in property and cash. In exchange, the orders were guaranteed indemnity from civil prosecution. In May 2009 CORI agreed to increase its contribution to nearly €350 million.[180]

15.5 Commentary

Positive commentary regarding the scheme has included reference to the fact that the RIRB was established under legislation as a wholly independent specialist tribunal. Chaired by a Judge it retained some of the benefits of the civil litigation system but operated separate to existing court processes (although positioned within the justice system rather than a Government department).

It aimed to be as informal as possible in the circumstances and had greater flexibility and responsiveness than the court system. It provided a relatively straight-forward application process. Some feedback was that '*victims have been able to tell their stories in a non-threatening environment. The process is quick and it is fair*'.[181] There were time restrictions imposed on applications but the legislation made provision for late applications. Potential awards were also relatively generous with a prescribed formula set out in the legislation. The overall cost of compensation has been estimated at nearly €1.5 billion.

Criticisms have been made in relation to the process itself including that some victims felt they were not 'believed' by the Board.[182] One witness to the inquiry also noted the perceived inadequacy of the awards available under the scheme compared to some damages payable as a result of litigation.[183] There was also criticism that those who went before the RIRB could not bring anyone with them to the hearing (only on request in exceptional circumstances) and there were strict confidentiality requirements regarding awards.

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178 Annual Report of The Residential Institutions Redress Board (2013), page 53

179 *Residential Institutions Redress Act* (2002) s 13(6)

180 'Abuse Redress, Property and the Catholic Church in Ireland' Human Rights in Ireland (4 November 2013) http://humanrights.ie/law-culture-and-religion/abuse-redress-property-and-the-catholic-church-in-ireland/

181 Submissions referenced in Parliament of Australia, Senate Standing Committees on Community Affairs, Inquiries, - Chapter 8 - Reparation and redress schemes http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/completed_inquiries/2004-07/inst_care/report/c08

182 'Victim protests over redress board hearing', The Irish Times (16 April 2004). referenced in Parliament of Australia, Senate Standing Committees on Community Affairs, Inquiries, - Chapter 8 - Reparation and redress schemes http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/completed_inquiries/2004-07/inst_care/report/c08

183 Above n 181

Schedule 1 - United Nations General Assembly Basic Principles and Guidelines

United Nations General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

(a) Treaties to which a State is a party;

(b) Customary international law;

(c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

(b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.